



**Chesang v Board of Management Christ the King High School Kemeliet & another  
(Petition E010 of 2024) [2024] KEELRC 13627 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13627 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION E010 OF 2024  
MA ONYANGO, J  
DECEMBER 5, 2024**

**BETWEEN**

**ALSEPHA JEMUTAI CHESANG ..... PETITIONER**

**AND**

**THE BOARD OF MANAGEMENT CHRIST THE KING HIGH SCHOOL  
KEMELIET ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE OLANG ONDIALAH ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Alsepha Jemutai Chesang, the Petitioner herein, is currently an employed by the 1<sup>st</sup> Respondent as a bursar.
2. The 2<sup>nd</sup> Respondent is the principal of the 1<sup>st</sup> Respondent.
3. The Petitioner filed the instant Petition on 15<sup>th</sup> July 2024 alleging that her rights have been violated by the Respondents. The Petitioner invoked various articles of *the Constitution* and sections of the *Employment Act* in seeking the following reliefs:
  - a. A Declaration that the respondents are in contravention and threatened contravention of fundamental rights and freedoms under Articles 25(c), 27, 28, 29, 31, 32, 41, 43(1)(a), 45, 49, 50(2) and 53 of *the Constitution* of Kenya
  - b. A Declaration that the Respondents are in contravention of sections 41, 43, 44, 45 and 47 of the *Employment Act* 2007
  - c. A Declaration that the alleged advertisement for the post of bursar dated 4<sup>th</sup> of July 2024 is null and void for want of compliance with the law and the Petitioner be allowed to continue with her work without any harassment and or disturbance.



- d. That the sexual harassment caused by the 2<sup>nd</sup> Respondent amounts to gross misconduct and warrants summary dismissal under section 44 of the *Employment Act* and he must damages.
  - e. That the 2<sup>nd</sup> Respondent be held personally liable for the fragrant abuse of office
  - f. That orders of certiorari do issue to quash any decision of dismissing the Petitioner
  - g. That orders of permanent injunction do issue to restrain the Respondents from hiring and or employing any other bursar in place of the petitioner until her retirement or any other valid reason
  - h. That the court do order compensation for the violation of petitioner's rights and freedoms
  - i. This court be pleased to issue order that the Respondents do bear the costs of this petition.
  - j. This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient for the ends of justice (Reproduced verbatim)
4. Filed together with the Petition was a Motion under certificate of urgency which the court heard and ordered that the status quo be maintained pending the disposal of the petition. The Respondent's application dated 29<sup>th</sup> July, 2024 seeking the setting aside of status quo orders was withdrawn on 19<sup>th</sup> September, 2024 and parties directed to dispose of the petition by way of written submissions. Both parties filed and exchanged submissions.

#### **The Petitioner's Case**

5. It is the Petitioner's case that on 5<sup>th</sup> June 2024, the 2<sup>nd</sup> Respondent sexually harassed her as a result of which she absconded duty for four days and when she reported back, she raised issues concerning payments and bank withdrawals made by the 2<sup>nd</sup> Respondent in her absence. According to the Petitioner, the 2<sup>nd</sup> Respondent became harsh and swore to dismiss her from work or make her working conditions unbearable.
6. It is the Petitioner's case that the 2<sup>nd</sup> Respondent invoked his threat on 4<sup>th</sup> July 2024 as the secretary of the 1<sup>st</sup> Respondent by advertising a vacancy in the office of the bursar without the resolution or approval of the 1<sup>st</sup> Respondent.
7. The Petitioner contends that further to the notice, the 2<sup>nd</sup> Respondent asked her to present to him account records, which action according to the Petitioner, indicated that she had been dismissed from work. The Petitioner further averred that the 2<sup>nd</sup> Respondent locked the accounts office where the Petitioner was operating thus rendering her services useless.
8. The Petitioner avers that the actions of the 2<sup>nd</sup> Respondent, which the 1<sup>st</sup> Respondent failed to act upon, violated her constitutional rights.

