



REPUBLIC OF KENYA



**Kurui v Aquila Development Company Ltd (Employment and Labour Relations
Petition E007 of 2023) [2024] KEELRC 658 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 658 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E007 OF 2023**

**HS WASILWA, J
MARCH 19, 2024**

BETWEEN
CHRISTOPHER KIPSANG KURUI PETITIONER
AND
AQUILA DEVELOPMENT COMPANY LTD RESPONDENT

JUDGMENT

1. The suit herein was instituted by a Petition dated 18th April, 2023, seeking for the following reliefs; -
 - a. A declaration that the Respondent unfairly and illegally terminated the Petitioner's Employment.
 - b. A declaration that the Respondent frustrated the Petitioner's Employment and indeed indirectly terminated his Employment on account of his work injury ailment.
 - c. A declaration that the Petitioner was unfairly discriminated upon on his employment status on account of his medical condition upon sustaining a work injury.
 - d. A declaration that the Petitioner was subjected unfair working environment and labour practices contrary to the provisions of;
 - i. Article 27 of the Constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law;
 - ii. Article 28 of the Constitution guaranteeing every person the right to inherent dignity which must be respected and protected at all times;
 - iii. Article 41 of the Constitution guaranteeing every worker the right to fair labour practices including the observance of the provisions of the Employment Act, 2007 and all relevant laws thereto;



- iv. Article 47 of the Constitution guaranteeing every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- e. A declaration that the actions of the Respondent were in violation of the Constitution of Kenya, 2010 and the Laws attendant thereto.
- f. A declaration that the Respondent violated the Petitioner's right to compensation under the work injury compensatory framework of The Work Injury Benefits Act, 2007 (WIBA)

Upon the above declarations, this Honourable court be pleased to issue an order:

- g. Compelling the Respondent to unconditionally issue to the Petitioner a Certificate of Service.
 - h. Compelling the Respondent to pay the Petitioner punitive damages equivalent to 12 months' salary on account of unfair termination from employment under section 49 of the Employment Act, 2007.
 - i. Compelling the Respondent to pay the Petitioner general/ and or exemplary damages from being subjected to workplace discrimination on employment status on account of a work place injury/ailment and/or his resultant medical condition.
 - j. Compelling the Respondent to pay the Petitioner all the outstanding terminal benefits including unpaid wages up to the time of termination, unpaid leave at the time of termination, applicable notice pay and salary in lieu of notice.
 - k. Compelling the Respondent to subject the Petitioner to the due compensatory process under the framework of The Work Injury Benefits Act, 2007 (WIBA) pursuant to the work injury as sustained by the Petitioner, within 30 days from the date of this Honourable Court's Judgment.
 - l. Compelling the Respondent to pay the Petitioner's costs of this suit.
 - m. Any such other orders, reliefs and/or directions that this Honourable Court may deem just and fit to grant to meet the exigencies of justice and the requirements of the Constitution of Kenya, 2010.
2. The Petitioner states that it is given *locus standi* to institute this suit by Articles 1,2(1) & (4), 3(1), 10,19,20, 21,22, 24(1), 25, 27, 28,41, 47, 48 and 50 of the Constitution.
 3. That the jurisdiction of the court to hear and determine this Petition is enable by Articles 1(3)(c), 4(2), 10, 20(3) &(4), 22, 23, 50(1), 159, 165,258 and 259 of the Constitution of Kenya as read with Section 5 of the High Court (Organizational and Administration) Act, 2015, that vests jurisdiction in the High Court, to inter alia hear any questions regarding violations of rights and fundamental freedoms, determining if acts or omissions are constitutional and the interpretation of the Constitution including questions of contradiction between any law and the Constitution, Protect the Constitution from any threats or violations and to interpret it in a manner that promotes its purpose, values and principles, advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance.
 4. The Petition herein is expressed under Section 4 of the Fair Administrative Actions Act and Sections 10(1) and 21 of the Work Injury Benefits Act.



Facts of the case.

