



REPUBLIC OF KENYA



KENYA LAW
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**Maina v West Nairobi School (Petition E005 of 2021)
[2024] KEELRC 466 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 466 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E005 OF 2021**

JK GAKERI, J

MARCH 5, 2024

BETWEEN

JOHN NG'ANG'A MAINA PETITIONER

AND

WEST NAIROBI SCHOOL RESPONDENT

JUDGMENT

1. The instant Petition was filed on 15th January, 2021 and was subsequently amended on 15th August, 2022.
2. In his Supporting Affidavit sworn on 15th August, the Petitioner deposes that on 1st July, 2019, the Respondent gave him a further employment contract as a Librarian under a 2 year fixed term contract ending on 30th June, 2021 at Kshs.193,087/= per month.
3. The Petitioner further depones that he had previously served on similar contracts for 7 years since 2012.
4. That on 28th July, 2020, the Respondent informed him in writing that his position had been furloughed but the daughter, Sally Ng'ang'a who was a student at the school in year 11 would continue her education during the furloughed period.
5. It is the Petitioner's case that on 31st December, 2020, the Respondent demanded fees for the Petitioner's daughter USD 6,415 and barred her from entering the school on 12th January, 2021 in breach of its promise.
6. The Petitioner avers that the singling out of the Petitioner for the furlough without pay was malicious and discriminatory and unilateral in breach of *the Constitution*.
7. The Petitioner deposes that Mr. Kröll, the Director of the School who furloughed him had just been promoted to the position and there were only 3 none whites in the school.



8. That attempts to have a meeting with the Director through one Mr. Jube fell through.
9. It is the Petitioner's case that he had a legitimate expectation that Sally Ng'ang'a would continue with her education at the school for the duration of the Petitioner's employment at the school.
10. The Petitioner deposes that by virtue of a court order, the daughter completed her education at the school but was not recognized in the school's yearbook 2021-2022 which occasioned her and the Petitioner distress.
11. The Petitioner deposes that he served the Respondent school with dedication though he frequently faced racial prejudice from white colleagues.
12. That he was not accorded leave.
13. Although paragraph 25 of the petition itemise particulars of the alleged oppression, cruelty and racial discrimination, the Supporting Affidavit is silent on the particulars.
14. The Petitioner prays for;
 - i. A declaration that the Respondent's actions violated the rights guaranteed by Articles 28, 29(d) and (f), 27(5), 41 and 47 of *the Constitution* of Kenya, 2010.
 - ii. A declaration that the Petitioner's contract of employment was in force up to 30th June, 2021.
 - iii. A declaration that an employee serving under a fixed term contract cannot be furloughed.
 - iv. A declaration that the furlough is invalid, null and void and the Petitioner is entitled to full salary with no loss of benefit for the remainder of his contract.
 - v. A declaration that the Petitioner's daughter had a legitimate expectation to receive her full education at the Respondent's school
 - vi. An order for the Respondent to compute and release the sum of Kshs.1,930,870/= being the Petitioner's salary for September, October, November and December 2020 and January – June 2021.
 - vii. Salary in lieu of notice.
 - viii. The sum of Kshs.1,506,827.04 being arrears of a loan the Respondent exposed the Petitioner to.
 - ix. General damages for oppressive conduct, racial discrimination and denial of income.
 - x. Unpaid leave for 8 years Kshs.1,081,287.20.
 - xi. Costs of the petition.
15. The Petitioner cites the provisions of Articles 2(1), 23(1), 27(5), 29(d) and (f), 41 and 47(1) of *the Constitution* of Kenya, 2010 as the foundation of the petition.

Respondent's case

16. By its response to the amended petition and counter-claim, the Respondent avers that the Petitioner's daughter was no longer a student at the school as she completed her studies and denies having disallowed Sally Ng'ang'a to access the school as alleged by the Petitioner.



