



**Olang’o v Insight Management Consultants Limited (Employment and Labour Relations
Petition E139 of 2023) [2024] KEELRC 2513 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2513 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E139 OF 2023
AN MWAURE, J
OCTOBER 11, 2024**

BETWEEN

CALVINCE OWOUR OLANG’O PETITIONER

AND

INSIGHT MANAGEMENT CONSULTANTS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed an Amended Petition dated 25th August 2023.

Petitioner’s Case

2. The Petitioner avers that the Respondent specializes in providing human resource solutions to companies operating in Kenya. Its primary services are staff recruitment and payroll management and is well known in the market of staff recruitment and regularly works with reputable companies such as Microsoft, Kenya Airways, Canon Chemicals Limited, Unilever, Ecolab and Huawei.
3. The Petitioner avers that he was employed by the Respondent but was outsourced to work for a group of companies known as Godrej Kenya. He entered into three-month contracts with the Respondent which outlined the nature of his engagement.
4. The Petitioner avers that under the outsourcing arrangement, the Respondent remained the primary employer responsible for handling all issues relating to his employment and his general welfare. The Respondent posted him to work at its client’s premises and required to report to a designated manager as directed by the Respondent from time to time.
5. The Petitioner avers that sometime in April 2022, the Petitioner was posted to work under Daljinder Kalsi who styled himself as the MIS Manager at Godrej Consumer Products.



6. The Petitioner avers that between April 2022 and April 2023, Daljinder Kalsi, subjected him to various forms of discrimination, humiliation, racism, torture, denial of equal opportunity and abuse of authority. He reported the matter to the Respondent on 29/4/2023 indicating that his designated manager's conduct had made the working environment unbearable and he was attending counselling as a result the designated manager's despicable conduct. The Respondent soon thereafter dismissed him to cover up the allegations of racism, bullying and inhumane treatment that he was experiencing at work.
7. The Petitioner avers that the manager adversely and subjecting him to racially charged remarks, disparaging and inhumane treatment on the account of his race and ethnic identity.
8. The Petitioner further avers that he was indirectly discriminated based on his race by the manager's persistent habit of denying him an opportunity to take his lunch break whenever there was a pending assignment. This was also in violation of his right to dignity and right to be free from hunger.
9. The Petitioner avers that the Respondent swiftly summarily dismissed his employment on 5/5/2023. In the summary dismissal letter, the Respondent quoted a disciplinary hearing held on 4/5/2023 which was conducted in his absence and at a time when the Respondent knew he was unwell and was out of the office. The Respondent did not inform him of his right to be accompanied by an employee of his choice or a union representative at the disciplinary hearing.
10. It is the Petitioner's case that his letter dated 29/4/2023, he informed the Respondent that he had been recommended to attend counselling at Mama Kibaki Lucy Hospital and one of the attending psychologists had prepared a report based on one of the sessions.
11. The Petitioner asserts that his summary dismissal was meant to conceal his claims of intolerable working environment comprising of insults, bullying, racially charged remarks and other forms of disparaging behaviour which was in breach of his right to fair administrative action under Article 47(1) of *the Constitution*.

Respondent's Case

12. In opposition to the Petition, the Respondent filed a replying affidavit dated 25th October 2023.
13. The Respondent avers that apart from routine professional feedback including correction and reprimands for occasional lapses, there were never any instances of inappropriate remarks or behaviour directed towards the Petitioner by Mr. Dalijinder Kalsi.
14. The Respondent avers that the Petitioner's dismissal lawful as the Petitioner failed to mention that he feigned sickness yet he was working for a neighbouring organisation for an entire month in April 2023 where continued post his formal dismissal.
15. The Respondent avers that the Petitioner disappeared from work without communication from 3/4/2023 and never reported back to work until service of this Petition. He intimated to the manager that he was suffering from a fever without medical proof and he lacked money to buy drugs, Mr. Kalsi sent him Kshs 2000 on 11/4/2023 to purchase the drugs.
16. The Respondent avers that when the Petitioner was requested to provide the hospital particulars when he informed his manager of his admission in a clinic in Pipeline, he changed the story that he had been transferred to Eldoret.



17. The Respondent avers that many of its staff and food vendors spotted the Petitioner report to work every evening at a neighbouring company, Bio Foods Products Limited, the entire period of 3rd to 30th April 2023.
18. The Respondent avers that the Petitioner was served with summary dismissal letters in May 2023 whereby he started sending Mr. Kalsi threatening messages on allegations of discrimination and mistreatment.
19. The Respondent avers that the Petitioner started stalking and intimidating his manager through calls and texts that he would arrest him for unknown crimes and have him deported not knowing he was a Kenyan citizen.
20. The Respondent avers that on many occasions, the Petitioner has certain police officers from Embakasi Police Station to call the manager's line and force him to pay Kshs 100,000 as damages for discrimination through his advocate on record which is extortion and he declined to succumb.

