



**Mwanzia v National Police Service Commission & 3 others (Employment and Labour Relations Petition E065 of 2024) [2024] KEELRC 13307 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13307 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E065 OF 2024  
AN MWAURE, J  
NOVEMBER 28, 2024**

**BETWEEN**

**ANDREW KYALO MWANZIA ..... PETITIONER**

**AND**

**THE NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THE DIRECTORATE OF CRIMINAL INVESTIGATION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioner filed a petition dated 26<sup>th</sup> April 2024 seeking the following orders:
  - a. A declaration that the act of the 1<sup>st</sup> Respondent in relieving the Petitioner of his duties is a breach of the latter's Constitutional Rights under Articles 27(1), (2) and (3), 28, 41, 48 and 50 of *the Constitution* of Kenya and that the same is null and void for all intent and purposes.
  - b. An order of Judicial Review of certiorari be and is hereby issued to quash the dismissal of the Petitioner by the 1<sup>st</sup> Respondent from the Service made on 19th July, 2021 for breaching the Petitioner's right to fair trial under articles 25, 47 (1) and (2) of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.
  - c. An order of Judicial Review of MANDAMUS be and is hereby issued to compel the Respondents to reinstate the Petitioner to the Police Service as his removal was unlawful, irregular and unjustifiable.



- d. In the alternative and without prejudice to prayer (b) and (c) above, an order of Payment of all dues due to the Petitioner from the date of removal from employment to the conclusion of this Petition.
- e. Costs of this Petition and interest thereon.
- f. Any other relief or order that this Honourable court may deem fit to grant.

### **Respondent's Preliminary Objection**

2. The 1<sup>st</sup> Respondent filed a Preliminary objection dated 3<sup>rd</sup> June 2024 as follows:
  1. That no constitutional issues are discernable in the entire petition to warrant its admission and adjudication before the Honourable Court.
  2. That the Petition is an abuse of the Court process.
3. Both parties canvassed the Preliminary Objection by way of written submissions.

### **Petitioner's submissions**

4. The Petitioner submitted that it is not disputed by the 1<sup>st</sup> Respondent that the Petitioner was its employee, and that the employment relationship was contractual in nature, resulting in constitutional violations concerning the Petitioner's right to a fair hearing and the presumption of innocence.
5. The Petitioner submitted that the period between the show cause letter and his response was too short, and he was not properly invited to answer the charges against him. The Petitioner argues that the disciplinary hearing was rushed, without giving him a chance to defend himself or seek legal representation.
6. The Petitioner submitted that the evidence shows that the incident occurred on 4<sup>th</sup> January, 2021, and he faced the disciplinary process just 24 hours later, making it unfair. The Petitioner argues that the process was biased due to past grudges held by Corporal Maurice Wakhu and Mr. Gilbert Too.
7. The Petitioner submitted that he was unfairly punished and dismissed, claiming bias from the officers involved in the disciplinary process. He stated that his dismissal was communicated orally and that his appeal was not heard, which indicates a breach of due process. Additionally, the dismissal letter, dated 5<sup>th</sup> June 2024 was issued only after the suit was filed, and he was called to collect it in August 2024.
8. The Petitioner submitted that these actions show a lack of respect for due process and attempt to distract him from protecting his rights and he was treated as guilty without a fair trial, provided under Article 50(1), (2)(a)(c)(f)(g)(k) and Article 25(c) of *the Constitution*.
9. In *Glady's Boss Shollei V Judicial Service Commission & Ano* (Petition No. 34 of 2014 (2022) KESC5(KLR) (17<sup>th</sup> February, 2022) (Judgement) the Supreme Court stated that Article 50(1) guarantees the right to a fair hearing for all persons, while Article 50(2) ensures a fair trial for accused individuals. Article 25(c) lists the right to a fair trial as a fundamental, non-derogable right that cannot be limited. Although "fair hearing" and "fair trial" are often used interchangeably, they can have subtle differences. Articles 19 and 20 call for a broad and inclusive interpretation to fully realize these rights.
10. The Petitioner submitted that his termination was unfair and violated the presumption of innocence and the right to a fair trial. The Petitioner argues this court (ELRC) has not only a responsibility to apply the law but the spirit of the law to protect litigants' rights which would be unjust to dismiss the petitioner's case because he chose a different court or pleadings.



