



**Jemurgor v Moi University (Petition E030 of 2022)
[2024] KEELRC 2839 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2839 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E030 OF 2022**

MA ONYANGO, J

NOVEMBER 14, 2024

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLES 19,22,23,27,28,41 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION
UNDER ARTICLES 3, 10,20,21,22,23,25,27,28,36,37,41,47,232,258
AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF SECTION
5,7,10,26,27,28,29,31,35,36,37,41,43,44,45,46,47,50,
AND 51 OF THE EMPLOYMENT ACT 207**

BETWEEN

BENEDICTOR JEMURGOR PETITIONER

AND

MOI UNIVERSITY RESPONDENT

JUDGMENT

1. The Petitioner filed the instant petition against Moi University, a public university registered under the [Universities Act](#), on 18th December, 2022 seeking the following reliefs:
 - a. A declaration that the termination of the Petitioner's employment by the Respondent was unprocedural, wrongful, unlawful for being substantively without justification and being



procedurally unfair as the Respondent failed to adhere to the threshold of fairness as provided for under section 45 of the *employment Act*, 2007.

- b. A declaration that the termination of the Petitioner's employment and unlawful conduct by the Respondent or acts or actions of the Respondent through its management infringed the Petitioner's constitutional rights to fair labour practice under Article 41 of *the Constitution* of Kenya and the right to reasonable working conditions.
- c. A declaration that the Respondent's actions of unlawfully, unprocedurally, and unfairly terminating the Petitioner from employment, not granting the Petitioner her statutory benefits such as not being entitled to annual leave maternity leave, house allowance and other allowances amounted to discrimination.
- d. A declaration that the Petitioner's seasonal contract of employment and is null and void.
- e. A declaration that the Respondent's actions of not employing the Petitioner on permanent and pensionable terms after more than 6 years of her service while it employed those that were employed after her on permanent and pensionable terms amounted to discrimination contrary to section 5 of the *Employment Act*, 2007.
- f. A declaration that the Petitioner had become a permanent and pensionable employee of the Respondent by operation of law after having worked for the Respondent for over 6 years.
- g. A declaration that the Respondent's expectations of the Petitioner performing the same tasks as lose employed on permanent and pensionable terms while she was underpaid and untimely amounted to discrimination.
- h. A declaration that the Petitioner is entitled to the payment of damages and compensation for infringement and contraventions of her fundamental rights and freedoms protected by Articles 19, 7, 28, 30, 41, 43, 47 and 50 of *the constitution*.
- i. An order compelling the Respondents to pay and/or award the Petitioner her lawful dues mounting to Kshs. 5,263,676.50/=.
- j. An order compelling the Respondent to pay for maximum compensation of 12 months' salary inclusive of all allowances and benefits) based on what a permanent employee of the qualification of the Petitioner earns or equal remuneration for work of equal value in respect of unfair termination.
- k. An order compelling the Respondent to pay the Petitioner general damages for discrimination and violation of fundamental rights and freedoms guaranteed and protected by the Kenyan Constitution, 2010.
- l. An order compelling the Respondent to pay the Petitioner General damages and aggravated damages aggravated scale under Article 41 of *the Constitution* of Kenya for the oppressive, arbitrary and constitutional conduct, acts or actions of the Respondent against the Petitioner through its management which caused her psychological trauma, humiliation, inconvenience, loss of reputation, stress and embarrassment.
- m. An order compelling the Respondent to pay Exemplary damages for lost opportunities.
- n. An order compelling the Respondent to pay the Petitioner for the loss of prospective future earnings due to refusal by the Respondent to issue the Petitioner with a certificate of service and further due to unlawful and unconstitutional termination of the Petitioner's employment



in contravention of Article 41 of the Constitution and Article 23 of the Universal Declaration of Human Rights being an infringement of the Petitioner's right to protection against unemployment, to right to work and legitimate expectation to work until retirement age without unlawful termination equivalent to current salary for 27 years from Petitioner's current age of 33 years to age of retirement at 60 years.

