



**Kibiku v Oracle Technology Systems (Kenya) Limited (Employment and Labour Relations
Petition 34 of 2020) [2023] KEELRC 2718 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2718 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 34 OF 2020**

K OCHARO, J

OCTOBER 5, 2023

BETWEEN

NGARI KARUTHURI KIBIKU PETITIONER

AND

ORACLE TECHNOLOGY SYSTEMS (KENYA) LIMITED RESPONDENT

JUDGMENT

Introduction

1. At all material times the Petitioner was an employee of the Respondent in the position of Territory Sales Manager, having joined the latter's workforce on the 1st March 2017, through a process that he termed "enticement" from his former employer SAP Africa Region. His said employment was terminated on the 28th of March 2019. Claiming that in the course of his employment, he was subjected to harassment, humiliation and embarrassment and that his constitutional rights under Articles 27, 28, 41 and 47 of the Constitution of Kenya 2010 were violated, the petitioner instituted the Petition herein dated 28th February 2020, seeking for the following reliefs:
 - a. A declaration that the Respondent violated the Petitioner's rights under Articles 27, 28, 41 and 47 of the Constitution .
 - b. Kshs. 11,260,800 being the amount the Petitioner would have earned over the 12 months from the date of termination.
 - c. Commissions for all the closed transitions courtesy of the petitioner.
 - d. Interest on (b) and (c) above at court rates until payment in full.
 - e. Damages for discrimination and denial of the right to dignity together with interest thereon from the date of judgment until payment in full.



- f. Any other order and or reliefs the court may deem fit.
- g. Costs of the Petition.
2. The Petition is supported by the affidavit that was sworn by the Petitioner on the 28th of February 2020.
3. The Respondent resisted the petition through an affidavit that was sworn on the 19th of August 2020, by Mukunya Mugo, its Territory Manager (Cloud HCM).
4. On the 27th of September 2022, by consent of the parties, this court directed that the petition be canvassed by way of written submissions. Parties were consequently given timelines for filing the submissions. The submissions are on record.

The Petitioner's Case

5. The Petitioner stated that he first came into the employment of the Respondent on the 1st of March 2017 in the position of Territory Sales Manager. The appointment was under a letter of appointment dated 23rd January 2017. His said employment was terminated through a letter dated 28 March 2019.
6. His contractual emoluments included basic salary, commissions, transportation allowance and medical and life insurance.
7. The Petitioner contended that he was a top performer within the Respondent's sales division which had 13 members, all led by his immediate supervisor Serge Blockmans.
8. The Petitioner contended that in May 2018 he was put under a Performance Improvement Plan (PIP) on account that he had failed to boost business, not tagging along Mr. Serge Blockmans for customer meetings, not completing business plans in the system, and not having enough business in the system. The Petitioner asserted that the opposite of all these allegations was true.
9. The Petitioner stated that he requested for a coaching plan before the PIP. He met 3 criteria out of 4, however, the PIP was extended in June 2018. This was at a time when he was going through emotional challenges, and under counselling. This emanated from marital issues that he had with his spouse. He had made his supervisor Mr. Blockmans aware of the challenges.
10. The Petitioner further stated that the Respondent's Sales Division was structured in a manner that each individual had his or her targets to meet based on the industry he or she was managing. He was concerned with the manufacturing industry.
11. During the PIP the target set for him was book business worth USD 148,600. The target for the whole year was set at USD 750,000 which was the highest for any team member. Further, the Respondent set a target for the whole of its business at 40% of their target due to prevailing market conditions. Some of his team members had closed nil businesses but still enjoyed their employment privileges.
12. The Petitioner contended further that during the year 2018, he posted a business worth USD 80,000. He was to book a further USD 150,000 from Pwani Oils and Simba Corporation but the same was frustrated by the Respondent's management. He was declared 3rd best performer of the entire team of 13 members.
13. The Petitioner contends that some of his colleagues who did not close a single business within that financial year are still in the employment of the Respondent to date. This shows that the narrative of poor performance propagated by the Respondent was unfounded and untrue.



