



**Kifano v Loivin Limited & 4 others (Petition E143 of 2022)  
[2024] KEELRC 13536 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13536 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E143 OF 2022  
DKN MARETE, J  
NOVEMBER 27, 2024**

**BETWEEN**

**PAULINE KIFANO ..... PETITIONER**

**AND**

**LOIVIN LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MAURICE OGONGO ..... 2<sup>ND</sup> RESPONDENT**

**MARY KIRORI ..... 3<sup>RD</sup> RESPONDENT**

**PETER MUCHIRI MWANGI ..... 4<sup>TH</sup> RESPONDENT**

**LOISE WANJIRU MUTHONI ..... 5<sup>TH</sup> RESPONDENT**

**Court awards damages of Kshs 4,217,750 to a worker subjected to slavery while working abroad.**

*The petitioner alleged that she was duped to travel to Saudi Arabia where she was treated like a slave, held in servitude and was forced to perform forced labour by the respondents contrary to articles 30 of the Constitution. The petitioner further claimed that she was subjected to inhuman and degrading treatment contrary to articles 28 and 29 of the Constitution. The court held that the respondents who had direct control over the petitioner’s travel to Saudi Arabia, work, and release from Saudi Arabia, breached their obligation to ensure that the petitioner was not exposed to inhuman and degrading treatment while she worked in Saudi Arabia. The respondents had not demonstrated any safeguards they put in place to ensure that the petitioner was safe and protected from harassment at work and were thus liable. The court proceeded to award damages totalling Kshs. 4,217,750.*

Reported by Ian Kiptoo

**Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - freedom from slavery – freedom from inhuman and degrading treatment - where petitioner was forced to work as a domestic worker in two homes - subjected to physical and psychological abuse, lack of sleep, lack of access to health care and her cell-phone was confiscated – where petitioner was not paid her monthly salary - whether employment agencies that were directly involved in the recruitment, transportation and exploitation of workers were liable for



*constitutional violations committed at their behest against the workers - Constitution of Kenya articles 28, 29, and 30 (1) & (2); African Charter on Human and People's Rights article 5.*

**Constitutional Law - jurisdiction – jurisdiction of the Employment and Labour Relations Court – jurisdiction to determine alleged violations of fundamental rights and freedoms - where alleged violations occurred in Saudi Arabia - whether the Employment and Labour Relations Court had jurisdiction to determine a case alleging violations of fundamental rights and freedoms where alleged violations arose out of an employment in a foreign country - Constitution of Kenya articles 2(5) & (6) and 162(2)(a); Employment and Labour Relations Act (Cap 8E) sections 12(1), (2), & (3) of the Employment and Labour Relations Court (Procedure) Rules, (Cap 8E Sub Leg) rule 7(1) & (3).**

**Employment Law – employment agencies – foreign employment contracts – requirements to be met - What were the legal requirements to be met in foreign employment contracts and the operation of employment agencies? - (Cap 234) section 56(3); Employment Act (Cap 226) section 83; Employment (General) Rules (Cap 226 Sub Leg) rule 36.**

### **Brief facts**

The petitioner in the instant case alleged that she was duped to travel to Saudi Arabia to work as a cashier but ended up in deployment as a domestic worker for two homes. That she was forced to work as a domestic servant for the two homes comprising of eight and twelve persons respectively on all days of the week between 3:00am and 10:00pm. That she was subjected to physical and psychological abuse, lack of sleep and no access to health care.

The petitioner sought the following reliefs; a declaration that the petitioner was subjected to slavery, practices similar to slavery, servitude, forced or compulsory labour, and exploitation by the respondents, a declaration that the petitioner was subjected to inhuman and degrading treatment by the respondents, a declaration that the petitioner's freedom of movement was infringed upon by the respondents, and a declaration that the petitioner was entitled to an award of damages, compensation, restitution and reparation.

### **Issues**

- i. Whether the Employment and Labour Relations Court had jurisdiction to determine a case alleging violations of fundamental rights and freedoms where the alleged violations arose out of an employment in a foreign country.
- ii. What were the legal requirements to be met;
  - a. in foreign employment contracts; and
  - b. for the operation of employment agencies?
- iii. Whether employment agencies that were directly involved in the recruitment, transportation and exploitation of workers were liable for constitutional violations committed at their behest against the workers.

### **Relevant provisions of the Law**

#### **Employment and Labour Relations Act (Cap 8E), section 12**

##### **12. Jurisdiction of the Court**

*“1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:*

- a. Disputes relating to or arising out of employment between an employer and an employee.*
- b. Disputes between an employer and a trade union;*
- c. Disputes between an employers' organization and a trade unions organization;*
- d. Disputes between trade unions;*
- e. Disputes between employer organizations;*
- f. Disputes between an employers' organization and a trade union;*



- g. Disputes between a trade union and a member thereof;
- h. Disputes between an employer's organization or a federation and a member hereof;
- i. Disputes concerning the registration and election of trade union officials; and;
- j. Disputes relating to the registration and enforcement of collective agreements.

2. *An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.*"

#### **Labour Institutions Act (Cap 234), section 55**

##### **55. Registration of employment agencies**

*"No person shall unless the person is registered under this Act*

- a) *Carry out business as an employment agency;*
- b) *Charge or recover any payment in connection with the procurement of employment through an employment agency."*

#### **Held**

1. The law required the court to exercise the jurisdiction conferred upon it by either the Constitution, statute and in some instances, both. The jurisdiction of the Employment and Labour Relations Court had been clearly delimited in the Constitution. Article 162(2)(a) set out the jurisdiction of the court as a court with the same status as the High Court to hear and determine disputes that related to employment and labour relations. The Constitution in article 162(3) went on to empower parliament to determine the jurisdiction and the faction of the courts contemplated in clause 2(2).
2. The question of whether the Employment and Labour Relations Court had jurisdiction to handle constitutional issues arising from employer-employee disputes had been conclusively settled in the affirmative. It was no longer an issue in the winds. That position was also evident from rule 7(1) & (3) of the Employment and Labour Relations Court (Procedure) Rules, which provided that a party who wished to institute a petition should do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.
3. Notwithstanding anything contained in that rule, a party was at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court. It was without doubt that the rules foresaw the filing of Constitutional Petitions in the Employment and Labour Relations Court (ELRC). The only requirement was for the constitutional issues to have arisen in the context of an employment relationship.
4. Kenya was a monist state in that it operated in a system where international law instruments entered into or ratified were applicable directly by domestic courts without going through parliament for domestication. That was supported by article 2(5) and (6) of the Constitution, which incorporated the general rules of international law and international conventions that Kenya was a party to.
5. Kenya and Saudi Arabia had ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the "Palermo Protocol") and the ILO Forced Labour Convention, 1930 (No 29), which set standards for determining issues relating to human trafficking and forced labour. Kenya had also been a member of the International Labour Organization, (ILO) since 1964 and was therefore bound by the ILO conventions it had ratified.
6. Kenya and Saudi Arabia had also ratified and were thus state parties to the Abolition of Forced Labour Convention, 1957 (No 105). Kenya ratified the Forced Labour Convention, 1930 No 29 on January 13, 1964. Article 2 of the convention required states to take effective measures to secure the immediate and complete abolition of forced or compulsory labour. Article 9 of ILO Eliminating Violence and Harassment in the World of Work Convention No 190 required states to take steps commensurate



