



**Mutemi v KK Security; Attorney General (Interested Party) (Petition E088 of 2022) [2023] KEELRC 949 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 949 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E088 OF 2022**

**BOM MANANI, J**

**APRIL 20, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUAL AS  
ENSHRINED UNDER ARTICLES 2(1), 23,(1), 27, 28, 40, 41  
AND 47 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE  
EXPECTATION, FAIRNESS, REASONABLENESS AND  
PROPORTIONALITY**

**AND**

**IN THE MATTER OF UNCONSTITUTIONALITY OF SECTION  
45(3) OF THE EMPLOYMENT ACT**

**BETWEEN**

**ERNEST MUTEMI ..... PETITIONER**

**AND**

**KK SECURITY ..... RESPONDENT**

**AND**

**ATTORNEY GENERAL ..... INTERESTED PARTY**



## RULING

### Background

1. Until his suspension from duty on September 4, 2015, the petitioner had been working for the Respondent as a team leader cash management. It appears that some time in the month of August 2015, there was loss of cash of Kenya Shillings 2,279,000.00 from an Automated Teller Machine (ATM) that fell within the supervisory area of the petitioner. Immediately before the loss, the petitioner is said to have been spotted visiting the ATM in the company of a colleague.
2. Following the incident, the petitioner was suspended from duty pending further investigations into the matter. Immediately thereafter, he was charged with the criminal offense of stealing by servant. It would appear that the petitioner was eventually acquitted of the charge.
3. The petitioner has now sued the respondent for alleged wrongful suspension from duty. It is the petitioner's case that from September 4, 2015 when he was suspended, the respondent has not informed him of his fate.
4. The petitioner suggests that the respondent has never issued him with a dismissal letter. Yet, the respondent has neither been allowed to resume duty nor been paid his salary from September 2015 to date.
5. It is the petitioner's case that the respondent's actions have infringed on his rights. In particular, the petitioner cites violation of his rights to: equal protection of law; fair labour practice; fair hearing; human dignity; and fair administrative action.
6. The respondent has contested the Petition. According to the respondent, the petitioner was suspended from duty following loss of cash from an ATM that was under his watch. The respondent avers that upon finalization of investigations, the petitioner was subjected to disciplinary proceedings where after his contract of service was lawfully terminated. The respondent indicates that the petitioner was notified of his dismissal from employment through the respondent's letter of September 17, 2015.
7. The respondent states that although the petitioner was accorded the right of appeal, he did not utilize it. As a result, his terminal benefits were processed and released to him thus finalizing the separation of the parties.

### Preliminary Objection

8. Contemporaneous with its reply to the Petition, the respondent filed a notice of preliminary objection challenging the competence of the Petition. The objection raises two grounds of objection namely:-
  - a. The Petition contravenes the express provisions of section 90 of the *Employment Act*, 2007.
  - b. The court does not have jurisdiction to adjudicate over the issues raised in the Petition.

### Analysis

9. The vexed question of the court's jurisdiction to entertain this kind of actions can be considered from two perspectives. The first perspective is whether the court has no jurisdiction generally to entertain the current Petition. The second perspective is whether the court's jurisdiction to entertain the Petition is ousted on account of the law on limitation of actions.



10. In respect of the first perspective, the respondent's submissions are that the court's jurisdiction flows from either the Constitution or statute or both. Outside this, the court cannot arrogate itself jurisdiction over a matter. That because this is a purely employment dispute, it is governed by the Employment Act. Therefore, the court lacks jurisdiction to hear the matter as a constitutional Petition.
11. I think that there is a way in which parties have perennially convoluted and perhaps conflated the question of jurisdiction in this respect. It is not in doubt that disputes stemming from employment relations may raise constitutional questions that need adjudication by the court. If and when this happens, the Employment and Labour Relations Court (ELRC) has jurisdiction to entertain the matter as a constitutional issue.
12. That the foregoing is the case is evident from article 162 of the Constitution by which the establishment of the court is decreed as read with section 165(5) (b) of the very Constitution. Under article 162 aforesaid, the ELRC is pronounced as a court of equal status with the High court. Under article 165(5) (b) of the Constitution, the High Court is precluded from handling disputes that fall within the realm of the ELRC including on constitutional questions.
13. That the ELRC has the mandate to entertain constitutional Petitions relating to employment issues is also evident from the rules of the court as read with the parent statute establishing the court. Section 27 of the Employment and Labour Relations Court Act provides for the making of rules to regulate the conduct of the court's business. Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 contemplates parties to an employment relation presenting a constitutional issue arising from the relation to the ELRC through a constitutional Petition.
14. That the court has jurisdiction in this sense is therefore perhaps no longer in doubt. As a matter of fact, this has been affirmed through a plethora of judicial pronouncements (see United States International University V The Attorney General & 2 others [2012] eKLR and Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR).
15. The other perspective is whether the court should entertain as constitutional disputes, matters that are on their face purely contractual disputes and which can be adequately resolved by application of ordinary legislation. This question raises a distinct matter altogether. The matter that is raised in this respect is one of constitutional avoidance.
16. The principle of constitutional avoidance requires courts to avoid resorting to the Constitution as the basis for adjudicating disputes before them if the matters can be adjudicated by reference to some other subsidiary legislation. The Constitution should be resorted to as a last resort.
17. This requirement, in my humble view and notwithstanding varied views about it including by higher courts, does not go to the question of jurisdiction. Rather, it goes to the question of avoidance. In this case, whilst the court has the power granted to it by law to hear a matter, it nevertheless avoids entertaining the dispute as a constitutional question because there are alternate statutory mechanisms through which the parties can seek a remedy.
18. The issue is addressed quite aptly by Mativo J (as he then was) in KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR). The learned Judge expressed his views on the matter as follows:-

