



**Lagat v International Potato Center & another (Petition E128 of 2021)
[2023] KEELRC 773 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 773 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E128 OF 2021
JK GAKERI, J
MARCH 22, 2023**

BETWEEN

BETHWEL KIPKOECH LAGAT PETITIONER

AND

INTERNATIONAL POTATO CENTER 1ST RESPONDENT

CAREER DEVELOPMENT LIMITED 2ND RESPONDENT

JUDGMENT

1. The Petitioner filed the instant Petition on 10th August, 2021 alleging violation of Constitutional and other rights by the Respondents.
2. The Petition is based on Articles 41, 27, 28 and 162(1) and (2) of *the Constitution* of Kenya, 2010, various provisions of *Employment Act*, National Health Insurance Fund Act, the *National Social Security Fund Act*, Rules 10 and 11 of the Mutunga Rules, 2013 and Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and is based on the grounds set out on its face and the Supporting Affidavit sworn by the Petitioner dated 10th August, 2021.
3. The Petitioner avers that he was engaged by the 1st Respondent for a cumulative period of 6 years on short term contractual terms and the Respondents failed to comply with the provisions of the National Health Insurance Fund (NHIF) and the National Social Security Fund (NSSF) and exposed the Petitioner to discrimination by offering other employees in the same capacity and class better contractual terms.
4. That delay in the availment of a formal contract and failure to pay the Petitioner's salary or delays in payment.
5. The Claimant further avers that the first internship contract for 3 months running from 25th June, 2015 to 28th September, 2015 at Kshs.2,000/= per day.



6. The second internship for 6 months run from 1st November, 2015 to 30th April, 2016 at Kshs.2,000/= per day.
7. That after internship, the Respondent offered the Claimant an irregular cycle of temporal contracts so as to avoid statutory obligations.
8. The first contract run from 1st May, 2016 to 31st October, 2016 at Kshs.2,000/= per day and had provision for annual leave and NHIF and NSSF Contributions were not made which according to the Petitioner violated Article 43(1) of *the Constitution* on right to Health and Social Security.
9. That he discharged his duties diligently.
10. Before the second contract was formalised, the Claimant worked for 5 months without a written contract from 1st May, 2017 to 30th September, 2017 and no payment was made.
11. The Petitioner avers that the 1st Respondent owed him Kshs.296,200/= for days worked in November 2016, May – September, 2017 and was without medical cover.
12. That a cheque issued by the Respondent on 2nd February, 2016 was dishonoured and the Petitioner's Bank debited his account for Kshs.2,300/= and the 1st Respondent did not repay the charges occasioned by its default.
13. The Petitioner avers that in October 2017, the 1st Respondent called the Petitioner to report back to work with a promise of permanent engagement but was issued with a two (2) months contract ending on 30th November, 2017 with no provision for NSSF and NHIF Contributions.
14. The contract was followed by a one (1) month contract effective 1st December to 30th December, 2017. That he was not paid the salary for November 2016 and May to September 2017 and did not proceed on leave from 1st May, 2016 to 31st December, 2017.
15. The Petitioner further avers that in January 2018, the 1st Respondent offered him employment as a Research Junior Assistant for one (1) year at Kshs.76,046/= with NSSF and NHIF membership, which was followed by 3 months contracts between January and March 2019 and April to June 2019 and the last contract had no renewal clause.
16. That thereafter, the 1st Respondent engaged the Petitioner in October to December 2019 with payments made through the 2nd Respondent and worked without a written contract at Kshs.4,000/= per day, paid by the 2nd Respondent which the Claimant alleges violated his rights under Article 41 of *the Constitution* since it freed the 1st Respondent the obligation of an employer.
17. That from January 2020, the 2nd Respondent prepared a contract for a period of six (6) months as follows; Kshs.4,210/= per day and all statutory dues paid. That he worked under the supervision of the 1st Respondent and reported to it.
18. That after expiry of the contract, the Petitioner continued working at the instance of the 1st Respondent until 21st July, 2020 when he was notified of the non-renewal of contract and was not paid for the 21 days worked in July 2020.
19. That the Petitioner was involved in fraudulent activity of the 1st Respondent which allegations were never substantiated.
20. The Petitioner avers that the 2nd Respondent was introduced into the arrangement to enable the 1st Respondent avoid its statutory obligations.



