



**Aliela v Kenton College Trust & another (Employment and Labour Relations
Petition E084 of 2022) [2023] KEELRC 226 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 226 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E084 OF 2022

K OCHARO, J

JANUARY 26, 2023

**IN THE MATTER OF ARTICLE 1, 2, 3 [1], 10, 19, 20, 21, 22, 23, 27[1][2] & [3], 28, 41[1],
47[1] & [2], 48, 50[1], 165[3][B] & 258[1] OF THE CONSTITUTION OF KENYA [2010]**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 27[1], [2] & [3], 28,
41[1], 47[1] AND 50[1] OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF RULES 4, 10, 11 AND 20 OF THE CONSTITUTION
OF KENYA [SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL]
HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACT

AND

IN THE MATTER OF SECTIONS 41, 44, 45, 49 & 51 OF EMPLOYMENT ACT

BETWEEN

LYDIA EDNA ALIELA PETITIONER

AND

KENTON COLLEGE TRUST 1ST RESPONDENT

KENTON COLLEGE PREPARATORY SCHOOL 2ND RESPONDENT



JUDGMENT

Introduction

1. Through a Petition herein dated 24th May 2022, the Petitioner seeks from this Court the following orders: -
 - a) A declaration be and is hereby issued that the termination of employment of the Petitioner on grounds of gross misconduct was unprocedural, unlawful, unjustified and or unfair and in violation of Articles 10, 27, 28, 41 and 47 of *the Constitution* of Kenya 2010 and sections 5, 45, 46 of the Employment 2007.
 - b) An order of certiorari do issue quashing the dismissal of the Petitioner by the Respondents.
 - c) An order of mandamus do issue directing the 1st Respondent to reinstate the Petitioner's employment in the same position or a similar one with similar terms of employment.
 - d) General damages for breach of the Petitioner's right to fair labour practices.
 - e) Costs of this suit.
 - f) In the alternative, the 1st Respondent to compute and pay the Petitioner the dues she would have earned up to the time of retirement.
 - g) Interest thereon.
 - h) Any other relief the court deems fit to grant in the circumstances.
2. She contemporaneously with the Petition, filed an application of the even date wherein she sought:
 - a) That the instant application and Petition be certified as urgent and the same be heard ex-parte in the first instance.
 - b) That pending the hearing and determination of this application and Petition, the Honourable Court be pleased to maintain the status quo ante the occurrences of 12/11/2021 with respect to the payment of the Petitioner /applicant's salary.
 - c) That pending hearing and determination of Kibera Criminal Case Number 2673 of 2021 between Republic v Lydia E. Aliela the Honourable Court order that status quo ante occurrences of 12/11/2021 with respect to the payment of the Petitioner's/applicant's salary maintained.
 - d) That the costs of this application be provided for.
 - e) Any other further relief that the court may deem fit.
3. However, for the interest of an expeditious disposal of the Petition, the parties agreed to have the application marked abandoned and it was so marked, to allow the Petition be proceeded with.
4. Imperative to state that the Respondent opposes the Petition upon premise of the grounds obtaining on the affidavit herein filed sworn by Susan Mungai on the 14th October 2022.
5. Directions were given that the Petition be canvassed by way of written submission. The parties did oblige and file their respective submissions.



The Petitioner's Case

6. The Petitioner states that she got into the employment of the Respondent on or about the 1st November, 2002 through a letter of appointment of the even date. It was a term of her appointment, that she was to be confirmed into employment after successfully serving a three months' probation period. Her confirmation came in on the 3rd February, 2003. Her gross salary was Kshs. 401,894.00.
7. She states that on or about the 12th November 2021, she was suspected of stealing water, chips, Royco tin, sungold cooking oil, steel wool, bread, cooking oil, soap, one kenchic frozen chicken of 1.6 kg, items that were found in her car, all valued at Kshs. 17,644.55, the property of the Respondent.
8. By a letter dated 14th November 2021, she was suspended from employment to enable the Respondent carry out investigation on the accusation.
9. The Petitioner avers that through a letter dated 23rd November 2021 she was invited to attend a disciplinary hearing that had been slated for the 3rd December 2021. According to her the period given between the date of the letter and the appointed date of the hearing was inadequate for preparation of her defence. Immediately after the hearing, she was, under the instructions of the Respondent, arrested by police officers from Kileleshwa Police station.
10. Subsequent to the disciplinary hearing, the Respondent decided to summarily dismiss her on the 15th December 2021. Despite her indication that she was to assail the decision by way of an appeal through the Respondent's internal mechanisms, the Respondent instituted criminal charges against her, through Kibera Magistrate's Court, criminal case number 2593 of 2021 – Republic v Lydia E. Aliela.
11. She contends that the Respondent's action of dismissing her and pressing criminal charges against her even before she would exhaust the internal appeal process amounted to double punishment a thing contrary to the best labour practices.
12. The Petitioner avers that the manner in which the Respondent effected the dismissal amounted to an abuse of fair trial and consequently a breach of sections 5, 41, 43, 44, 45 of the Employment Act, 2007.
13. She further asserts that the Respondent failed to give her adequate time to prepare for her defence, resultantly breaching her right to a fair trial.
14. The dismissal was without first establishing the conditions set out in section 44 of the employment Act 2007. Consequently, it was unfair by dint of the provisions of section 45 [1] of the Employment Act 2007.