#### **The Respondents' case**

9. The Respondents opposed the petition vide a replying affidavit sworn by Ondialah G. Olang, the 2<sup>nd</sup> Respondent herein in which he denies the averments of the Petitioner in the petition and the affidavit in support thereof as well as the averments in the Petitioner's application. it is the position of the Respondents.
10. The Respondents state that the Petitioner was employed by the 1<sup>st</sup> Respondent on 30<sup>th</sup> December, 2018. The Respondent's deny that there is any intention to terminate the employment of the Petitioner as alleged in her petition.



11. According to the Respondents, the Petitioner who was employed as Accounts Assistant has been unable to perform her roles due to grave incompetence.
12. The 2<sup>nd</sup> Respondent denies that he has ever developed any sexual attraction towards the Petitioner and has never approached her for any sexual favours.
13. The 1<sup>st</sup> Respondents avers that on 5<sup>th</sup> June 2024 when the Petitioner avers that he sexually harassed her, he left the school at 12.41 pm for official duties outside the school and he did not report back until the following day. That on the same day the Petitioner worked up to 5.50 pm as is evident from Annexures “ODO1A”, “OGO1B”, “OGO1C” “OGO1D” and “OGO2” of the Replying Affidavit which are attendance registers for both teaching and non-teaching staff for the relevant dates.
14. He states that he was personally aware from discussions with the Chairperson of the 1<sup>st</sup> Respondent that she never contacted the Petitioner to persuade her to report back to work as averred in the Petitioner’s affidavit as the Petitioner was in school for the whole of the period she alleges to have been away because of sexual harassment by the 2<sup>nd</sup> Respondent.
15. The 2<sup>nd</sup> Respondent deposes that he is the accounting officer of the 1<sup>st</sup> Respondent and does not need to consult the Petitioner before expending school funds. That he reports to the 1<sup>st</sup> Respondent.
16. On the advertisement for the position of bursar, the 2<sup>nd</sup> Respondent deposes that this was a decision of the 1<sup>st</sup> Respondent due to the fact that the school has been growing and requires the professional services of a qualified bursar as the Petitioner, apart from not being a qualified accountant, has been incompetent in the performance of her roles compelling the Respondents to hire services of external accountants to do their accounts.
17. It is the position of the Respondents that the recruitment of a bursar was recommended by County Schools Auditor after noting that the 1<sup>st</sup> Respondent had not onboarded the school onto the digitized IPSAS-Integrated Public Sector Accounting Standards as directed by the Auditor General.
18. It was the position of the Respondents that the school had purchased the natshule system from National Bank but the Petitioner was unable to onboard the accounts system onto the same due to her incompetence.
19. It is the averment of the Respondents that the Petitioner has been sponsored by the school to attend several workshops to improve her skills but there was no improvement in her performance.
20. It is the averment of the Respondents that the Petitioner left the school on 4<sup>th</sup> July, 2024 during working hours of her own volition and did not report back until 23<sup>rd</sup> July, 2024 the Respondents had been served with the proceedings and status quo orders from this court in the instant suit.
21. It is deposed that the Petitioner is no stranger to controversies as she had been warned severally for on at least seven different occasions for infractions including absenteeism, insubordination, unbecoming behavior, insulting a teacher, negligence of duty and indiscipline. Copies of letters issued to the Petitioner were attached to the replying affidavit at “OGO9” to “OGO15”
22. It is submitted that the Petitioner moved to court based on mere suspicion and innuendos.