21. That the severance package offered failed to address the Petitioner's concern.
22. The Petitioner claims that the irregular temporal employment of not less than one (1) year, non-payment of salary in November 2016 and May to September 2017 and failure to provide a written contract from November 2016 to October 2017 violated Article 43 of the Constitution of Kenya, 2010.
23. That he was discriminated contrary to Article 27 of the Constitution, in that other employees had contracts with favourable terms including payment of NHIF, NSSF and Pension scheme.
24. That the Respondent violated the Petitioner's right to dignity as enshrined in Article 28 of the Constitution of Kenya, 2010.
25. The Petitioner prays for;
 - i. A declaration that the 1st Respondent violated his right to fair labour practices under Article 41 of the Constitution and Sections 10, 17 and 18 of the Employment Act.
 - ii. A declaration that the 1st Respondent violated the Petitioner's right to social and economic rights including the right to the highest attainable standards of health and social security.
 - iii. A declaration that the 1st Respondent violated the Petitioner's freedom from discrimination and right to human dignity.
 - iv. Order directing the Respondents to pay the Petitioner unpaid dues as follows;

Month	No. of days	Amount (Kshs.)	Airtime (Kshs.)
November 2016	22	48,400	1,000
May 2017	22	48,400	1,000
June 2017	21	46,200	1,000
July 2017	22	48,400	1,000
August 2017	23	50,600	1,000
September 2017	21	46,200	1,000
October 2017	- -	1,000	
November 2017	- -	1,000	
Total 288,200			
Grand Total Kshs.296,200/=			
21 days worked in July 2020, Kshs.88,410/=			
Amount debited from the Petitioner's bank account Kshs.2,300/=			
Overall Totals Kshs.638,425/=			
 - v. Compensation for violation of the Petitioner's rights Kshs.3,000,000/=.
 - vi. Any other relief that the honourable court may deem fit to grant.
 - vii. Costs of the Petition.



1st Respondent's case

26. By its Replying Affidavit dated 27th September, 2022 sworn by Paul Demo, the affiant avers that he is the Regional Director of the 1st Respondent's office at Nairobi, Kenya.
27. The 1st Respondent admits the contents of paragraph 1 – 20 of the Petition.
28. It also admits that it first engaged the Petitioner on 25th June, 2015 to 30th April, 2016 at Kshs.2,000/= per day and for a further 6 months from 1st November, 2016 to 30th April, 2016 at Kshs.2,000/= per day and based on his performance as an OFSP Puree Processing Intern at Kshs.2,000/= per day and based on his performance as an intern, the 1st Respondent engaged him as a Research Assistant from 1st May, 2016 to 31st October, 2016 at Kshs.2,000/= - Kshs.2,200/= per day and a bonus of Kshs.8,800/= for November 2016 for which he was not paid.
29. That the contract was renewed for a further 5 months from 1st December, 2016 to 30th April, 2017 at Kshs.2,200/= per day and thereafter a two (2) month contract between 1st October, 2017 to 30th November, 2017 on similar terms.
30. That on 15th December, 2017, the Petitioner was offered a Permanent contract from 3rd January, 2018 to 31st December, 2018 as a Junior Research Assistant Post-Harvest at the Kisumu Office which was followed by a 3 months contract from January 2019 to 31st March, 2019 which was renewed from 1st April, 2019 to 30th June, 2019.
31. That on 6th February, 2020, the 2nd Respondent offered the Petitioner a position as a Research Assistant and seconded him to the 1st Respondent for 6 months effective 6th January, 2020 to June at Kshs.4,210/= per day until the contract lapsed.
32. The affiant states that the Petitioner was treated fairly during his employment without any discrimination on terms of employment and all employees had fair and favourable terms and the 1st Respondent remitted statutory deductions when the Petitioner's employment was permanent.
33. That the 1st Respondent did not promise a renewal of contract after 30th June, 2020 and it was for a defined term and discussions on the issue were inconclusive.
34. The affiant denies that the Petitioner was accused of fraudulent activities during his employment.
35. That the 1st Respondent has been ready and willing to pay the Petitioner his dues amounting to Kshs.251,515.00 but the Petitioner had not cleared with the 1st Respondent which is an essential quality control mechanism as the 1st Respondent is accountable to donors and its partners as evidenced by the Director's email to the Petitioner dated 14th July, 2021 on the discharge voucher which the Petitioner refused to sign and made further claims from the Respondents yet they are distinct entities.
36. That attempts to pay the amount due via Real Time Gross Settlement (RTGS) has not borne fruit due to the Petitioner's unresponsiveness and uncooperativeness.
37. The 1st Respondent prays for dismissal of the petition with costs.