“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



courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.....The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.”

19. The learned Judge went further to observe as follows on the relation between the principle of avoidance and jurisdiction of a court to hear a matter:-  

“The 1<sup>st</sup> and 2<sup>nd</sup> respondent’s objection brings to fore two important and closely interrelated concepts. These are the doctrine of ripeness and the doctrine of avoidance. .... These two concepts are completely different from the presence or absence of jurisdiction which is the power of the court to entertain a matter which is conferred by *the Constitution* or a statute.”
20. I think that what the respondent’s counsel may have intended to articulate before me is the question of avoidance. However, he ended up mixing the issue with the question of jurisdiction which in my humble view appears erroneous.
21. In respect of the law on limitation, once a matter is barred by a provision of statute prescribing limitation of actions, the court’s jurisdiction to entertain the matter is thereby ousted. In this sense, it is proper to consider that the court has no jurisdiction to entertain such dispute (see *Gregory Kyalo Nzoka v Teachers Service Commission* [2018] eKLR).
22. In the dispute before me, the petitioner’s primary reason for presenting the dispute as a constitutional Petition is that section 45(3) of the *Employment Act* bars him from presenting it as an ordinary claim. The section proscribes causes of action based on termination of a contract of employment if the employee has not served the employer for at least thirteen months prior to his dismissal.
23. At the time of his suspension from duty, the petitioner had served the respondent for hardly nine months. In his view, the above provision of law bars him from suing the respondent for a remedy through an ordinary claim. He therefore asks this court to declare the said section unconstitutional and permit this action as a constitutional Petition.
24. I have studied the Petition intently. Plainly, the grievance that the petitioner raises is premised on the respondent’s alleged irregular handling of the petitioner’s contract of employment.
25. I note that the question regarding the constitutional status of section 45(3) of the *Employment Act* which the petitioner suggests stood in his way in filing this action as an ordinary claim has been the subject of protracted commentary by the court. As a matter of fact, the section was declared unconstitutional and therefore invalid in the decision of *Samuel Momanyi v SDV Transami and Anor* [2012] eKLR. This position has been affirmed by other Judges of this court in *Linus Barasa Odhaimbo v Wells Fargo Ltd* [2013] eKLR, *Silas Otieno Okumu v Kenya Medical Research Institute* [2022] eKLR, *Nyagah v Internet Solutions (Cause 650 of 2018)* [2022] KEELRC 13294 (KLR), and *Enoch Thiong’o Kibathi v Directline Assurance Company Limited* [2021] eKLR.
26. The constitutionality of section 45(3) of the *Employment Act* having been thus far addressed, I do not agree with the petitioner that the presence of this provision stood in his way in filing an ordinary claim for unfair termination. The section had already been declared invalid.
27. Having come to this conclusion, it is my view that absent other limiting factors (other than the effect of section 45(3) of the *Employment Act*) the petitioner was at liberty to approach the court by way of an ordinary claim. The question that the court must then grapple with is whether the Petition as presented discloses some other valid reason to justify the petitioner approaching the court by way of a constitutional Petition as opposed to an ordinary claim.