- with their degree of control to prevent violence and harassment in the world of work, including gender-based violence and harassment.
7. Article 10 of the Eliminating Violence and Harassment in the World of Work Convention No 190 required states to facilitate easy access to appropriate and effective remedies and safe, fair and effective reporting and dispute resolution mechanisms and procedures in cases of violence and harassment in the world of work, such as:
    1. complaint and investigation procedures, as well as, where appropriate, dispute resolution mechanisms at the workplace level;
    2. dispute resolution mechanisms external to the workplace;
    3. courts or tribunals;
    4. protection against victimization of or retaliation against complainants, victims, witnesses and whistle-blowers; and legal, social, medical and administrative support measures for complainants and victims.
  8. Kenya had not ratified Convention 190 on elimination violence and harassment in the world of work. It was in the process and final stages of doing so. In as much, the convention was persuasive to the extent that states should take appropriate measures to ensure that individuals whose fundamental rights and freedoms were violated in the workplace had access to remedy.
  9. The petition alleged the breach of various rights, including fundamental rights and freedoms alleged to have been infringed out of an employment situation. The court had the jurisdiction to entertain those proceedings by dint of article 162(2)(a) and 2(5) and (6) of the Constitution, section 12(1) and (2) of the Employment and Labour Relations Act, section 12(3) of the Employment and Labour Relations Act, rule 7 (1) & (3) of the Employment and Labour Relations Court (Procedure) Rules, and International Conventions.
  10. It was not disputed that the petitioner travelled to Saudi Arabia on May 2, 2019. That was evidenced by the exit and entry stamps produced by the petitioner. The petitioner further produced evidence of an email between her advocate and the 1<sup>st</sup> respondent. The email dated July 16, 2019 originated from the 1<sup>st</sup> respondent to the petitioner's advocate, requesting for Kshs 68,100 as a precondition for the release of the petitioner from Saudi Arabia. The email stated that the amount was to facilitate her release and travelling back as she prepared to book her return ticket. The email further referred to previous discussions between the 1<sup>st</sup> respondent and the petitioner's advocates. The email expressly referred to the petitioner by name and passport number.
  11. The emails linked the 1<sup>st</sup> respondent to the petitioner, as there would be no basis of sending an email to the petitioner's advocate demanding for Kshs 68,100 as a precondition for the petitioner's release, unless there was a causal link between the 1<sup>st</sup> respondent and the petitioner's travel to Saudi Arabia for employment and her release from the same employment.
  12. The email and text messages exhibited by the petitioner were credible and further evidence of the 1<sup>st</sup> respondent's direct involvement and control over the petitioner's employment in Saudi Arabia.
  13. Rule 36 of the Employment (General) Rules required all foreign contracts under section 83 of the Employment Act to be in the form set out in the Sixth Schedule and for any security bond required to be given under section 85 of the Act to be as prescribed in the Seventh Schedule. Section 85 of the Employment Act required such a foreign contract to be reduced into writing.
  14. The 1<sup>st</sup> and 5<sup>th</sup> respondents had not produced any evidence of a written foreign contract of employment, as the law placed such an obligation on them. They had probably not produced any evidence of a security bond for the performance of the contract as foreseen by section 85 of the Employment Act. They further did not provide any evidence of registration as an employment agency and undergoing vetting and examination to verify that the respondents were qualified under section 56(3) of the Labour Institutions Act. Omitting to comply with the legal requirements for the



- operation of employment agencies proved that the 1<sup>st</sup> and 5<sup>th</sup> respondents did not discharge their legal burden as stipulated by the law, thus exposing the petitioner to exploitation.
15. Section 5(c) of the Counter-Trafficking in Persons Act placed liability on anyone who promoted trafficking in persons by managing, running or financing any job recruitment agency. The Counter-Trafficking in Persons Act foresaw a situation where aggrieved individuals would file lawsuits against persons engaged in their exportation to and from Kenya. That was further affirmed by section 16 of the Act, which exempted victims of human trafficking from paying court fees.
  16. The 1<sup>st</sup> respondent and the 5<sup>th</sup> respondent had not disclosed whether in running the employment agency, they were acting to their ultimate benefit, or the benefit of a principal. The law on agent-principal relationships and liability was settled. Where a principal was not disclosed by the 1<sup>st</sup> and 5<sup>th</sup> respondents, then the petitioner was justified in suing the 1<sup>st</sup> and 5<sup>th</sup> respondents. That was in agreement with the common law principle which allowed the agent to be sued and held personally responsible where the principal was not disclosed. Where a principal was disclosed, the agent was liable to be sued where the agent employed fraud, deception, misrepresentation, or murder.
  17. The petitioner was forced to work as a domestic worker in two homes. She worked on all days of the week (Monday - Sunday) between 3 .00 am and 10:00pm. She was subjected to physical and psychological abuse, lack of sleep, lack of access to health care and her cellphone was confiscated. She was not paid her monthly salary. When she requested to be repatriated to Kenya she was told that she had been bought for 14,000 USD and under no circumstance would she be released. Her human rights were severely violated.
  18. The 1<sup>st</sup> respondent and the 5<sup>th</sup> respondent were directly involved in the recruitment, transportation, and exploitation of the petitioner. They were liable for the constitutional violations perpetrated against the petitioner at their behest.
  19. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognised that human beings have inherent dignity. Further, article 5 of the African Charter on Human and People's Rights recognized and guaranteed human dignity. The Eliminating Violence and Harassment in the World of Work Convention No 190 and Recommendation (No 206) were enacted with an aim to prevent and address violence and harassment at work, based on an inclusive, integrated and gender-responsive approaches.
  20. A copy of a counselling report detailed that the petitioner demonstrated significant symptoms of Post-Traumatic Stress Disorder (PTSD). That she experienced intrusive memories, nightmares, flashbacks, hyper arousal, negative mood alterations, avoidance of trauma-related stimuli, depression, persistent sadness, loss of interest, feelings of worthlessness, excessive worry, restlessness, emotional distress, fear, and a diminished sense of worth.
  21. The report outlined that the petitioner's detailed experience in Saudi Arabia were responsible for her psychological and physical harm. It was proof of the petitioner having suffered mentally and psychologically as a direct result of her experience in the Republic of Saudi Arabia. That Report also demonstrated that the petitioner's suffering did not end when she left the Republic of Saudi Arabia, but continued even after she returned to Kenya.
  22. Article 28 of the Constitution guaranteed enjoyment of the right to inherent dignity and the right to have dignity respected and protected. Article 29 stated that every person had the right to freedom and security of the person. The petitioner had sufficiently demonstrated inhuman and degrading treatment. Considering that the 1<sup>st</sup> and 5<sup>th</sup> respondents had direct control over the petitioner's travel to Saudi Arabia, work, and release from Saudi Arabia, they breached their obligation to ensure that the petitioner was not exposed to inhuman and degrading treatment while she worked in Saudi Arabia. The 1<sup>st</sup> and 5<sup>th</sup> respondents had not demonstrated any safeguards they put in place to ensure that the petitioner was safe and protected from harassment at work, and were thus liable.



23. The 1<sup>st</sup> and 5<sup>th</sup> respondents were liable to the petitioner for the sum of Kshs 120,000 being three months' salary for May, June. And July. The petitioner was released after her advocates paid a sum of Kshs 68,100 to the 1<sup>st</sup> respondent. The petitioner had also provided proof of buying a plane ticket worth Kshs 29,650. Noting that the respondents did not furnish any security bond deposited in line with section 85 of the Employment Act to guarantee the performance of the foreign employment contract, the 1<sup>st</sup> and 5<sup>th</sup> respondents were liable to reimburse the said amount.
24. The object of exemplary damages was to punish and deter. Exemplary damages could be awarded to punish, deter and in cases where the defendant's conduct was calculated to make a profit. The instant case was an appropriate case in which the 1<sup>st</sup> and 5<sup>th</sup> respondents should be compelled to pay exemplary damages. It was a sad chapter for the petitioner and generally the subject of violence and harassment in the world of work. It was lucky that both municipal and international law and conventions recognised a need to erase and remedy the situation.

