



Omollo v Naivasha Self-Service Stores Limited & another (Petition E009 of 2024) [2024] KEELRC 2527 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2527 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E009 OF 2024
B ONGAYA, J
OCTOBER 18, 2024
IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS
UNDER ARTICLES 41 & 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

RAY OMOLLO PETITIONER

AND

NAIVASHA SELF-SERVICE STORES LIMITED 1ST RESPONDENT

NAIVAS LIMITED 2ND RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 26.01.2024 through Mutisya & Company Advocates, seeking the following Orders:
 - a. A declaration be issued that the respondent violated the petitioner’s fundamental right to privacy and human dignity under Articles 28 and 31 of *the Constitution* by forcefully taking pictures of her while holding picnic bites and threatening to publish the pictures.
 - b. An order of permanent injunction be issued restraining the respondent from publishing and using the petitioner’s image and likeness in any manner without the petitioner’s consent.
 - c. An order that the respondent be compelled to compensate the petitioner for damages and loss arising from taking the petitioner’s picture without her express authority.
 - d. The respondent supplies the petitioner with the Standard Operating Procedure Manual (SOPS.)
 - e. The petitioner be paid by the respondent damages for discrimination at work.



- f. The petitioner be paid by the respondent general damages for violation of the petitioner's fundamental rights.
 - g. That the respondent do pay costs of these proceedings.
 - h. Any other relevant relief.
 - i. Interest on d), e), f), g) and h) above.
2. The petition is supported by the affidavit of the petitioner in which she stated as follows:
- a. On 26.12.2023, the respondent subjected the petitioner to an unlawful labour practice, intimidation and harassment in the course of employment, by forcing her to carry picnic bites, which it alleged she had stolen, then proceeding to take a picture of her while holding the said items and labelling her a thief. The respondent also threatened to publish the said pictures.
 - b. Whereas the petitioner stated she had paid for the said picnic bites and had obtained a receipt, the respondent alleged the picnic bites were above the weight indicated. She contended that all edible items sold by the respondent, including picnic bites, are never the exact weight indicated in the package as some would be above the weight and others would be below the weight.
 - c. Through the Fresh Lead and LCM (Loss Control Manager), the respondent forced the petitioner to write a letter of apology indicating she stole the goods and will never repeat the mistake.
 - d. The respondent's continual harassment and intimidation is causing the petitioner untold suffering, mental anguish and torture. She believes the respondent had targeted her for dismissal owing to her long years of service with it and in line with its resolve to get rid of all old staff to get new ones after a foreign investor acquired the company.
 - e. The respondent failed to supply the petitioner with the Standard Operating Procedure Manual (SOPs), which would have assisted her in seeking redress to the malpractices she went through and the grievances she had, and would have guided her in the course of employment.
 - f. The respondent has also discriminated against her by treating her case differently while all her colleagues purchase goods in the same manner and nothing happens to them.
3. The respondent filed the replying affidavit of Cynthia Muli sworn on 07.06.2024 and through Thuita Kiiru & Company Advocates. The respondent's case was as follows:
- a. The respondent employed the petitioner as a Bakery Assistant through an Appointment Letter dated 07.11.2012. The petitioner was later transferred to the respondent's Gateway Mall Branch vide a letter dated 29.11.2017.
 - b. The petitioner packed for herself two (2) packets of picnic bites at the bakery section for purchase and personal use. She approximated the weight of the two packets of picnic bites and failed to use the weighing scale for weight-confirmation as per the respondent's guidelines, allegedly due to the absence of a nearby weighing scale. The petitioner then proceeded to the till area and presented the picnic bites of unconfirmed weight at the point of sale using the code for purchase of 200g picnic bites, code:13506039 at Kshs. 50 through receipt No. 0333-11100317456.
 - c. The respondent's Loss Control Department had been suspecting the process of buying picnic bites in the said branch by the respondent's employees. Therefore, out of caution, the



said department started weighing purchases made by the employees to ascertain the weight. Consequently, the Loss Control weighed the bites the petitioner had purchased and realized they had excessive varying weights of 280gms and 250gms, which was an average excess grammage of 130gms.

