



**Osewe & another (Suing on their Own Behalf and on Behalf of
144 others) v County Government of Kisumu & another (Petition
E041 of 2022) [2024] KEELRC 904 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 904 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E041 OF 2022
CN BAARI, J
APRIL 25, 2024
IN THE MATTER OF ARTICLES 2,10,19,20,21,22,23,27,30,48,258
AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS**

BETWEEN

MOSES OSEWE 1ST PETITIONER

JOHN OBIERO JUMA 2ND PETITIONER

SUING ON THEIR OWN BEHALF AND ON BEHALF OF 144 OTHERS

AND

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD KISUMU 2ND RESPONDENT

JUDGMENT

1. The 1st and 2nd Petitioners have brought this petition on their own behalf and that of 84 others as former employees and retirees of the now defunct Kisumu County Council. They aver that in the year 1998 they were deployed to Nyando County Council and Ahero Town Council which were later subsumed by the Kisumu County government upon the advent of County Governments.
2. They assert that the defunct Nyando County Council and Ahero Town Council owed them unpaid dues amounting to Kshs 58,247,822/= which remains unpaid to date.



3. They contend that the continued non-payment of their dues infringes on their rights enshrined under Articles 2(1) & (2), 27(1) & (2), 28, 30, and 48 of *the Constitution*.
4. The petition proceeded for hearing on 27th September, 2023 with the 1st Petitioner testifying on behalf of the Petitioners. The Respondents on their part opted to rely on their Replying affidavit and bundle of authorities.
5. Submissions were filed for both parties.

The Petition

6. In the petition dated 27th October, 2022 the Petitioners seek the following reliefs: -
 - i. A declaration that the refusal, failure and or neglect by the Respondents to pay the Petitioners unpaid salaries and other accrued benefits from the year 1998 to the year 2012 constitutes a grave violation of the Petitioners' rights as protected under Articles 27 and 30 of *the Constitution*.
 - ii. That the Respondents do forthwith pay the Petitioner and his colleagues, their unpaid salaries as set out in the schedules of payments.
 - iii. General and exemplary damages against the Respondents, jointly and severally for violation of the Petitioners' right to protection against discrimination slavery and forced labour.
 - iv. Interest from the date of accrual till payment in full.
 - v. Costs
7. The Petitioners state that they were seconded to the County Government of Kisumu which took over the liabilities of Kisumu Town Council in accordance with Section 7 of the *Transition to Devolved Government Act* 2012.
8. They contend that for almost 23 years the Respondents have persisted in non-payment of their dues despite numerous reminders and follow ups.
9. It is their assertion that the conduct of the Respondents amounts to unfair and discriminatory labour practices.
10. The Petitioners urge the court to be guided by Article 2(1) & (2) of *the Constitution* on the Supremacy of *the Constitution*, and being binding on all state organs at both levels of government.
11. They equally cite the Respondents for breach of Article 27 (1) & (2) of *the Constitution* on non-discrimination. They assert that the Respondents discriminated against them by settling Kisumu Municipal Council workers' dues to their exclusion.
12. It is their case that the Respondents' 20-year delay in payment of their dues breaches their right to dignity as enshrined in Article 28 of *the Constitution*.
13. They also cite Article 30 of *the Constitution* likening the Respondents action to subjection of slavery, servitude and forced labour.

The Reply

14. The Respondents opposed the Petition through a joint replying affidavit dated 27th January, 2022, sworn by Norah Opondo their legal officer.



15. The Respondents' case is that the petition is an abuse of the court process, is defective and a non-starter. They state further that in so far as the Petitioners purport to file a petition on behalf of deceased persons without obtaining grants, ignore the provisions of Section 15 schedule 6 of *the Constitution*, Sections 3(d), 7 (e) to (h) and Schedule 6 of the *Transition to devolved Government Act*. the petition has no legs to stand on.
16. It is their assertion that the County Government of Kisumu is only obligated to honour the liabilities of defunct local authorities after vetting and verification.
17. The Respondents further state that the affidavit in support of the petition is in violation of the *Oaths and Statutory Declarations Act* for referring to annexures not affixed to it.
18. They assert that the Petitioners' claims would be better handled through filing of a claims as it would allow cross-examination on the facts and documents relied on.
19. According to the Respondents, the Petitioners have not established any ground of discrimination meeting the Constitutional threshold. They further submit that the exact amount being claimed by the Petitioners is vague and it is not clear how it was arrived at.