*Petition allowed.*

### **Orders**

- i. *A declaration was issued that the petitioner was subjected to slavery, practices similar to slavery, servitude, forced or compulsory labour and exploitation by the 1<sup>st</sup> and 5<sup>th</sup> respondents.*
- ii. *A declaration was issued that the petitioner was subjected to inhuman and degrading treatment by the 1<sup>st</sup> and 5<sup>th</sup> respondents.*
- iii. *A declaration was issued that the petitioner's freedom of movement was infringed upon by the 1<sup>st</sup> and 5<sup>th</sup> respondents.*
- iv. *The 1<sup>st</sup> and 5<sup>th</sup> respondents ordered to meet and reimburse Kshs 29,650 and Kshs 68,100 being monies paid by the claimant for her air ticket to and from Saudi Arabia.*
- v. *The 1<sup>st</sup> and 5<sup>th</sup> respondents are further ordered to meet and pay Kshs 120, 000.00 being unpaid salaries for three months worked by the claimant.*
- vi. *The 1<sup>st</sup> and 5<sup>th</sup> respondents were ordered to meet and pay Kshs 4,000,000.00 being damages for the violation of the petitioner's constitutional rights.*
- vii. *Total of award .....Kshs 4,217,750.*
- viii. *Interests on the total award at court rates from date of the judgement till payment in full.*
- ix. *The costs of the petition would be borne by the 1<sup>st</sup> and 5<sup>th</sup> respondents.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Hassan, Ahmed Issack v Auditor General* Petition 356 of 2014; [2015] KEHC 4712 (KLR) - (Explained)
2. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Explained)
3. *London Distillers Kenya Limited & another v Kenya Union of Commercial Food Allied Workers Union* Constitutional Petition 326 of 2019; [2021] KEHC 6738 (KLR) - (Explained)
4. *Mabachi, Victor & another v Nurtun Bates Limited* Civil Appeal 247 of 2005; [2013] KECA 204 (KLR) - (Explained)
5. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Applied)
6. *Makuto v Almakony Limited & another* Civil Appeal 329 of 2013; [2016] KECA 318 (KLR) - (Mentioned)
7. *Mbugua v Resort* Cause E096 of 2022; [2024] KEELRC 1950 (KLR) - (Mentioned)
8. *Muchiri, Daniel Maingi v Jubilee Insurance Company Limited* Civil Appeal 136 of 2016; [2017] KECA 110 (KLR) - (Explained)



9. *MWK & another v Attorney General & 3 others* Constitutional Petition 347 of 2015; [2017] KEHC 1496 (KLR) - (Explained)
10. *Ndwiga v Principal Secretary, Ministry of Health & another* Constitutional Petition 137 of 2021; [2024] KEELRC 2703 (KLR) - (Explained)
11. *Spangler, Jonathan v Centre for African Family Studies (CAFS)* Cause 108 of 2015; [2017] KEELRC 1242 (KLR) - (Explained)
12. *Xiang, Jiang Nan v Cok Fas-St Company Limited* Miscellaneous Civil Application 56 of 2015; [2018] KEHC 10230 (KLR) - (Mentioned)

### **South Africa**

*Mayelane v Ngwenyama and another* (CCT 57/12) [2013] ZACC 14 - (Explained)

### **United Kingdom**

*Basfar v Wong* [2022] UKSC 20 - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution article 2(5)(6); 28; 29; 30; 39; 41; 162(2)(a); 162(3) - (Interpreted)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2013 (Constitution Sub Leg) In general - (Interpreted)
3. Counter-Trafficking In Persons Act (cap 61) section 3 - (Interpreted)
4. Employment (General) Rules, 2014 (cap 226 Sub Leg) rule 36- (Interpreted)
5. Employment Act (cap 226) section 4, 17, 83, 85 - (Interpreted)
6. Employment and Labour Relations Court (Procedure) Rules, 2016 (cap 8E Sub Leg) rule 7 - (Interpreted)
7. Employment And Labour Relations Court Act (cap 8E) section 12 - (Interpreted)
8. Labour Institutions Act (cap 234) section 55; 56(3) - (Interpreted)

### **Instruments**

1. Abolition of Forced Labour Convention, 1957 (No 105) In general
2. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 5
3. Forced Labour Convention, 1930 article 2
4. ILO Eliminating Violence and Harassment in the World of Work Convention No 190 article 1(a), 2, 9, 10
5. International Covenant on Civil and Political Rights (ICCPR), 1966 In general
6. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 In general
7. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children article 2
8. United Nations Convention against Transnational Organized Crime article 3

### **Advocates**

*Mr Nyangasi instructed by Manase & Company Advocates* for Petitioner

*Mr. Obando instructed by Onyango Odhiambo & Company Advocates* for 1st Respondent

*Mr. Ochieng instructed by Ochieng K. Associate Advocates* for 2nd Respondent

*Mr. Abutika instructed by Shinyula Abutika & Company Advocates* for 3rd Respondent

*Mr. Ochola instructed by O&K Advocates* for 4th Respondent

## **JUDGMENT**

1. This matter was originated by way of a petition dated August 1, 2022.



2. The 2nd respondent *vide* a 2nd respondent's replying affidavit in application to the petition sworn on November 22, 2022 denies the petition and prays that the same be dismissed with costs.
3. The 3rd respondent also pushed in a replying affidavit sworn on November 25, 2022 in further denial of the case of the petition.
4. By an application dated July 13, 2023 the 4th and 5th respondents were brought on board. This was allowed by court for lack of opposition.
5. The 4th respondent, Peter Muchiri Mwangi in a replying affidavit sworn on April 4, 2023 denies liability and association with petition and state that in the course of business he resigned from the company on November 14, 2018 and left it under charge of Loise Wanjiru Muthoni, the 5th respondent herein.
6. The 5th respondent did not file any documents in opposition to the petition or even defend it.
7. The petition's case is based on a detailed legal foundations as read out in part B of the petition.
8. Her other case is that in April, 2019, while the petitioner was working Airtel Subscriber identity Module (SIM) cards in the Nairobi Central Business District, she was approached by the 3rd respondent with a promise of finding a job in a foreign country. There was an undertaking that she and the 1st respondent would cater for all expenses necessary to facilitate her flight to take such employment. She was asked to deposit her passport for purposes of obtaining a visa once a vacancy had been availed.
9. The petitioner's further case is that on April 27, 2019, the 3rd respondent called the petitioner and asked her to report to the JKIA on May 2, 2019 so that she could travel to the Kingdom of Saudi Arabia to work as a cashier in a supermarket at a pay of Kshs 40,000.00 per month.
10. She left Nairobi for Riyadh on May 2, 2019 and on arrival she was taken to a holding room where she stayed for two days.
11. The petitioner's other case comes out thus; The petitioner was then transported to Hotat Bani Tamim where she forced worked as domestic worker for two homes. She worked for the two homes and every time she raised a complain she was warned by a man from SMO recruitment agency that he had paid a price for her and as such, she would do whatever he said. The petitioner was forced to work as a domestic servant for the two homes comprising of eight and twelve persons respectively on all days of the week between 3:00am and 10:00pm. The petitioner was subjected to physical and psychological abuse, lack of sleep and no access to health care. Despite her plea for repatriation back to Kenya this was denied. On June 20, 2019 the petitioner contacted Lilian Nyangasi, an advocate of High Court of Kenya to aid her release to Kenya. Lilian Nyangasi contacted the 3rd respondent and later the 2nd respondent informed her that the petitioner would only be released after expiry of two years. The petitioner planned to escape from the homes on learning that she would be entrapped in servitude for two years. She did escape on July 14, 2019 but while hiring a taxi to take her to the Kenya Embassy in Saudi Arabia, she was arrested for moving around without the permission of a male guardian. On learning of her arrest, Lilian Nyangasi contacted the 2nd respondent who intoned that the petitioner would be allowed to return to Kenya on payment of sum Kshs 68,100.00 as her return air ticket to Kenya. The petitioner was then transferred from the police station to the SMO recruitment agency office in Riyadh. Her phone was arbitrarily confiscated and leaving her unable to communicate. Apprehensive of the danger facing the petitioner, on July 27, 2019, Nyangasi bought a flight ticket at Kshs 68,100.00 to facilitate the petitioner's release and return. This monies were paid to the 2<sup>nd</sup> respondent. The petitioner returned to Kenya on July 29, 2019.