14. The Petitioner further contended that at the time of exiting employment of the Respondent, he had pending businesses that were in the process of being booked, among them, from Bobmil, which was valued at USD 45,000. The Bobmil account would have propelled him to position 2 of the 13.
15. The Petitioner asserted further that his supervisor did not support him in improving his performance, but instead, he frustrated any chance of improvement. Before his exit, he had numerous transactions that were pending closure and needed the direct input of his supervisor, but the closure was not enabled due to the supervisor's conduct of uncooperativeness. The supervisor's conduct towards the transactions was unprofessional and ill-motivated.
16. The Petitioner stated that in so saying, he had in mind:
 - a. The Pwani Oil Limited business worth USD 80,000, whose formalization was frustrated when his supervisor completely declined to meet the management team of the client, to finalize the transaction. This notwithstanding that he had made considerable efforts to convince the client severally to reschedule the meeting to accommodate the supervisor. The client had to cancel the procurement.
 - b. Simba Corporation business, worth USD 70,000. The Respondent had a successful bid and was awarded the tender. The procuring entity requested to meet the Respondent's sales team for introductions and signing of the contract, but his supervisor Serge Blockmans, declined to meet them for his reasons. Simba Corporation eventually awarded the tender to the 2nd best bidder. The transaction was lost.
 - c. That the supervisor, Mr. Blockmans so often denied him authority to travel to the client's premises for meetings.

He concluded that had these transactions materialized he would have surpassed his target of USD 146,000 within the 1st quarter.

17. On or about the 24th of September 2018, he was issued with a show cause letter to explain the failure to meet the expected performance whereas it was around that time that the supervisor had declined to attend meetings to close prospective business transactions.
18. He further stated that unlike him all other team members were accorded full support despite not having any business over the same period.
19. The Petitioner asserted that while undergoing the Performance Improvement Programme (PIP) he achieved 3 points out of 4 without the support of his immediate supervisor. Despite the achievement, he was unreasonably subjected to an extended PIP programme, contrary to the provisions of the Respondent's Human Resource Manual, which provided for a minimum score of 2 out of 4 points.
20. The Petitioner stated that as part of the set targets for assessment under PIP; he was required to schedule meetings with the stakeholders of Prospective Clients – Java House where he was pursuing a deal worth USD 200,000, a meeting which he set for 27/12/2018, and which the supervisor declined to attend. This denied him an opportunity to better his performance by USD 200,000. In January 2019 the supervisor also failed to attend a meeting with the Pwani Oil Limited's team, this further denied him the opportunity to close a business and attain the targets.
21. By reason of the premises, the Petitioner asserted that his immediate supervisor was not interested in his business and supporting his (Petitioner's) clients. According to Mr. Blockmans, the PIP process was merely focused on the weaknesses rather than the strengths of the Petitioner.



