



Muriithi v Autocheck Kenya Limited also t/a Cheki kenya Ltd (Petition E138 of 2023) [2024] KEELRC 518 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 518 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E138 OF 2023**

B ONGAYA, J

MARCH 7, 2024

IN THE MATTER OF: ARTICLE 2(1), 3(1), 10, 20, 23, 25(A), 27, 28, 29(D) (F), 41(1), 2(A, B), 47, 48, 50, 159, 258 AND 260 OF THE CONSTITUTION OF KENYA 2010

-AND-

**IN THE MATTER OF SECTIONS 2, 3, 4, 7 OF THE
FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

-AND-

**IN THE MATTER OF SECTIONS 2, 5, 8, 9, 10, 20,
29, 31, 45, 46, 49 OF THE EMPLOYMENT ACT, 2002**

-AND-

IN THE MATTER OF SECTION 6 & 7 OF THE HEALTH ACT, 2017

-AND-

**IN THE MATTER OF SECTIONS 2 & 8 OF THE
OCCUPATIONAL SAFETY AND HEALTH ACT, 2017**

BETWEEN

BILHAH NJOKI MURIITHI PETITIONER

AND

**AUTOCHECK KENYA LIMITED ALSO T/A CHEKI KENYA
LTD RESPONDENT**

JUDGMENT

1. The petitioner filed the petition dated 05.07.2023 through Mutuma Gichuru & Associate Advocates seeking the following prayers:



- i. A declaration be made or issued that the respondent constructively dismissed the petitioner from employment.
- ii. A declaration do issue that the respondent discriminated and therefore violated the petitioner's rights because of her pregnancy.
- iii. A declaration that the respondent violated the Petitioner's right and freedoms from discrimination on account of her gender or sex.
- iv. An order do issue that the respondent do pay the petitioner unpaid and accrued house allowance being Kshs. 2,986,301/= for 29 months that the petitioner has been employed as the respondent's Country Manager.
- v. An order do issue that the respondent pay the petitioner a sum of Kshs. 391,326.00 being salary underpayment in comparison to the salary of the current Country Manager for 29 months that the Petitioner has been employed by the respondent.
- vi. An order do issue against the respondent for the payment of Kshs. 225,403.00 being equivalent of 9.85 days leave not taken by the petitioner.
- vii. An order do issue against the Respondent for the payment of Kshs. 686,506.00 being equivalent of a month's unpaid notice period as per contract of employment.
- viii. An order do issue against the respondent to pay a sum of Kshs. 8,238,072.00 being compensation to the petitioner for unfair termination on account of her constructive dismissal.
- ix. An order do issue against the respondent to pay the petitioner a sum of Kshs. 14,700,000.00 being the value of her 15,000 E.S.O.P shares issued to her by the respondent at the current business valuation.
- x. An order do issue against the respondent to pay general damages to the petitioner for discriminating her because of her pregnancy.
- xi. An order do issue against the respondent to pay general damages to the petitioner for discriminating her on the basis of her sex or gender.
- xii. An order do issue against the respondent to pay the Petitioner exemplary damages.
- xiii. An order do issue against the respondent to pay the petitioner aggravated damages.
- xiv. An order do issue that the respondent do pay general damages for violation of the petitioner's rights to equality, fair labour practice, fair administrative action, self-worth and psychological and mental stress and anguish suffered.
- xv. An order do issue against the respondent to pay to the petitioner a sum of Kshs. 171,626.50 being 25% Q4 bonus for the year 2022 as per business policy.
- xvi. An order do issue that the respondent do issue a certificate of service to the petitioner.
- xvii. Interest at court rates on iv, v, vii, viii, ix from the date of institution of the petition until payment in full.
- xviii. Any other further relief(s) that the Honourable Court may deem appropriate to meet the ends of justice.
- xix. Costs of this petition.