12. The petitioner's other case is that she was treated like a slave, held in servitude and was forced to perform forced labour by the respondents contrary to articles 30 of the Constitution.
13. Other infringements of the Constitution include; Article 39 – the right to freedom of movement. Section 3(1)(d) at read with section 3(5) of Counter Trafficking in person Act No 8 of 2010 by way of recruitment and transportation to Saudi Arabia for exploitation through deception. She was duped to travel to Saudi Arabia to work as a cashier but ended up in deployment as a domestic worker for two homes. The petitioner's passport was confiscated in Saudi Arabia by the SMO recruitment agency denying her freedom to leave the country. The petitioner did not volunteer rendering unrewarded labour, she was tricked into supply compulsory and force labour contrary to section 4 of Employment Act, 2007. The Respondent extracted labour from the petitioner with no intention for paying for it and indeed did not pay for it contrary to section 17 of Employment Act, 2007. The petitioner was assaulted by Miror, her boss when she requested to repatriated back to Kenya and informed that this would not work as she had bought for Kshs 14,000 USD. The petitioner's return was facilitated by her advocate through concerted consultations with government agencies and civil society organization. The petitioner's advocates ended up paying the Kshs 29,350.00 for a return air ticket to Nairobi. The petitioner's further cites the following as violations of her right not to be subjected to inhuman and degrading treatment. Article 28 which guarantees the petitioner's enjoyment to the right to inherent dignity and the right to have this dignity respected and protected at the place of employment. The petitioner was subject to inhuman and degrading treatment contrary to articles 28 and 29 of the Constitution. The following instances of abuse and breach of her right not to be treated in an inhuman and grading manner as follows; She was not paid her salary for all the period worked in Saudi Arabia. She was deprived of food and survived on left overs and scraps after her hosts had eaten to their fill. He was forced to sleep on a corridor of a cold storage room with three large freezers. She slept on a plastic carpet which was rolled away by the day to create space for entry into the cold storage room. Her health was neglected in that even with a fall in the bathroom, she did not get medical attention but was forced to continue working despite the injury. She was not afforded basic sanitary materials such as pads and body oils and therefore needs in indignity using handchiefs in the place of sanitary pads. The petitioner was frequently assaulted, deprived of sleep and work for 15 hours continuously. The petitioner was manipulated into going to Saudi Arabia and was not able to send monthly upkeep for her son and each mom back in Kenya for lack of salary. The respondent ignored the complaints of the Petitioner thereby subjecting her to further suffering in servitude.
14. She seeks the following relief;
  - a. A declaration that the petitioner was subjected to slavery, practices similar to slavery, servitude, forced or compulsory labour, and exploitation by the respondents.
  - b. A declaration that the petitioner was subjected to inhuman and degrading treatment by the respondents.
  - c. A declaration that the petitioner's freedom of movement was infringed upon by the respondents.
  - d. A declaration that the petitioner's rights and freedoms were thus contravened and grossly violated by the respondents.
  - e. A declaration that the petitioner is entitled to an award of damages, compensation, restitution and reparation, and as such an award be based on the gravity of the violation of the petitioner's rights and freedoms as well as the unjust enrichment by the respondents as a result thereof.
  - f. A refund of the flight ticket of Kshs 29,650 and Kshs 68,100 paid to the respondents.



- g. General damages and exemplary damages.
  - h. Cost of the petition.
  - i. Any other relief the court may deem fit to grant.
15. The 1st respondent (a company) made an application dated February 13, 2023 and swore a supporting affidavit on the same date. The supporting affidavit was sworn by Rahma Wairimu Mohammed. The application prayed to the court to join Peter Muchiri Mwangi and Loise Wanjiru Muthoni. The reason for this is that Rahma Wairimu Mohamed purchased Loivin Limited (the 1st respondent) from the then directors Peter Muchiri Mwangi and Loise Wanjiru Muthoni early 2019 and paid the full purchase price.
  16. The 2nd respondent swore an affidavit dated November 25, 2022 and denied most of the allegations raised by the petitioner. The 3rd respondent swore an affidavit dated January 23, 2023. She stated that she was employed as a secretary in the 1st respondent Company which was a recruitment agency. She further stated that her duties were purely secretarial; she mostly dealt with paperwork and she was fired from the company after six (6) months.
  17. The cause of action arose before the Company had been purchased. The current director of the 1st respondent is a total stranger to the petitioner's claim. In the circumstances, it is ostensible that the issues or questions arising as between the petitioner and the 1st respondent are ought to be interrogated in the presence of Peter Muchiri Mwangi and Loise Wanjiru Muthoni who were directors at the time of the alleged violation of right as claimed by the petitioner.
  18. The 4th respondent swore a replying affidavit dated April 4, 2023 and stated inter alia that he is a person living with disability, he incorporated the company with the 5th respondent (Loise Wanjiru Muthoni) and the main aim of the company was to benefit from the affirmative action through Access to Government Procurement Opportunities (AGPO) programme. The object of the company was general supply. Around 2017 and 2018 the 4th respondent discovered that the Company was being run as an employment agency which he disagreed with and resigned from the company. The changes were never effected despite having delivered all the necessary documentation to the Company Secretary. The 4th respondent denies having any knowledge or having participated in any deeds of the company.
  19. The 1st respondent's case as stated by its Director is that she joined the Company in September 2019 after purchasing the Company and its shares from Loise Wanjiru Muthoni. She annexed Exhibits RWM-1, RWM-2, RWM-3, RWM-4, RWM-5, and RWM-6 to show that she purchased the Company from the 4th and 5th respondents.
  20. She states that in purchasing the Company, she believed that the same was a Human Resource consultancy company.
  21. The 2nd respondent's case is that there is no evidence of any contract evidencing the Claimant's employment.
  22. The 2nd respondent disputes the claim that the claimant's Advocates paid Kshs 68,100 to him as there is no proof of the same.
  23. The 2nd respondent also states that the claimant did not provide evidence of pursuing any criminal charges for the alleged human trafficking.
  24. The 2nd respondent further states that the claimant has failed to establish a link between the 2nd respondent and any inhuman treatment she allegedly experienced in Saudi Arabia.