2nd Respondent's case

38. In its Replying Affidavit by Mr. Rodgers Wafula, the witness deposes that on 23rd September, 2019, the 2nd Respondent entered into an agreement with the 1st Respondent for the provision of man-power management services for one (1) year renewable upon appraisal.



39. That the parties agreed on replacement of staff either by recommendation of the 1st Respondent or recruitment by the 2nd Respondent with approval of the 1st Respondent.
40. The affiant states that on 20th January, 2020, the 1st Respondent requested for causal employment of the Petitioner as a temporary research assistant and the 1st Respondent approved the engagement and the 2nd Respondent engaged the Petitioner on 6th February, 2020 for a period of 6 months and the Petitioner was seconded to the 1st Respondent at daily wage of Kshs.4,210/= subject to statutory deductions.
41. The affiant further states that on 22nd June, 2020, the 2nd Respondent received a letter from the 1st Respondent stating that the Petitioner had been involved in potential fraud at Chomba Hotel between 24th and 26th February, 2019 and would not be engaging the Petitioner in future unless cleared by the 2nd Respondent.
42. That because the Petitioner's contact was coming to an end on 30th June, 2020, the 2nd Respondent informed the Petitioner to ignore the notice to show cause sent to him earlier as the alleged fraud happened before the Petitioner was an employee of the 2nd Respondent.
43. The affiant denies owing the Petitioner any dues for 21 days worked in July 2020 and all its communication was in writing.
44. That the contract lapsed by effluxion of time.
45. That the 2nd Respondent did not engage the Petitioner between October 2019 and December 2019 and no payments were made.
46. The affiant states that the contract between the Petitioner and the 2nd Respondent was for one (1) year only.

Petitioner's submissions

47. The Petitioner's counsel isolated two issues for determination, namely;
 - i. Whether the Petitioner is entitled to unpaid salary as claimed.
 - ii. Whether the Respondents violated the Petitioner's Constitutional rights.
48. As regards entitlement to unpaid salary, counsel submitted that his right to fair labour practice was violated in that he was not paid for the period between his contracts and continued working without a formal contract.
49. That employing the Petitioner in periodic contracts violated his right.
50. Reliance was made on the decision in *Kenyatta University v Esther Njeri Maina* to reinforce the submission.
51. That the NSSF and NHIF payments were not made and the contracts had no provision for leave days.
52. The decision in *Kenya County Government Workers Union v County Government of Nyeri & another* [2015] eKLR was relied upon to buttress the submission.
53. Counsel urged that cumulatively, the Respondents violated the Petitioner's rights to fair labour practices.