22. To further frustrate him, his Supervisor resorted to deliberately excluding him from team meetings. He could only learn of the held or pending meetings from his colleagues.
23. Despite all the frustrations he managed to secure various businesses worth USD 1,700,000, as can be discerned from the business summary as of 25th September 2019.
24. On the 29th of January 2019, he wrote to the Respondent's management expressing his frustrations with the tough, and unfair working conditions, by an email dated 29th January 2019, the Respondent's Human Resource representative dismissed all his concerns.
25. On the 6th of February 2019, he was issued a show cause letter requiring him to explain the failure to meet the expected performance standards. Mr. Blocmasns had insisted to the management that the Petitioner did not meet any of the PIP requirements and further that he was incapable of meeting the expected performance standards of the Respondent. The show cause letter was a result of his recommendations.
26. He attended the disciplinary hearing. After the hearing, he was denied an opportunity to have a copy of the minutes thereof. Later, he requested for the same via email. The Respondent's promise to forward the same to him was not honoured.
27. The Petitioner further contended that during the show cause meeting, new items that were outside those set on the show cause letter were brought on board for deliberation. They were unrelated to the PIP. This was aimed at creating an impression that lowly scored.
28. He stated further that during the meeting the salary he was earning was made a subject of discussion. Mr. Blockmans suggested that the Petitioner was not worth the salary he was earning. This confirmed that all through, his supervisor's actions against him were ill-prompted. He asserted that his salary was negotiated, as he was head-hunted from his previous employer SAP Africa Region, to join the Respondent and manage one of its portfolios.
29. He stated that quite untruly, maliciously and inaccurately, his Supervisor communicated to the Respondent's management that; he had not booked any business on the system and that there was no indication of that being done, contrary to what the system audit of his staff log showed as business that he booked but Mr. Blockman "moved" so as to justify his narrative. His explanation, clarification and evidence to the management were ignored.
30. The Petitioner stated that on the 3rd of April 2019, he was on an assignment where he was called and handed a termination letter purportedly for unsatisfactory performance of duties.
31. Dissatisfied with the termination, the Petitioner, appealed through a letter on dated 3rd April 2019.
32. He further stated that on the 10th of April 2019, the Respondent sent him an email purportedly detailing the final payment due to him. The dues were indicated to be KShs.1,119,827.72.
33. On the 25th of April 2019, he discovered that he had only been paid KShs.199,969.24. He immediately raised concerns over the same. To his surprise, he received an email dated 2nd May 2019 from the Respondent indicating that he had resigned from employment. The email was from the Head of Human Resource Operations in Africa and the Middle East, who sits in Romania. Looking at the contents of his email he was definitely misled.
34. He stated that his appeal was subsequently dismissed by the Respondent despite clear evidence that the termination was unfair. The hearing of his appeal happened over 3 months after he requested it.



35. Notwithstanding that it was a term of the employment contract that he was entitled to earn commissions, he earned none during the period he was in the employment of the Respondent.

The Respondent's Case

36. The Respondent stated that the Petitioner was employed as a Territory Sales Manager on 1st March 2017. During the tenure of his employment, the Petitioner was expected and agreed to be bound by the terms of his employment contract and the Respondent's policies including the poor performance policy, the compensation policy, the compensation policy and the MCA Disciplinary Policy.
37. The Respondent asserted that contrary to the Petitioner's allegation that he was head-hunted into employment, he was employed after a competitive recruitment process. He was not enticed by the Respondent to stop working for his previous employer. At all times, his continuity of employment was subject to his performance measured based on set targets.
38. The Petitioner's role involved developing and maintaining the long-term relationship between Oracle and designated customers to support revenue growth.
39. The Respondent stated that the Petitioner was not a top-performing employee as he alleges. During the tenure of his employment, the Petitioner failed to meet set targets. Consequently, and in accordance with the Respondent's poor performance policy, he was placed on a 3-month coaching plan commencing on 1st March 2018 and ending on 9th May 2018. The Petitioner was made aware that failure to achieve the objectives of the coaching within the time period set could result in the initiation of a performance improvement process.
40. It was further stated that the coaching plan set out the grounds for improvement, the objectives and the target completion date as well as comments on what he was to work to achieve over the coaching period. During this period, the Petitioner was offered guidance and support to enable him to achieve the set coaching objectives. Weekly reviews were also introduced to assess the Petitioner's progress. At the end of the period, the Petitioner had not met the set objectives.
41. It was further contended that prior to the commencement of the coaching, the Petitioner did not raise any of the discrimination or harassment claims. The Respondent has an elaborate grievance handling process through which the Petitioner could have safely raised the issues against his supervisor if at all they existed. He did not utilize the same.
42. The Respondent asserted that the allegation of discrimination and/or harassment are unfounded. The termination of his employment contract was on grounds of poor performance. He failed to meet the requirements of his job and follow through on agreed deliverables during coaching.
43. It was further alleged that the failure to improve resulted in the initiation of a 3-month performance improvement plan (PIP) process in accordance with the Respondent's performance policy. The process commenced on 6th June 2018 and ended on the 22nd August 2018. During the final review meeting, it was noted that the Petitioner failed to meet the expected performance standards. He had not reported any closures during the PIP period.
44. Flowing from the failure, the Respondent issued the Petitioner with an invitation to a show cause meeting that was scheduled for the 26th of September 2018 for him to explain why disciplinary action could not be taken against him for poor performance. The Petitioner was afforded an opportunity to respond to the allegations and to provide documentary evidence he was to rely on during the meeting. Realising that the notice to show cause was a two days' notice, contrary to the MEA Disciplinary Policy,