2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 10.07.2023. The petitioner's case is as follows:
 - a. That prior to her resignation on account of constructive dismissal, she was employed by the respondent as its country manager on 9th January, 2021 reporting to the Chief Operating Officer (C.O.O). She annexed the letter of offer and her letter of acceptance as BNM- 1 and 2 respectively.
 - b. That she was head-hunted by the Respondent's founding member and current C.E.O, Mr. Etop Ikpe on or about December 2020 while working at NCBA Bank P.L.C.
 - c. That due to a delicate pregnancy she was medically advised to take bed rest or work remotely from home. She communicated to the respondent and exhibited the medical report and email of correspondence as BNM 3 and 4 respectively.
 - d. That in the course of working from home and her maternity leave, she started experiencing hostility from her line manager, the then C.O.O one Mr. John Egwu.
 - e. The petitioner particularized a few instances of the hostile treatment by the said line manager and the respondent as follows;
 - i. While visiting her at her house the line manager stated that the petitioner should have considered terminating the pregnancy since it affected the business of the respondent or better still the position should have been held by a man. She annexed an audio of their conversation as exhibit BNM 5.
 - ii. Getting snide comments and humiliation in front of colleagues.
 - iii. Disregarding the input and key contributions of the petitioner.
 - iv. Disregarding her medical condition by giving tasks that were not commendable.
 - v. Not respecting the petitioner's position at work.
 - vi. Redeploying and re-designating the petitioner while she was on maternity leave without her knowledge.
 - vii. Moderating and interfering with the employees working under the petitioner's performance appraisals as rewarded by the petitioner who was their line manager.
 - f. That she was never paid her bonus as entitled despite her good performance.
 - g. That an interview was set for someone else in her position despite her still holding the position. The offer of payment was higher than that of the petitioner hence citing discrimination.
 - h. That an interview was held and someone else given the position, which the C.O.O stated that it was better, held by a man owing to the petitioner's imminent motherhood.
 - i. That owing to the several particulars of discrimination and violation of her rights she was compelled to resign.
 - j. That she had never been paid any house allowance during her time with the respondent.
 - k. The petitioner also outlined her achievements while she worked for the respondent.
 - l. That she had been issued with 15,000 shares, under the employee share ownership plan, which she is yet to redeem, each worth USD 7.00.



3. The respondent filed the replying affidavit sworn by John Egwu the Chief Operating Officer on 06.12.23 and filed through COL Advocates LLP. It was stated and urged as follows:
- a. That the petitioner was an employee of Automarket Nigeria Limited holding the position of country manager since 10th February 2024 earning Kshs. 6,981,420/= per annum. They annexed the letter of offer dated 9th January 2021 and the letter of confirmation of employment.
 - b. That the respondent herein was not the petitioner's employer and that at the time of her employment the respondent was non-existent since her engagement was to set a subsidiary in Kenya for Automarket Nigeria Limited.
 - c. That in her remuneration, housing allowance and other statutory allowances were all inclusive.
 - d. That the transition in the petitioner's job description and position from Country Manager to Head of Strategic Partnerships East Africa, was negotiated and consented through a virtual meeting held on 21st December 2022 and that she was not constructively dismissed as alleged.
 - e. That the said discussions were captured in an email dated 22.12.22 and exhibited on the affidavit.
 - f. That the petitioner gave maternity leave notice to commence on 9th February 2023.
 - g. That vide an email dated 9th January 2023, sent to the petitioner by the Senior Vice President, Human Resources informing her of her new job description and invited her to raise any question or seek clarification if needed.
 - h. That the petitioner confirmed receipt of the said email and continued to serve as Country Manager until 27th March 2023 when the respondent filled the position and she transitioned to her new role.
 - i. That the petitioner's salary remained unchanged and that the petitioner did not raise any issues when taking up her new role.
 - j. That the petitioner resumed from maternity leave on 10th May, 2023 and tendered her resignation on 5th June, 2023 in which her last working day was to be 23rd July, 2023 which was 48 days' notice while her letter of offer of employment provided for 60 days.
 - k. The allegations of discrimination by the petitioner on grounds of gender and sex are denied for the respondent and it is urged that the petitioner was out to tarnish the respondent's reputation. The respondent stated that the difference in salary pay for the new Country Manager that replaced the petitioner was due to inflation owing to the difference in the years of employment being January 2021 for the petitioner and March 2023 for the new country manager.
 - l. The respondent denied all the allegations and particulars of discrimination as particularised by the petitioner and stated that the audio evidence or recording brought in support qualify as illegally acquired and ought to be expunged from the record.
 - m. That the ESOP shares claimed by the petitioner are governed by the Company's employee equity award policy which they annexed as AKL-20 and referred to the relevant clauses being clauses 4.2.1 and 4.2.2 and averred that the issuing company is Vee8 International Holdings Ltd and that the claim for ESOP is equivalent to a commercial claim.