1st Respondent's submissions

54. Counsel for the 1st Respondent submitted that Petitioner sought the court's intervention by way of a petition for declaratory reliefs and did not claim unfair termination of employment as his employment was not terminated and the last contract with the Respondent lapsed on 30th June, 2020 but was claiming monies under previous contracts entered into in 2017 and the 1st Respondent had conceded owing the Petitioner Kshs.227,810/= for 5 months from May 2017 to September 2017.
55. That the Petitioner had never cleared with the 1st Respondent.
56. Reliance was made on the decision in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] on the binding nature of terms of a contract.
57. Counsel submitted that the Petitioner had not proved some of the claims he seeks against the 1st Respondent such as pay for November 2016 and had not proved that he worked in July 2020 to justify the claim for Kshs.88,410/= for 21 days in July 2020 and there was no verbal agreement of renewal and in any event the contract had been issued by the 2nd Respondent.
58. The 1st Respondent's counsel submitted that the claim for leave was unproved.
59. That the decision in Kenyatta University v Esther Njeri Maina relied upon related to conversion of casual employment to term employment and was thus distinguishable as the Petitioner was not a casual employee.
60. Counsel submitted that in Amos Kitavi Kivite v Kenya Revenue Authority [2020], the court declined to find that termination of the Claimant's employment was unfair.
61. Counsel prayed for dismissal of the Petitioner's case with costs.

2nd Respondent's submissions

62. Counsel for the 2nd Respondent identified two issues for determination, namely;
 - i. Whether the 2nd Respondent violated the Petitioner's right under Article 27, 28, 41 and 43 of *the Constitution* of Kenya, 2010 and Sections 10, 17 and 18 of the *Employment Act* and
 - ii. Entitlement to the reliefs sought.
63. As regards violations of *the Constitution*, counsel submitted that the Petitioner was clear that the only Article of *the Constitution* allegedly violated by the 2nd Respondent was Article 41.
64. Counsel relied on the decision in Anarita Karimi Njeru v Republic [1979] eKLR to urge that constitutional violations must be specifically pleaded. That the Petitioner had not proved that he was paid by the 2nd Respondent from October 2019 to December 2019.
65. The decision in Peter Kariuki Ngunjiri v Board of Management Magomano Secondary School [2022] eKLR was relied upon on proof of an employment relationship.
66. Counsel argued that the Petitioner had not adduced any evidence of payment or actual engagement.
67. To the allegation that the Petitioner continued working after 30th June, 2020 when the fixed term contract ended, counsel relied on the Court of Appeal decision in Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho [2017] eKLR on termination



of fixed term contracts. As was the decision in *John Mwangi Gaturu v Agriculture and Food Authority* [2022] eKLR.

68. Counsel submitted that the 2nd Respondent did not violate any of the Petitioner's rights.
69. As regards the reliefs sought, counsel submitted that he was not entitled to any as his rights had not been violated.

Determination

70. The issues for determination are;
 - i. What was the nature of the employment relationship between the Petitioner and the Respondents?
 - ii. Whether the Respondents breached any of the Petitioner's constitutional rights as alleged.
 - iii. Whether the Petitioner is entitled to the remedies sought.
71. From the evidence on record, the Petitioner was first employed by the 1st Respondent as an intern under fixed 3 month contract from 25th June, 2015 to 28th September, 2015 at Kshs.2,000/= per day, 5 days a week subject to withholding tax of 5% and salary paid through the bank.
72. The second internship of 6 months run from 1st November, 2015 to 30th April, 2016 at Kshs.2,000/= per day on similar terms as the previous contract.
73. The third 6 months contract as Research Assistant was effective 1st May, 2016 to 31st October, 2016.
74. After expiry of the contract on 31st October, 2016, the Petitioner by email dated 21st November, 2016 to one Penina Muoki thanked the 2nd Respondent for the one (1) year 3 months he had served as an intern and expressed optimism that he would be considered for more permanent employment and better salary.
75. Evidently, the Petitioner was not in employment at this point in time as the email attests in its penultimate sentence.
76. The fourth 5 month fixed term contract commenced on 1st December, 2016 to 30th April, 2017 at Kshs.2,200/= per day subject to 5% withholding tax under the supervision of Penina Muoki and Tawanda Muzhingi.
77. The fifth contract of 2 months commenced on 1st October, 2017 and lapsed on 30th November, 2017 at Kshs.2,200/= per day and a further 2 months from 1st December, 2017 to 31st December, 2017.
78. The 6th contract was a one (1) year offer as a Junior Research Assistant Post Harvest from 3rd January, 2018 to December, 31st 2018 at Kshs.76,046/= per month subject to a 3 months probation, enrolment to a non-contributory scheme, 24 working leave days, paternity leave and 40 hours per week.
79. The 7th contract of 3 months was effective 1st January, 2019 to 31st March, 2019 on similar terms.
80. The Petitioner tendered no evidence of employment by either of the Respondents from April 2019 to January 31st 2020.
81. The allegation of being recalled in October 2019 to December 2019 and payment by the 1st Respondent through the 2nd Respondent was unsupported by evidence of either a contract or payment of the alleged Kshs.4,000/=.