The Respondent's Response

15. The Respondent states that on or about the 12th November 2021, the Petitioner was found in possession of various items in her car, including two jerrycans of 20 litres of sungold cooking oil, one jerrycan of 20 litres of soilex baklin soap, one jerrycan of 20 litres of soilex supa wash soap, one Royco tin of 500 grams, four pieces of sufuria steel wool of 75 grams, six pieces of supa brite scouring pad, two pieces of mega Klecnit sufuria scrubber, one bread of 800 grams, one kenchic frozen chicken of 1.6 kilogram, all valued at seventeen thousand five hundred and forty four Kenya shillings.
16. The Respondent contended that the Petitioner's conduct amounted to stealing since she took the items without its authority. Following the incident, the Petitioner was placed under an investigatory suspension, on the 15th November 2021.



17. It is averred further that on the 23rd November 2021, the Petitioner was issued with a letter notifying her of a disciplinary hearing that was slated for the 3rd December 2021. In the stated letter, her right of accompaniment was expressed.
18. Upon receipt of the notification letter, which was sent through her email address, the Petitioner confirmed receipt of the same, and confirmed that she was to attend the disciplinary hearing. She even sought for a clarification on the issue of accompaniment.
19. The Respondent avers that the disciplinary hearing was held on the December 2021 as scheduled, the Petitioner appeared and made her representations before the disciplinary panel. Subsequently, the minutes of the hearing were sent to the Petitioner under cover of an email dated 7th December 2021, for her review, which email she never responded to. Reminders thereafter did not elicit any response either.
20. The disciplinary panel sat on the 8th December 2021, deliberated on the matter, and found the Petitioner's conduct as one that warranted a summary dismissal. In the circumstances of the matter the Petitioner was rightfully dismissed pursuant to Clause 13 [c] of the contract of employment. The Petitioner was guilty of gross misconduct, in accordance with section 44 [g] of the *Employment Act*.
21. The Respondent further states that it had a right under Clause 10.9 to impose an investigatory suspension on the Petitioner.
22. In conformity with the procedural requirements under section 41 [2] of the *Employment Act*, 2007, the Petitioner was notified of the grounds upon which the Respondent intended to take action against her, she was invited to make a representation on the grounds, her right of accompaniment was extended to her, and she indeed made the representation.
23. The duration given to the Petitioner of 9 [nine] days to prepare for her defence was adequate. In any event she did not at any time either before or on the hearing date protest the duration as being insufficient.
24. On the Petitioner's contention that pressing for the criminal charges amounted to double jeopardy, the Respondent stated that the disciplinary process and the criminal law process were distinct processes, and the fact that the Respondent had engaged the former did not in any manner diminish or eradicate its right to pursue the latter.
25. The Respondent contended further that the existence of the criminal charges would not in any manner prevent the Petitioner from appealing against the Disciplinary Committee's decision. The Respondent's disciplinary Rules provided for the appeal procedure. Any employee aggrieved by and who wished to appeal against the decision of the committee will notify the Head Teacher in writing within 14 days stating reasons for the intended appeal. The Head Teacher will then forward the notice to a director of the Respondent who would give the employee a hearing and the decision of the Board would be final.
26. The reason given by the Petitioner for her failure to appeal stands on no firm ground as; the Head Teacher's role under the Rules is only limited to forwarding an intended appeal to the Director of the school; the Head Teacher does not sit in the Appeals Committee and plays no role in the determination of an appeal; she did not make any attempt to pursue the appeal mechanism to test its fairness and efficacy.
27. The Respondent asserted that where a party approaches court through a constitutional claim, such a party is enjoined to specifically put forth the rights violated, constitutional violations and the manner



how. In the instant matter the Petitioner only went to the extent of citing constitutional provisions, without demonstrating how the same were violated by the Respondents.