- n. That from the clauses on the employee equity award policy the claimant is only entitled to 50% of the shares, which is what, was rightfully vested and that the value of USD 7 per share is unfounded.
4. The respondent's case was that the petitioner is not entitled to any of the prayers sought except it is willing to issue her with a positive certificate of service.
5. The petitioner went ahead and filed a further affidavit in response to the answer to the petition sworn on 23.02.24 through the firm of Eunice Akello & Co. Advocates. The petitioner stated as follows:
 - a. The petitioner reiterated the contents of her petition and supporting affidavit and asserted that she was an employee of the respondent.
 - b. The petitioner stated that the transition to her new position was involuntary and that she was not given any contract in regards to the same. She also stated that her payslip after the alleged transition still described her as a Country Manager.
 - c. The petitioner averred that her audio recording was to aid her case and the Court to reach a just determination and that the right to privacy is limited under Article 24 of the Constitution.
 - d. The petitioner referred to her exhibits to the court and urged the Court to grant the prayers sought in the petition.
6. The parties filed final submissions. The Court has considered all the material on record and returns as follows.
7. The 1st issue is whether the respondent was the petitioner's employer. The letter of offer of appointment is dated 09.01.2021. It states that the offer of employment was by Automarket Nigeria Limited and commencing 10.02.2021 for a probationary period of 3-months. The contract is silent on the tenure after the probationary period. She was to report to the Vice-President, New Market Development with dual functional reporting to the Chief Operating Officer or such other person designated by the company from time to time. It is submitted for the respondent that it was a contract of service between the petitioner and Automarket Nigeria Limited as the parties who signed the contract of employment per the letter of offer of employment. The letter of confirmation of the employment dated 04.08.2021 states that she was being confirmed in the employment of Automarket Nigeria Limited. The petitioner reported to Vice-President New Market Development with dual functional reporting to the Chief Operating Officer or such other person designated by the company (Automarket Nigeria Limited). Per the Employee Handbook exhibit AKL-13 at page 59 of answer to petition shows that the said Vice-President worked for Automarket Nigeria Limited. In the letter of offer, the place of work was stated as Automarket Nigeria Limited's Nairobi Office. In the mutually exhibited disciplinary policy, company is defined as Automarket Nigeria Limited. The respondent therefore submitted that it had no employer-employee relationship with the petitioner. The suit must therefore fail. However, the petitioner in her further affidavit sworn on 23.02.2024 states that Automarket Nigeria Limited was acquired by the respondent who then offered her employment by the letter dated 01.09.2021 being exhibit B.N.M-22. John Egwu being the respondent's Chief Operating Manager was her line manager. Further, the respondent provided her monthly payslips per exhibit AKL-11B. Further, the respondent has exhibited the clearance form upon resignation exhibits AKL 19a and 19b was approved by John Egwu protesting that she was not the respondent's employee. The Court has considered the evidence and submissions. In view of the subsequent employment contract per letter of offer dated 01.09.2021 between the petitioner and the respondent, it is obvious that the initial contract of employment with Automarket Nigeria Limited was thereby overtaken as the



respondent expressly became the employer. The claimant's case is upheld that the respondent was her employer.

8. The 2nd issue is whether the resignation amounted to unfair constructive dismissal. The resignation letter is dated 05.06.2023. The petitioner resigned effective 23.07.2023. She gave two reasons for the resignation. First, prior to commencement of her maternity leave and per maternity notice dated 04.01.2023 she made arrangements for a reliever one Jackson Orwa the Commercial Manager to hold forte in her absence as the acting Country Manager. Upon resumption from leave on 02.06.2023, it came to her attention that her role as the Country Manager – Kenya had a substantive office holder one Wilson Nguyo who had reported in April 2023. Second, she stated in the resignation letter thus, “A few days to the start of my maternity leave, the role of banking partner relations/ regional partnerships was proposed to me. However, this is a position that is not viable as the product was previously tested in this market without success. I shared these grievances with the CEO – Etop, my line manager – Jhohn , & Mayakun at different times. Whereas the offer for the said position has not crystallised, it is a role which should I take up, I have no confidence in its success.” She concluded that for the stated reasons it had become untenable to work for Autocheck. For the petitioner it is submitted that the petitioner voluntarily transitioned to the new role of Head of Strategic Partnerships effective January 2023. That by the email dated 22.12.2022 to the respondent's CEO, Etop Ikpe on the meeting summary 21.12.2022, the petitioner expressly accepted to take up the role of head of regional partnerships. By the email she agreed that there would be an incoming retail head who would be the Country Manager – Kenya from 2023 in-charge of managing Kenya and, effective January 2023 she would transit from her current position of Country Manager – Kenya to handle banking partners across East Africa as Head of Strategic Partners. The Court has considered the evidence, submissions, and finds that there is no established fundamental breach of the contract of service by the respondent. The evidence is that the petitioner agreed to transit to the new role. By that agreement to transit, she condoned the change and relinquishing the position of Country Manager. The Court finds that even if the parties had not signed a contract to show the claimant had been appointed in the new role and that the contract of service as Country Manager was still in place, the claimant expressly condoned the change and even if the change would have amounted to a fundamental breach, the Court finds that the claimant having condoned the change as found, allegations of unfair constructive termination will therefore fail. The related prayer for compensation will also fail.
9. The 3rd issue is whether the claimant was discriminated on account of sex or pregnancy. The petitioner relies on an audio recording at which she says her line manager visited her house while she was on maternity leave and they discussed work related issues. The claimant asserts that in the conversation the line manager disregarded her recommendations like for one Mary Wanjiru to be transferred to Mombasa. It is not clear to the Court whether the petitioner's case is that even while on maternity leave she offered to continue working and, in the circumstances her work at the material time was disregarded. The Court considers that while on maternity leave it would be that the petitioner was not on duty so that the conversations with her line manager in that regard and at her house were largely private than official. While the petitioner says the line manager visited her at her house while she was on maternity leave in official capacity, it appears to the Court that at that time the respondent officially had released the petitioner from work or official duty and the private conversations between the line manager and the petitioner cannot, if offensive, be visited upon the respondent as an employer. The petitioner says the line manager at the visit mentioned that she should have terminated her pregnancy, as the pregnancy did not augur well with the respondent's business. The Court finds that the petitioner has failed to establish contractual disadvantage or breach associated with the line manager's utterances. The petitioner has also failed to show that the utterances, if offensive as alleged, when made in a private conversation with the line manager, would render the respondent as an employer, vicariously