25. The 2nd respondent argues for the dismissal of the petition due to lack of evidence of the petitioner's allegations.
26. The 3rd respondent states that she was not a manager in the 1st respondent company, but rather a secretary. She denies signing a contract of engagement with the petitioner.
27. The 4th respondent denies any knowledge or interaction with the claimant.
28. He states that he did not facilitate her travel or benefit financially from any related transactions, as he had already resigned from the company before the incidents in question occurred. The 4th respondents exhibits PMM-1, PMM-2, PMM-3, and PMM-4 as exhibits to his replying affidavit to prove his resignation from the 1st respondent company.
29. The 4th respondent contends that he is a complete stranger to the claimant's claims and the purported ordeal.
30. He states that each individual should be personally liable for their actions and urges the court to lift the corporate veil, exonerating him from responsibility as he was not involved in the transactions cited in the petition.
31. The 5th respondent did not file any documents in opposition to the petition. She did not defend the petition, or at all. She must have left it to nature.
32. The issues for determination therefore are; -
  1. Whether this court has the jurisdiction to entertain the petition.
  2. Whether the respondents subjected the petitioner to slavery, servitude, forced labour and exploitation as contrary to articles 30 of the Constitution.
  3. Whether the respondents subjected the petitioner to inhuman and degrading treatment contrary to articles 28 and 29 of the Constitution.
  4. Whether the petitioner's freedom of movement under articles 39 of the Constitution was infringed upon by the respondents.
  5. Whether the petitioner is entitled to unpaid salaries and benefits.
  6. Whether the petitioner is entitled to general damages.
33. The 1st issue for determination is whether it has the jurisdiction to entertain the petition. The law requires this court to exercise the jurisdiction conferred upon it by either the Constitution, statute and in other instances, both.
34. In the authority of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the apex court observed as follows on the subject;
 

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law”.
35. The jurisdiction of the Employment and Labour Relations Court has been clearly delimited in the Constitution. Article 162(2)(a) sets out the jurisdiction of this court as a court with the same status as the High Court to hear and determine disputes that relate to employment and labour relations. the



Constitution in article 162(3) goes on to empower parliament to determine the jurisdiction and function of the courts contemplated in clause 2(2.) This includes this court.

36. Clad with this authority therefore, parliament enacted section 12(1) and (2) of the Employment and Labour Relations Act which imbues jurisdiction to this court as follows;

1. “The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:
  - a. Disputes relating to or arising out of employment between an employer and an employee.
  - b. Disputes between an employer and a trade union;
  - c. Disputes between an employers’ organization and a trade unions organization;
  - d. Disputes between trade unions;
  - e. Disputes between employer organizations;
  - f. Disputes between an employers’ organization and a trade union;
  - g. Disputes between a trade union and a member thereof;
  - h. Disputes between an employer’s organization or a federation and a member hereof;
  - i. Disputes concerning the registration and election of trade union officials; and;
  - j. Disputes relating to the registration and enforcement of collective agreements.
2. An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

37. Section 12(3) of the Employment and Labour Relations Court Act provides for the powers of the court thus;

“In exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders: -

Interim preservation orders including injunctions in cases of urgency;

- I. A prohibitory order;
- II. an order for specific performance;
- III. A declaratory order;
- IV. An award of compensation in any circumstances contemplated under this Act or any written law;
- V. An award of damages in any circumstances contemplated under this Act or any written law;



- VI. An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or
- VII. Any other appropriate relief as the court may deem fit to grant.”
38. The issue of this court’s jurisdiction *vis-à-vis* its jurisdiction to hear and determine constitutional violations on fundamental rights and freedoms arising from an employer and employee relationship was set out in the authority of *London Distillers Kenya Limited & another v Kenya Union of Commercial Food Allied Workers Union* [2021] eKLR, where the court observed thus;
- “In exercising its mandate, the Employment and Relations Court, being a court of equal and concurrent status as this court, has jurisdiction to hear and determine constitutional violations on fundamental rights and freedoms arising from an employer and employee relationship, as well as, all disputes falling under article 41 of the *Constitution*, as is in this case, as well as, all disputes stipulated under section 12 of the *Employment and Labour Relations Court Act*.”
39. Again, in *Daniel Mangi Gichuru v Jubilee Insurance Co. Ltd* CA No 138 of 2016 the court expressed itself as follows:
- “The Environment and Land court and the Employment and Labour relations court do have jurisdiction to redress violation of constitutional rights in matters falling under their jurisdiction”.
40. The question of whether the Employment and Labour Relations Court has jurisdiction to handle constitutional issues arising from employer-employee disputes is thus conclusively settled in the affirmative. It is no longer an issue in the winds.
41. This position is also evident from rule 7(1) & (3) of the *Employment and Labour Relations Court (Procedure) Rules*, which provide as follows:
- “A party who wishes to institute a petition shall do so in accordance with the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012*.
- Notwithstanding anything contained in this rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court.”
42. Further, in the authority of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR, the three Judges of the Court of Appeal confirmed that this Court has the requisite jurisdiction to determine constitutional petitions arising from employment disputes where they raise constitutional questions.
43. It is without doubt that these rules foresee the filing of constitutional petitions in the Employment and Labour Relations Court (ELRC). The only requirement is for the Constitutional issues to have arisen in the context of an employment relation.
44. The debate as to whether Kenya is a monist or a dualist state reigns. To me, we are a monist state in that we operate in a system where international law instruments entered into or ratified are applicable directly by domestic courts without going through parliament for domestication. This is supported



- by article 2(5) and (6) of the Constitution of Kenya, 2010, which incorporates the general rules of international law and international conventions that Kenya is a party to.
45. Kenya and Saudi Arabia have ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Palermo Protocol”) and the ILO Forced Labour Convention, 1930 (No 29), which sets standards for determining issues relating to human trafficking and forced labour.
  46. Kenya has also been a member of the International Labour Organization, (ILO) since 1964 and is therefore bound by the ILO conventions it has ratified.
  47. Kenya and Saudi Arabia have also ratified and are thus state parties to the Abolition of Forced Labour Convention, 1957 (No 105). Kenya ratified the Forced Labour Convention, 1930 No 29 on 13 January 1964. Article 2 of this convention requires states “to take effective measures to secure the immediate and complete abolition of forced or compulsory labour”
  48. Article 9 of ILO Eliminating Violence and Harassment in the World of Work Convention No 190 requires states to “take steps commensurate with their degree of control to prevent violence and harassment in the world of work, including gender-based violence and harassment”. This Convention has been cited as persuasive in several cases, such as in Mbugua v Resort [2024] KEELRC 1950 (KLR).
  49. Article 10 of the Eliminating Violence and Harassment in the World of Work Convention No 190 requires states to facilitate easy access to appropriate and effective remedies and safe, fair and effective reporting and dispute resolution mechanisms and procedures in cases of violence and harassment in the world of work, such as:
    - a) Complaint and investigation procedures, as well as, where appropriate, dispute resolution mechanisms at the workplace level;
    - b) Dispute resolution mechanisms external to the workplace;
    - c) Courts or tribunals;
    - d) Protection against victimization of or retaliation against complainants, victims, witnesses and whistle-blowers; and legal, social, medical and administrative support measures for complainants and victims;
  50. Again, article 2 of The Eliminating Violence and Harassment in the World of Work Convention No 190 provides that it applies to the following group of persons:

“Protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer”
  51. Kenya has not ratified Convention 190 on elimination violence and harassment in the world of work. It is in the process and final stages for so doing.
  52. In as much, this convention is persuasive to the extent that states should take appropriate measures to ensure that individuals whose fundamental rights and freedoms are violated in the workplace have access to remedy.



