



REPUBLIC OF KENYA



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**Omukatia v Kenvic School (Petition 3 of 2021)
[2023] KEELRC 753 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 753 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
PETITION 3 OF 2021
MA ONYANGO, J
MARCH 23, 2023**

BETWEEN

FRANCIS FWOBE OMUKATIA PETITIONER

AND

KENVIC SCHOOL RESPONDENT

JUDGMENT

1. The Respondent is a private primary school registered in Kenya and regulated by the Ministry of Education.
2. The Petitioner, a male adult resident of Kajiado County was until 1st March 2021, an employee of the Respondent having been engaged as a driver from 2006.
3. In his petition dated 30th August 2021 which is supported by his affidavit sworn on even date and further affidavit sworn on 22nd November, 2021 the Petitioner avers that the Respondent violated his rights under Articles 2, 3, (1), 19, 20, 21, 22, 23, 24, 10, 259, 27(1),(2)and(5), 35(1)(b) and 41 of *the Constitution* of Kenya 2010. In particular, the Petitioner avers that the Respondent -
 - i. Disrespected, failed to uphold and defend *the Constitution*;
 - ii. Ignored or neglected the national principles and values of the rule of law, human Rights, non-discrimination, good governance and social Justice;
 - iii. Failed to treat the Petitioner equally in law by giving him his benefits and entitlements under law;
 - iv. Failed to give Petitioner access to information necessary for protection of his constitutional Rights



4. The Petitioner further avers that the Respondent failed to comply with employment law statutes and constructively dismissed him from service and/or unfairly terminated his employment.
5. The Petitioner seeks the following reliefs:
 - a. A declaration be and is hereby given that the Petitioner is entitled to equal protection in law, equal benefit of the law, full and equal enjoyment of all fundamental rights and freedoms.
 - b. A declaration be and is hereby given that the Petitioner's Constitutional Rights have been violated by the Respondent.
 - c. A declaration be and is hereby given that the Petitioner's International Labour Rights have been violated by the Respondent.
 - d. A declaration be and is hereby given that the Respondent denied the Petitioner his benefits under law.
 - e. A declaration be and is hereby given that the Respondent has violated sections 3,5,7,8,9,10, 11,12, 13,14,16,17,18,19,20,28,31,35, 40, 51 and 88 of the Employment Act No. 11 of 2012, Section 4, 45, 46, 47, 48, and 50 50 of the Labour Institutions Act No. 12 of 2012, Section 20, 22, 27 and 55 of the National Social Security Fund Act of 2014.
 - f. An order of mandamus be and is hereby issued compelling the Respondent to issue the Petitioner with a certificate of service.
 - g. An order of mandamus be and is hereby issued compelling the Respondent to pay the following unremitted payments as calculated in the schedule:
 - i. House allowance Ksh.533,613.36/=
 - ii. Weekly Rest Day Ksh.1,010,688/=
 - iii. Annual Leave Ksh.278,405.40/=
 - iv. Unremitted NSSF Contributions Ksh.199,640/=
 - v. Service pay Ksh.107,088.45/=
 - h. An order of mandamus be and is hereby issued compelling the Respondent to pay Compensation for constructive dismissal/unfair termination Ksh 276,000/=.
 - i. General Damages for Constitutional violations Ksh.1,000,000/=.
 - j. Petitioner be granted the cost of this petition.
 - k. Interest in (g), (h), (i) and (j) from the date of filling the petition.
6. In response to the petition the Respondent filed a replying affidavit of VICTORIA MUTHONI GAKAMI, a director of the Respondent who states that following the closure of schools by the Government due to Covid-19 Pandemic all staff including the Petitioner were sent on unpaid leave as the Respondent who is a private school and earns its income exclusively from school fees, was not in a position to sustain the staff during the period when the school was closed indefinitely.
7. Ms. Gakami depones that when schools reopened the Petitioner did not report back. That on 1st March 2021 the Petitioner sent a resignation letter to the Respondent.