17. The Respondent avers that owing to the COVID-19 Pandemic and attendant shut down by the government, the Respondent conducted learning online and paid the Petitioner's salary upto September 2020 when it decided to do away with the services of the Petitioner and the decision to furlough the Petitioner was made pending reopening of the school as it was not a termination of the Petitioner's employment.
18. That the recall of final students on 9th October, 2020 did not change the Petitioner's state of affairs which precipitated a demand from the Petitioner for termination of his employment and the Respondent responded and clarified the position but the Petitioner insisted that he had been constructively dismissed.
19. It is the Respondent's case that the benefit of non-payment of school fees was only available to those in the employment of the school.
20. It denies having acted in an arbitrary, irrational or malicious manner and invites the court to take judicial notice of the COVID-19 crisis in 2020 and its implications on employees.
21. The Respondent denies having kicked the Petitioner out of employment.
22. The Respondent deposes that Sally Ng'ang'a led the school in singing the National Anthem at the commencement of the graduation ceremony and her name was included in the Respondent's 2022 commencement program for the ceremony as part of the class of 2021 and she declined an offer to publish an amended copy of school's year book 2021 – 2022.
23. In its Counter-claim, the Respondent avers that the Claimant constructively terminated his employment and did not pay fees, sum of USD 6,415.00 and the daughter had 2 more semesters at the school, USD 21,300.00 and a graduation fee of USD 185 which the Respondent prays for including;
 - i. Petition be dismissed with costs.
 - ii. Declaration that the Petitioner constructively dismissed himself by his conduct.
 - iii. Set off of the total school fees against any benefits due to the Petitioner.

Petitioner's submissions

24. On discrimination and unfair dismissal, counsel for the Petitioner submitted that the Respondent's decision to furlough the Petitioner's position vide letter dated 28th July, 2020 for an unspecified period was unilateral and the Respondent employed 5 more teachers and the action was thus discriminatory, unlawful, oppressive and malicious.
25. On racial discrimination, counsel submitted that white students and teachers were exempted from strict Library Procedures such as borrowing and payment of fines and white folks would seat in their own section which the Petitioner opposed and his dismissal was actuated by the desire to get rid of him in the name of the furlough.
26. As regards discrimination to the Petitioner's daughter, counsel cited the disputed stoppage at the gate of the school in January 2021 and the court's intervention.
27. Similarly, the daughter was not recognized in the school's crossroads 2021-2022 having eagerly waited for the publication but she was left out in the key pages and her complaint was dismissed by the Director, Mr. Kroll.
28. That the Petitioner suffered mental anguish through the daughter.



29. On legitimate expectation, counsel submitted that the sudden furlough affected the Petitioner's ability to service loans to Bibilia Sacco Ltd and NCBA Bank and was penalized.
30. That the furlough resulted in dire financial consequences.
31. That the daughter would receive free education as per the Respondent's policy, for the remaining period of her education.
32. Counsel urged that the Petitioner had a legitimate expectation that his daughter would enjoy free schooling and the demand for the school fees due was untenable.
33. Counsel submitted that the provisions of *the Constitution* of Kenya, 2010 did not recognize furlough which is alien to Kenyan law and was thus void and unconstitutional.
34. Reliance was also made on Article 27 of *the Constitution* of Kenya, 2010 on discrimination as well as the provisions of Article 41 on fair labour practices to urge that the Claimant was discriminated as he was targeted.
35. In addition, counsel cited the provisions of Section 5 of the *Employment Act*, 2007 as was the decision in *Gichuru V Package Insurance Brokers* on the definition of discrimination as well as indirect discrimination to urge that the Petitioner was discriminated as only one out of 90 employees was furloughed which in counsel's view was a cover up and intended to cause the Petitioner mental anguish.
36. On legitimate expectation, counsel cited Article 47(1) and (2) of *the Constitution* of Kenya, 2010 as well as Section 4 of the Fair Administration Action Act, 2015 to urge that the Respondent's decision to furlough the Petitioner's position was unfair.
37. Reliance was also made on the sentiments of the court in *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others* to urge that the Petitioner legitimately expected that his daughter would continue receiving free education at the Respondent's school till Grade 12.
38. Counsel submitted that the furlough subjected the Petitioner to financial embarrassment and distress.

Respondent's submissions

39. As regards constructive termination of the Petitioner's employment, counsel for the Respondent submitted that when the Petitioner was recalled on 9th October, 2020, he sent a demand letter claiming that his employment had been terminated making several demands and counsel responded that there had been no termination of employment.
40. Counsel submitted that the Petitioner had not provided a letter or statement to show that his employment was terminated by the Respondent.
41. That the Petitioner had not proved that his employment was terminated by the Respondent.
42. On school fees, counsel submitted that it was demanded from the Petitioner because he insisted that his employment had been terminated and the daughter could no longer enjoy free school as per the Respondent's policy and admitted as much in his submissions and the Respondent had no issue with that.
43. In any case, counsel submitted the Petitioner's daughter completed her studies at the school without payment of fees and graduated in 2022 pursuant to a court order.