53. This Petition alleges the breach of various rights, including fundamental rights and freedoms alleged to have been infringed upon out of an employment situation. This court finds that it is within its jurisdictional ambit of to determine such violation of fundamental rights and freedom arising out of an employment relationship.
54. Flowing from the above, the court is persuaded that it has the jurisdiction to entertain these proceedings by dint of article 162(2)(a) and 2(5) and (6) of the Constitution, section 12(1) and (2) of the Employment and Labour Relations Act, Section 12(3) of the Employment and Labour Relations Act, rule 7 (1) & (3) of the Employment and Labour Relations Court (Procedure) Rules, and International Conventions.
55. The second issue for determination is whether the respondents subjected the petitioner to slavery, servitude, forced labour and exploitation as contrary to article 30 of the Constitution.
56. Her case and submission is in reliance on article 30 of the Constitution, which prohibits holding individuals in slavery, servitude, or forced labour. She also relies on article 3(a) of the Counter The Trafficking in Persons Act, which defines human trafficking as the recruitment, transportation, transfer, harbouring, and exploitation of individuals. She also quotes section 3(1)(d)(5) of the Counter-Trafficking in Persons Act No 8 of 2010 (TIP Act), which outlaws forced labour and holding persons in servitude.
57. The petitioner in buttressing her case sought to refer to the UK authority of Basfar v Wong 2022 UKSC 20, where the court found that the claimant had been held in domestic servitude in Saudi Arabia, amounting to human trafficking. She further relied on this decision to establish that human trafficking has three elements, which include:
- a) The act of recruitment, transportation, transfer, harbouring.
  - b) The means by which the act is done, including coercion
  - (c) The purpose of exploitation.
58. The petitioner submits that she was recruited in April 2019 by the 3rd respondent under the inducement and deception of working in Saudi Arabia for a salary of Kshs 40,000.
59. The petitioner further submits that she left Nairobi on May 2, 2019, by the facilitation of the 1st respondent, and that upon her arrival, she was held in a holding room for two days. She exhibited as PK-1 a copy of her passport, exit stamps from Kenya, and entry stamps into the Republic of Saudi Arabia.
60. The petitioner submits that she was transported to Hotat Bani Tamim, where she was forced to work as a domestic worker in two homes. She exhibited as PK-5 the geographical coordinates of the two homes, showing the precise locations of the two homes.
61. She submits that she was illegally restrained from leaving the said homes, one of which has 8 people, and the other 12 people, where she worked all days of the week from 3:00am to 10:00pm.
62. The petitioner submits that she was subjected to abuse, until June 20, 2019, when she contacted Lillian Nyangasi, as advocate to offer legal aid and assistance to facilitate her release and repatriation to Kenya.
63. The petitioner states that upon the 2nd respondent declining to authorise her release from the 1st respondent's correspondent employment agency in the Republic of Saudi Arabia, she planned to escape from servitude.



64. The petitioner states that she escaped from the house on July 14, 2019, but was arrested for moving around without the permission of a male guardian. That she was then transferred to the 1st respondent's correspondent SMO agency's office in Riyadh. That her advocate pursued the 2nd respondent, who stated that he would only allow the petitioner's release upon the payment of a sum of Kshs 68,100. She states that her advocate bought her a return ticket and paid the sum to secure her release.
65. The petitioner submits that she was exploited at the behest of the respondents in forced labour and servitude.
66. The 1st respondent's director in her replying affidavit averred that she was a stranger to the petitioner's allegations, as she joined the company in September 2019 after the material times of the alleged acts.
67. The 2nd respondent submits that the petitioner failed to adduce evidence of any engagement she had with the 2nd respondent. The 2nd respondent also submits that he never received kshs 68,100 from the petitioner's advocates. He also disputed as to whether the petitioner was subjected to any physical and or psychological abuse.
68. The 3rd Respondent submits that she was not involved in the recruitment of the petitioner, and was not privy to the contract of employment between the 1st respondent and the petitioner.
69. The 4th respondent submits that since he had exited the company before the material dates, he is not liable for the petitioner's predicament, and was not engaged in the day-to-day management of the 1st respondent company.
70. The 4th respondent further submits that the 1st respondent company was registered to benefit from affirmative action through access to Government Procurement Opportunities (AGPO) programme and to carry out the business of general supplies.
71. The 4th respondent urges the court to lift the corporate veil in line with *Makuto v Almakony Limited & another* [2016] eKLR and *Jiang Nan Xiang v Cok Fas-st Company Limited* [2018]eKLR to relinquish him from any claims, and to instead hold each person individually for their acts and omissions.
72. It is not disputed that the petitioner travelled to Saudi Arabia on May 2, 2019. This is evidenced by the exit and entry stamps produced by the Petitioner as Exhibit PK-1.
73. The Petitioner exhibited a bundle of emails, evidencing correspondence between her advocates and several persons in attempting to rescue her from Saudi Arabia. She exhibited the emails as PK-3, PK-4, PK-5, and PK-6.
74. The petitioner produced evidence of an email between her Advocate and the 1st respondent. The email dated July 16, 2019 originated from the 1st respondent to the petitioner's Advocate, requesting for Kshs 68,100 as a precondition for the release of the petitioner from Saudi Arabia. The email states that the amount was to "facilitate her release and travelling back as you prepare to book her return ticket". The email further refers to previous discussions between the 1st respondent and the petitioner's advocates. The email expressly referred to the petitioner by name and passport number. The petitioner submits that the email ended with a phrase stating that "We supply manpower in the Middle East and Asian Countries".
75. I find that these emails link the 1st respondent to the petitioner, as there would be no basis of sending an email to the petitioner's advocate demanding for Kshs 68,100 as a precondition for the petitioner's



- release, unless there was a causal link between the 1st respondent and the petitioner's travel to Saudi Arabia for employment and her release from the same employment.
76. In her supplementary affidavit dated April 23, 2014, the petitioner exhibited text message communications as PK-11 and PK-12 with the 2nd respondent and the 3rd respondent. The 3rd respondent also admits in her written submissions that the petitioner's Advocates contacted her in order to acquire the contacts of the 1st respondent's directors. The respondents did not dispute the said text message communication. In the text messages, the 3rd respondent shared the 2nd respondent's contact with the petitioner's advocate on July 16, 2019. On the same date, the 2nd respondent sent an email to the petitioner's advocate requesting for the sum of Kshs 68,100 to secure the petitioner's release. The petitioner also stated that the 3rd respondent's phone number appears on the email sent demanding for the Kshs 68,100.
  77. The 3rd respondent in response stated that her phone number appeared on the said email by virtue of her being a secretary of the 1st respondent. The 3rd respondent likely swore in her affidavit that the petitioner was brought into the 1st respondent company by one of the directors on a promise to assist her in getting employment in the Kingdom of Saudi Arabia.
  78. Even though the 2nd respondent attempts to dispute communication with the petitioner's advocates, i am inclined to find that the email and text messages exhibited by the petitioner are credible and are further evidence of the 1st respondent's direct involvement and control over the petitioner's employment in Saudi Arabia.
  79. The 4th respondent in his replying affidavit sworn on April 4, 2023, stated that he incorporated the 1st respondent company together with the 5th respondent with the object of carrying out general supply. He states further that the 5th respondent was responsible for the day to day running of the company. That he however came to find out that the company was being run as an employment agency, which led to his resignation as he felt deceived, leading to wrangles between himself and the 5th respondent.
  80. The 4th respondent produced evidence showing that he ceased being part of the 1st respondent company prior to the petitioner's recruitment. I find that he, is therefore not liable for the acts and omissions perpetrated after he ceased being the director of the said Company. I also find that being merely employees of the 1st respondent, the 2nd and 3rd respondents were not in direct control of the petitioner's employment in Saudi Arabia, and are equally not personally liable for the exploitation of her labour.
  81. Based on the uncontroverted admissions by the 2nd respondent and the 4th respondent, i am convinced that the 1st respondent company was being ran as an employment agency, and that it had direct control over the petitioner's travel to Saudi Arabia, employment, and travel from the Republic of Saudi Arabia even in the absence of a written contract of employment.
  82. Even after the 4th respondent disclosed that the 5th respondent was running the 1st respondent as an employment agency without the director's knowledge, the 5th respondent has not supplied this court with any safeguard policies or actions put in place to ensure that the petitioner would not be exposed to exploitation while in the Republic of Saudi Arabia.
  83. Rule 36 of the *Employment (General) Rules* requires all foreign contracts under section 83 of the *Employment Act* to be in the form set out in the Sixth Schedule and for any security bond required to be given under section 85 of the Act to be as prescribed in the Seventh Schedule".
  84. Again, section 85 of the *Employment Act* requires such a foreign contract to be reduced into writing.