8. The affiant denies that the Petitioner worked under harsh conditions as averred in the petition and supporting affidavits. She states that the only responsibility of the Petitioner was to pick students and ferry them to school in the morning and back in the evening from Mondays to Fridays. That the Petitioner was not discriminated as he was treated in the same way as other staff of the Respondent.
9. On the averment that the Petitioner did not take annual leave for the entire period he worked for the Respondent, Ms. Gakami states that the school closed for holidays in April, August, September and December every year and the Petitioner, like all other staff took leave during the period when school was closed. He was thus on annual paid leave for over 90 days each year.
10. On the allegation by the Petitioner that the Petitioner was not paid house allowance, the affiant states that the Petitioner's salary which was Ksh. 12,000 per month at the time of engagement was inclusive of house allowance. That the salary increased over the years to Ksh. 23,000 at the time of his resignation.
11. The affiant depones that the Respondent deducted and remitted NSSF and all statutory deductions to the respective statutory bodies. That since the Petitioner was a member of NSSF he was not entitled to service pay.
12. The affiant further depones that the petition offends section 90 of the *Employment Act* which provides that continuing injury claims be brought within 12 months. That the petition should be preliminarily dismissed.

Evidence

13. The petition was disposed of by way of written submissions. In his submissions dated 29th November 2021 the Petitioner contends that the petition meets the threshold established under the case of James Maringa Mwangi .v. Kenya Medical Research Institute.
14. The Petitioner submits that the petition is brought pursuant to Article 22(1) of *the Constitution*, relying on the decision of Onguto J.(as he then was) in *Mwangi wa Iria & 2 Others .v. Speaker Murang'a County Assembly & 3 others*.
15. He submits that his fundamental rights under Articles 27, 35, and 41 of *the Constitution* have been violated and the reference to court is made under Articles 10 and 259 of *the Constitution*, relying on the decision in *Dr. Samson Gwer & 5 Others .v. Kenya Medical Research Institute (KEMRI) & 3 Others* where the court cited the case of *Dr. Anne Kinya .v. Nyayo Tea Zones* to the effect that in determining constitutional questions courts ought to adopt a robust and purposive approach. He submits that labour rights are part of the Bill of Rights in *the Constitution* relying on the cases of *Kusow Billow Issak .v. Ministry of Interior and Coordination of National Government & 3 others*; *Munir Sheikh Ahmed .v. National Bank of Kenya*; and *Prof. Dr. Moni Wekesa .v. Mount Kenya University*.
16. On the Respondent's contention that the suit is time barred the Petitioner submits that section 90 of the *Employment Act* provides for suits to be filed in 3 years or within 12 months from cessation of continuing injury or damage. That the Petitioner filed this suit barely 5 months from the date he was forced to resign and it is thus not statute barred.
17. On whether the Respondent violated the Petitioner's fundamental rights under Articles 27(1),(2) and (5), 35(1)(b) and 41 of *the Constitution*. The Petitioner submits that the Respondent deliberately ignored sections 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 26, 27, 28, 31, 35 and 51 of the *Employment Act* and by so doing denied the Petitioner the full enjoyment of all his employment rights contrary to Article 27(1) and (2) of *the Constitution*. That specifically the Petitioner was not issued with a written contract, was denied basic minimum conditions of employment, the right to entire wages



- earned and the right to itemized pay statement, hours of works, annual leave, housing and certificate of service as particularised in his letter dated 7th January, 2021 (Exhibit “FFO-001”).
18. The Petitioner relied on the decision in *Rose Wangui Mambo & 2 Others v. Limuru Country Club & 17 Others* where the court adopted the definition of discrimination as set out in *Peter K. Waweru v. Republic*.
 19. The Petitioner further submits that the Respondent violated his fundamental rights under Article 35(1)(b) when it failed to provide the information requested in his letter at exhibit “FFO-004” which sought the following information.
 - i. A copy of written contract as required by section 9(2) of the *Employment Act*.
 - ii. Certified copies of written statements of pay
 - iii. Any schedule of work performed by particularizing hours and days worked by the Petitioner.
 - iv. Annual leave records particularizing hours and days worked by the Petitioner
 - v. Annual leave records particularizing days taken and days due
 - vi. House allowance records particularizing accommodation provided or wages paid therewith
 20. For emphasis the Petitioner relied on the decisions in *Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 Others*, and *Unital Hospital v. Van Wyk & Another (231/05) [2006] ZASCA* as quoted in *Nairobi Law Monthly case-(Supra)*, where the court addressed the right to information as provided in Article 35(1)(b) of *the Constitution*.
 21. It is further the Petitioner’s position that the Respondent violated Articles 2,3(1), 10, 19, 20, 22, 23, 24 and 259 by neglecting the principles of the rule of law and non-discrimination by denying the Petitioner his employment benefits under the law, including house allowance and NSSF. The Petitioner relies on section 26(1) of the *Employment Act*, section 48 of the *Labour Institutions Act* and rule 2 the Regulation of wages (General Order 2007).