82. What appears clear is that on 6th February, 2020, the 2nd Respondent offered the Petitioner a six (6) month's employment contract and seconded him to the 1st Respondent's Bio Innovate Project Department at Kshs.4,210/= per day. Salary was subject to statutory deductions and 30 days notice of termination and the contract lapsed on 30th June, 2020 as envisioned.
83. The foregoing analysis is unambiguous that although the Petitioner was being paid a daily wage, of Kshs.2,000/= which subsequently rose to Kshs.2,200/= and Kshs.4,210/=, he was not a casual employee within the meaning of Section 2 of the *Employment Act*, 2007 which defines a casual employee as a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time."
84. Needless to emphasize, the Petitioner was serving the Respondent under fixed term contracts.
85. Noteworthy, by an agreement dated 23rd September, 2019, the 1st and 2nd Respondents agreed that the 2nd Respondent would provide man-power management services to the 1st Respondent. This perhaps explains the nature and character of the last contract.
86. From the foregoing, it is clear that the Petitioner worked for the 1st Respondent as an intern initially for 9 months under two contracts thereafter as a Junior Research Assistant and finally as a Research Assistant for 6 months.
87. It is unclear whether the Petitioner rendered services in November 2016. His email dated 21st November, 2016 would appear to suggest that he was not in employment by either of the Respondents and states unequivocally that;
- "My current internship contract expired on 31st October, 2016."
88. Similarly, the Petitioner adduced no evidence of the alleged recall and by whom from October 2019 to December 2019 or payment.
89. Puzzlingly, and what appear to support the Petitioner's allegations of the recall, in January, the 2nd Respondent attached a copy of the Petitioner's payslip for January 2020 at a gross salary of Kshs.56,000/=. The payslips for February, April, May and June have different amounts as basic salary ranging from Kshs.88,410 to Kshs.101,040/=.
90. Evidently, the 1st Respondent engaged the Petitioner on fixed short term contracts of between 2 and 12 months from 2015 to 2019. It is unclear as to why it adopted this practice though the Petitioner was involved in a project which typically are donor funded and for fixed terms.
91. From 2015 to the end of 2017, the 1st Respondent appear to have treated the Petitioner as a consultant as it deducted withholding tax of 5% as opposed to PAYE and from January 2018 onwards, treated him as an employee with consolidated monthly salary of Kshs.76,046.00.
92. It is however unclear as to whether PAYE and other statutory deductions were made and submitted to the relevant bodies.
93. From the evidence on record, it is clear that the 1st Respondent engaged the Petitioner under several fixed term contracts from June 2015 to 2019 which the Petitioner routinely executed and served under without any complaint.
94. The 1st Respondent on the other hand routinely renewed the contracts and enhanced the Petitioner's status from Intern to Junior Research Assistant.