5. The Petitioner states that he was employed by the Respondent on 1st April, 2012 to work as a construction maintenance worker, for a gross salary of Kshs 4,100/=.
6. While working for the Respondent, the petitioner herein was involved in a work injury on 15th June, 2020, whereby he sustained a work injury to his left malleolus joint. He reported this injury to his supervisor and thereafter received first aid from the clinic at the work place. Due to the severity of the injuries, he was referred to Naivasha County Referral Hospital for appropriate medical checkup and treatment. Therein, the Petitioner was examined, received treatment and was put on a POP plaster to mitigate injuries on the said joint and subjected to continuous treatment for a period of two months.
7. He avers that the POP Plaster was eventually removed on 3rd August, 2020, thereafter, he was put on oral pain medication and subjected to continuous follow up at the orthopedic department at Naivasha County Referral Hospital. Furthermore, that the Medical Superintendent recommended that the Petitioner be given a further time off from work for a further period up to 17th November, 2020 to enable and facilitate the healing of his left malleolus joint; and thereafter be given lighter duties to avoid much strain on the affected joint.
8. It is averred that contrary to the Doctor's recommendation and medical advice, the Respondent refused to grant the Petitioner an additional time for healing, forcing the Petitioner to resume work in early August 2020 after removal of POP Plaster.
9. After returning back to work, the Petitioner's condition recurred and was unable to continue working and upon seeking treatment, the Respondent refused to facilitate the Petitioner's further treatment at the Hospital.
10. Left with no option, the Petitioner absconded work with verbal notice to the Supervisor, and resort to self-treatment at home as he had no funds to continue receiving treatment at the hospital.
11. Upon getting better, he returned to work sometime in October 2020, however, he was told by the supervisor to bring the medical reports and treatment notes from the Hospital to show that he had been undergoing treatment but on availing the treatment note, he was not allowed to resume work.
12. The Petitioner kept on reporting for work at the Respondents farm but was denied entry on every occasion and was informed that he was no longer an employee and directed to clear with the Human Resource department.
13. Consequently, the Petitioner was forced to address his grievances by writing to the Respondent's Human Resource Manager explaining his situation, However, he did not receive any response.
14. Since no communication was received from the Respondent, the petitioner went to the Labour Office in Naivasha to lodge a labour complaint, wherein the Labour Office advised the Petitioner that they will look into his situation and address the same with the Respondent but never did. The Labour officer advised the Petitioner to have the DOSH form filled by the employer in the intervening period and submit the same afterwards. He kept going back to the said Labour Office but no help was forthcoming.
15. Upon approaching the Respondent to fill the DOSH forms, the Respondent refused to grant the Petitioner any audience or help him to fill in the DOSH form as advised by the Labour Office in Naivasha. The Respondent stopped his salary from September, 2020 and in effect dismissed him without notice or hearing thereof.



16. He stated that it is the way his termination was carried out that forced him to seek for legal redress. He believed that his termination was discriminatory based on the following facts; -
- a. Denying him entry into the workplace without essentially terminating his employment.
 - b. Denying him entry into the workplace without proffering any reasons thereto.
 - c. Failing to fill in the DOSH form for onward inquiry or inquiries by the Director of Occupational Safety & Health Services (DOSHS) that are necessary to decide upon the Petitioner's claim or liability in accordance with the provisions of [Work Injury Benefits Act \(WIBA\)](#).
 - d. Failing to report the work injury herein to the Directorate of Occupational Safety & Health Services (DOSHS) in line with the provisions of [Work Injury Benefits Act \(WIBA\)](#).
 - e. Refusal to facilitate Petitioner's treatment at Naivasha County Referral Hospital.
 - f. Refusal to pay wages to the Petitioner as from September 2020 without any explanation to the Petitioner.
 - g. Exclusion from work in complete disregard to the provisions of the [Employment Act](#), the [Fair Administrative Actions Act](#), and the [Constitution](#) of Kenya.
 - h. Frustrating Petitioner's Employment in complete disregard to the provisions of the [Employment Act](#), the Fair Administrative Actions Act, and the [Constitution](#) of Kenya.
 - i. Indirectly terminating Petitioner's Employment without according the Petitioner a fair administrative action.
 - j. Indirectly terminating Petitioner's Employment on account of his work injury which was reasonably taking time to heal.
 - k. Failing to provide any reasons to the Petitioner behind its conduct.
 - l. Subjecting the petitioner to unnecessary mental anguish and trauma.
17. He avers that the conduct of the Respondent was majorly aimed at prematurely terminating and/or frustrating his employment by continually denying him entry into the workplace without essentially stating the reasons thereto or formally terminating his services in line with the applicable provisions of employment laws of Kenya.