For emphasis the Petitioner cites the case of *Agatha Bugosi Said. v.Vegpro Kenya Limited and Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEIHA) v. Fatuma Mohamed*.
 22. It is further the submission of the Petitioner that the Respondent constructively dismissed him, relying on the decision in the case of *Nathan Ogada Atiagaga v. David Engineering Limited* where the court defined constructive dismissal. The Petitioner further relied on the decision in *Milton M. Isanya .V. Aga Khan Hospital and Sophie Muthoni Njagi v. Rift Valley Railways (Kenya) Limited* wherein the court adopted the decision in *Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited*.
 23. It is further the submission of the Petitioner that the Respondent subjected him to unfair Labour Practice by violating his fundamental rights under Article 27, 35 and 41 and denying the Petitioner numerous employment benefits provided for in various status. The Petitioner relies on the decision in *Elizabeth Washeke and 62 Others v. Airtel Networks (K) Ltd & Another*.
 24. The Petitioner prays for award of the reliefs as set out in the petition.

Respondents submissions

25. In its submissions dated 10th February, 2022 the Respondent submits that the Petitioner has failed to establish discrimination, relying on the Court of Appeal decision in *Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others* where the court held that it was incumbent upon the



- Petitioners to prove that they were treated differently and suffered prejudice on account of the grounds alleged. The Respondent further cited and relied on the decision in *Al Yusra Restaurant Ltd.V. Kenya Conference of Catholic Bishops & Another* where the court held that the Petitioner must prove direct or indirect discrimination and the differential treatment on the prohibited grounds set out under Article 27.
26. The Respondent further submits that the Petitioner did not prove denial of access to information as set out under Article 35 or unfair labour practice under Article 41 of *the Constitution*.
 27. It is the submission of the Respondent that the petition is time barred under section 90 of the *Employment Act* as the Petitioner did not move the court within 3 years from the date of the alleged violations of the *Employment Act*. The Respondent further submits that the Petitioner has filed a petition instead of an ordinary claim to avoid the timeline under section 90 of the *Employment Act*.
 28. The Respondent submitted that the Petitioner variously alleged constructive dismissal and redundancy under section 40 of the Act. The Respondent submits that the Petitioner did not prove that his employment was terminated by the Respondent at all. That the Petitioner absconded duty when schools were reopened on 4th January, 2021 when he failed to report back like all other non-teaching staff.
 29. On the specific prayers of the Petitioner the Respondent submits that the Petitioner is not entitled to house allowance as he was paid a consolidated salary. He is not entitled to pay for weekly rest days as he worked only on weekdays picking and dropping pupils to and from school. The Respondent further submits that the Petitioner did not adduce evidence that he worked 7 days a week as alleged.
 30. The Respondent submits that the Petitioner took leave every time the school was closed for vacation three times a year. The Respondent relied on the decision in *Josephine Nzau Ndilu.V. Board of Management Resul Al Amin Preparatory School* where Rika J. held that schools within the Republic of Kenya ordinarily close for holidays thrice a year with extended vacation in November and December each year when non-teaching staff would be expected to utilize their annual leave.
 31. On the prayer for NSSF the Respondent submitted that it had since 2013 remitted the Petitioner's contributions in accordance with Section 20 of NSSF Act.
 32. The Respondent submits that the Petitioner is not entitled to service pay as he was not declared redundant.
 33. It is further the Respondent's submission that there was no violation of the Petitioner's fundamental rights. That should the court find otherwise it should exercise discretion as stated by Mativo J (as he then was) and Nyamweya J (as she then was) in *Edward Akong'o Oyugi & 2 others .v. Attorney General*.
 34. On costs the Respondent submits that since the Petitioner resigned from his employment he should not be awarded any costs. That instead the Petitioner should be compelled to pay the Respondents costs.

Analysis and Determination

35. Having considered the pleadings and submissions, the issues arising for determination are the following:
 - i. Whether this suit is time barred;
 - ii. Whether the Petitioner was constructively dismissed by the Respondent.



- iii. Whether the Respondent violated the Petitioner's fundamental rights under the various Articles of *the Constitution* cited; and
- iv. Whether the Petitioner is entitled to any of the reliefs sought.