28. The order of mandamus can only be available if the Respondents were shown to have failed to perform a statutory duty imposed upon them. By reason of the circumstances of this matter, it is clear that the Respondents did comply with all that was required of them.
29. The Petitioner deserves not, the reliefs sought.

The Petitioner's Submissions

30. The Petitioner cited three principal issues for determination by this Court, thus:
 - (i) Whether the Petitioner was accorded adequate opportunity to challenge her dismissal using the internally laid mechanisms by the Respondent.
 - (ii) Whether the dismissal was fair and just.
 - (iii) Whether the prayers sought are merited.
31. On the first issue counsel for the Respondent argued that the Respondent's appeal mechanism is one that gives the Head Teacher a sole discretion to either forward or not, the intended appeal to the Director. The Rules do not in any way stipulate how the director to whom the appeal is forwarded would be selected. The Rules consider the decision of the director to be that of the Board, yet the Board itself does not deliberate on the appeal.
32. It is further submitted that the duration of 9 [nine] days that the Petitioner was given to prepare for her defence was inadequate. According to the Petitioner's counsel the standard duration is 14 or 21 days. The Petitioner could not seek any further indulgence as the same would be a futile exercise, the Respondent had a pre-determined mind.
33. The Petitioner's counsel argued that the appeal was not filed for the following reason:
 - a) The Petitioner had no time since there was a criminal matter in court by the Respondents.
 - b) Two Board members, Headmistress and Chairman of the Board were part of the Respondent's witnesses in the criminal matter.
 - c) Once a matter is in a competent court of law, all other internal procedures stop until determination of the matter.
 - d) Alternatively, all internal mechanisms ought to be completed before taking a matter to a court of law.
34. On whether the dismissal was fair and just, counsel for the Petitioner stated that Article 41 [1] of *the constitution* of Kenya provides every person a right to fair labour practices.
35. Counsel submitted that, section 41 elaborately provides for the procedure to be adhered to by an employer before termination of an employee's employment, to support this point reliance was on the court of Appeal decision in Pius Machafu Isundu v Lavington Security Guards Limited [2017] eKLR.
36. In all forms of employment terminations, there must be substantive and procedural fairness as was expressed in the case of Titus Muriuki Ndirangu v Beverly School of Kenya Limited [2022] eKLR.
37. Considering the circumstances of the dismissal of the Petitioner, there can be no doubt that the same was wanting in procedural and substantive fairness; it was submitted.



38. Lastly, on the issue as to whether the prayers sought are merited, Counsel submitted that the Petitioner was unfairly dismissed and consequently denied a chance to enjoy her salary. She was denied her dues since 15/12/2021 contrary to the stipulations of Article 41 [1] of *the Constitution* of Kenya 2010.
39. Counsel concluded that the Petitioner's Petition is merited, it meets the threshold established in the case of Republic -vs- Anarita Karimi Njeru.

The Respondent's Submissions

40. The Respondents suggest the following issues for determination, thus:
- (a) Whether the Petitioner's Petition has satisfied the prerequisites of a constitutional Petition;
 - (b) Whether the Petitioner's employment termination was premised on fair and valid reasons;
 - (c) Whether the Petitioner was accorded a fair hearing before her employment was terminated; and
 - (d) Whether the Petitioner should be granted the prayers sought.
41. Counsel submits that Rule 7 of the Employment and Labour Relations Court [procedure] Rules, 2016 dictates that a party who wishes to undertake a constitutional litigation shall do it in consonance with *the Constitution* of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*] Practice and Procedure Rules, 2012.
42. It was argued that courts have adopted an approach that asserts that the constitutional Petitions should be limited to instances where it is absolutely necessary. To buttress this, the decision in KKB v SCM & 5 others [Constitutional Petition 014 of 2020] [2022][KEHL 289 [KRR] was cited, thus:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the court will entertain The doctrine of avoidance was fortified in Sports and Recreation Commission v sigittarious Wrestling club & another in which Ebrahim J.A. said the following:

“.....courts will not normally consider a constitutional question unless the existence of a remedy depends upon it: if the remedy is available to a Petitioner under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.”

43. On the doctrine of constitutional avoidance further reliance has been placed on the holding in Makori Beatrice Kwamboka v Kenya Airways Limite eKLR [2021] eKLR in which the holding in S. v Mhulungu [1995] [3] SA 867 [CC] 50 was cited with approval thus:

“I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed.”



And on *Lugo v Director of Public Prosecutions* [2022] KEHC 10574 [KAR] where it was held:

“A constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of constitutional issues until it becomes very necessary to extent that it is the only course available to assist the litigant’s cause.”