Respondent's case

18. In response to the Petition, the Respondent raised a preliminary Objection dated 9th January, 2024, based on the following grounds; -
1. That the Petition dated 18th April 2023 has no merit, is frivolous, bad in law and ought to be dismissed with costs.
 2. That the petition discloses no constitutional issue, rather it merely attempts to constitutionalize an ordinary civil employer - employee dispute.
 3. That the petition offends the doctrine of constitutional avoidance by seeking application of the [Constitution](#) to matters fully addressed by statute.



4. That the petition by the Petitioner herein is nothing more but a claim for breach of contract of employment, merely clothed and framed in the 'Bill of Rights Language'.
 5. That the law is clear that a court will not entertain a constitutional issue where there exists a different forum where the matter can be determined.
 6. That the issues raised and reliefs sought by the Petitioner are subject to the provisions of the [Employment Act](#) and the [Work Injury Benefits Act \(WIBA\)](#).
 7. That further, entertaining this Petition would go contrary to the Gazette Notice No 6024 (Vol CXX No 74) dated 22nd June 2018 which expressly mandates this Honourable Court to only handle matters where the Claimant earns a gross salary of over Kshs 80,000.
 8. That the Petitioner earned a gross monthly salary of Kshs 12,938 per month which is less than Eighty thousand Kenyan Shillings (80,000) at the time of his termination.
 9. That in the circumstances, the Petition dated 18th April 2023 is a monumental procedural and substantive legal nullity, fatally and irredeemably incompetent, an abuse of the court process, frivolous, vexatious, mischievous and a proper candidate for dismissal and or striking out with costs to the Respondent.
19. In addition to the preliminary objection, the Respondent filed a replying affidavit sworn on 19th February, 2024, by Joyce Gakinya, its Human Resource Manager.
 20. In the affidavit, the affiant stated the Petition is premature, totally defective, bad in law, incompetent, misleading and an abuse of the court process and for striking out ex debito justitiae.
 21. She stated that the Petitioner herein was injured on 15/06/2020 while at the workplace and the Respondent did assist in transporting him to the company dispensary where first aid was done and he was thereafter referred to Naivasha County Referral Hospital where he underwent treatment, costs thereof fully catered for by the Respondent. Moreover, that the Petitioner was granted two months off work to fully recuperate and thereafter resume employment.
 22. It is their case that the Director of Occupational Safety and Health (DOSHS) was notified and the Petitioner instructed to bring all medical documents to the Respondent company upon resumption of duty to aid in presenting the particulars of claim in their entirety to the Director of Occupational Safety and Health (DOSHS) as per Section 24(1) of [Work Injury Benefits Act \(WIBA\)](#).
 23. That the Respondent tried to make follow-up calls to no avail as the Petitioner was never reachable through calls made to him and to date, the Petitioner has never resumed duty or presented the necessary documents in support of the claim for referral before the Director of Occupational Safety and Health (DOSHS) as per Section 24(1) of [WIBA](#).
 24. The Respondent stated that it is shocking for the Petitioner to purport, 3 years later, that he was never afforded time to heal yet he was granted two months off work which he fully utilized and thereafter never showed up for work.
 25. She avers that it is misleading for the Petitioner to claim that the Respondent failed to facilitate further treatment when in actual fact, the Respondent catered for medical expenses and was ready to compensate him after assessment of injuries but the Petitioner ignored follow-up calls and later absconded duty with the sole intention of presenting the instant petition. Further that no evidence has been presented before this Honourable Court to show that the purported doctor's recommendation or letters from the Petitioner were ever served upon or received by the Respondent.



