



**Makhulo v Planet Motors (MSA) Limited (Petition E020 of 2022)  
[2023] KEELRC 2032 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2032 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION E020 OF 2022**

**M MBARÚ, J  
JULY 27, 2023**

**BETWEEN**

**PETER OGINA MAKHULO ..... PETITIONER**

**AND**

**PLANET MOTORS (MSA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. In a contract dated 1<sup>st</sup> November 2016 the respondent employed the claimant as sales personnel at a wage of Kshs 30,000 per month. The petitioner was promoted to salesman and wage increased to Kshs 38,813 per month and the last wage he was earning when his employment was terminated on 31<sup>st</sup> January 2020.
2. The petitioner's case is that on 8 October 2019 the respondent asked the petitioner to sign a forged sale certificate that had been backdated to 8 August 2018 indicating that an auction was held and that the petitioner had emerged the highest bidder for a Nissan Vanette KCN 227V. The petitioner was shocked about these directions for being forced to engage in an illegality to fix him with KRA, NTSA/TIMS since he was not the one selling or receiving the cash. The petitioner told the directors that they were asking him to undertake an unlawful act which would put him in lots of problems. He was told that this was not the first such activity where the directors had signed off transactions under his name without his authority.
3. From this point, the directors became hostile to the petitioner by subjecting him to complaints and on 31<sup>st</sup> December 2019 the respondent issued him with notice of cessation of employment. Putting into account the threat and use of his signatures without authorisation, the petitioner reported the matter to Makupa Police Station under OB No 40/15/01/2020.
4. The petitioner resumed work on 27 January 2020 but the respondents terminated his services on the allegations that the company was making losses. However, there were active daily sales of motor



vehicles and any alleged losses cannot have affected a single employee. The respondents only wanted the petitioner out of his employment since there was no redundancy. There was nothing to justify the wrongful and unlawful termination of his employment which was contrary to Section 29(2) and 41 of the *Employment Act*.

5. That the petitioner was treated unfairly in termination of employment without being given a hearing and was denied natural justice. This was discriminatory since he was the only one targeted for such action without any good cause.

The petitioner is claiming the following dues;

- a. Notice pay at Kshs 44,631.5;
  - b. House allowance at 15% at Kshs 5,855 for 38 months Kshs 221,236;
  - c. Severance pay for 3 full years Kshs 67,171.2;
  - d. Unpaid service pay for 3 years Kshs 58,215;
  - e. 12 months compensation Kshs 535,578;
  - f. General damages for hostility and discrimination Kshs 3,000,000;
  - g. Exemplary damages Kshs 2,000,000;
  - h. Certificate of service; and
  - i. Costs.
6. The petitioner testified in support of his case. He had filed another case but he was forced to withdraw it because he had a disagreement with his advocate. That matter was not prosecuted.
  7. The petitioner testified that he performed his duties well with the respondent but he was alleged to have sabotaged operations and was issued with a warning letter which was not correct since they wanted him to undertake illegal activities. The boss wanted to engage the petitioner in work outside his ordinary duties resulting in the warning letter. This was discriminatory because when the respondent realised that the petitioner would not be swayed to do outside duties, they started abusing him before other employees.
  8. In response, the respondent filed the Replying Affidavit of Muhammad Faraz one of the directors of the company and aver that the petitioner was employed through letter dated 1<sup>st</sup> November 2016 as sales personnel earning Kshs 30,000 per month.
  9. In the year 2019 the respondent started experiencing financial challenges and could no longer sustain employees. On 31<sup>st</sup> December 2019 the respondent issued the petitioner with notice terminating his employment contract on grounds of redundancy and in line with the *Employment Act*, paid his terminal dues in notice pay and severance pay all particularised in the letter dated 27 January 2020.
  10. Aggrieved by the decision to terminate his employment, the petitioner filed a claim on 28 October 2021 in Mombasa ELRC Cause No 708 of 2021 seeking terminal dues amounting to Kshs 10,029,231.30 for alleged unfair termination of employment. The respondent filed a response to the claim but could not proceed since the petitioner filed Notice of Withdrawal dated 26 September 2022 and now lodged this petition over the same matter. The dispute herein is purely an employment matter and should not be addressed as a constitutional petition as it has not met the constitutional threshold.