44. The Petitioner ought not have approached the constitutional path without any reasonable justification, like is here. This court should decline the Petition.

45. It is submitted that the Petitioner cited several Articles of *the Constitution* claiming that they have been violated. However, she has not in any manner with particularity stated how the alleged rights have been violated. The Petition does not meet the requisites for a properly presented Petition as was established in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, that:

“We would, however, again stress that 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 a reasonable degree of precision that, of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

46. Section 41 of the *Employment Act* was complied with. Through the letter dated 23rd November 2021, the Petitioner was notified of the Respondents’ intention and the grounds of misconduct. Thereafter, she was granted an opportunity to be heard in a disciplinary hearing that was held on the 3rd December 2021. The right of accompaniment was extended to her. The Respondents duly adhered to the procedure stipulated in their Human Resource Manual Appendix II.

47. The Petitioner’s assertion that the provisions of section 44 of the *Employment Act*, were breached, is ill founded. Section 44 of the *Employment Act* provides for when a summary dismissal may occur. In a matter where an employee is dismissed summarily, notice is not a pre-requisite.

48. Under section 44 [3] of the *Employment Act*, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract. The incident of theft involving the Petitioner was indicative of the Petitioner’s fundamental breach of her obligations under her contract of service. The Petitioner’s conduct was one that could justify a summary dismissal under section 44 [4] [g] of the Act. Reliance was placed on the decision in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] , to bolster this point.

49. The Respondent’s counsel submitted further that the Petitioner cannot assail the Respondents’ appeal mechanism, yet she never filed any appeal and tested the efficacy of the mechanism. In this submission the Respondent sought support from the holding in *JJ Okwaro & Co. Limited v Firearms Licensing Board* wherein the case of *Dawala J. Jawara v Gambia ACMHPR 147/95 – 149/96* wherein the African Commission of People and Human Rights held:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if the offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] “



50. On the Petitioner’s assertion that the criminal process affected her right of appeal, and that she was subjected to double jeopardy, the Respondent’s Counsel submitted that engaging the two processes not tantamount to double punishment. To support this position, reliance was placed on the case in *Jeremiah Gitau Kiereini v Capital Markets Authority and the Attorney General* [2013] eKLR where Justice Majanja stated:

“Double jeopardy rule strictly applies to criminal offences and not disciplinary proceedings or proceedings of administrative nature such as concerning the Petitioner.”

51. And the case of *Gladys J. Cheroni v Board of Trustees NSSF & another* [2021] eKLR where this Court held:

“..... being subjected to internal disciplinary process and also criminal proceedings cannot amount to double jeopardy. In any case, this court has also previously ruled that internal disciplinary processes and criminal processes are two independent processes and therefore can proceed side by side and none can bar the other from proceeding”.

52. Having failed to demonstrate that the summary dismissal was unfair, and the Petition being one that is wanting in the prerequisites necessary for a properly presented Petition, it should be dismissed.

Analysis and Determination

53. From the material placed before me inclusive of the submissions by the parties, the following issues present themselves for determination:

- a) Whether the Petitioner’s Petition herein meets the threshold of a properly presented petition.
- b) What is the consequence if the answer to [a] above is it the negative?
- c) Whether the dismissal of the Petitioner’s employment was fair.
- d) Who should bear the costs of this suit?

Whether the Petitioner’s Petition herein meets the threshold if a properly presented Petition.

54. The Respondent’s Counsel submitted that the Petitioner’s Petition herein does not meet the prerequisites for a proper constitutional Petition and as such it should be dismissed. On the other hand, Counsel for the Petitioner submitted that the Petition meets the threshold established in the *Anarita Karimi* case [supra].

55. It is a trite principle of constitutional litigation that where a party seeks reliefs through a constitutional Petition on basis of an alleged violation of *the constitution*, constitutional rights and fundamental freedoms, he or she must plead with a higher degree of precision; show the constitutional or fundamental freedoms violated, the manner of violation, the constitutional provision in question or violated and the jurisdictional basis for the litigation. This is the threshold that was established in the *Anarita Karimi Njeru v Attorney General* [1979] eKLR case, when the court held:

“Where a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”



This principle was echoed by the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, thus:

“..... although Article 22 [1] of *the Constitution* given every person the right to initiate proceedings claiming that a fundamental right[s] has been violated, denied or infringed a party invoking that Article has to show the rights said to be infringed as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru -vs- Republic [1979] eKLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have contravened and the manifestation of the contravention or infringement.”