11. The Petitioner submitted that this court (ELRC) handles Employment and Labour Relations cases and should not avoid its constitutional duty. The Petitioner argues that the 1<sup>st</sup> Respondent has not demonstrated the unconstitutionality of such petitions related to Employment and Labour relations.
12. In conclusion, the Petitioner submitted that he should not be denied justice simply because he chose one of two legal approaches and the court has already rendered many employment petitions and has many more awaiting decisions.
13. The Petitioner cited the case of Petition number E032 of 2023 Collins Chivolo Makokha V National Police Service Commission and 3 Others where judgment was delivered in favour of the Petitioner and the court addressed the issues raised therein applying the law as it is as opposed to punishing the Petitioner for approaching the court over unfair dismissal via a Petition.
14. The Petitioner submitted that the Preliminary Objection seems to manipulate the law against him, and the 1<sup>st</sup> Respondent is accused of attempting to avoid justice and obstruct him.
15. The Petitioner submitted that the court ought to dismiss the Preliminary Objection with costs awarded to him.

### **The 1<sup>st</sup> Respondent's submissions**

16. The 1<sup>st</sup> Respondent submitted that standards of a Constitutional petition have been established in numerous decisions and the case of Anarita Karimi Njeru V Republic [1979] eKLR where the Court stated:

“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.”
17. In Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the Court of Appeal held that:

“Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”
18. The 1<sup>st</sup> Respondent submitted that the Petition does not meet the specificity and precision test required of a constitutional petition.



19. The 1<sup>st</sup> Respondent submitted that the Petition is an abuse of the court process citing the case of Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) V Habil Olaka-Executive Director (secretary) of the Kenya Bankers Association being sued on behalf of Kenya Bankers Association) & another [2018] eKLR held that:

“It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.”

20. In Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) V Habil Olaka-Executive Director (secretary) of the Kenya Bankers Association being sued on behalf of Kenya Bankers Association) & Another (supra) the court cited the case *Harrikissoon V Attorney General of Trinidad and Tobago* [1980]AC 265 where Lord Diplock stated:

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...*the constitution* is fallacious. The right to apply to the High Court... 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 procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.” (emphasis).

21. The 1<sup>st</sup> Respondent submitted that the tendency of litigants to disguise labour law claims as petitions to expedite the process is seen as an abuse of the court process as it takes advantage of the court’s jurisdiction over both constitutional and labour matters. The 1<sup>st</sup> Respondent argues that the practice dilutes the seriousness of genuine constitutional violations, which deserve priority attention.
22. In *David Mathu Kimingi V SMEC International PTY Limited* [2021] eKLR in the court’s view it was not the intention of the Legislature to allow employees to raise labour disputes as a constitutional matter. The court has previously ruled that not all issues in an employment dispute are constitutional issues.
23. In conclusion, the 1<sup>st</sup> Respondent urges this Honourable Court to find that the petition is an abuse of the court process which was disguised as a claim as a petition avoiding seeking the appropriate remedy and prays that the petition be dismissed with costs.



## **Analysis and determination**

24. The preliminary objection before the court raised the issue that there is no discernable constitutional issue in the entire Petition to deserve admission and adjudication before this Honourable court.
25. In the case of Hassan Nyange Charo -VS- Khalib Mwashetani & 3 Others (2014) eKLR the court held “Thus a preliminary objection may only be raised on a pure question of law-to discern such a point of law the court has to be satisfied that there is proper contest as to the facts.

Also in Mukhisa Biscuits Case -VS- West End Distributors Limited E.A 696 a preliminary objection was defined as consisting on a point of Law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

A preliminary objection was held to be in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct.

It cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion.

26. In this case the respondent is raising the issue of constitutional nature. That is a matter that would have to be litigated and determined through judicial discretion and determination. It is not a pure point of law as in matters of limitation of time or cases that need to be tried through arbitration.
27. This is a matter that the parties need to present evidence for the court to make a decision. In that case the court finds the same would not be decided merely as a preliminary objection.
28. The court finds the respondent has not proved the tenets of a preliminary objection and so the same is not merited. It is dismissed and each party is ordered to meet their respective costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

