



**Massawa v Shop and Deliver Limited (Employment and Labour Relations  
Petition E207 of 2020) [2024] KEELRC 2778 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2778 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E207 OF 2020  
AN MWAURE, J  
NOVEMBER 8, 2024**

**BETWEEN**

**BRENDA ACHIENG MASSAWA ..... PETITIONER**

**AND**

**SHOP AND DELIVER LIMITED ..... RESPONDENT**

**RULING**

1. The Petitioner filed a Petition dated 19<sup>th</sup> October 2023 seeking to be compensated by the Respondent as follows:
  - a. A declaration that the termination of the Petitioner’s employment was unprocedural, unfair, unlawful and wrongful contrary to the provisions of Articles 41 and 47 of the Constitution, sections 41, 43 and 45 of the Employment Act and Section 4(3) of the Fair Administrative Action Act
  - b. A declaration that the Respondent treated the Petitioner in a degrading and discriminatory manner contrary to the provisions of Articles 27 and 28 of the Constitution by summarily dismissing her from its employment merely because she had been injured in an accident and thus posed a perceived liability to the Respondent
  - c. A declaration that the Respondent breached the Petitioner’s right to fair labour practices, the right to a fair disciplinary and administrative process and denied the Petitioner adequate time and opportunity to respond to the allegations against her
  - d. An order that the Petitioner be compensated by the Respondent as follows:
    - i. One (1) month’s salary amounting to Kshs. 61,250.00 in lieu of notice of termination of the Employment Contract



- ii. Twelve (12) months' earnings amounting to Kshs. 735,000.00 as damages for unfair termination of the Petitioner's employment; and
  - iii. General damages for degrading and inhumane treatment and mental anguish
  - iv. Applicable interest on the amounts in (i), (ii) and (iii) above from the date of filing suit until payment in full.
- e. The costs of this Petition

### **Respondent's Notice of Preliminary objection**

2. The Respondent filed a preliminary objection dated 1<sup>st</sup> November 2023 stating that the Petitioner's suit has been filed in the wrong forum as the Honourable Court does not have jurisdiction to hear this suit as the Petitioner's gross monthly salary was Kshs. 61,250/=.

### **Petitioner's grounds of opposition**

3. The Petitioner filed grounds of opposition dated 8<sup>th</sup> July 2024 in opposition to the Respondent's preliminary objection as follows that:
  1. The Petitioner seeks declaratory reliefs under the Constitution of Kenya, 2010 in her petition dated 19<sup>th</sup> October 2023 which cannot be granted by the Magistrates' Court as the same falls under the jurisdiction of the Employment and Labour Relations Court.
  2. Therefore, the grounds upon which the Preliminary Objection is based cannot be substantiated without relying on documentary evidence.
  3. As a result, the Preliminary Objection lacks merit, frivolous and amounts to a mere delay tactic.

### **Submissions**

4. The Petitioner filed her submissions on 13<sup>th</sup> September 2024 while the Respondent filed their submissions on 14<sup>th</sup> August 2024 together with supplementary submissions dated 7<sup>th</sup> October 2024.

### **Analysis and determination**

5. The main issue of determination herein is whether the preliminary objection dated 1<sup>st</sup> November 2023 is merited.
6. The threshold to determine whether a preliminary objection is merited was held in *Mukisa Biscuit Manufacturing Co. Ltd -vs.- West End Distributors (1969) EA 696*:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit example being to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
7. In this instant case, the Petitioner alleges that she was unfairly and unlawfully dismissed from her employment. She was earning a salary of Kshs.61,250/=.



8. Vide Kenya Gazette Notice No. 6024 of 22<sup>nd</sup> June 2024 Chief Justice Emeritus Maraga appointed the rank of senior resident magistrates and above were designated to hear and determine employment and labour cases within their respective areas of jurisdiction dispute arising from employment contracts (excluding trade disputes under the *Labour Relations Act*, 2007) where the monthly pay does not exceed Kshs.80,000/=.

9. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR the Court of Appeal held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. The jurisdiction of Employment and Labour Relations Court is well established in Section 12 of *Employment and Labour Relations Court Act* and is as follows: -

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' organisation and a trade unions organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

11. This court states firmly that it has jurisdiction to handle all matters of employment and labour. The fact that the lower court has been clothed with jurisdiction to handle some employment matters does not by any means denote that this court cannot handle such cases where the claimant's salary is less than Kshs.80,000/=.

If anything this is more of an administration matter to decongest the High Court. It does to take away the power of the High Court to handle matters where the employee's salary is less that Kshs.80,000/=.



12. In this case the Petitioner claims she has also raised issues of constitutional violations. Should that be the case then this court must interrogate and determine. The court cannot make a decision before hearing the parties in full.
  13. This court has jurisdiction to hear all matters of employment and labour and so is well placed to proceed with this matter.
  14. The preliminary objection therefore is unmerited and is dismissed forthwith.
  15. Costs will be in the man suit.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

**ANNA NGIBUINI MWAURE**

**JUDGE**

