



**Kosgei v Mvita Management Company Limited (Petition E022 of 2024)  
[2024] KEELRC 2841 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2841 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E022 OF 2024  
B ONGAYA, J  
NOVEMBER 15, 2024  
IN THE MATTER OF ARTICLE 22(1) OF THE  
CONSTITUTION OF KENYA  
IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLE 27, 41 AND 47 OF THE CONSTITUTION OF  
KENYA**

**BETWEEN**

**JEPCHIRCHIR KOSGEI ..... PETITIONER**

**AND**

**MVITA MANAGEMENT COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner filed the petition dated 14.02.2024 through Kyale Mumo & Associates Advocates, claiming damages for unlawful termination of employment tabulated as follows:
  - a. Twelve (12) months' salary in compensation for unlawful termination at Kshs. 270,000 (Kshs. 22,500 x 12)
  - b. Unpaid House Allowance for every year worked at Kshs. 486,000 (15% of Kshs. 22,500 x 12 months x 12 years)
  - c. General damages for discrimination on account of pregnancy at Kshs. 3,000,000
  - d. Cost of the Petition
  - e. Interest on the above.



- f. Any other orders or further reliefs this Honourable Court may deem fit to grant.
2. The petition is supported by the affidavit of the petitioner in which she pleaded that she was employed as a cleaner and to perform general duties in the respondent company since 2009. The respondent only gave her a formal written contract in 2020, which contract was renewable annually. The petitioner performed her work obligations diligently and without fail from 2009 up to 2023 when she was unlawfully terminated from employment.
3. The petitioner's case was as follows:
- a. The respondent converted the petitioner's permanent employment to an annual contract without prior notice to her.
- b. The petitioner requested for her annual leave and then for her maternity leave and the same was granted. She thus went on her annual leave in July 2023 and was on maternity leave from August to October 2023. Her annual leave was meant to coincide with the maternity leave as per the company's regulations and as per her contract of employment. Her maternity leave was to lapse on 31.10.2023 and she was supposed to report back to work on 01.11.2023.
- c. When the petitioner's maternity leave was about to lapse, she received a text message from Dancun Munyasia inviting her for a meeting with the Board on 01.11.2023, the same day she was to resume duty. The agenda of the said meeting was not disclosed but she availed herself as instructed and she was informed that her employment had been terminated due to poor performance.
- d. The respondent gave the petitioner a letter of termination dated 01.11.2023 and coerced her to sign it. She had no choice but to sign the termination letter as she was informed that her remaining dues would not be processed prior to her signing the letter. The letter of termination in paragraph one stated, "Reference is made to the meeting of 1 November, 2023 with the Board whereby you were notified of your performance review, and having reviewed Sec. 11(a) of your employment contract, the Board hereby notifies you termination of your employment with effect from 1 November, 2023." The letter stated that she would be paid the remaining months up to the end of the current contract (i.e November and December 2023) and unutilized leave days. She would also be paid 15 days for each year worked per provisions of the *Employment Act*, 2007. The letter further stated that she would be notified when her final payment would be ready for collection. The petitioner signed in receipt of the letter on 26.11.2023.
- e. The petitioner alleges that the termination of her employment was discriminatory, unlawful and unfair. The respondent failed to issue her with a notice to show cause and did not give her ample time to prepare for a disciplinary hearing. It also failed to conduct a disciplinary hearing. The petitioner's employment was terminated while she was on maternity and she was not accorded ample notifications and reasons for the dismissal, against her constitutional rights to fair administrative action and fair labour practices. The respondent therefore discriminated against her based on pregnancy and only reasoned that the termination was because of poor performance.
- f. The petitioner never received any warning letter or invitation to discuss purported dismissal performances for the 14 years she was employed at the respondent company. In addition, the respondent carried out neither any performance appraisals nor reviews during the pendency of the petitioner's employment. As such, her case was that dismissal for purported poor performance was an afterthought.