Is the suit time barred

36. It is the Respondent's position that the claims by the Petitioner were time barred at the time he filed the instant petition. The Respondent relied on section 90 of the *Employment Act* which provides –

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
37. The section is clear that claims under the Act should be brought within 3 years from the date of the act, neglect or default complained of except in cases of continuing injury where the claim must be brought within 12 months from the date of cessation thereof.
38. From the facts of this case, the Petitioner stopped working when schools were closed by a directive of the Government in March 2020 to contain the spread of the Covid-19 pandemic. According to the Petitioner, his constructive dismissal was effective on the date of his resignation which is 1st March, 2021. This suit having been filed on 23rd November, 2021, the suit is not statute barred whether considered under the 3 years limitation period or the 12 months continuing injury provision. I thus find no basis in the Respondent's contention that the suit as filed is time barred.

Whether the Petitioner was constructively dismissed.

39. Constructive dismissal although not provided for directly in the statutes or *the constitution*, has been recognized and applied in several decisions of both this court and the Court of Appeal. In the case of Nathan Ogada Atiagaga .v. David Engineering Limited (supra) the court defined constructive dismissal as follows:

“constructive dismissal occurs when an employee resigns because their employer's behavior has become intolerable or made life so difficult that the employee has no choice but to resign.”
40. In Milton M. Isanya .v. Aga Khan Hospital (supra) the court defined constructive dismissal as follows.

“A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent the employee tenders resignation”
41. Again in Joseph Kibet Kipruto .v. Gajipara Limited the court defined constructive dismissal thus:

“The employee has to show that the employer made continued employment relationship intolerable and that, objectively assessed, the conditions at the work place have become so intolerable that he had no option but to terminate the employment relationship. Where a reasonable alternative exists, there can be no constructive dismissal.”



42. In the Court of Appeal decision in *Coca Cola East and Central Africa Limited .v. Maina Kagai Ligaga* the court set out several principles to determine whether there has been constructive dismissal. These are that:
 - a. The employer must be in breach of contract of employment.
 - b. The breach must be fundamental as to be considered repudiatory breach;
 - c. The employee must resign in response to that breach and,
 - d. The employee must not delay in resigning after the breach has taken place, otherwise the court may find the breach waived.
43. In the instant case, the Petitioner, together with all other employees of the Respondent were sent home with no pay following the directive of the Government that all schools be closed in the wake of the Covid-19 pandemic. It is a matter of general knowledge that the closure occurred not only in Kenya but all over the world. The Respondent has stated that when schools reopened the Petitioner did not report back to work. That thereafter the Respondent received several demand letters from the Petitioner's advocates dated 7th January, 3rd February, 5th February and 19th February, 2021. The Respondent replied by letter dated 13th January, 2021. Thereafter the Petitioner wrote a termination notice dated 1st March 2021 effectively resigning from employment with effect from 31st March, 2021. The Petitioner's advocate wrote a further demand letter dated 12th April 2021 before filing the instant petition on 23rd November, 2021.
44. The demand letters written before the Petitioner's resignation were titled "Unlawful termination on Account of Redundancy. Our client: Francis Omukata" and "Breach of Employment Contract and unlawful termination on account of Redundancy: Our client Francis Omukatia"
45. After receiving the reply from the Respondent dated 13th January, 2021 denying that the Petitioner's employment was terminated, the Petitioner's demand letters cited "Breach of Employment Contract and unfair Labour Practices". The letter written after the Petitioner's resignation is titled: "Breach of Employment Contract and Unlawful Termination."
46. From the foregoing it is clear that first, the Petitioner was aware of the reason he was sent on unpaid leave which was a directive from the Ministry of Education to close schools due to the Covid-19 pandemic. The Respondent was not at fault as it was only complying with the directive.
47. Secondly, the initial demand letters were based on the fact that the Petitioner's employment had been terminated. His letter purporting to be a notice for resignation is obviously an afterthought that appears to have been intended to be used for purposes of filing suit.
48. Thirdly, the Petitioner admitted in the 1st demand letter that he was sent home due to Covid-19 pandemic. He has not demonstrated that he went back to the Respondent to find out when he could report back for duty after schools were reopened.
49. Finally, and most importantly, the Petitioner has not demonstrated that the Respondent made the environment at the workplace intolerable to the extent that the Petitioner was forced to resign or that the Respondent committed any act that fundamentally repudiated the employment contract.
50. I find that the Petitioner has not demonstrated that he was constructively dismissed.



Whether the Respondent violated the Petitioner’s fundamental rights under Articles 2, 3(1), 10, 19, 20,21, 22, 23, 24, 27, 35, 41 and 259.