### **Submissions**

23. On 15<sup>th</sup> September 2024, the court directed that the Petition to be disposed of by way of written submissions. Only the Respondents filed written submissions dated 22<sup>nd</sup> October 2024.
24. The Respondents in their submissions, framed the issues for determination to be:



- i. Whether the Petition meets the required threshold of Anarita Karemi
  - ii. Whether the Petitioner was constructively dismissed
  - iii. Whether the recruitment of a qualified bursar by the Respondents violates any rights of the Petitioner
25. On the first issue, the Respondents submit that the court has no jurisdiction to determine rights under Article 31, 43(1)(a), 49, 50(2) and 53 of *the Constitution*. According to the Respondents, the only time that the court can deal with a violation of a right that is outside its jurisdiction is when the same are intertwined such that one cannot be determined without determining the others and where the main issues fall under section 12 of the Employment and *Labour Relations Act*.
  26. It is the Respondents' further submission that the Petitioner has alleged contravention of her right to privacy under Article 31, economic rights under Article 43, the rights of arrested persons under Article 49, the right to a fair hearing pursuant to Article 50 and the rights of children under Article 53 of *the Constitution*. That there is no narrative on how the alleged violations are related to the cause of action brought by the Petitioner in the petition herein.
  27. In addition, it is submitted that the Petition does not meet the principles set out in the case of Mumo Matemu and Anarita Karimi as the Petitioner has just stated that various Articles of *the Constitution* were violated but has not explained how the violations occurred.
  28. Regarding the second issue, the Respondents have submitted that the Petitioner alleges that she was sexually harassed by the 2<sup>nd</sup> Respondent which action amounts to constructive dismissal but she failed to explain in detail how she was sexually harassed.
  29. According to the Respondents, sexual harassment is a broad term and the court is required to arrive at the decision whether the actions the Petitioner alleges fall under the definition of sexual harassment. In this regard, it is the Respondents submissions that it is not enough for the Petitioner to merely state that she was sexually harassed or forced to have sexual relationship. That she ought to have given details of how she was sexually harassed so as to enable the court to reach a determination whether the factual background amounts to sexual harassment.
  30. The Respondents have submitted that the 2<sup>nd</sup> Respondent in denying the claims of sexually harassing the Petitioner on 5<sup>th</sup> June 2024 attached attendance sheets showing that he left office on 5<sup>th</sup> June 2024 at 12.41pm while the Petitioner left office at 5pm on the said date. It is stated that the Petitioner reported to work the next day.
  31. While citing section 6 of the *Employment Act*, the Respondents submit that the allegations set out by the Petitioner do not meet the definition of sexual harassment as set out in section 6 as she did not provide details and proof of sexual harassment.
  32. It is therefore the Respondents' submissions that the unfounded allegations of sexual harassment cannot amount to constructive dismissal as espoused in the case of Milton M. Isaya v Aga Khan Hospital Kisumu (2017) eKLR and Nathan Ogada Atiagaga v David Engineering Ltd (2015) eKLR.
  33. On the third issue whether the recruitment of a qualified bursar by the Respondents violate the rights of the Petitioner, it has been submitted that the Petitioner has a record of controversy, indiscipline, insubordination, disrespect, absenteeism and incompetence. According to the Respondents, the Petitioner has been facilitated on career development but despite all the efforts by the Respondents, the school's accounting department remains crippled in the wake of the growing population of students



and the need to embrace lawful procurement procedures to facilitate smooth running of the operations of the school.

34. The Respondents submit that the school has always been forced to outsource accounting personnel to assist the Petitioner in preparation of accounting documentation. Further, that the County Schools auditor recommended the recruitment of a qualified bursar as evidenced by the letter marked OGO8.
35. In this regard, it is the Respondents submission that owing to the Petitioner's incompetence, they adhered with the law clearly set out in the employment laws in dealing with the Petitioner before advertising for the position of bursar. To buttress this point, the Respondents cited the case of Maina Mwangi v Thika Coffee Mills Limited (2012) eKLR.
36. The Respondents have also submitted that the Petition is hinged on mere suspicion and unfounded basis of sexual harassment and that the recruitment of a bursar is meant to dismiss her from employment yet the 1<sup>st</sup> Respondent has not made a decision to dismiss her. It is submitted that these actions do not infringe on any of the Petitioner's rights.
37. The Respondents urged the court to allow the 1<sup>st</sup> Respondent proceed to recruit a qualified accountant to enable it provide quality and timely services in the public interest.
38. The court was also urged to dismiss the Petition with costs.