or otherwise liable. The Court considers that such are matters that would entitle the petitioner to hold the line manager privately liable as in that private conversation it has not been established that the line manager was exercising official authority over the petitioner. It was a private conversation free from the respondent's instituted employment relationships and at a time of private visit. The Court considers that with or without the audio recording, the conversation appears to have been private and not official. The petitioner also pleaded that a man was offered her position at a higher pay but the man declined the offer. To that the Court considers the offer was a bargain made and not discriminatory as alleged as competencies and other related considerations have not been shown to be exactly the same. That the offer was to a man at a higher proposed salary, in the Court's opinion, would not by itself pass for discrimination. The petitioner raises many issues like field assignments during pregnancy but it appears no report of a grievance was made in that regard. The petitioner lists in paragraph 9 of her supporting affidavit instances she may have been overruled or her opinion not upheld but she has not shown that the same was because of her sex, gender, or even pregnancy. Considering all circumstances of the case the Court finds that the petitioner has failed to establish a case for discrimination as was alleged and the related prayers for compensation will collapse.

10. The 4th issue is on residual remedies in view of the reliefs the Court has already found unavailable. The Court returns as follows:
 - a. It is true that throughout the of service no house allowance was paid. The respondent urges that the salary was consolidated per section 31(2) of the *Employment Act*. The initial contract of 09.01.2021 referred to the total cash compensation. The Court finds the wording to mean consolidated pay and in any event, the contract was not with the respondent. The respondent employed the petitioner by contract dated 01.09.2021 also worded thus, the total cash compensation shall be Kshs. 6, 981, 420.00 Annual Gross. The Court finds that the pay was consolidated and inclusive house allowance.
 - b. The petitioner resigned and is not therefore entitled to notice payment in lieu of the termination notice.
 - c. The claim for employee share ownership program has not been shown to be based on the contract of service and the same will fail. The respondent's submission is upheld that the claim can only be directed to the issuing company Vee8 International Holdings Ltd per the Employee Equity Award Grant Policy and which appears not incorporated in the contract of service between the parties dated 01.09.2021.
 - d. The petitioner has not established the contractual basis for bonus claim and which is hereby declined.
 - e. The petitioner has not shown that she was paid less than the agreed total cash compensation. The claim for underpayment is found not based on statutory or contractual provision.
 - f. The prayer for general and aggravated damages is found not justified at all. The tests for grant of such relief have not been established in the instant case.
 - g. The petitioner is entitled to a certificate of service per section 51 of the *Employment Act*. In that consideration, each party to bear own costs of the suit.
11. In conclusion the petition is hereby determined with orders each party to bear own costs of the petition and the respondent to deliver the certificate of service within 7 days per section 51 of the Act.

Signed, dated and delivered by video-link and in court at Nairobi this Thursday 7th March 2024.

BYRAM ONGAYA



PRINCIPAL JUDGE