- o. An order compelling the Respondent to reinstate the Petitioner to employment as a permanent and pensionable employee with full salary, allowances, benefits and privileges thereto as from the date of dismissal to the date of reinstatement.
 - p. In the alternative but without prejudice to prayer (m), a declaration that the Respondent re-engages the Petitioner in work comparable to that which the Petitioner was employed prior to her dismissal or other reasonably suitable work and on permanent and pensionable terms.
 - q. An order directing the Respondent to issue to the Petitioner a certificate of service as per Section 51 of the Employment Act.
 - r. An order compelling the Respondent to pay the costs of the petition plus interest at court rates until payment in full.
 - s. That this Honourable Court be pleased to grant such after Order or Orders as may be just and appropriate.
2. The petition is supported by the Petitioner's affidavit and exhibits thereto filed together with the petition and sworn on 29th January 2019 as well as the Supplementary Affidavit sworn on 29th September 2022.
 3. In the petition the Petitioner challenges the termination of her employment which she terms as discriminatory, unfair, unprocedural and unlawful. The Petitioner further avers that the Respondent violated her rights and fundamental freedoms under the Bill of Rights. She cites the preamble to the Constitution of Kenya 2010 and Articles 2, 3, 4, 19, 20, 21, 23, 41, 159, 232 and 258 of the Constitution as the basis for the petition.
 4. The Petitioner further cites sections 35,36,41,44,45 and 46 of the Employment Act which she alleges were violated by the Respondent in the termination of her employment.
 5. In the affidavit supporting her Petition the Petitioner states that she was employed by the Respondent on 14th December, 2010 as a casual and worked in the Respondent's Estates Department at an initial salary of Kshs. 5,470.50 per month.
 6. It is her case that she was issued with a contract for five (5) months from 1st December, 2010 to 30th April, 2011 under which she was entitled to 2 days off per month.
 7. The Petitioner states that upon expiry of the contract she was not issued with any other contract but continued working until 1st November, 2012 when she was issued with another contract to cover the period from 1st November, 2012 to 30th April, 2013.
 8. It is the Petitioner's case that the Respondent kept renewing her contracts until 31st October, 2013 when it stopped but the Petitioner continued with her work.
 9. The Petitioner avers that when she asked the Respondent about her contract she was taken in circles but never given a clear answer. That during the whole of this time her salary was calculated on daily basis but paid at the end of the month.



10. The Petitioner avers that in 2014 she enrolled for advanced studies and acquired a Grade TT3 Certificate as certified plumber pipe fitter.
11. She avers that she continued working for the Respondent until 22nd February, 2022 when the Respondent introduced a new contract to run for six (6) months from 1st March to 31st August, 2022. Under the contract her consolidated salary was Kshs. 23,970.70 per month subject to deduction of NSSF, NHIF, PAYE, HELB and any other statutory deductions.
12. The contract further provided for 2 annual leave days per month and maternity/paternity leave.
13. The Petitioner avers that on 12th April, 2022 when she reported for work in the morning she found her colleagues had not reported to their duty stations as they were protesting against poor working conditions. That after 2 to 3 hours of waiting to be addressed by the Respondent's relevant representatives they decided to walk peacefully to the Administration Block to raise their concerns. Upon reaching the Administration Block they were informed by the security officer that the Vice Chancellor had travelled to Nairobi on official duty and there was no one to listen to them.
14. The Petitioner states that after waiting for a while they were joined by some union officials who listened to their concerns and urged them to break up and wait until Tuesday, 19th April, 2022 when the Vice Chancellor was expected back in the office.
15. The Petitioner states that on Tuesday, 19th April, 2022 she reported to work and worked until 10 am when she and her colleagues were called by the supervisor to return the tools of work and go to the Administration Block where they were handed letters of termination.
16. It is the Petitioner's averment that having worked for the Respondent for 12 years her terms of service automatically converted to permanent and pensionable by operation of the law and she is therefore entitled to the benefits of a permanent employee.
17. The Petitioner avers that she was discriminated by the Respondent who employed new comers on permanent and pensionable terms while she was bypassed and retained as a casual employee.
18. The Petitioner avers that the termination of her employment was arbitrary, discriminatory, unfair, unprocedural, wrongful and unlawful. That she was never given a chance to be heard before the termination.
19. The Petitioner avers that while in the employment of the Respondent she was subjected to long working hours without off days, paid leave, no paid sick leave and no pay for overtime hours worked. That in 2013 she was blessed with a child and despite being entitled to maternity leave of 3 months, she was only given off days for two weeks.
20. The Petitioner avers that she was not given a chance to enjoy statutory benefits available to her colleagues on permanent and pensionable terms such as training opportunities to further her professional qualifications, promotions, sick off, maternity leave, annual leave, house allowance, soap allowance and paid overtime.
21. The Respondent filed a Notice of Appointment through Federation of Kenya Employers (FKE) but did not file any response to the petition. Mr. Ouma attended court on behalf of the Respondent on 23rd March 2023 and asked for 14 days to file response which was granted and the petition fixed for further mention on 8th June 2023 for directions.