11. The petitioner had repeated disciplinary issues involving insubordination and lack of teamwork and was issued with warning on 14 March 2018 but the reason leading to termination of employment was redundancy and not misconduct. The petitioner was never coerced or forced to do his work as alleged and the respondent is not an auctioneer and deals with sale of motor vehicles and the details attached by the petitioner with regard to vehicle No KCN 227V is strange to the respondent. The documents attached to support the averments relates to Motors Limited a different entity from the respondent.
12. The remedies sought by the petitioner are not justified and should be dismissed with costs.  
In evidence, the respondent called Mohammad Faraz.
13. At the close of the hearing parties filed written submissions which are analysed and the issues for determination are whether there are constitutional violations, whether the remedies sought should issue and who should pay costs.
14. Whether to file a petition of a claim is a matter that has now gained notoriety and the court has addressed in firmly with affirmation from the Court of Appeal particularly in the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR and *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR that;  

The Article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder 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*.
15. The matters addressed by the petitioner in the instant case are not novel calling for a constitutional petition because under Rule 7(3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* to file a Memorandum of Claim and urge any matter with regard to the enforcement of any constitutional rights and freedoms;  

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.
16. In this case, it was needless to invoke the constitutional petition route. The respondent ought to have raised such matter early enough for the court to address before hearing the parties.
17. With regard to the substantive issue at hand, through letter dated 31<sup>st</sup> December 2019 the respondent issued notice to the petitioner with regard to cessation of employment on the grounds that the company is experiencing losses and negative cash flows and is unable to fulfil majority of its current financial obligations. ..
18. Whereas an employer is allowed under Section 40(1) of the *Employment Act*, 2007 (the Act) to lawfully terminate employment due a redundancy following operational requirements due to financial hardships, the same should only apply where there exists reasons for, and the extent of, the intended redundancy. Indeed, a redundancy cannot exist just to lay off a single employee as held in the case of *Jane Khalechi v Oxford University Press E. A. Ltd* [2012] eKLR and in *Geoffrey Nyabuti Onguko v Blow Plant Limited* [2015] eKLR that to single out an employee and effect termination of employment



- under the guise of a redundancy is contrary to Article 41 of the Constitution that guarantee the right to fair labour practices.
19. The respondent has not demonstrated any matter of the extent of the redundancy necessitating the removal of the petitioner from his employment as against any other employee of the respondent.
  20. The notice dated 31<sup>st</sup> December 2019 is also not copied to the Labour Officer as a mandatory requirement under the provisions of Section 40(1)(b) of the Act;
    - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  30. Without the respondent adhering to the statutory requirements with regard to a redundancy, termination of employment is hereby found to be unfair and contrary to the provisions of Section 45(2)(b) of the Act.
  31. The petitioner is entitled to compensation due to unfair termination of his employment.
  32. On these findings, the court is required to look at the work record of the petitioner in assessing the compensation for unfair termination of his employment in terms of Section 45(5)(e) of the Act. The fact of the petitioner having been issued with a warning letter dated 14 March 2018 is not contested. The reasons thereof are challenged but the petitioner did not challenge the issuance of the warning. It remained part of his work records.
  33. On the last wage paid at Kshs 38,810, such is due in one month compensation for unfair termination of employment.
  34. Notice issued for a month and the petitioner served under the same was paid the due wage. The unfairness of exit from employment is addressed with compensation.
  35. Severance pay was awarded and duly paid and the petitioner acknowledged receipt of his terminal dues. A fresh claim for severance pay is not justified.
  36. Service pay claimed for 3 years is on the grounds that this was part of the contract. However, the court reading of the letter of appointment does not confer such benefit. The petitioner was secured under the NHIF and NSSF membership and the final dues paid through letter dated 27 January 2020 confirm these facts.
  37. The petitioner was not a general worker to claim within a minimum wage where house allowance is due. The claim for 3 years house allowance is not justified.
  38. General damages for work hostility and discrimination is made on the grounds that the petitioner was subjected to hostility and abuses while in employment. Such matters were generally made and not particularised. Having moved the court through a petition instead of a Memorandum of Claim, the petitioner ought to have addressed such claims of discriminatory treatment in a manner that would have allowed the respondent a fair chance to respond by giving details and particulars thereof which is lacking in this case.
  39. A certificate of service is due at the end of employment which should issue upon clearance.
  40. With regard to costs, as addressed above, the petitioner ought not to have invoked the constitutional petition route. For this reason, no costs are due.



41. Accordingly, judgment is hereby entered for the petitioner against the respondent with a finding that employment terminated unfairly; compensation awarded at Kshs 38,810; a Certificate of Service shall be issued; each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