95. The Petitioner alleges that he worked continuously for 6 years though there are unexplained gaps in 2016 and 2019.
96. The duration served is 5 years as the first contract commenced on 25th June, 2015 and the last lapsed on 30th June, 2020.
97. The principles governing fixed term contracts are well settled.
98. As held by the Court of Appeal in *Registered Trustee of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho (Supra)*,
- “... We note that fixed term contracts carry no rights, obligations or expectations beyond the date of expiry. Accordingly, any claim after the expiry of the Respondent’s contract ought not to have been maintained. This is in relation to the salary for the months of April upto 5th May 2010. Similarly, since the Respondent’s contract came to an end by effluxion of time, any claim for wrongful termination could not be maintained.”
99. In this case, the Petitioner’s last fixed term contract lapsed on 30th June, 2020 and the Petitioner has not urged a claim for unlawful termination of employment.
100. Having delineated the nature of the Petitioner’s relationship with the Respondents, I will now examine whether the Petitioner’s constitutional rights were violated.
101. Since the Petitioner’s case is formulated as a constitutional petition, premised on various provisions of *the Constitution* of Kenya, 2010, it is incumbent upon the Petitioner to establish with sufficient clarity and precision the provisions of *the Constitution* allegedly violated, the manner or nature of the violation and the extent as held in *Anarita Karimi Njeru v Republic (Supra)* where Trevelyn and Hancox JJ stated as follows;
- “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 were alleged to be infringed.”
102. Similar sentiments were expressed in *Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR* as well as *Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR*.
103. The Petitioner cites Articles 10(2)(a) and (c), 19, 27, 28, 41 and 43 of *the Constitution* of Kenya, 2010.
104. The Petitioner urges that the right to fair labour practice was violated in that he was engaged by the 1st Respondent on irregular temporary contracts for more than one year, non-payment of salary in November 2016 and from May to October 2017 as well as the Respondents failure to issue a written contract in November 2016 and May 2017 to October 2017.
105. That Article 43 on economic and social rights was violated by non-payment of NHIF contributions and NSSF contributions.
106. That Article 27 was violated in that other employees working for the 1st Respondent had contracts with favourable terms including payment of NHIF, NSSF and pension and had contracts throughout the period the Petitioner worked.



107. That Article 28 on human dignity was violated by unfavourable working conditions such as delays in payment of salary or non-payment.
108. The salient issue for determination is whether the Petitioner provided sufficient evidence to establish the foregoing allegations and the same meet the threshold for a constitutional petition.
109. On irregular temporal contracts, the Petitioner adduced no evidence that the contracts were indeed irregular. He signed all of them in agreement with their terms and did not raise the issue with the supervisor.
110. Relatedly, the Petitioner is faulting the contracts after having derived benefits from them.
111. The court is not persuaded the contracts were irregular or violated the Petitioner's constitutional rights as there is no legal obligation on an employer to engage employees on permanent terms.
112. The employment contract is first and foremost a consensual relationship between the employer and employee and parties are obligated to observe their part of the bargain. Non-payment or delay in payment of salary is a breach of the employment contract.
113. Secondly, the Petitioner tendered no evidence to demonstrate that the 1st Respondent was not making NHIF and NSSF contributions.
114. Statements from the respective bodies would have revealed the true state of affairs.
115. The Claimant did not avail a copy of his payslip.
116. Even assuming that the 1st Respondent did not make NHIF and NSSF contributions, the failure to do so would be a violation of the provisions of the National Health Insurance Fund Act and [*National Social Security Fund Act*](#) which impose criminal sanctions for non-compliance and prescribe enforcement mechanisms by the respective board of directors. Non-compliance with the provisions of these Acts of Parliament does not amount to a violation of [*the Constitution*](#).
117. As regards the right to human dignity under Article 28 of [*the Constitution*](#), non-payment of or delay in payment of salary is a contractual not a constitutional violation and is typically and effectively remedied within the operative statutory framework.
118. In the court's view, the delay in payment of salary or non-payment is a breach of contract remediable under the contract.
119. As regards discrimination, the Petitioner submitted that other employees were treated differently in that they had contracts for the entire duration he worked for the 1st Respondent and their NHIF and NSSF contributions were being made and he was thus discriminated.
120. The foregoing claim is contained in paragraph 25(c)(iii) of the Supporting Affidavit.
121. Puzzlingly, apart from the two (2) sentence paragraph, the Petitioner provided no evidence to buttress the claim. It is unclear as to how many employees the 1st Respondent had, their positions and terms of employment. The "other employees" referred to by the Petitioner are also unknown. This is a serious allegation that required particulars which the Petitioner did not provide or allude to in the Supporting Affidavit. I will revert to this issue shortly.