26. The Allegation that the petitioner was not allowed back to work was denied and instead, the Respondent stated that the Petitioner never resumed work since his injury on 15/06/2020, ignored calls from the Respondent, failed to produce documents for assessment, refused to be referred to the Director of Occupational Safety and Health (DOSHS) for assessment and subsequent compensation.
27. She confirmed that the Respondent never terminated the Petitioner's employment. Also that the Respondent could not refer him to the the Director of Occupational Safety and Health (DOSHS) for assessment of his injuries for purposes of compensation, because the Petitioner did not supply the medical documents to be forwarded to DOSHS.
28. It is the Respondent's position that the the Petitioner's letter, which was never served upon the Respondent, confirms that the petitioner was fully aware that he was required to bring all treatment notes and relevant documents for assessment of injuries but he failed and he further goes to admit that he was never terminated but only required to facilitate procedure of assessment and compensation as provided for under WIBA.
29. Therefore, that the suit herein has been filed prematurely because, the Petitioner first port of call in such a work-injury matter is at the Director of Occupational Safety and Health (DOSHS) as per the provisions of WIBA.
30. It is also stated that the instant dispute is a civil one between an employer and an employee (whose employment contract still subsists) and the instant Petition discloses no constitutional issue, rather it merely attempts to constitutionalize an ordinary civil employer-employee dispute. Therefore, that the Petition offends the doctrine of constitutional avoidance by seeking application of the Constitution to matters fully addressed by statute.
31. It is also stated that the issues raised and reliefs sought by the Petitioner are subject to the provisions of the Employment Act and the Work Injury Benefits Act (WIBA), which by law cannot be considered as a constitutional issue where there exists a different forum where the matter can be determined. In any event that entertaining this Petition would go contrary to the Gazette Notice No 6024 (Vol CXX No 74) dated 22nd June 2018 which expressly mandates this Honourable Court to only handle matters where the Claimant earns a gross salary of over Kshs 80,000.
32. Accordingly, that the Petitioner earned a gross monthly salary of Kshs 12,938 per month which is less than Eighty thousand Kenyan Shillings (80,000) and therefore this court has no jurisdiction to handle the matter. Therefore, that the suit herein ought to be struck out with costs to the Respondent.
33. The Petition herein was canvassed by written submissions with the Petitioner filing on 6th February, 2024 and the Respondent filed on 21st February, 2024.

Petitioner's Submissions.

34. The Petitioner submitted on six issues; whether the Respondent frustrated the Petitioner employment and terminated him on account of his work injury ailment, whether the Petitioner was discriminated against on account of his work injury, whether the Petitioner was subjected to unfair working environment and labour practices and were thus in violation of the Constitution of Kenya and the laws of Kenya, whether the Respondent violated the Petitioner's right to compensation under the work injury compensatory framework of The Work Injury Benefits Act, 2007 (WIBA), whether the Petitioner is in the circumstances entitled to be compensated and who should bear the costs of this petition.