44. On discrimination, counsel submitted that the Petitioner's submissions should be disregarded because, the issues raised at pages 2 and 3 were not pleaded and the allegation on racial discrimination was unpleaded as well and the Respondent had no opportunity to rebut the same.
45. Counsel cited the decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR for the proposition that submissions cannot take the place of evidence as they are for the most part "marketing language".
46. Counsel submitted that the incidents of the alleged discrimination were unsubstantiated.
47. Counsel urged that the Petitioner had failed to prove that he was furloughed for another person to be employed and the Respondent's witness denied the allegation. Equally, the Petitioner provided no evidence of the 5 teachers allegedly hired by the Respondent.
48. That the argument about unavailability of budget to pay the Petitioner was made from the bar as it had not been pleaded.
49. Reliance was made on the sentiments of the court in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR on pleadings.
50. Counsel submitted that the Respondent had a grievance handling procedure which the Petitioner did not invoke and provided no evidence to prove the grave allegation he was making.
51. On the discrimination against the Petitioner's daughter, counsel urged that Sally Ng'ang'a sang the national anthem before the commencement ceremony as she was a good musician and the omission of her picture was inadvertent.
52. Counsel wondered how the school would nominate her to sing the national anthem but simultaneously discriminate her by not having her picture in the yearbook to urge that there was no discrimination and request to prepare an amended copy to correct the mistake was rejected and was not the only student who had been missed out.
53. Counsel submitted that Sally Ng'ang'a wrote to Valentine Wanjiku and Petitioner's submission that the issue was dismissed had no supportive evidence.
54. That the school had a staff complement of 91 with 59 Kenyans and 32 expatriates and the Petitioner's allegation of discrimination among many was false.
55. Reliance was made on the provisions of Section 5(4) of the *Employment Act*, 2007 on discrimination as were the sentiments of the Supreme Court of India in *Kedar Nath v State of WB* on the burden of proof of the party alleging discrimination to urge that since the COVID-19 Pandemic rendered physical library services unavailable, the selection of the Petitioner had a rational basis and cited the sentiments of the South African court in *Transport and General Workers Union Wiseman Mkonjeni v Bayele Security Holding (No. J25/2/98)* to reinforce the submission.
56. Counsel urged that the school had notified the Petitioner of the furlough by letter dated 28th July, 2020 and the same was to commence in September after it realized that the closure of schools had taken more than 6 months and he was requested to return in November 2020 but responded with his lawyers demand letter.
57. On legitimate expectation, counsel submitted the claim on the Petitioner's financial obligations had no basis as the Respondent was not privy to the arrangements the Petitioner had with 3rd parties as held in *Mark Otanga Otiende v Dennis Oduor Aduol Civ. Appeal E013 of 2021* and *Agricultural Finance Corporation v Lengetia Ltd* [1985] KLR 765.



58. Reliance was also made on Section 19(1)(g) of the *Employment Act*, 2007 on lawful deduction to urge that the Petitioner had not proved his indebtedness to any 3rd party for the sum of Kshs.1,506,827.00 claimed.
59. Reliance was also made on the decision in *Alphonse Maghanga Mwachanya v Operations [680] Ltd* No. 146 of 2012 on payment for the unexpired term of a contract.
60. Finally, counsel submitted that the expectation that Sally Ng'ang'a would enjoy free schooling at the Respondent's school was dependent on the Petitioner's continuation of being the Respondent's employee and was extinguished when he refused to report back and alleged termination of employment since the Respondent's letter was categorical that he was still an employee of the Respondent and the demand for fees for the January 2021 was justified.

Determination

61. The issues for determination are;
 - i. What is meant by the term Furlough and what were its implications?
 - ii. Whether the Petitioner was discriminated by the Respondent.
 - iii. Whether the Petitioner had a legitimate expectation that his daughter Sally Ng'ang'a would benefit from free schooling till she graduated as well as salary payment.
 - iv. Whether the Petitioner is entitled to the reliefs prayed for.
62. Before delving into the foregoing issues, it is elemental to dispose of the issue whether the Petitioner's suit herein meets the threshold in *Anarita Karimi Njeru v Republic* [1979] eKLR.
63. This is because the suit is premised on various provisions of *the constitution* allegedly violated by the Respondent and it is incumbent upon the Petitioner to establish with sufficient clarity and precision the alleged provisions and how the Respondent's conduct violated them as enunciated by Trevelyn and Hancox JJ who stated as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
64. Similar sentiments were expressed in *Trusted Society of Human Rights Alliance v Attorney General & 2 others* [2012] eKLR as well as *Kiambu County Tenants Welfare Association v Attorney General & another* [2017] eKLR.
65. The petition cites the preamble Articles 2(1), 3(1), 27(5), 29(d) & (f), 41 and 47(1) of *the Constitution* of Kenya, 2010 to underscore foundation of the petition but the body of the petition as amended, makes no reference to the Articles except under paragraph 13 on the right to be heard and paragraph 11 on discrimination.
66. The specific or particulars of the alleged violations are not marched with the specific articles of *the Constitution* to demonstrate with precision how the articles were allegedly violated.