### **Determination**

39. Upon analyzing the Petition and the submissions on record, I find that the issues that fall for this court's determination are:
  - i. Whether the court has jurisdiction to determine this Petition
  - ii. Whether the Petition meets the threshold of a constitutional petition, and if so
  - iii. Whether the Respondents violated the Petitioner's constitutional rights as alleged.
  - iv. What orders should issue

### **Whether the court has jurisdiction to determine this Petition**

40. The Respondents in their submissions contended that this court has no jurisdiction to determine the instant suit and averred that the only time that this court can deal with a violation of a right that is outside its jurisdiction is when the same are intertwined such that one cannot be determined without determining the other and the main issue falls under section 12 of the *Employment Act*.
41. The jurisdiction of this court to hear and determine constitutional disputes has been discussed by all levels of the superior courts of Kenya. In the case of International Centre for Insect Physiology and Ecology (ICIPE) v Nancy McNally (2018) eKLR, the Court of Appeal observed as follows:
  - “27. There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) v Attorney General (2012) eKLR which was upheld by this court in Daniel N Mugendi v Kenyatta University & 3 others.”



42. In the case of *United States International University v Attorney General* (supra), the Court observed as follows;

“(41) Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret *the Constitution*, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law...”

“[44] ...The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to interpret *the constitution* and fundamental rights in Article 41 and freedoms is incidental to the exercise of jurisdiction over matters within its conclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of *the Constitution* within a matter before it.”

43. From the above authorities, it is clear that this court is clothed with the requisite jurisdiction to hear and determine the dispute herein.

#### **Whether the Petition meets the threshold of a Constitutional Petition**

44. In their submissions, the Respondents argued that the Petition has not been precisely framed to meet the standard required for pleading in Constitutional petitions relying on the decisions in *Anarita Karimi Njeru* (No. 2) [ 1979] KLR 154 and *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR.

45. In the celebrated case of *Anarita Karimi Njeru* (Supra) the court set out the criteria that a matter must meet for it to qualify as a Constitutional Petition. It held: -

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

46. This principle was reaffirmed by the Court of Appeal in the Case of *Mumo Matemo v Trusted Society of Human Rights, Alliance & 5 others* (2013) eKLR where it was observed as follows:-

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* (supra). In view of this we find the petition before the High Court did not meet the threshold established in that case. At the very least the 1<sup>st</sup> Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made



reference to. In view of the substantive nature of the shortcomings, it was not enough for the Superior Court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting” without requiring remedy by the 1<sup>st</sup> Respondent.”

47. In the petition filed herein the Petitioner cited Articles 25(c), 27, 28, 29, 31, 32, 41, 43(1)(a), 45, 50(2) and 53 of the Constitution alleging that the Respondents violated her rights under those articles. However, as rightly submitted by the Respondents, apart from Articles 27, 28 and 41 of the Constitution, I do not see the relevance of the rest of the Articles. Further, even with regard to Article 27 on equality and freedom from discrimination, Article 28 on human dignity and Article 41 on fair labour practices which the Petitioner cited, the Petitioner has not pleaded with reasonable clarity how the said provisions have been violated and the extent of the violations, if any.
48. Flowing from the above analysis, it is my considered view that the Petition as drafted does not meet the threshold of a petition as set out in the Anarita Karimi’s case and emphasized in Mumo Matemu’s case. (supra).
49. I further find that the Petitioner has failed to demonstrate that any of her fundamental rights and freedoms under the cited provisions of the Constitution have been breached by the Respondents.
50. I further find that the Petitioner has not proved either that she was constructively dismissed or that she was sexually harassed by the 2<sup>nd</sup> Respondent as alleged in her petition.
51. Consequently, I find that the petition is without merit. The Petition is accordingly dismissed. Each party shall bear its costs.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

**M. ONYANGO**

**JUDGE**