35. On the first issue, it was submitted that it is not in dispute that the claimant was involved in a work injury, neither is it in dispute that the same was reported to the Respondent. It was argued that after the injury, the Respondent gave the petitioner some time off from work to enable his recovery, and thereafter gave him light duties to avoid much strain on the affected joint. However, the Respondent, contrary to the Doctor's recommendation and medical advice, refused to grant the Petitioner additional time for healing and was left with no choice but to resume work in early August 2020 after removal of POP Plaster. As a result, his condition recurred shortly afterwards and was unable to continue working and had to seek further treatment.
36. On returning to work in October 2020, the Claimant was advised to furnish the medical reports and treatment notes from the Hospital to show that he had been undergoing treatment. He availed all the medical reports and treatment notes from Naivasha County Referral Hospital as requested but he was not allowed to resume work. After several attempts he was informed that he was no longer an employee. In mitigation, the claimant wrote to the Respondent's Human Resource Manager explaining his situation and predicaments. However, he did not receive any response and when no action was forthcoming, the claimant lodged a labour complaint at the Labour Office in Naivasha and eventually filed this suit.
37. It was argued that from the above facts, it is clear that the Petitioner's employment was frustrated as his pay was stopped and denied entry into the Respondent's premises.
38. On whether the Petitioner was discriminated, it was submitted that the Petitioner herein had served the Respondent for more than 8 years in good health and upon sustaining work injury, he sought treatment and resumed to work, However, he was denied entry, his salary stopped in September, 2020 and verbally informed that he was no longer an employee. He argued thus, that it is apparent that the claimant's employment was terminated pursuant to his injury which was taking time to heal. Hence there is direct relationship between his injuries and termination, therefore that the actions taken against him were discriminatory. To support this, the Petitioner relied on the Supreme Court of Kenya's in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) adopted the following definition of discrimination: -
- “In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows- “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
39. Similarly, that the Respondent's conduct was nothing short of discriminatory and attributable to his injury which was taking time to heal. He reiterated that he was discriminated against contrary to article 27(5) of the *Constitution* as well as section 5 and 47 of the *Employment Act*.
40. On whether the Respondent violated the petitioner's right to compensation under *WIBA*, it was submitted that section 21 of The *Work Injury Benefits Act*, mandates the Employee to give written or verbal notice of any accident which occurs during employment to the Employer; while Section 22 mandates the Employer to notify the Director of any work injury within seven days after having



learned that an employee has been injured in an accident. Therefore, that as soon as the Respondent was informed that the petitioner was injured, The Respondent was under obligation to provide information to the Petitioner to enable him to pursue his right to proper compensation. The Respondent did not however process the claim form and send the same to the Director DOSH, therefore the Respondent is in breach of its statutory obligation.

41. On whether the Petitioner is entitled to the reliefs sought, it was submitted that the Respondent majorly aimed at prematurely terminating and/or frustrating his employment by continually denying him entry into the workplace without essentially stating the reasons thereto or formally terminating his employment. Further that the Respondent's actions described above are prejudicial and constitutes gross violation of the National values and principles of governance set out in Article 10 of the Constitution, the right to equality and freedom from discrimination under Article 27 of the Constitution, the right to fair labour practices under Article 41 of the Constitution, the right to fair administrative action under Section 4 of the Fair Administrative Action Act and Article 47 of the Constitution and the right to fair hearing under Article 50 of the Constitution.
42. From the foregoing, it was submitted that the Petition has met the threshold and justification for an award in general damages for gross violations of his constitutional rights by the Respondent and deserves to be compensated.
43. The Petitioner also prayed to be issued with Certificate of Service, Payment of punitive damages equivalent to 12 months' salary, Payment of general/ and or exemplary damages of Kshs 2,000,000/= from being subjected to workplace discrimination on employment status on account of a workplace injury/ailment and/or his resultant medical condition and in this he relied on the case of Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC [2 (KLR) where the Court made an award of Kshs 2,000,000 as general damages for discrimination.
44. Finally, the Petitioner submitted on costs of the suit by relying on the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR and prayed to be awarded costs of this petition.

Respondent's Submissions

45. The Respondent submitted on four issues; whether this Honourable Court has jurisdiction to hear and determine the suit herein, whether the Petition raises any constitutional questions, whether the Petitioner is deserving of the reliefs sought and who should bear the costs of the Petition.
46. On the first issue, it was submitted that Jurisdiction is everything and when an issue of jurisdiction is raised, the court must first address itself to the jurisdictional challenge raised before proceeding on other issues. This was the position adopted in the decision of Sir Ali Salim v Shariff Mohammed Sharray [1938] KLR where the court held:

“If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction. “
47. It was submitted that the Preliminary Objection raises three important issues; that the Petition discloses no constitutional issue, the Petition offends the doctrine of constitutional avoidance and that the Petition goes contrary to the Gazette Notice No 6024 (Vol CXX No 74).