67. For instance, paragraphs 23 and 25 of the Petition which sets out the particulars of oppression, cruelty and racial prejudice or discrimination, cite no article of the Constitution of Kenya, 2010 or any other law.
68. It requires no belabouring that the provisions of the Employment Act, 2007 provide for the right of an employee to be heard and so do the provisions of the Fair Administrative Action Act, 2015.
69. Similarly, the provisions of the Employment Act contain detailed provisions on discrimination in all aspects of employment including recruitment.
70. Finally, other than one declaration encompassing Articles 28, 29(d) & (f), 27(5), 41 and 47 of the Constitution of Kenya, 2010, which the court has jurisdiction to make in a claim, no other remedy sought implicates the provisions of the Constitution. All the other 9 reliefs sought relate to the employment relationship.
71. In sum, the court is not persuaded the petition herein could not have been prosecuted more effectively and comprehensively as a cause where parties would have availed oral testimony to exemplify or rebut of the unsubstantiated allegations made by both parties.
72. As courts have repeatedly emphasized, not every violation of the Constitution justifies a constitutional petition and in particular where statute law addresses similar violations as is the case here.
73. (See Josephat Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR) on the burden of a litigant who alleges violations or infringement of the constitution).
74. In the instance case, it is the finding of the court that the instant petition does not meet the threshold in Anarita Karimi Njeru v Republic (Supra).
75. On discrimination, counsels have adopted contrasting positions with the Petitioner's counsel submitting on discrimination as well as racial discrimination of the Petitioner and his daughter. Counsel for the Respondent submitted that no discrimination had been demonstrated.
76. The homeport is a delineation of the concept of discrimination.
77. In Nyarangi & others v Attorney General [2008] KLR 688, the court stated as follows;
- “Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.”
78. Similarly, in Peter K. Waweru v Republic [2006] KLR, the court expressed itself as follows;
- “. . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another 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.”
79. Wilson J. expressed similar sentiments in Andrews v Law Society of British Columbia [1989] 1 SCR 321.



80. Article 27 of *the Constitution* of Kenya, 2010 outlaws direct and indirect discrimination on the ground of race, pregnancy, sex, marital status, health status, ethnic or social origin, colour, age, disability, religion, culture, dress, language or birth.
81. Section 5(3) of the *Employment Act*, 2007 adopts a similar formulation.
82. However, Section 5(7) of the Act imposes a heavy burden of proof to disprove allegations of discrimination by an employer.
83. However, for an employee to succeed, he/she is required as a minimum to demonstrate prima facie discrimination.
84. The Petitioner's allegation of discrimination is grounded on the furlough, non-recognition of the daughter in the Respondent's 2021-2022 yearbook and racial discrimination as well as being required to pay fees for his daughter.
85. As regards the furlough, the Petitioner deposes that he felt discriminated and victimized.
86. It is common knowledge that owing to COVID-19 Pandemic from March 2020, the Ministry of Health imposed several containment measures one of which was closure of all learning institutions and this state of affairs continued until October when final year students were allowed to go back to class subject to strict adherence with the attendant protocols.
87. By then, most institutions had institutionalized online learning. The Petitioner was the Respondent's Librarian.
88. Although the Petitioner alleged that out of 90 employees, he was the only one whose position as furloughed, he did not provide supportive evidence and the same applies to the allegation that all other employees continued receiving their full salaries throughout the period the institution was closed.
89. Similarly, the Petitioner tabled no scintilla of evidence to demonstrate that the Respondent staff complement had only 3 non-whites out of 59 as revealed by the Respondent.
90. Was the Petitioner targeted by the Respondent's Director?
91. The Petitioner adduced no evidence that the Director, Mr. Kroll or any other person was targeting him for any reason.
92. The Petitioner admits that the Director had just been promoted to the position.
93. To the question whether the furlough was discriminative, the court returns that the Petitioner has not provided sufficient material for the court to find that he was singled out of over 90 employees by virtue of being a Librarian or non-white.
94. On racial discrimination, the Petitioner's Supporting Affidavit is silent.
95. The petition uses the furlough and the non-recognition of the daughter as racial discrimination.
96. In his submissions, counsel for the Claimant introduced evidence on alleged happenings at the Respondent's Library in an attempt to prove that white students were favoured or treated better.
97. The evidence on how the Respondent's Library conducted its affairs including who sat where was neither pleaded nor availed by the Petitioner and is of no consequence as parties are bound by their pleadings as held in *Deniel Otieno Migore V South Nyanza Sugar. Co. Ltd* cited by the Respondent's counsel.