The Petitioners' Submissions

20. The Petitioners submit that the Auditor General's report attached to their supplementary affidavit shows that employees are owed money. He further submits that the handing over report by Ahero Town Council attached to the supplementary affidavit as "MNO 2" enumerates the employees and the amounts owed.
21. They submit that the Respondents have infringed on their constitutional rights as enumerated in the petition by tossing them around despite their old age. They rely on the case of Irene Wangari Gacheru & 6 others v Attorney General (2017) eKLR where Mativo J (as he then was) stated as follows regarding Constitutional rights: -

“Regarding the constitutional issues raised in the petition, it must be borne in mind that *the Constitution* must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of *the Constitution* in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.”

22. It is the Petitioners' submission that they are entitled to the reliefs sought as their former employment status is not in dispute. They equally submit that the Respondents have not tabled any evidence refuting the Petitioners' documents despite being custodians of employment records. They sought to rely on the case of Simon Kimani Gitura & 2 others v Administrator, Thika Sub County [2016] eKLR. for the holding that: -

“Where an employer does not file the record, this reflects that the records do not exist, which is an unlawful practice or the records do not support the employer's case.... Without such record being produced the court, is left with the claimant's case only.”

23. In staking their claim for compensatory damages, the Petitioners submit that the litigation process has been financially and emotionally draining. They placed reliance in VMK v CUEA [2013] eKLR which cited Daniel Musinga t/a Musinga & Co. Advocates v Nation Newspapers limited (2006) eKLR



where it was stated that an award of damages must cover injured feelings, the anxiety and uncertainty undergone during the court trial.

24. They conclude by urging the court to award each of the Petitioners KShs 1,000,000/= as compensation together with costs of the suit.

The Respondents' Submissions

25. It is the Respondents' submission that a Petition should identify infringements of *the Constitution* with some level of precision to enable the Respondent to mount a defence. They submit that the Petition herein does not specifically demonstrate how the Petitioners' rights were violated.
26. They assert that this petition is an omnibus application depicting lamentation over some dues by people whose identities are not ascertainable some of having died, and others seemingly not aware of the proceedings. They had reliance in the cases of Anarita Karimi Njero v Republic 1979 eKLR and that of Evans Ladtema Muswahili v Vihiga Public Service Board and 2 Others, Marley Ezekiel Ayiego (interested Party) [2021] eKLR where the common thread is that a party must coherently put forth its case to enable the court decipher the real issues for determination.
27. The Respondents submit that for Article 27 to be violated, it must be shown that persons in the same category were treated differently. They aver that other than hearsay, no evidence has been adduced to show that the Petitioners were treated differently. They rely on the case of Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR where the court held that not every differentiation amounts to discrimination.
28. It is the Respondents' further contention that it has not been disclosed how the court's awards would be distributed and whether all the beneficiaries would get the money.
29. The Respondents submit that the authenticity of the Petitioners' documents cannot be vouched for. They assert that the documents are neither signed nor addressed to the Petitioners and that the makers of the documents have neither produced them nor have they been cross-examined, Contrary to the provisions of Section 70 to 73 of the *Evidence Act*.
30. In addition, they submit that the documents have not been certified as is the requirement for public documents by Section 80 of the *Evidence Act*. In view of the foregoing, they aver that the documents have no probative value and should be expunged. They rely on Nairobi Petition Nos 106 and 160 (consolidated) of 2021 Robert Waweru and Three Others v Director of Public Prosecution and Others where the court emphasized the necessity of compliance with the *Evidence Act* even in affidavits accompanying the petition.
31. It is submitted further that it is not known for what period the amount being sought is for and that it is not clear how much each Petitioner is entitled to receive.
32. The Respondents submit that the special damages must be specifically pleaded and strictly proven. They rely on Equity Bank Limited v Gerald Wang'ombe Thuni (2015) eKLR where the court stressed on the importance of special damages being specifically and strictly proved.
33. They urge this court to dismiss the Petitioners' suit.

Analysis and Determination.

34. Having carefully considered the petition, the supporting affidavit, the replying affidavit, the supplementary affidavits, the 1st Petitioner's oral testimony and the rival submissions, the following issues crystallize for determination.



- i. Whether the Petitioners' rights as listed in the petition have been infringed.
- ii. Whether the Petition offends the doctrine of Constitutional avoidance.
- iii. Whether the Petitioners deserve the prayers sought.