122. According to Black’s Law Dictionary, 10th Edition, Discrimination refers to;
- “Differential treatment, especially, a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”
123. It entails unfair or prejudicial treatment of different categories of persons in similar circumstances.
124. The phrase was also defined in *Barclays Bank of Kenya & another v Gladys Muthoni & 20 others* [2018] eKLR.
125. In *Ol Pejeta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR, the Court of Appeal cited the South African Labour Court decision in *Transport & General Workers Union and another v Bayete Security Holdings J 2512/98 [1998] ZALC 147* with approval as follows;
- “ . . . the mere fact that an employer pays one employee more than the other does not in itself amount to discrimination. It was further held discrimination takes place when two similarly circumstanced individuals are treated differently . . . ”
126. The court is guided by the foregoing sentiments.
127. Both Articles 27 of *the Constitution* of Kenya, 2010 and Section 5(3) of the *Employment Act*, 2007 outlaw discrimination.
128. As adverted to elsewhere in this judgement, the Petitioner did not provide any particulars of the alleged discrimination.
129. As regards the burden of proof, the Supreme Court of Kenya expressed itself as follows in *Dr. Samson Giver & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR;
- “It is timeless rule of the common law tradition, Kenya’s juristic heritage and one of fair and pragmatic conception that the party making an averment in validation of a claim is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the “balance of probability”. Balance of probability is a concept deeply linked to the perceptible fact scenario, so there has to be evidence on the basis of which the court can determine that it was more probable than not, that the Respondent bore responsibility in whole or in part.
- The Petitioner’s case is set around the constitutional right of freedom from discrimination (*Constitution of Kenya, 2010* Article 27). It is already the standpoint of this court as regards standard of proof, that this assumes a higher level in respect of constitutional safeguards, than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights safe guards bear generalities, or qualifications, which call for scrupulous individual appraisal for each case. This is the context in which the rights claim in the instant case, founded upon racial discrimination is to be seen.”
130. Similarly, in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No. 5 of 2013, the Supreme Court was categorical that;
- “ . . . a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden.”
131. Section 108 of the *Evidence Act* provides that;



- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
132. In addition, Section 109 of the Act provides that;
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
133. The Petitioner in this case bore the burden to provide evidence of the alleged discrimination and as he did not place any material before the court, the Respondent had nothing to rebut. For instance, the Petitioner had not previously raised the issue with the 1st Respondent.
134. For the foregoing reasons, it is the finding of the court that the claim that the Petitioner was discriminated against by the 1st Respondent was not substantiated.
135. Further, it is the finding of the court that the Petitioner has failed to demonstrate that the Respondents breached his constitutional rights as alleged.
136. As regards the reliefs sought, the court proceeds as follows;
- i. In light of the foregoing findings, the declarations sought under paragraph 54 (a), (b) and (c) of the Petition are unmerited and are accordingly declined.
 - ii. As regards unpaid salaries, email communication on record reveal that indeed the Petitioner worked for sometime in 2017 without a formal contract of employment which would appear to the court to give credence to his evidence that he continued working without a contract or salary in 2016 and 2017.
137. By an email dated 23rd November, 2017, the Petitioner informed one Tawanda Muzhingi that while he was in employment from 1st May 2017 to August 2017 and from 1st October, 2017, he was disengaged for the months of August and September 2017, a fact acknowledged by the demand letter dated 12th October, 2020.
138. However, the Petitioner's claim includes salary for the two months for 23 and 21 days worked respectively. Since the Petitioner did not render any service to the 1st Respondent in August and September 2017, there was no salary earned and as he has not challenged the disengagement for the two months, the amount claimed is unmerited.
139. It is unclear why the Petitioner is claiming unpaid salary for months he was not in employment. In addition, an email from one Furtado Alessandra dated 23rd November, 2017 addressed to Tawanda Muzhingi confirms that the Petitioner had no formal contract and had not been paid for services rendered.
140. The writer of the email acknowledges that the 1st Respondent was at fault and promises to rectify the situation. This email appear to have been actuated by an earlier email by Muzhingi Tawanda dated 22nd November, 2017 to one Brian Cheruiyot and copied to other staff on the plight of the Petitioner regarding the formal contract and payment of salary. The writer plainly acknowledges that the Petitioner was a good employee. To his credit, the Petitioner had indeed called Muzhingi Tawanda on the issues.
141. As regards renewal of the last contract by the 2nd Respondent, the 2nd Respondent stated that it did not engage the Petitioner after the contract lapsed on 30th June, 2020 and did not engage the Petitioner in discussions on renewal.