98. Similarly, and though important, submissions are neither pleadings nor evidence and have been characterised as “marketing language”. (See Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi (Supra)).
99. As regards the daughter’s alleged racial discrimination, the Petitioner’s argument is that his daughter, Sally Ng’ang’a was not recognized in the Respondent’s yearbook 2021-2022, an omission the Petitioner alleges was discriminative.
100. On its part, the Respondent admitted the omission and responded to the Petitioner’s daughter’s email on the issue sent to one Valentine Wanjiku who was incharge.
101. Equally, the Petitioner’s daughter had noticed that another student had also been omitted.
102. Mr. Kroll’s statement states that an apology was tendered to Sally Ng’ang’a and an offer for amends was made but the same was declined.
103. Copies of emails on record attest to the truthfulness of Mr. Kroll’s statement.
104. Coincidentally, during the commencement ceremony, the Petitioner’s daughter was honoured to lead to school in singing the National Anthem as she was a good musician.
105. Was the omission of the Petitioner’s daughter’s page and that of another student named Sihyun by design or inadvertent?
106. In the totality of the evidence before the court, the court is not persuaded that the Petitioner has placed sufficient material for the court to make a finding that the omission was deliberate and thus racially discriminative.
107. Relatedly, Sihyun’s race was not disclosed.
108. The fact that one Nellyne K’Otieno and the Petitioner’s daughter led in the singing of the National Anthem during the commencement ceremony on 21st May, 2021 and on notification of the omission, an apology was made as was a promise to rectify the same which the Petitioner’s daughter declined, shows that the omission may not have been deliberate.
109. In the totality of the evidence before the court, it is the finding of the court that the Petitioner has failed to evidentiary demonstrate that he or his daughter were discriminated by the Respondent.
110. As regards payment of fees for the daughter, the Petitioner pleaded that on 31st December, 2020, the Respondent sent him a fee invoice of USD 6,415 for the January 2021 School term. That it was sent in breach of the promise made on 28th July, 2020 that Sally would study at the school during the Furlough.
111. The Respondent admitted that it had a policy that children of employees were not charged school fees but argued that in October 2020 after the Respondent informed the Petitioner to remain on furlough pending the re-opening of schools for regular learning, even after requesting him to return to work, by letter dated 9th October, 2020, the Petitioner engaged an advocate who by letter dated 27th October, 2020 under the reference unlawful dismissal accused the Respondent of having terminated the Petitioner’s employment vide the letter dated 28th July, 2020 and demanded an apology, salary for the duration of the contract, Kshs.5,000,000/= for discrimination, and severance pay.
112. By letter dated 5th November, 2020, the Respondent’s advocate affirmed that the Petitioner’s employment had not been terminated and suggested that the matter be resolved amicably.
113. However, by letter dated 19th October, 2020, the Petitioner’s counsel insisted that the Furlough was a termination of employment and added another demand, that the Petitioner’s daughter’s education



- at the school continues until graduation and threatened legal action if the demand was not positively responded to within 7 days.
114. The change of tune by the Petitioner changed the Respondent's appreciation of the circumstances and it took the view that the Petitioner had terminated his employment and the daughter could no longer benefit from the free education at the school.
 115. Was the demand for fees from the Petitioner discriminatory? The court is not so persuaded.
 116. The court is persuaded that the Respondent's unilateral variation of the preliminary contract of employment was a repudiation of the employment relationship which entitled the Petitioner to claim constructive dismissal as the change made by the Respondent run to the root of the contract.
 117. As to what is meant by Furlough and its implications, the Petitioner submitted that it was a termination of employment while the Respondent maintained that it was not.
 118. Black's Law Dictionary defines a Furlough as;

“A leave of absence from the military or other employment duty or a brief release from prison.”
 119. As correctly submitted by the Claimant's counsel, Furlough means suspension or discharge of a worker or workers for a specified period of time.
 120. While Kenyan employment law does not recognize such leave which is compulsory, and is imposed by the employer in undefined circumstances as in this case, the Human Resource Policies and Procedures Manual of the Public Service Commission of Kenya, 2016 recognize unpaid leave which may be given to an employee of his/her instigation for not more than 3 years in certain circumstances.
 121. The leave is not increment earning and the Government's Pension portion is not payable and no pension is earned.
 122. In a nutshell, the employee retains the position without its other entitlements.
 123. Such leave is by mutual agreement between the employer and employee and is conditional. Many employers in the public service regularly accord employees unpaid leave or leave of absence and in all instances at the instigation of the employee.
 124. Are there circumstances in which an employer may require an employee to proceed on unpaid leave?
 125. Kenya's employment law does not envision such a scenario as leave can only be granted to a person who is rendering services and it has no legal anchorage perhaps because salary or wage is one of the fundamental elements of a contract of service.
 126. Was the Respondent's conduct of sending the petitioner on unpaid leave for an indefinite period unlawful?
 127. By letter dated 28th July, 2020, received by the Petitioner on even date, the Respondent's Director informed the Petitioner that due to the COVID-19 pandemic and closure of schools, his position had been furloughed for the duration that learning would be virtual and online as there was no physical presence at the school. The letter promised that the Petitioner would be paid till August 2020 and for the furloughed period and thereafter there would be no pay.
 128. The letter promised that for the duration of the furlough, the school would provide education to the Petitioner's daughter free of charge as before and the Petitioner would be on the schools medical