- d. On 27.12.2023, the respondent received a letter from the Petitioner in which she acknowledged her violation of the respondent's procedures. However, on 29.12.2023, it received a demand letter from the petitioner's Advocates demanding that the respondent ceases "unlawful acts". It nevertheless responded by requesting that the petitioner shares an explanation of her failure to adhere to the internal grievance procedure(s) of the company. The petitioner clearly neglected to adhere to the prescribed procedures outlined in both the grievance process and the HR policies.
 - e. The respondent adhered to due process by issuing the petitioner with a Notice to Show Cause Letter dated 19.01.2024, inviting her for a disciplinary hearing vide a letter dated 24.01.2024 and holding the disciplinary hearing on 29.01.2024. The petitioner waived her right to have a witness present during the meeting, confirmed she was aware of the respondent's core values of honesty and accountability and then used her name as her signature on the minutes of the meeting.
 - f. Further, the panel of five (5) conducting the petitioner's disciplinary proceedings extensively deliberated and recommended that she be summarily dismissed for gross misconduct. The petitioner was then dismissed from employment through a letter dated 05.02.2024.
 - g. The petitioner's conduct flew in the face of the respondent's procedures, policies and core values of honesty and accountability. In addition, her actions constituted theft by servant and dishonesty.
 - h. The petitioner was well aware of the relevant respondent's procedures, having undergone vigorous training sessions on 20.09.2023 concerning the HR policies and the code of conduct. She also participated in a subsequent session on the grievance process on 29.11.2023, which delineated three available channels for employees to address grievances.
4. In further opposing the petition, the respondent filed grounds of opposition dated 26.06.2024 raising the following grounds:
1. THAT no constitutional issues are discernable in the entire petition to warrant its admission and adjudication before this Honourable Court for reasons that:
 - a. The instant matter does not call for this Honourable Court's Constitutional interpretative mandate under the Bill of rights. There was no violation and/or infringement of any Constitutional provisions under the Bill of Rights to justify the petitioner to invoke the Constitutional jurisdiction of this Court.
 - b. The petition offends the doctrine of constitutional avoidance, which entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.
 - c. The alleged infringements as pleaded in the petition raise issues in employment law. As such, the matter can comfortably be handled by way of a Statement of Claim.
 2. THAT the petition and the prayers sought therein are a procedural and substantive legal nullity, bad in law, misconceived and discloses no reasonable cause of action as against the respondent thus rendering it fatally and incurably defective.



5. Parties then filed their respective submissions. The Court has considered all the material on record and returns as follows.
6. To answer the 1st issue, the Court returns that the grounds of opposition will collapse as unjustified or not established at all. The petition has set out clear allegations and prayers and it cannot be said that no reasonable cause of action has been established. Indeed, the respondent admits that the parties were in a contract of service and the respondent employed the petitioner as a Bakery Assistant by the letter dated 07.11.2012. Further, the case as pleaded alleges harassment that on 26.12.2023 the respondent subjected the petitioner to unlawful labour practice, intimidation and harassment in the course of her employment allegedly by forcing her to carry picnic bites that she had allegedly stolen and by allegedly proceeding to take a picture of her while holding the said items and labelling her as a thief. The petitioner pleaded and alleged contravention of Article 28 on the right to inherent dignity and the right to have that dignity respected and protected; Article 25 on freedom from torture and cruel, inhuman or degrading treatment or punishment; Article 31 on the right to privacy; Article 41 of *the Constitution* on the right to fair labour practices; and, the claimant made prayers as set out in the petition. The Court finds that as pleaded, the petition disclosed a reasonable cause of action and properly set out allegations on contravention of *the Constitution* with respect to alleged events on 26.12.2023.
7. To answer the 2nd issue, the Court returns that the petitioner has failed to establish that events on 26.12.2023 amounted to harassment and unfair treatment in violation of the cited constitutional provisions. The petitioner has not exhibited the photographs that were allegedly taken on the material day. The petitioner has not shown that the respondent intended to use such photographs, if they were taken at all, other than for the allegations the respondent had initiated against the petitioner and for internal use and not publication to third parties. There is no evidence to suggest that the respondent took the photos as alleged and then threatened or set out to publish the same to third parties. Instead, the evidence is that the petitioner engaged in misconduct on 26.12.2023 by breaching the procedures applicable to the respondent's staff who desired to buy the picnic bites. In particular, the petitioner bought the picnic bites for herself without weighing the same thereby underpaying as was established by the respondent. The petitioner then wrote the letter received by the respondent on 27.12.2023 for packing the overweight picnic bites for herself and committing never to repeat the incident again. It appears to the Court that by that evidence, the respondent was at all material times engaged in proper employer's prerogative to supervise and exercise disciplinary control over the employee. Accordingly, the Court returns that the petitioner has failed to show that her fundamental freedoms and rights in the Bill of Rights were contravened or threatened with contravention as was alleged.
8. To answer the 3rd issue, the Court returns that the petitioner is not entitled to remedies as prayed for. As submitted for the respondent, the claimant has failed to show that the pictures had been taken as was alleged. As for provision of the Standard Operating Procedure Manual, the petitioner has not shown that the same was requested for and the respondent had failed to provide the same per the respondent's internal procedures. Further, the Court has found that discrimination was not established by way of necessary evidence and circumstances.
9. The Court has considered all the circumstances of the case and the obtaining otherwise cordial employment relationship up to the time of the dispute herein and there will be no orders on costs.
10. Needless to state, as pleaded and urged for the respondent, the respondent is not a state corporation as was pleaded for the petitioner, but it is limited liability company registered under the *Companies Act*.
11. In conclusion, judgment is hereby entered for the respondent against the petitioner for dismissal of the petition with no orders on costs.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 18TH OCTOBER 2024.**

BYRAM ONGAYA

PRINCIPAL JUDGE

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