56. It is in light of the foregoing that I turn to consider the Petition and determine whether it meets the threshold. In the Petition, the Petitioner has put forth Articles 27 [1], [2] and [3], 28, 41, 47 [1] and 50 [1] of *the Constitution* as the foundation for her grievance. I have carefully studied the Petition, all that the Petitioner has done elaborately is setting out what these constitutional provisions stipulate and in fact picked almost word by word from *the Constitution*. However, the Petition is too insufficient in content on how the fundamental rights and freedoms have been violated or are threatened to be violated as they relate to the Petitioner.
57. The “manner of violation” section, that is Part IV of the Petition states,
- “ 24. By failing to give the Petitioner adequate time to prepare a defence and/or face her accusers the Respondent breached the Petitioner’s fundamental rights of the fair trial.
 - 25. By dismissing the Petitioner and charging the Petitioner in criminal court simultaneously, the Respondents breached the ILO best labour practices in managing conflict and disputes between the employer and employees.
 - 26. By summarily dismissing the Petitioner without establishing that the conditions stated in section 44 of the *Employment Act* 2007 are met, the Respondents treated the Petitioner unfairly contrary to section 45 [1] of the *employment Act* 2007.
 - 27. By summarily dismissing the Petitioner and charging her in a criminal court the Respondents exposed the Petitioner to double punishment.”
58. No doubt, this is not what is meant by pleading with a reasonable degree of precision. Mere general statements like I am seeing here do not help the Petition meet the legal threshold.
59. What is before me raises not any constitutional issues. It is not surprising therefore, that the Petitioner’s Counsel does not even in a single line in their submissions submit on the specific rights and any violation thereof.
60. Still under the forestated issue, I now turn to discuss the principle of constitutional avoidance, how it relates to, and its import on, the Petition herein.



61. In *KKB v SCM & 5 others* [Constitutional Petition 014 of 2020] [2022] KEHC 289 [KLR] on the Principle, Justice Mativo, stated and I agree, thus:

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the Constitutional arguments that the courts will entertain

The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and another* 2001 [2] ZLR 501 [J] in which Ebrahim J.A. said the following:

“..... Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it, if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.”

62. The Constitutional Court of Zimbabwe in *Chawira & others v Minister of Justice Legal and Parliamentary Affairs & others* held:

“As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.”

63. The Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others -vs- Royal Media Services Limited & 5 others* [2014] eKLR stated on the principle:

“[256]. The Appellants in this are seeking to invoke the “Principle of avoidance.” Also known as “Constitutional avoidance”: The Principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S. v Mhlunou*, [1905] [3] S.A. 867 [CC] the Constitutional Court Kentridge A.J articulated the Principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, Civil or Criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257]. Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of [*Ashwander -vs- Tennessee Valley Authority*, 297 U.S. 288, 347 [1936].”

64. In the case of *COD & another -vs- Nairobi City Water & Sewerage Company Limited* [2015] eKLR, the Court stated:

“ 11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact *the constitution* is a solemn document, and should not be a substitute for remedying emotional



personal questions or mere control of excesses within the Administrative Processes I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it [with] all the liberalism they can Marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

12. the Supreme Court of India also has held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner as provided under statute. For instance, see Re Application by Bahadur [1986] LRC [Const]. the Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringement of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not *the constitution*. This case highlights the un-wisdom of ignoring that advice

The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and actions of man. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at Section 14, yet, as has been proclaimed by the highest Court in the land, it is not “a general substitute for the normal procedures for invoking Judicial Control of Administrative Action.” [see Harrikison v A.G. [1979] 3 WKR 62].

65. The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow, only to be travelled in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under *the Constitution*. Where a dispute can be litigated under common law or statute, the best course is to have it litigated thereunder. It matters not that alternatively it can be litigated under *the Constitution*.
66. Considering the premises hereinabove, I have no doubt that the dispute presented before this Court by way of the Petition is one that would be addressed under the *Employment Act* 2007, duly. The suit ought to have been pursued in the ordinary manner under statute.
67. In the upshot, I conclude that the principle of constitutional avoidance militates against the Petition. Too that it does not meet the threshold established in the Anarita Karimi case[supra].

Of the consequence of the finding

68. Having found as I have hereinabove the Petition herein becomes a fit candidate for dismissal, and it is hereby dismissed.
69. Having decided as hereinabove I find it not fit to delve into the fairness or otherwise in the Petitioner’s dismissal from employment.
70. The Petitioner to bear the costs of this petition.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY, 2023.

.....

OCHARO KEBIRA

JUDGE



In presence of

Ms. Makili for Mr. Makena for the Petitioner.

Mr. Muchiri holding brief for Ms Njuguna for respondent.

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 15th March 2020 and subsequent directions of 21st 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.**

.....

Ocharo Kebira

Judge