- cover through the furlough period and would be recalled when physical learning resumed at the Respondent's at a later date though uncertain.
129. Although the Respondent may not have intended to terminate the Petitioner's employment as evidenced from the promise that;
- i. The Respondent would continue educating the Petitioner's daughter at its costs.
 - ii. The Petitioner would remain on the Respondent's medical insurance for duration of the furlough, and
 - iii. The Petitioner would be recalled when physical learning resumed on the Respondent's campus, these promises are collateral to the contract of employment.
130. The crux of the matter is that the Respondent unilaterally altered one of the fundamental terms of the employment contract; remuneration.
131. The Petitioner contends that the Respondent's action of sending him on furlough was unilateral, oppressive and malicious.
132. From the evidence on record, it is clear that the Respondent acted unilaterally and the Petitioner was unaware of the changes until 28th July, 2020.
133. The provisions of Section 2, 8, 9 and 10 among others of the *Employment Act*, 2007 are explicit that the employment relationship is a consensual engagement between the employer and employee and it follows that any variation ought to be consultative as provided by Section 10(4) of the *Employment Act*, 2007 which states that;
- “Where any matter is stipulated in subsection (1) changes the employer shall in consultation with the employee revise the contract to effect the change and notify the employee of the change in writing.”
134. In *Kenya County Government Workers Union v Wajir County Government & another* [2020] eKLR, the court cited the earlier decisions in *Maxwell Miyawa & 7 others v JSC* [2017] eKLR and *Ronald Kamps Lugaba v Kenol Kobil Ltd* [2016] and expressed itself as follows;
- “Further in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and a breach of contract and the statutory requirement to consult with an employee where there is a variation to the employment contract and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are sub-summed in the fair labour practice principle . . .”
135. Section 10(4) of the *Employment Act*, 2007 makes it obligatory for the employer to consult the employee whenever there is a change in the essentials of a contract of employment.
136. In this case, the Respondent informed the Claimant to proceed on leave of absence without consulting him and he would remain on “leave” without pay.
137. In law, employment and remuneration are inseparable.



138. Under Section 2 of the *Employment Act*, 2007 an employee means;
- “a person employed for wages or a salary and includes an apprenticeship and indentured learner.”
139. The centrality of wages or salary is further underscored by the provisions of Part IV of the *Employment Act*, 2007 entitled protection of wages.
140. In *Geoffrey Muriithi Muthee v XPLICO Insurance Co. Ltd* [2022] eKLR, the court held as follows;
- “Remuneration is undoubtedly one of the most important terms of an employment contract. In fact this court has held before that the right to remuneration is the most important right to an employee, considering the immense protection that the *Employment Act*, 2007 accords wages and salaries of an employee.
- Where an employer substantially alters (including by a significant reduction or change of the manner of payment) of an employee’s compensation without their consent such alteration may amount to a fundamental breach of the contract.
- An employee whose compensation has been altered can successfully claim constructive dismissal.”
141. Since the Respondent altered the Petitioner’s entitlement to remuneration without consultation, the unilateral variation was a breach of the contract of employment and a repudiation of the contract, the daughter’s education, medical insurance and recall notwithstanding.
142. As held in *Geoffrey Muriithi Muthee v XPLICO Insurance Co. Ltd* (Supra), the Petitioner could claim that his contract of employment had been constructively terminated by the Respondent as he did by its counsel’s letters to which the Respondent reacted to by demanding fees and stopping the Petitioner at the gate on 12th January, 2021.
143. As to whether the Petitioner had a legitimate expectation that his daughter would enjoy free school until graduation, counsels have adopted contrasting positions. Counsel for the Petitioner submitted that the Petitioner legitimately expected that the daughter would continue receiving education at the Respondent’s school “for as long as he remained an employee of the Respondent school” as per the school policy on fee exemption to members of staff as had been the case for the duration he had already served as the Respondent’s employee.
144. However, the argument that the legitimate expectation subsisted even after the furlough which the Petitioner regarded as a termination of employment is tenuous in light of the Respondent’s policy which the Petitioner was relying on.
145. In sum, it is discernible free education for Sally Ng’ang’a was only available if the employment relationship between the parties subsisted and as it was terminated by the furlough, the policy had no foundation to stand on and was non-existent.
146. The elements of legitimate expectations were laid down in *National Director of Public Prosecutions v Phillips* [2002] 4 SA 60 (W) P.S 28, namely;
- i. clear representation.
 - ii. expectation must be reasonable.
 - iii. the expectation was induced by the decision maker.