22. On the mention date Ms. Achieng' holding brief for Mr. Ouma informed the Court that the Respondent had filed an application for striking out the petition, which application had by that date not been served upon the Petitioner.
23. On 29th June 2023 when the matter came up for further mention Ms. Barasa who was holding brief for Ms. Achieng informed the court that the Respondent intended to apply for consolidation of this petition with petition numbers 85 to 96 of 2022. The court fixed the petition for hearing on 19th September, 2023 after Mr. Wafula informed the court that he was not aware of the other petitions.
24. On the hearing date Ms. Barasa again attended court holding brief for Ms. Achieng. She informed the court that the Respondent had not had time to make the application for consolidation. The court gave time allocation for hearing of the matter at 11.45 am when there was no appearance for the Respondent. The hearing therefore proceeded in the absence of the Respondent.
25. The Petitioner testified and closed her case. She reiterated the averments in her affidavit in support of the petition. Thereafter the Petitioner filed written submissions.

Analysis and Determination

26. I have considered the pleadings and submissions on record. The issues that arise for determination are:
 - a. Whether the Petitioner has proved that there was an employment relationship between her and the Respondent,
 - b. Whether the termination of the Petitioner's employment was fair, and,
 - c. Whether the Petitioner is entitled to the remedies that she seeks.
27. The prayers in this petition are basically normal employment remedies. The Petitioner should have filed a normal claim as all the issues raised in the petition are adequately catered for in the Employment Act. As has been stated by courts from time to time, not every violation of the constitution should be elevated to the constitutional pedestal. Where statutes provide adequate remedies parties should seek redress through those statutes.
28. In an employment suit where no defence has been filed the first issue that the employee must prove is the existence of an employer employee relationship between the employee and the Respondent. In this case the Petitioner has produced copies of contracts and letter of termination of employment. I therefore find that the existence of employer employee relationship has been established.
29. The second issue is whether the termination of employment was in compliance with the law and therefore fair. Section 45(1) prohibits termination of employment of an employee unfairly while subsection (2) provides that termination of employment is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason and related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer and that the employment was terminated in accordance with fair procedure.
30. The termination letter issued to the Petitioner is reproduced below:-

ID No.269XXX60 14th April, 2022

Ms. Benedictor Jemurgor

c/o Apple Farm

Moi University



Dear Ms. Jemurgor,

RE: termination of contract appointment

This letter is to inform you that your employment with Moi University has been terminated with effect from 14th April, 2022.

You have been terminated for the following reasons:

ii. Failing to obey lawful orders issued by your supervisor

SUBPARA iii.

Participating in an illegal strike and disrupting the University operations.

Your actions are contrary to the provisions of the *Employment Act* section 44(4) c, e and Clause 9.2 (L) of Human Resource Policies and Procedures Manual and amount to Gross Misconduct.

In line with the provisions of your contract of employment you shall be paid 15 days salary in lieu of notice.

You are requested to return any University property that is in your possession.

If you have any questions, please contact the Registrar Administration Planning and Development at the main Campus.

We would like to thank you for your contribution and we wish you all the best for the future.

Your sincerely,

Signed

PROF. DR. NATHAN. O. OGECHI

(AG. DEPUTY VICE-CHANCELLOR

ADMINISTRATION, PLANNING AND DEVELOPMENT)

Cc Vice-Chancellor senior Legal Officer

Deputy Vice Chancellor (A,P&D) Chief Security Officer

Deputy Vice Chancellor (R&E) farm Manager

Deputy Vice Chancellor , Finance dean, School of Agriculture

Chief Finance Office KUDHEIHA Officials

Labour Officer, Uasin Gishu

31. In the instant case the Petitioner's case was that on 12 April, 2022 when she reported for work she found her colleagues had not started working because they wanted to be addressed by the Respondent's leadership over complaints that they had regarding poor working conditions. That together with the Petitioner the workers marched to the administration block but did not get anyone to address them as the Vice Chancellor was away on official duty.
32. The action of the workers was a withdrawal of labour which constituted a strike action. Although Article 41(2)(d) gives employees the right to strike, it does not provide for the procedure or circumstances when employees may resort to strike action lawfully. Section 79 of the Labour Relations provides for protected strikes as follows:



- (2) A person does not commit a breach of contract or a tort by taking part in
 - (a) a protected strike or a protected lockout; or
 - (b) any lawful conduct in contemplation or furtherance of a protected strike or a protected lockout.
- (3) An employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.
- (4) Civil proceedings may not be instituted against any person for
 - (a) participating in a protected strike or a protected lockout; or
 - (b) any conduct in furtherance of a protected strike or protected lockout.
- (5) Subsections (2) (3) and (4) do not apply to any action that constitutes an offence.
- (6) An employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lockout.