51. In his submissions the Petitioner cited the various Articles of *the Constitution* which he alleges were violated by the Respondent. However, in the main prayers in the petition the Petitioner only seeks a declaration that his constitutional rights have been violated by the Respondent without specifying the specific provisions that the Respondent is alleged to have violated. The prayers that refer to specific provisions are under prayer (e) in the petition which cite violations of various sections of the *Employment Act* and the *National Social Security Fund Act*. The reliefs sought are all based on the *Employment Act*.
52. Having found that the Petitioner was not constructively dismissed by the Respondent I do not find any basis to hold that any of his constitutional rights were violated by the Respondent. On the contrary, what is in issue is alleged violation of the contract of employment.
53. In Petition 13 of 2020 (High Court Machakos Martin Lemaiyan Mokoosio & Another .v. Reshma prayful Chandra Vadera, the court while dealing with a matter which had been filed as a constitutional petition instead of an ordinary suit cited and relied on the following decisions:

- i. NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae). The Constitutional Court of South Africa stated that:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

SUBPARA ii.

Minister of Home Affairs vs Bickle & others, Georges where the, CJ held as follows;

“It is an established practice that where a matter can be disposed off without recourse to *the Constitution, the Constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs The State AIR).”

The judge added that:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on 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.”

54. In the instant suit all the substantive remedies sought are in the nature of employment benefits under the *Employment Act* as reflected in prayers (g) and (h). The suit should have been brought in the form of a memorandum or statement of claim.



55. This however does not mean that I should strike out the petition without considering the prayers therein. I will however consider the same as if the prayers were made in a claim. In doing so I associate myself with the sentiments of Odunga J. (as he then was) in *MOKOOSIO & ANOTHER. V. VADERA & 3 OTHERS (PETITION 13 OF 2020) [2021] KEHC 56 (KLR) 921* September 2021(Judgment) where he stated-
- “In light of these allegations, whereas I agree that the issues raised herein could have been dealt with as an ordinary civil suit, I find that it would not advance the course of justice to send the parties away from the seat of justice based on that procedural lapse.”
56. The Petitioner prays for house allowance, weekly rest days, annual leave, and service pay. He further prays for compensation for constructive dismissal and general damages for constitutional violations.
57. I have already held above that the Petitioner was neither constructively dismissed nor has he proved that any of his constitutional rights were violated by the Respondent. He is thus not entitled to the two heads of prayers in his prayers (h) and (i) in the petition.
58. On the prayer for house allowance, the parties are in agreement that the Petitioner’s salary at the time of leaving service was Ksh.23,000/= . The Petitioner did not make any attempt to break down the figure of Ksh.533,613.36 that he seeks under this head. He did not adduce any evidence as to the size of motor vehicle he was driving and salary he was entitled to every year from the time of appointment in 2006 to the time of his resignation in 2021 which form the basis of his prayer under this head.
59. According to the Respondent, the claimant’s starting salary was Ksh.12,000, an averment that the Petitioner did not rebut or deny.
60. According to the Regulation of Wages and Conditions of Service (General) Order, 2006, the salary of a driver of a medium size motor vehicle under “all other areas” (other than Cities and Municipalities) was Ksh. 7,226. The Petitioner was therefore paid much more than the minimum wage inclusive of 15% house allowance at Ksh. 12,000 per month.
61. By 2021 when the Petitioner left service the minimum wage was Ksh.18,881.21. Inclusive of 15% house allowance, he was entitled to Ksh. 21,713,39. His salary of Ksh.23,000 was therefore above the statutory minimum wage inclusive of 15% house allowance. The prayer therefore fails as the Petitioner was not underpaid.
62. The prayer for weekly rest days was not proved beyond the averments of the Petitioner which were denied by the Respondent. No evidence was adduced to prove that the Petitioner worked on rest days nor did the Petitioner indicate how he arrived at the figure of Ksh. 1,010,688 that he claims.
63. The prayer must therefore fail for want of proof. The same is accordingly dismissed.
64. The prayer for annual leave like that of weekly rest days, must also fail for the same reason that it was not proved.
65. The prayer for NSSF, apart from not being proved, is a matter that should be raised with the National Social Security Fund, which has both the statutory mandate and the administrative structure and capacity to enforce the same. This Court therefore declines to make any orders in respect thereof.
66. The prayer of service pay fails because under section 35(6) as read with section 35(7) of the [Employment Act](#), an employee who is a member of NSSF is not eligible for payment of service pay.



67. The Petitioner is however entitled to a certificate of service and the Respondent is directed to issue the same to him in accordance with section 51 of the *Employment Act*.

68. For the foregoing reasons I find no merit in the petition herein. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORETON THIS 23RD DAY OF MARCH, 2023

MAUREEN ONYANGO

JUDGE