48. On doctrine of Constitutional avoidance, it was submitted that this doctrine dictates that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which must be followed. Similarly, that the dispute before court is a work-injury matter which has in place clear and defined structures and procedures to deal with work injuries as provided for under the Work Injury Benefits Act (WIBA). To support this, he relied on the case of Daniel Mwangi Nkonge v Flamingo Horticulture Ltd [2021] eKLR , when the Court while dismissing the petition held that;

“The subject of this petition is basically work injury related. It squarely falls onto the domain of work Injuries Benefits Act, 2007, popularly referred to as WIBA. This being the case, adjudication on the subject falls and a different sphere of law and therefore jurisdiction. This is material for the Director of Occupational Safety and Health, foremost. All other aspects, be they constitutional or otherwise, fall therein and only come to this jurisdiction on appeal. That is the law. The claim is therefore struck out.”

49. To buttress the applicability of the doctrine of avoidance, the Petitioner relied on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR the Court stated thus at Para 256:

“The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mblungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59:“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

50. Similarly, that this being a work-injury claim, it falls under a plain civil dispute pitting an employee against his employer. As such, the principle of constitutional avoidance militates against the Petition.

51. He also relied on the case of Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR cited in Emmanuel Nyongesa & 34 others v County Government of Trans Nzoia [2021] eKLR where Ohungo, J. stated as follows regarding the constitutional jurisdiction of the Court:-

“The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the Constitution by filing a petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave. So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court.”

52. On whether the instant Petition is incompetent null ab initio owing to Gazette Notice No 6024 (VOL.CXX No 74), it was submitted that the Chief Justice vide Gazette Notice No 6024 in the quest to reduce backlog at the Employment and Labour Relations Court and in exercise of powers of an employee under Section 29(3) of the Employment and Labour Relations Court Act, conferred jurisdiction on Magistrates of the rank of Senior Resident Magistrate and above to hear and determine



disputes arising from contracts of employment where the employee's gross monthly salary did not exceed Kshs 80,000/-. Similarly, that since the Petitioner was paid Kshs 12, 938, the suit herein ought to have been filed at the Chief Magistrates Court and not this Court. Furthermore, since this Court does not have jurisdiction, it cannot transfer this suit to the appropriate court for determination. To support this, the Respondent relied on the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No 36 of 1995, where the Court had the following to say on the circumstances under which the order to transfer suits may be granted; -

“Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused...”

53. This position is further buttressed in *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR where the court held that:

“Jurisdiction is everything and without jurisdiction the Court has no option but to down its tools. It is not in doubt that though the powers to order transfer ... are discretionary, however, a matter can only be transferred if the Court from which the Applicant is seeking to have the matter transferred had jurisdiction over the said matter and the Applicant has satisfied the Court that the transfer is necessary.”

54. On whether the petition raises any constitutional questions, it was submitted that a constitutional issue is one that forces the court to consider constitutional rights and value, one that will deal with the interpretation of the *Constitution* and the Courts have, in so many cases, discouraged and reprimanded litigants from using constitutional petitions to prosecute matters which can be pursued through other statutory procedures. In fact, a Petition must raise a constitutional question for it to be entertained in this Honourable Court. In this, they relied on the decision by J. M. Mativo J (As he then was) in the case of *Hakiziman Abdoul Abdulkarim v Arrow Motors EA Ltd & another* [2017] eKLR. He stated: -

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.”

55. Accordingly, that the petition herein does not raise constitutional infringement rather that it raises statutory violations to which the *WIBA* statute provides clear procedures and remedies available to the Petitioner herein. Hence the court would be misguided to interpret a work-injury as being a constitutional violation. Moreover, that the Petitioner prays for orders resulting from unfair termination and not constitutional violations.