28. It has been observed that in order for the court to adjudicate on a matter as a constitutional Petition, it must satisfy itself that the case raises a constitutional question that the court is asked to determine. It is otherwise not permissible for a party to disguise an ordinary claim as a constitutional question.
29. It has also been observed that where a statute provides a pathway for adjudicating a dispute, it is generally undesirable for a litigant to overlook this pathway and premise his claim on a constitutional point unless he is able to demonstrate that the pathway provided by statute does not guarantee him an adequate remedy. This thinking is informed by the desire to preserve the sanctity and primacy of the Constitution so that its standing as the supreme law of the land is not unnecessarily lowered.
30. Emphasizing this point, the court in *Harrikson versus Attorney General of Trinidad & Tobago* (1980) AC 265 expressed itself as follows:-

“The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

31. In *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR, the court had these observations to make on the subject:-

“It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach of the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1<sup>st</sup> respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act.

The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made there-under provide adequate remedy and orderly enforcement mechanisms. The 1<sup>st</sup> respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without



challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*.”

32. In the present case, although it may be argued that the petitioner has challenged the constitutionality of section 45(3) of the *Employment Act*, it is clear that this question has already been determined by courts of competent jurisdiction. In my view therefore, the question is not one that requires a revisit except for cogent reasons.
33. Therefore, and in my humble view, the question of constitutionality of section 45(3) of the *Employment Act* is closed for now until the Court of Appeal or Supreme Court pronounces itself differently on it. Absent exceptional reasons, it is neither open to the parties to reopen the matter before a court of concurrent jurisdiction nor desirable for such court to re-adjudicate on the issue.
34. The pleadings by the petitioner do not point to any other deficiency in the current statutory framework on employment law in Kenya to address the questions that he raises in the Petition. To be specific, issues of the right of an employee to be informed of the case against him; the right to be heard on the matter; the right to call witnesses; the right to be promptly informed of the decision and the reasons therefor; and the right to expeditious resolution of the case are all matters that are adequately provided for by statute. These matters can all be adequately addressed by reference to the provisions of the *Employment Act* as read with the *Fair Administrative Action Act* both of which breathe life into various provisions of *the Constitution* that may have application to employment relations.
35. At the same time, the *Employment Act* and the *Employment and Labour Relations Court Act* provide a plethora of remedies to an employee whose employment has been unfairly managed. I do not understand the petitioner as suggesting that these remedies are inadequate for his case.
36. That being the case, was it desirable that the petitioner moves the court by way of a constitutional Petition? Is it possible that this attempt was motivated by other considerations other than a genuine desire to raise a constitutional question? Might the decision to file a constitutional Petition as opposed to an ordinary claim have been informed by the desire to circumvent the law on limitation of actions?
37. It is not in dispute that constitutional Petitions cannot be barred on account of the limitation period set in an Act of Parliament. However, this is not the same thing as saying that such petitions cannot be barred on account of the equitable doctrine of laches (see *Moses Nyandusi Osoro v National Police Service Commission & another* [2022] eKLR).
38. At the same time, where a matter ought to have been filed as an ordinary claim in the sense in which I have mentioned in the preceding sections of this decision, the court will not permit a party to file the case as a constitutional Petition in order to circumvent the provisions of section 90 of the *Employment Act* (see *Maxwell Sifuna v Teachers Service Commission* [2022] eKLR, *Matthew Kamanu Mwaura v Permanent Secretary Office of the President Provincial Administration & 2 others* [2018] eKLR).

## Determination

39. Having regard to the fact that the question of the constitutionality of section 45(3) of the *Employment Act* is more or less settled absent further pronouncement on it by the Court of Appeal or Supreme Court and having regard to the fact that the other issues raised in the Petition can conveniently be dealt with under the *Employment Act* and *Fair Administrative Action Act*, I do not think that there was sufficient basis for the petitioner to invite the court to consider the issues raised as constitutional



questions. Consequently, the court arrives at the conclusion that the dispute ought to have been presented as an ordinary claim.

40. The court invokes the principle of constitutional avoidance to decline to provide a constitutional remedy to the dispute. The court finds that in presenting the matter as a constitutional Petition as opposed to an ordinary claim, the petitioner was attempting to circumvent the effects of section 90 of the *Employment Act*.
41. The cause of action arose on September 4, 2015 when the petitioner was suspended. This action was filed in court on June 3, 2022 approximately six years from the date the cause of action accrued. Accordingly, the court holds that the action, being in reality an ordinary employment claim albeit disguised as a constitutional Petition is time barred and filed in contravention of section 90 of the *Employment Act*.
42. The action is therefore struck out with costs to the respondent.

**DATED, SIGNED AND DELIVERED ON THE 20<sup>TH</sup> DAY OF APRIL, 2023.**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the petitioner

..... for the respondent

..... for the Interested Party

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**