85. Section 55 of the *Labour Institutions Act* states as follows:
- “No person shall unless the person is registered under this Act
- a) Carry out business as an employment agency;
  - b) Charge or recover any payment in connection with the procurement of employment through an employment agency.”
86. The 1st and 5th respondents have not produced any evidence of a written foreign contract of employment, as the law places such an obligation on them. They have likely not produced any evidence of a security bond for the performance of the contract as foreseen by Section 85 of the *Employment Act*. They further did not provide any evidence of registration as an employment agency and undergoing vetting and examination to verify that the respondents were qualified under section 56(3) of the *Labour Institutions Act*.
87. Omitting to comply with the legal requirements for the operation of employment agencies proves that the 1st and 5th respondents did not discharge their legal burden as stipulated by the law, thus exposing the petitioner to exploitation.
88. Section 5(c) of the *Counter Trafficking in Persons Act* places liability on anyone who promotes trafficking in persons by managing, running or financing any job recruitment agency. The *Counter Trafficking in Persons Act* foresaw a situation where aggrieved individuals would file lawsuits against persons engaged in their exportation to and from Kenya. This is further affirmed by section 16 of the Act, which exempts victims of human trafficking from paying court fees.
89. The 1st respondent and the 5th respondent have not disclosed whether in running the employment agency, they were acting to their ultimate benefit, or the benefit of a principal. The law on agent-principal relationships and liability is settled. Where a principal is not disclosed by the 1st and 5th respondents, then the petitioner is justified in suing the 1st and 5th respondents. This is in agreement with the common law principle which allows the agent to be sued and held personally responsible where the principal is not disclosed. Where a principle is disclosed, the agent is still liable to be sued where the agent employed fraud, deception, misrepresentation, or murder. This principle was held in the case of *Victor Mabachi & David Oliwa v Nurtun Bates Limited* [2013] KECA 204 (KLR).
90. In *Ndwiga v Principal Secretary, Ministry of Health & another* [2024] KEELRC 2628 (KLR), the court held that withholding the petitioner’s salaries amounted to servitude.
91. Further, section 10 of recommendation (No 206) to the ILO Convention No 190 provides that:
- “Members should take legislative or other measures to protect migrant workers, particularly women migrant workers, regardless of migrant status, in origin, transit and destination countries as appropriate, from violence and harassment in the world of work”.
92. Again, article 2 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime* (Palermo Protocol) establishes its object as follows:
- “(a) To prevent and combat trafficking in persons, paying particular attention to women and children.



- (b) To protect and assist the victims of such trafficking, with full respect for their human rights”.

93. Article 3(a) [Palermo Protocol](#) defines “trafficking in persons” as follows:

“The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

94. Article 3(b) [Palermo Protocol](#) provides as follows with regards to consent:

“The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used”.

Article 30(1) of the [Constitution](#) of Kenya 2010 states that a person shall not be held in slavery or servitude. Article 30(2) states that a person shall not be required to perform forced labour. Slavery is defined as “a brutal form of organized crime in which people are treated as commodities and exploited for criminal gain”. Another definition is “situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception and/or abuse of power”

95. The Petitioner was forced to work as a domestic worker in two homes. She worked on all days of the week (Monday - Sunday) between 3am and 10:00pm. She was subjected to physical and psychological abuse, lack of sleep, lack of access to health care and her cellphone was confiscated. She was not paid her monthly salary. When she requested to be repatriated to Kenya she was told that she had been bought for 14,000USD and under no circumstance would she be let go. Clearly her Human Rights were severely violated.

96. Based on the above, I am convinced that the 1st respondent and the 5th respondent were directly involved in the recruitment, transportation, and exploitation of the Petitioner. I also find that they are liable for the constitutional violations perpetrated against the Petitioner at their behest.

97. The 3rd issue for determination is whether the respondents subjected the petitioner to inhuman and degrading treatment contrary to articles 28 and 29 of the [Constitution](#).

98. The Petitioner submits that while in the Republic of Saudi Arabia, she was subjected to inhuman and degrading contrary to articles 28 and 29 of the [Constitution](#). She submits that her labour was not paid for, contrary to section 17 of the [Employment Act](#) 2007.

99. The [International Covenant on Civil and Political Rights](#) (ICCPR) and the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR) recognise that human beings have inherent dignity. The preambles of these covenants are similar and come out as follows:

“Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all



members of the human family is the foundation of freedom, justice and peace in the world, recognizing that these rights derive from the inherent dignity of the human person...”

100. Further, Article 5 of the [\*African Charter on Human and People’s Rights\*](#) recognizes and guarantees human dignity. It provides thus:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

101. The [\*Eliminating Violence and Harassment in the World of Work Convention No 190\*](#) and Recommendation (No 206) were enacted with an aim to prevent and address violence and harassment at work, based on an inclusive, integrated and gender-responsive approaches.

102. The preface of the Convention acknowledges that;

“Violence and harassment in the world of work remains pervasive, affecting all countries, occupations and work arrangements. It manifests in different forms and contexts. It deprives people of their dignity and is incompatible with decent work and social justice. “

103. Again, The [\*Eliminating Violence and Harassment in the World of Work Convention No 190\*](#) supplements several international conventions ratified by Kenya, such as:

“The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities.”

104. The [\*Eliminating Violence and Harassment in the World of Work Convention No 190\*](#) acknowledges that:

“Violence and harassment in the world of work affects a person’s psychological, physical and sexual health, dignity, and family and social environment”.

105. Article 1(a) of The [\*Eliminating Violence and Harassment in the World of Work Convention No 190\*](#) defines violence and harassment as:

“A range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment”.

106. She submits that the respondents ignored her complaints, which subjected her to further suffering. She stated that she was denied of food and was only allowed to eat leftover scraps after her employers has eaten. She stated that she was made to sleep in a cold storage room on a plastic carpet laid on a floor. She states that she was also denied of healthcare and sanitary materials and menstrual pads. She states that the respondents ignored her complaints.