Whether the Petitioners' rights have been violated/infringed upon

35. The Petitioners have listed a litany of Constitutional provisions alleged to have been infringed. Central to the infringement is the Respondents' action of failing to pay their salaries and accrued benefits despite numerous reminders.
36. The Petitioners particularly aver that the Respondents action of paying workers from the Kisumu Municipal Council to their exclusion, violates Article 27(1) & (2) of *the Constitution*.
37. It is their further contention that by taking them in circles for over 20 years, the Respondents have breached Article 28 on human dignity, in that by refusing to settle their dues, the Respondents have subjected them to slavery, servitude and forced labour contrary to Article 30 of *the Constitution*.
38. The Petitioners assert further that by refusing to address their concerns the Respondents have curtailed their right to access to justice enshrined in Article 48 of *the Constitution*.
39. The Black's Law Dictionary defines discrimination as the "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
40. The Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, had this to say on the standard of proof of violation of Constitutional rights: -

“It is already the standpoint of this Court, as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights-safeguards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights-claim in the instant case, founded upon racial discrimination, is to be seen.”
41. In *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, the Supreme Court similarly stated thus on the burden of proofs:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”
42. The question for this court is whether the Petitioners have proved violation of their rights under Articles 27, 28, 30 and 48 as alleged.
43. The Petitioners have placed before this court various letters of appointment, deployment, retirement notices, some pay slips and promotion letters indicating that they were at one point or another, employees of the Respondents.
44. The allegations of discrimination and other Constitutional violations are captured in the petition, the supporting affidavit and the supplementary affidavit. The court notes however, that the Petitioners have not laid substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of Respondents as unconstitutional.



45. The Petitioners have for example, not shown prove that some employees of the Kisumu Municipal Council were paid any dues that they themselves were entitled, to their exclusion.
46. It is not decipherable therefore, how the Respondents have breached these rights. For the claim of discrimination to succeed, the Petitioners must prove that they were treated differently. (see the Court of Appeal case of Kenya Medical Research Institute v Samson Gwer & 8 others [2019] eKLR).
47. Turning to the other rights listed by the Petitioners the principle in Anarita Karimi Njeru v The Republic (1976-1980) KLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR rings true. They not only stipulate that the Petitioners must plead with specificity the rights infringed upon, but must also demonstrate the manner in which the rights were infringed.
48. In the circumstances of this case, it has not been sufficiently demonstrated how the Respondents have infringed on the Petitioners' dignity, subjected them to slavery and forced labour or denied them access to justice.
49. The upshot of the foregoing is that the Petitioners have not proven any form of infringement of their Constitutional rights by the Respondents.

Whether the petition offends the doctrine of Constitutional avoidance

50. The Petition herein revolves around unpaid salaries and accrued benefits. The question is whether claims of unpaid salaries and benefits would better have been dealt with as a normal claim/cause or in form of a constitutional petition as the one before court.
51. In the case of Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost.755, cited in the case of Uhuru Muigai Kenyatta V Nairobi Star Publications Limited [2013] eKLR, the court stated:

“It is an established practice that where a matter can be disposed off without recourse to *the Constitution, the Constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22). The judge went on to add that: “Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”
52. In the South African case of S v. Mhlungu, 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.”
53. Similarly, the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).
54. The Respondents in their submissions asserted that the documents provided in the matter, could only pass the production threshold if they were produced by their makers. They have also stated that it would be prudent if the makers of the documents were cross examined so as ascertain the clear picture.



55. I am inclined to agree with the Respondent that in order for the Petitioners to prove non-payment of salaries and benefits, it would require a more intense inquiry than that presented in a constitutional petition.
56. It is my opinion that the Petitioners' claims would be better handled through filing of a claim/ cause which would allow cross-examination on the facts and documents relied on. Questions such as how much each Petitioner is owed; how each of the Petitioners' entitlement came about proof of appointment; appointment dates; representation of deceased Petitioners and whether their representatives obtained limited grants as well as retirement dates for those who retired to mention a few, are questions that would have been better addressed through a normal claim as opposed to a Constitutional Petition.
57. From the foregoing, the question that begs answer is whether a Constitutional court can undertake the inquiry it is being invited to undertake by the Petitioners herein.
58. In *Kimani Waweru & 4 Others Vs. Central Bank of Kenya & 7 Others* [2018] eKLR, the court stated as follows: -
- “Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend *the Constitution* and a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused.
59. Further in *Karuri & Others Vs. Dawa Pharmaceuticals Company Limited and Others* [2007] 2 EA 235:
- “Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process... A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under *the Constitution* for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”
60. From the foregoing it is evident that the petition as filed, offends the doctrine of Constitutional avoidance. It therefore is hereby struck out with no orders on costs.
61. Judgment accordingly.



**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH
DAY OF APRIL, 2024.**

C. N. BAARI

JUDGE

Appearance:

N/A for the Petitioners

Mr. Otieno Obiero present for the Respondents

Erwin Ongor - C/A