- iv. it was lawful for the decision maker to make the representation.
147. (See also Communication Commission of Kenya & 5 others V Royal Media Services & 5 others (Supra)).
148. The Petitioner has failed to prove that the Respondent violated his right of legitimate expectation on her daughter's education as a promise had been made.
149. The same applies to the legitimate expectation of receiving a salary which was dependent on the employment relationship
150. The fact that the Petitioner rightly considered the furlough a repudiation of the contract of employment, the expectation of receiving a salary was repudiated as well as an element of the contract of employment.
151. In his submissions, the Petitioner's counsel submitted that the Petitioner had made financial arrangements with Bibilia Sacco Ltd and NCBA Bank Ltd yet the Petitioner's Supporting Affidavit made no reference to loans owed to anyone and no documentary evidence was availed to demonstrate the degree of indebtedness of the Petitioner.
152. Equally, evidence of the alleged penalty was also not canvassed.
153. As regards payment of salary, the Petitioner had a legitimate expectation that it would continue being paid as long as he remained in employment.
154. On the other hand, the employer envisioned a situation where the Petitioner would remain in employment without a salary, without the Petitioner's concurrence, which was untenable.

Respondent's Counter-claim

155. In its counter-claim, the Respondent avers that the Petitioner did not pay the sum of USD 20,800 being the daughter's fees for the second semester year 11, first and second semester, year 12 and graduation fee and was claiming the same from the Petitioner.
156. The Respondent also prays for the court to take judicial notice of the COVID-19 crisis in 2020 which led to closure of schools, declare that the Petitioner constructively dismissed himself from employment, the school fees to offset the benefits due to the Petitioner and costs of the suit.

Whether the Petitioner is entitled to the reliefs sought.

a. Declaration that the Petitioner's rights guaranteed under Articles 28, 29 (d) & (f), 27(5), 41 and 47 of the Constitution of Kenya, 2010 were violated

157. Having found that the petition herein does not meet the threshold of a constitutional petition as enunciated in Anarita Karimi Njeru V Republic (Supra) and the allegations made lacked supportive evidence, the declaration sought is unmerited and is declined.

b. Declaration that the Petitioner's contract of employment with the Respondent was in force up to 30th June, 2021

158. From the evidence on record, it is clear that the Petitioner correctly, in the court's view, deemed the furlough a termination of employment by the Respondent as his counsel's two (2) letters on record reveal and as found elsewhere in this judgment, the furlough was not only a breach of the contract of employment but a repudiation and no employment relationship existed thereafter.



159. In the premises, the declaration sought is unmerited and is declined.

c. Declaration that an employee serving under a fixed term contract cannot be furloughed

160. In law, breach of contract entails a violation of the terms of the contract and entitles the aggrieved party to a remedy.

161. It is injudicious for court to declare that breach of contract applies only to fixed term employment contracts.

d. Declaration that the furlough was invalid, null and void and the Petitioner is entitled to full salary for the remaining of the contract of employment

162. Having found that the furlough amounted to a repudiation of the contract of employment by the Respondent, the Petitioner was entitled to treat the contract as having come to an end as he did.

163. The furlough was a breach of contract entitling the Petitioner to remedies as appropriate.

164. Needless to emphasize, the furlough was unfair to the Petitioner.

165. Since the Petitioner did not render any service to the Respondent from the beginning of September 2020 to the end of June, 2021, the court is not persuaded that the breach committed by the Respondent entitled him to the salary for the unserved term of the contract of employment.

The declaration sought is declined.

e. Declaration that Sally Ng'ang'a had a legitimate expectation of entitlement to receive her full education at the Respondent's school

166. As the free schooling policy only applied to children of employees of the Respondent, and the same was an employment benefit, the expectation would not be reasonable if the parties have no employer/employee relationship as ordained by the Respondent's policy.

167. The court cannot issue a declaration in relation to a benefit whose subsistence was dependent on another relationship whose existence the law does not guarantee.