56. On whether the Petitioner is entitled to the reliefs sought, it was submitted that the Petitioner herein has come before this Honourable Court seeking orders for unlawful termination yet he was never terminated. It was argued that despite granting the petitioner time off work to heal from his injuries, he absconds duty upon expiry of the period granted. Further, that the petitioner failed on his part to supply the medical forms to the Respondent in compliance with the provisions of *Work Injury Benefits Act (WIBA)* in so far as assessment and compensation are concerned. Therefore, that the Respondent cannot be blamed for the Petitioner negligence. To support this, the Respondent relied on the case of *Boniface Francis Mwangi v B.O.M Iyego Secondary School* [2019] eKLR where the Court held that:-

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”



57. Accordingly, that the Respondent has on a balance of probability discharged its onus of establishing that the Petitioner absconded duty as confirmed in the Petitioner letter marked as CK7. He argued that the Petitioner remains an employee of the Respondent and it is up to him to present himself before the Director of Occupational Safety and Health (DOSHS) with the appropriate documents that would accompany the particulars of claim. The Director of Occupational Safety and Health (DOSHS) having been notified, it makes no sense for the Petitioner to prosecute this Petition when he has clearly failed to comply with statutory procedures which clearly offer him the desired remedies. It is on this basis, that the Respondent argued that the Petitioner is not deserving of any reliefs and/or orders sought.
58. On costs of the Petition, it was submitted that Section 27 of the Civil Procedure Act provides that costs follow the event unless the court or for good reason otherwise orders. In light of the foregoing, it was argued that the Respondent has proven their case and thus are entitled to costs of this suit.
59. I have considered the averments and submissions of the parties herein. The Claimant's contention is that he was injured while at work and the Respondents declined to process his Injury Compensation and also terminated his services.
60. The Respondents raised a preliminary objection to this petition on the ground that the petition is frivolous, bad in law and ought to be dismissed with costs as it has no constitutional basis and is an ordinary employer – employee dispute.
61. It is indeed true that the petition as it is, raises no proper constitutional issues. The only issues raised in this petition relate to an unfair termination and failure to pay compensation for injury.
62. Indeed, this court will not delve into matters that can be handled under laid down parallel provisions of law.
63. The issue before this court is unlawful termination and the failure on the part of the Respondent to fill dosh forms to enable compensation to the Claimant by the Respondent.
64. The issue of Director of Occupational Safety & Health Services (DOSHS) forms and failure by the Respondent to fill the same is provided under the WIBA Act.
65. The Respondent aver that they asked the Claimant to submit his documents for purposes of assessing the compensation payable but the Claimant did not submit the same.
66. My view is that there is a process to be followed under WIBA where the employer declines to fill the compensation form.
67. This roadmap is provided under WIBA Act which envisages that where the employer does not report to the director the injury of the employee, the employee can report to the director directly. This is found at Section 22 (5) which provides as follows:-
- “The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.”
68. Indeed, the petitioner has not been precluded from reporting this accident at any point. He has failed to proceed and report the accident on his own and has proceeded to file a petition seeking orders to compel the Respondent to pay him compensation.
69. This in my view is an abuse of the court process, since the petitioner has failed to follow due process.
70. As concerns the issue of termination, the Claimant was earning Kshs 12,938/= per month. It is apparent that this claim should have been instituted in the subordinate court as per Gazette Notice



No 6024 (Volume CXX No 74) dated 22/6/2018 which grants the subordinate court jurisdiction to handle such a matter

71. It is my finding that the petitioner chose to come before this court prematurely. I direct that the petitioner follows the process as envisaged under the Law.
72. As to the claim for wrongful dismissal being in the wrong forum is forthwith struck out. There will be no order of costs.

JUDGEMENT DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Maiyo for Petitioner – Present

Kamau holding brief for Mwemi for Respondent – Present

Court Assistant - Fred