142. Although it is unclear as to what transpired after 30th June, 2020, an email from the Petitioner to one Zani Naomi an employee of the 1st Respondent dated July 27th 2020 provides some insight.
143. The Petitioner intimated that he had received communication that his contract would not be renewed allegedly for fraudulent activities unknown to him and requested for information. The Petitioner hoped that the contract would be renewed.
144. From the contents of the email, it is unclear whether the Petitioner was still working on 27th July, 2020, the date of the email. Paragraph 32 of the Supporting Affidavit states that after the last contract lapsed on 30th June, 2020, the Petitioner continued working on instructions of the 1st Respondent from 1st July to 21st July, 2020 when the Supervisor Tawanda Muzhingi informed that Petitioner of the non-renewal of contract and was not paid.
145. An email from the Supervisor Tawanda Muzhingi dated 20th April, 2020 would appear to confirm the Petitioner's case as she had promised to ask for a renewal till the end of December 2020 to "assist with some of Rose's responsibilities."
146. The 1st Respondent did not adduce evidence to controvert the Petitioner's testimony that he worked for 21 days at its instigation.
147. As the Petitioner's email dated 23rd November, 2017 intimates, the Petitioner is entitled to the unpaid salary as prayed for in paragraph 54 (d) of the Petition.
- iii. Regrettably, the Petitioner tendered no evidence of entitlement to the Airtime of Kshs.8,000/= claimed and none of the contracts on record provide for the allowance.
148. Equally, in his demand letter dated 12th October, 2020, the demand for airtime was for the months of October and November 2017 exclusively.
149. The claim for Airtime of Kshs.8,000/= is unsubstantiated and is accordingly declined.
150. The claim for Kshs.2,300/= being the amount deducted from the Petitioner's account on account of a dishonoured cheque issued by the 1st Respondent, is merited as evidenced by the Petitioner's email to one Tabither Obonyo dated 6th January, 2017.
151. The cheque had not been signed in accordance with the mandate given to the bank and the Claimant had to shoulder the burden for the 1st Respondent's mistake.
- The sum of Kshs.2,300/= is recoverable and is accordingly awarded.
- iv. Compensation for violation of the Petitioner's rights to Kshs.3,000,000/=.
152. Having found that the Petitioner had failed to prove that his constitutional rights were violated by the Respondents, the claim for compensation is disallowed.
153. In conclusion, judgement is entered in favour of the Petitioner against the 1st Respondent in the following terms;
- a. Unpaid salary for the months of;
- November 2016 22 days Kshs.48,400/=
- May 2017 22 days Kshs.48,400/=
- June 2017 21 days Kshs.46,200/=
- July 2017 22 days Kshs.48,400/=



July 2020 21 days Kshs.88,400/=

Total Kshs.279,800/=

b. Deduction from the Claimant's account for the returned cheque Kshs.2,300/=

Total Kshs.282,100/=.

c. Costs of the Petition.

d. Interest at court rates from date of judgement till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF MARCH 2023

DR. JACOB GAKERI

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 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

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