Petitioner's Submissions

21. The Petitioner submitted that invitation to the disciplinary hearing supplied to the court by the Respondent does not show what the contemplated hearing scheduled on 4/5/ 2023 is about. The invitation mentions a letter which was not given to him and neither was his written explanations considered by the Respondent during the disciplinary hearing. The Respondent's reason for terminating his employment was that the management had lost confidence in him and decided to dismiss him, however, it did not indicate the Petitioner's representations.
22. The Petitioner submitted that on 29/6/2023, Jonathan Matata wrote that there was no issue at all but official clearance pending. The Respondent had every intention of paying the Petitioner and clearly explained the reason for the delay. Therefore, the Respondent is estopped from stating that the Petitioner's salary was paid erroneously.
23. It's the Petitioner's submission that the Respondent has not discharged its burden of proof under Section 108 of the *Evidence Act* and as such, this Court should dismiss the claim for reimbursement with costs to the Petitioner.
24. The Petitioner submitted that he was subjected to discrimination, humiliation, debasement, bullying, insults, inhumane and degrading treatment and psychological torture by his designated manager. The Petitioner's designated manager, Daljinder Kalsi, treated him as though he was not dealing with a human being who is entitled to respect for his humanity.
25. The Petitioner submitted that from the evidence on record, it is clear that he was subjected to humiliation and debasement by his designated manager. In a letter dated 29/4/2023, the Petitioner described to having been subjected to insults and bullying at the work place. Daljinder Kalsi, the Petitioner's designated manager had the habit of addressing the petitioner as "Kindergarten" and "useless" at the workplace. He also questioned his academic credentials and on several occasions, he informed the petitioner that "I do not know how you got here. It's like you got zero in mathematics."
26. The Petitioner's designated manager sought to portray the Petitioner as a person of low intellect in front of six other colleagues. The humiliation and debasement of the Petitioner lead to experience extreme pain and mental agony. Therefore, his freedom from inhumane and degrading treatment protected under Article 29 (f) of *the Constitution* of Kenya was violated by the Respondent.
27. It is the Petitioner's submission that he suffered severe pain which went beyond ill-treatment from his designated manager. According to the Psychological Report dated 12/6/2024, prepared by Clinical



Psychologist Susy Omonya, the combined effect of ill-treatment and psychological torture resulted in severe impairment of the Petitioner's persona and sense of self. The psychological report indicates that the Petitioner's core adaptive systems such as his emotional safety, attachment, identity and existential meaning have been impaired. Further, the Petitioner is exhibiting long lasting somatic characteristics arising from his designated manager's degrading treatment and psychological torture such as disruptive sleep patterns, impaired social judgement and attention deficit.

Respondent's Submissions

28. The Respondent submitted that the Petitioner was not unfairly terminated as alleged. He absented himself from work with no explanation and even after the Respondent's Human Resource Office, Wilfresher Ouma tried to inquire about his whereabouts, he did not explain his absence or give sufficient evidence for his absence.
29. The Respondent submitted that the Petitioner chose not to attend the disciplinary hearing or rather he did not get permission from his new employer, Bio Food Products Limited to enable him attend. The Petitioner appeared had nothing to lose even if the existing contract of employment was terminated by the Respondent.
30. The Respondent submitted that alternatively, nothing stopped the Petitioner from notifying the Respondent that the period given was insufficient and asking for more time. He cannot then turn around and seek to benefit from a process he chose not to engage in. The Petitioner did not want to engage the Respondent except for the expectation of payment of April 2023 salary. The Respondent was left with no option but to dismiss him.
31. It is the Respondent's submission that the Petitioner is not entitled to any notice pay since he absented himself from work from 3/4/2023 with no concrete explanation despite the Respondent's inquiry.
32. The Respondent submitted that the Petitioner's allegations of discrimination are only captured in his affidavits and the petitions is not given life elsewhere. The Petitioner did not table any particulars or evidence to prove the direct and indirect discrimination or presented a corroborative witness before court to warrant concrete evidence. Therefore, the Petitioner's claim of racial discrimination holds no merit and should be disallowed.

Analysis and Determination

33. Having considered the pleadings, affidavits and submissions, the issues for the Court's determination are:
 - a. Whether the Petitioner was directly and/or indirectly discriminated upon by the Respondent.
 - b. Whether the Petitioner absconded his duties.
 - c. Whether the Petitioner is entitled to the orders sought herein.