107. She referred to the case of *Jonathan Spangler v Centre for African Family Studies (CAFS)* [2017] eKLR where the court held that failure to pay salaries to an employee amount to inhuman and degrading treatment.
108. The 2nd respondent disputed the respondent's subjection to inhuman and degrading treatment in Saudi Arabia. The other respondents did not address the question of the inhuman and degrading treatment alleged to have been endured by the petitioner.
109. In the petitioner's further supplementary affidavit sworn on June 29, 2023, the petitioner annexed Exhibit PK-13 being a copy of a counselling report. The said report shows that the Petitioner underwent six sessions of counselling between August 2019 and December 2019.
110. The Report details that the petitioner demonstrated significant symptoms of Post Traumatic Stress Disorder (PTSD). That she experienced intrusive memories, nightmares, flashbacks, hyperarousal, negative mood alterations, avoidance of trauma-related stimuli, depression, persistent sadness, loss of interest, feelings of worthlessness, excessive worry, restlessness, emotional distress, fear, and a diminished sense of worth. The report outlines that the petitioner's detailed experience in Saudi Arabia were responsible for her psychological and physical harm. I find that the report is proof of the petitioner having suffered mentally and psychologically as a direct result of her experience in the Republic of Saudi Arabia. This Report also demonstrates that the petitioner's suffering did not end when she left the Republic of Saudi Arabia, but continued even after she returned to Kenya.
111. On this note, article 28 of the *Constitution* of Kenya 2010 guarantees enjoyment of the right to inherent dignity and the right to have dignity respected and protected. Article 29 states that every person has the right to freedom and security of the person.
112. The Petitioner was compelled to work as a domestic worker in two households, enduring a schedule from 3:00 a.m. to 10:00 p.m. every day of the week (Monday to Sunday). She faced physical and psychological abuse, sleep deprivation, restricted access to healthcare, and confiscation of her cell phone. Despite her work, she received no wages. When she sought repatriation to Kenya, she was informed that she had been "purchased" for \$14,000 USD, and under no condition would she be released. Her convention clearly demonstrates that she faced harassment at the workplace and that her dignity was violated.
113. The South African Constitutional Court in the authority of *Mayelane v Ngwenyama and another* (CCT 57/12) [2013] ZACC 14 observed as follows:-
- “...the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity.”
114. Again, the court in *Abmed Issack Hassan v Auditor General* [2015] eKLR the court observed as follows:
- “...the right to human dignity is the foundation of all other right and together with the right to life, forms the basis for the enjoyment of all other rights...put differently thereof, if a person enjoys the other rights in the Bill of rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated”. See *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) SCR (2) 516.”



115. I find that the petitioner has sufficiently demonstrated inhuman and degrading treatment. Having found that the 1st and 5th respondents had direct control over the petitioner's travel to Saudi Arabia, work, and release from Saudi Arabia, I am inclined to find that they breached their obligation to ensure that the petitioner was not exposed to inhuman and degrading treatment while she worked in Saudi Arabia. The 1st and 5th respondents have not demonstrated any safeguards they put in place to ensure that the petitioner was safe and protected from harassment at work, and thus are liable.
116. The petitioner submitted that her salaries and benefits were never paid to her, even though she offered labour in Saudi Arabia from May 2, 2019 to July 29, 2019 after her recruitment by the respondents. The petitioner states that her promised monthly salary was Kshs 40,000. The monthly salary was not controverted by the respondents. The 2nd respondent in her replying affidavit stated that the petitioner was recruited by a director of the 1st respondent.
117. I find that the 1st and 5th respondents are liable to the petitioner for the sum of Kshs 120,000 being three months' salary for May, June and July.
118. The petitioner was released after her Advocates paid a sum of Kshs 68,100 to the 1st respondent. The petitioner has also provided proof of buying a plane ticket worth Kshs 29,650. Noting that the respondents did not furnish any security bond deposited in line with section 85 of the *Employment Act* to guarantee the performance of the foreign employment contract, the 1<sup>st</sup> and 5<sup>th</sup> respondents are liable to reimburse the said amount.
119. The 6th issue for determination is whether the petitioner is entitled to general damages and exemplary damages.
120. Having established that the petitioner's rights were violated and that the petitioner was exploited, the question now to ask is what compensation the petitioner is entitled to section 14 of Recommendation (No 206) to the ILO Convention No 190 provides for:
- “The remedies referred to in article 10(b) of the Convention could include:
- a) The right to resign with compensation;
  - b) Reinstatement;
  - c) Appropriate compensation for damages;
  - d) Orders requiring measures with immediate executory force to be taken to ensure that certain conduct is stopped or that policies or practices are changed; and
  - e) Legal fees and costs according to national law and practice
121. Section 15 of Recommendation (No 206) provides that:
- “Victims of violence and harassment in the world of work should have access to compensation in cases of psychosocial, physical or any other injury or illness which results in incapacity to work”.
122. The object of exemplary damages is to punish and deter, Godfrey Julius Ndumba Mbogori & another v Nairobi City County refers. The court further stated that exemplary damages may be awarded to punish, deter and in cases where the defendant's conduct was calculated to make a profit. I find that



this is an appropriate case in which the 1st and 5th Respondents should be compelled to pay Exemplary damages.

123. It is well established that awarding compensation is a suitable and effective remedy for addressing a proven violation of a fundamental constitutional right. However, the amount of compensation will depend on the specific facts and circumstances of each case.
124. In *M W K & another v Attorney General & 3 others* [2017] eKLR, the court awarded a total sum of Kshs 4,000,000/= after determining that the actions of the respondents, who were police officers, had infringed upon the petitioner's right to human dignity.
125. This is a sad chapter for the petitioner and generally the subject of violence and harassment in the world of work. It is lucky that both municipal and international law and conventions now recognise a need to erase and remedy this situation now and in the future.
126. I am therefore inclined to allow the petitioner and order relief as follows;
  - i. A declaration be and is hereby issued that the petitioner was subjected to slavery, practices similar to slavery, servitude, forced or compulsory labour and exploitation by the 1st and 5th respondents.
  - ii. A declaration be and is hereby issued that the petitioner was subjected to inhuman and degrading treatment by 1st and 5th respondents.
  - iii. A declaration be and hereby issued that the petitioner's freedom of movement was infringed upon by the 1st and 5th respondents.
  - (iv) The 1st and 5th respondents ordered to meet and reimburse Kshs 29,650 and Kshs 68,100 being monies paid by the claimant for her air ticket to and from Saudi Arabia.
  - iv. The 1st and 5th respondents are further ordered to meet and pay Kshs 120, 000.00 being unpaid salaries for three months worked by the claimant.
  - v. The 1st and 5th respondents be and are hereby ordered to meet and pay Kshs 4,000,000.00 being damages for the violation of the petitioner's constitutional rights.
  - vi. Total of award .....Kshs 4,217,750.00
  - vii. Interests on the total award at court rates from today's date till payment is full
  - viii. The costs of the Petition shall be borne by the 1st and 5th respondent.

**DELIVERED, DATED AND SIGNED THIS 27<sup>TH</sup> DAY OF NOVEMBER 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

1. Mr Nyangasi instructed by Manase & Company Advocates for the Petitioner.
2. Mr. Obando instructed by Onyango Odhiambo & Company Advocates for the 1st Respondent.
3. Mr. Ochieng instructed by Ochieng K. Associate Advocates for the 2nd Respondent.
4. Mr. Abutika instructed by Shinyula Abutika & Company Advocates for the 3rd Respondent.
5. Mr. Ochola instructed by O&K Advocates for the 4th Respondent.



6. No appearance for the 5th Respondent.