33. A protected strike is provided for in section 76 of the [Labour Relations Act](#) as follows-

A person may participate in a strike or lockout-

- (a) the trade dispute that forms the subject of the strike or lockout concerns terms and conditions of employment or the recognition of a trade union;
 - (b) the trade dispute is unresolved after conciliation
 - (i) under this Act; or
 - (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and
 - (c) seven days written notice of the strike or lock out has been given to the other parties and to the Minister by the authorised representative of-
 - (i) the trade union, in the case of a strike;
 - (ii) the employer, group of employers or employers' organisation, in the case of a lockout.
34. From the foregoing the strike action by the Petitioner and her colleagues which appears to have been spontaneous, was not a protected strike. She and her colleagues were thus liable for disciplinary action. The Respondent therefore had valid reason to take disciplinary action against her.
35. Section 45(2) of the [Employment Act](#) provides that besides having valid reason for termination, an employer must comply with fair procedure. Fair procedure is provided for in section 41 of the [Employment Act](#) as follows:
41. Notification and hearing before termination on grounds of misconduct
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have



another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

36. In the instant case the Petitioner was not given a hearing. She was informed to present herself at the administration block where she was issued with the letter of termination. The termination did not comply with section 41 and is therefore unfair.
37. Section 45 provides that there must be both justification and fair procedure for a termination of employment to be fair. The Respondent having not complied with fair procedure, the termination of the Petitioner's employment was unfair.

Remedies

38. Having found the termination of the Petitioner's employment contract, I now consider the remedies sought. The Petitioners sought a plethora of remedies. I will only deal with those that are relevant, having stated above that this is an ordinary employment suit which has been elevated to a constitutional pedestal without justification.
39. Having found the termination of the Petitioner's employment unfair for want of fair procedure, I declare so. I however decline to declare the termination unconstitutional.
40. The Petitioner is not entitled to have her contract declared permanent and pensionable as such kind of employment is not provided for in the [Employment Act](#). It is only applicable where the terms and conditions of service in a particular entity provides for the same. In this case the Petitioner did not adduce any evidence to support the averments in this respect.
41. On the monetary remedies, the Petitioner is entitled to pay in lieu of notice in accordance with the provisions of section 35 as read with section 36 and 49(1)(a) of the [Employment Act](#). Her salary according to her last contract was Kshs. 23,970.70. The Petitioner did not demonstrate that she was underpaid. She did not prove that the Respondent pays artisans of trade test Grade III Kshs. 52,500 as alleged. I therefore award her Kshs. 23,970.70 as pay in lieu of notice.
42. The Petitioner prayed for payment of compensation for unfair termination. Taking into account all the circumstances of this case including the terms of employment of the Petitioner, her length of service and all other relevant factors under section 49(4) of the [Employment Act](#) I award her 6 months' salary as compensation in the sum of (23,970.70x6) Kshs.143,824.20.
43. The Petitioner prayed for service gratuity. Her contract did not provide for gratuity but provided that she would be a member of NSSF. She also produced an NSSF statement as proof that she was a member thereof. Under section 35(5) of the [Employment Act](#) as read with subsection 35(6) thereof the Petitioner is not entitled to service pay/gratuity.
44. The Petitioner prayed for house allowance. Her salary having been consolidated as stated in the contract she is not entitled to the same.
45. The Petitioner prayed for unpaid leave. Her contracts provided for leave at 2 days per month worked. She did not adduce any evidence to prove that she did not take the leave and was not paid in lieu thereof



at the end of each contract period. For the final contract the Petitioner had served for only one full month for which I award her 2 days leave at Kshs. 1,844.

46. The Petitioner prayed for unpaid maternity leave. The same having been in 2013, it is statute barred. Even if it was not, no evidence was adduced to prove the same.
47. The Petitioner prayed for public holidays. No evidence was adduced in support of the prayer. The same is accordingly declined.
48. The Petitioner prayed for underpayments. As I have already stated above when dealing with pay in lieu of notice, no evidence was adduced to support the claim for underpayments. The same is declined for want of proof.
49. The Petitioner prayed also prayed for damages for breach of her constitutional rights. I have already stated above that this was an ordinary termination of employment claim that should have been filed through an ordinary claim. The Petitioner is accordingly not entitled to damages as she did not prove that any of her constitutional rights were violated to warrant compensation beyond remedies provided for in the *Employment Act*.

Conclusion

50. In conclusion judgment is entered for the Petitioner against the Respondent in the sum of Kshs. 169,638.90.
51. Interest shall accrue at court rates from date of judgement till payment in full.
52. The Petitioner is awarded costs of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