4. The respondent filed the replying affidavit of Duncan Munyasi sworn on 01.07.2024 and through Oraro & Company Advocates. The respondent's case was as follows:
  - a. The dispute herein ought not to be adjudicated upon as a constitutional petition because of the doctrine of constitutional avoidance. That the petitioner seeks reliefs from this Court under the guise of alleged constitutional violations but which are awardable under the *Employment Act*, Chapter 266, Laws of Kenya.
  - b. Further, by virtue of filing this petition, the petitioner mischievously seeks to escape the jurisdiction of the Magistrates Court and obtain the reliefs sought under the guise of a constitutional right violation. The petition ought to be filed as a claim for unfair or unlawful termination in the Magistrates Court.
  - c. Nevertheless, the respondent pleaded in response to the petition as hereunder:
    - i. The respondent affected her full payment during the period the petitioner proceeded for her annual and maternity leave.
    - ii. That the petitioner had previously been on maternity leave three (3) times and during which each period, she was paid her full wages and returned to work once the maternity leave was over.
    - iii. That when the petitioner was later issued with the letter dated 01.11.2023, she denied signing the same and took a copy for discussion with her lawyers. The petitioner only returned the signed letter on 26.11.2023.
    - iv. That the petitioner is not entitled to any of the reliefs they seek from this Court.
    - v. That the jurisdiction of this Court is disputed and denied and this matter ought to be filed in the appropriate forum.
5. The petitioner then filed a further affidavit sworn on 03.09.2024, wherein she averred that this Court has jurisdiction to determine this matter as the same raises violation of constitutional rights under Articles 22, 27, 41 and 47, and the aforementioned rights have been specified and pleaded in the petition. She asserted that the Magistrate Court does not have jurisdiction to determine the human rights violation outside the rights under Article 25(a) and (b) of *the Constitution* and as per the Magistrate Act. She pleaded that the respondent did not produce any documentary evidence to disprove the averments in her petition and supporting affidavit.
6. Parties filed their respective written submissions. The Court has considered all the material on record and returns as follows.
7. To answer the 1<sup>st</sup> issue the parties are in mutual agreement that they were in a contract of service as pleaded and urged for the petitioner. The contract of service was terminated by the respondent's letter of 03.11.2023. The termination letter invoked clause 11(a) of the contract of service thus, "Your employment may be terminated by either you or the Company giving to the other one (1) months' notice in writing of their intention to terminate or payment of one (1) month's salary instead of such notice."
8. To answer the 2<sup>nd</sup> issue, the Court returns that the parties were bound by the invoked termination clause. The petitioner has not established any material respect in which the respondent may have treated her unfairly. The letter refers to a performance review and review of clause 11(a). it was urged for the petitioner that the respondent terminated her on account of performance review and as much that



is not in dispute per the letter of termination, there were no allegations of poor performance that would entitle the petitioner to a notice and a hearing as envisaged in section 41 of the *Employment Act*, 2007. The termination letter mentioned nothing adverse against the petitioner. It is that parties met, reviewed performance and terms of contractual clause on termination by notice and the termination letter issued. The Court finds that as urged for the respondent, the petitioner has failed to establish that the respondent denied her due process or fairness. The Court upholds the submission that the termination of employment was purely under the clause on termination by notice and nothing more. Section 35 of the Act as well envisaged such mode of termination as fair and lawful. The Court considers that the respondent adopted a fair procedure and reason for termination as per section 45 of the Act. The alleged violation of Article 47 on fair administrative action and Article 41 on fair labour practices is found unjustified. In finding that the termination was not unfair, the Court has as well upheld the submission for the respondent that the payments in the termination letter were fully honoured. No injustice has been established in that regard.

9. To answer the 3<sup>rd</sup> issue the Court returns that the petitioner has failed to establish discrimination based on pregnancy as was alleged. By her own pleading, she confirmed that she was fully paid during the maternity leave and which was fully accorded as required in law. There is no doubt that she had on two previous occasions enjoyed maternity leave. It is that she served full maternity leave and thereafter the employment was terminated per contract. The Court finds that it was speculative to attach the issue of pregnancy to the parties' entitlement to terminate the contract per the express contractual provisions. As submitted for the respondent, the petitioner has not pleaded particulars of discrimination and by evidence shown such particulars to have taken place.
10. As to whether the Court had jurisdiction to hear the case, the Court returns in the affirmative. By pleading the petitioner alleged violation of the stated provisions of the Bill of Rights. That she was merely avoiding, moving the Magistrate's Court in an ordinary suit, has not been established at all. Section 8(3) of the *Magistrates Court Act*, Cap 10 which provides, "Nothing in this Act may be construed as conferring jurisdiction on a Magistrates Court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights." The petitioner could not have therefore filed in the Magistrate's Court a claim for compensation for an alleged breach of the Bill of Rights as was pleaded for her. The petitioner's case was the alleged breach of cited provisions of the Bill of Rights. It turns out that after considering all material on record, she has failed to establish her allegations. The submission for the respondent that the principle of constitutional avoidance chained the petition is unfounded. It is true that the petition was a blend of alleged unfair termination and breach of the Bill of Rights and it appears that the petitioner was entitled to file a petition with the mixed causes of action.
11. The costs follow the event. However, the respondent appears to have failed to formalise the later employment arrangements in writing and which if had been done and communicated to the petitioner, may have helped to avert the litigation. Each party will bear own costs.

In conclusion, the petition is hereby dismissed and each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15<sup>TH</sup> NOVEMBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