Whether the Petitioner was directly and/or indirectly discriminated upon by the Respondent.

34. The Court in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment), held as follows with regards to discrimination and the burden of proof:

“Discrimination against any employee is specifically provided for under article 27 of *the Constitution* as well as section 5 read together with section 47 of the *Employment Act*. Article 27 of *the Constitution* at clause 4 and 5 provides that:



- “(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (Emphasis).”

Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) more particularly on account of health status or disability. Section 5 of the *Employment Act* (cap 226) provides that:

- “(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —
- a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.”

The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub-section 7 thus provides:

- “(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

Section 47 (5) of the *Employment Act* further requires that:

- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

35. This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.
36. This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied section 108 of the *Evidence Act* in requiring the claimant to prove his claim



in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

37. This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

38. The Court of Appeal in *Mohammed Abduba Dida vs. Debate Media Limited & Another* [2018] eKLR developed the following criteria to be applied in determining the question of discrimination:-

“From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by Article 27, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of *the Constitution* should be determined by applying a three stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of Article 27 will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of *the constitution*. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of *the constitution*.”

39. The Court of Appeal continued to discuss the burden of proof :-

“...ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters within the petitioner’s knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by Article 27(4), more so the reason for the petitioner have to prove that his or



her rights have been infringed in respect of the grounds alleged. And this is why the learned Judge stated, and we agree, that, “...where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.”

40. In the instant petition, the Petitioner herein merely alleged the direct and indirect discrimination by his supervisor, Mr. Dalijinder Kalsi. No evidence or affidavit was tabled before this court to substantiate the Petitioner’s allegations but merely said he was discriminated on the basis of his race and disparaging language was used against him time and time again. For that reason his petition fails.
41. Accordingly, the Petitioner has failed to prove that he was directly and indirectly discriminated by Mr. Dalijinder Kalsi.

Whether the Petitioner absconded his duties

42. Absconding of duty was dealt with by the Court’s decision in *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, in which the Court held: -

“The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee’s unexplained absenteeism through the available internal disciplinary channels.

43. It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.
44. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR, the court observed as follows on the issue: -

“.....the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.”

45. It is up to the employee to show up to explain his absence from duty. It is possible that he may have been prevented from reporting on duty for justifiable reasons such as incapacitating sickness or natural calamities.

If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism. These principles are well articulated in a series of decisions by this court including *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR.



46. The essence of this procedure is to ensure that the employee is terminated in a manner that meets the requirements of section 41 of the *Employment Act* as read with articles 41 and 47 of *the Constitution*. It must be demonstrated that the employer had a justifiable ground to terminate the employee and that he accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination.
47. The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant's absenteeism the Respondent cannot lawfully plead abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them."
48. Indeed the Respondent needed to demonstrate he had attempted to reach out to the Petitioner and informed him he was to attend a disciplinary hearing in relation to his abscondment and such proceedings were likely to lead to termination of employment. He also needed in accordance to Section 41 of the *Employment Act* to inform him that he was entitled to be accompanied by a fellow employee of his choice or a union representative during his hearing. The court did not find any evidence that this process was followed.
49. In the case of RONALDO NYAMBU DAUDI -VS- TORNADO CARRIERS LIMITED (2019) eKLR the court held:
- “Desertion of duty is of grave administrative offence which if proved would render an employee liable to summary dismissal.
- It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting him on notice that termination of employment on this ground is under consideration.”
50. The Respondent has not demonstrated efforts made to put the Petitioner under disciplinary process as is required. In that case the court holds the defence of abscondment is not proved and the Petitioner is found to have been unfairly and unprocedurally terminated from his employment. Judgment is entered in favour of the Petitioner for unfair and unprocedural termination.
51. The Petitioner is awarded the following reliefs: -
- (a) The prayers a, b, c and d of the petition dated 12th July 2023 remain unproven and are not granted.
 - (b) Prayers E the Petitioner is granted
 - (i) One month salary in lieu of noticeKshs 23,010/=
 - (ii) Salary for days worked in May 2023Kshs 10,765/=
 - (iii) Five (5) months equivalent salary for unlawful termination ..Kshs 115,050/=
 - (iv) The court finds no proof of unutilized leave days
Total awarded Kshs 148,816/= plus interest at 14% p.a from date of judgment till full payment.
 - (v) Petitioner is awarded costs as well.
 - (vi) He is also to be given his certificate of service within 30 days hereof.
- Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