The declaration is denied.

f. Sum of Kshs.1,930,870/= being the Petitioner's salary for September, October, November, December 2020 and January – June 2021

168. Having found that the Petitioner was constructively dismissed by the Respondent effective 1st September, 2020, the employment relationship came to an end from the date the Respondent had promised not to pay the Petitioner's monthly salary and the claim for unpaid salaries is therefore unjustifiable and is declined.

g. Pay in lieu of notice

169. Evidently, the Respondent neither complied with the provisions of Section 35 nor 36 of the *Employment Act, 2007*.

170. The prayer for salary in lieu of notice is merited and the same is awarded Kshs.193,087/=.



h. Sum of Kshs.1,506,827.04 as loan arrears the Respondent exposed the Petitioner to

171. As adverted elsewhere in this judgment, the Petitioner adduced no evidence of the alleged debt including who the creditors were and how the amount claimed was arrived at.
172. Neither the Petition nor the Supporting Affidavit provided the relevant particulars and no documentary evidence was attached.

The prayer is declined.

i. General damages for the Respondent's oppressive conduct, racial discrimination and denial of income

173. Having found that the Petitioner failed to prove racial discrimination or any other form of discrimination, and the furlough amounted to a repudiation of the employment contract by the Respondent, the Petitioner has not demonstrated any entitlement to general damages and the prayer is declined.
174. However, having found that the Respondent constructively dismissed the Petitioner's employment, the Petitioner is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
175. In determining the quantum of compensation, the court has considered the following;
- i. The Petitioner was an employee of the Respondent for about 8 years.
 - ii. The Petitioner had no recorded cases of misconduct, indiscipline or warning.
 - iii. The Petitioner did not contribute to the termination of employment.
 - iv. The Petitioner neither appealed the Respondent's decision nor express to continue in the Respondent's employment.
 - v. Following the Court Orders issued on 27th January, 2021, the Respondent was directed to ensure that the Petitioner's daughter continued enjoying the free education at the Respondent's school as she had previously and graduated in 2022.
176. In the circumstances, the court is satisfied that the equivalent of 5 months' salary is fair.

j. Unpaid leave days for 8 years

177. Although unpaid leave days were prayed for, and the sum of Kshs.1,081,287.20 indicated as the amount due to the Petitioner, the Petitioner provided no particulars on how the sum was arrived at or the duration it related to.
178. The Petitioner's last contract dated 1st July, 2019 provided for 21 days leave to coincide with the school holiday each year.
179. Intriguingly, the Petitioner neither pleaded nor stated that he did not proceed on leave or worked during all the school holidays for 8 years. He led no evidence to show how the school semesters were organized and why he did not proceed on leave.
180. In the absence of the requisite particulars, the prayer is declined.



Counter-claim

- i. The court is alive to the fact that owing to the COVID-19 Pandemic, schools, workplaces and places of worship among others were closed and employees stayed and or worked from home.

Being the 1st pandemic of such huge magnitude, employers addressed it differently. While some declared employees redundant due to the uncertainty, others reduced employee's salaries while others retained them on full pay.

The distinguishing feature is how an employer decided to deal with its employees. While many followed the law, others did not.

The Respondent did not as it varied the Petitioner's employment contract without consultations.

- ii. Contrary to the Respondent's prayer that the Petitioner constructively terminated his employment with the Respondent, the opposite is the case as it is the Respondent's repudiation of the contract which entitled the Petitioner to treat the contract as constructively terminated. The Respondent had by its letter of 28th July, 2020 demonstrated that it was not ready to abide by a fundamental term of the contract.

The Petitioner's employment was constructively terminated by Respondent.

The prayer is declined.

- iii. Unpaid fees USD 20,800

It is common ground that the Petitioner's daughter completed her education at the Respondent's school pursuant to the interim orders granted by the Hon. Justice Nzioki Wa Makau on 27th January, 2021 and as the orders were not made conditional upon payment of fees by the Petitioner, upholding the Respondent's counter-claim would be tantamount to qualifying or sitting on appeal on the learned judges orders which this court is not persuaded is the right thing to do.

As a consequence, the counter-claim is declined.

- iv. The foregoing addresses the prayer of set-off.

181. In the upshot, judgment is entered in favour of the Petitioner against the Respondent as follows;

- a. Pay in lieu of notice Kshs.193,087.00.
b. Equivalent of 5 months gross salary Kshs.965,435.00
Total Kshs.1,158,522.00
c. Costs of this suit.
d. Interest at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF MARCH 2024

DR. JACOB GAKERI

JUDGE

ORDER



In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

DRAFT

JUDGEMENT Nairobi ELRC Petition No. E005 of 2021 Page 22 of 22