- the Respondent rescheduled the meeting to 2nd October 2018, to give the Petitioner sufficient time to prepare his defence.
45. At the show cause hearing the Petitioner opted to waive his right of accompaniment by a colleague, however he was given an opportunity to respond to the allegations in respect of his performance during the coaching and PIP processes and to submit documents and information he deemed necessary for consideration by the disciplinary panel.
 46. The Respondent states that the panel considered his representations and resolved to extend the PIP process to the 30th of November 2018. The Petitioner was informed that he would be expected to meet the objectives of the initial PIP and to organize at least 5 meetings between his line manager and key stakeholders from Pwani Oil Products Limited, Kenol Kobil Ltd and Doshi Group, Java House and NOC by 30th November 2018 i.e. at least one customer per week.
 47. On 26th October 2018, the petitioner wrote to the Respondent, appreciating the opportunity given but expressing his reservation on the \$148,000 target by 30th November 2018. The Petitioner proposed to close his forecast, \$80,000 deal by the said date. The Respondent considered and agreed to the Petitioner's terms as long as the 5 meetings were scheduled as directed. The Respondent accorded him the necessary resources and assistance to enable him to meet the agreed goals.
 48. The Respondent further stated that despite the support, the Petitioner failed to meet the objectives set for the 2nd PIP. Further, on the 28th of November 2018, the Petitioner sent an email to the Respondent stating that he had been attacked and his phone stolen. He also forwarded a medical certificate stating that he would require sick off from 28th November 2018 to 13th December 2018. The Respondent accommodated him given the circumstances and the December holidays and communicated that he would extend the second PIP to 31st January 2019. He was also issued with a new phone.
 49. The Respondent states that the second PIP process resumed once the Petitioner reported from his sick leave. Weekly meetings were held between the Petitioner and the Sales Manager. He was all through accorded support but failed to show any signs of progress necessitating the Respondent to invite him for a second show cause meeting through its letter dated 6th February 2019. The meeting was to take place on the 12th of February 2019. However, it was rescheduled to 15th February 2019 to allow the disciplinary panel to read and review the material shared by the Petitioner.
 50. The Petitioner attended the meeting and was given an opportunity to make his presentations. The panel considered the presentations and concluded that the Petitioner had consistently failed to meet the expected performance standards and resolved to terminate his employment contract on 29th March 2019 on grounds of poor performance. The Petitioner's terminal dues were computed and paid to him.
 51. The Respondent asserted that the matters that were discussed in the show cause meeting were strictly those that were set forth in the show cause notice.
 52. The Respondent further stated that the Petitioner was notified of his right to appeal against the decision within 5 days as per the Respondent's policy. The Petitioner lodged his appeal on 5th April 2019. He was invited to the appeal hearing on 23rd May 2019. He was informed of his right to present documents in support of his appeal, and of his right to be accompanied by a colleague during the hearing. The appeal was heard and upon consideration, the panel found no merit in it and dismissed the same.
 53. The Respondent denied that the allegation was subjected to harassment or discriminatory treatment for attending a colleague's burial on 14th May 2018 or at all. The Petitioner did not notify his line



manager or obtain the requisite approval to be away from the office. However, no adverse action was taken against him.

54. The Petitioner is not entitled to payment of commissions as it did not meet the threshold for payment of the same pursuant to the Respondent's compensation policy.
55. The Petitioner is not entitled to any compensation in the form of damages sought as none of his constitutional rights were violated.

The Petitioner's submissions

56. Counsel for the Petitioner submits that the matter distils down to the following issues:
 - i. Whether or not the Respondent violated the rights of the Petitioner as decreed under Articles 27, 28, 41 and 47 of the *Constitution* of Kenya.
 - ii. Whether or not the Petitioner is entitled to damages for violation of his constitutional rights.
 - iii. Whether the Petitioner is entitled to damages for unfair termination.
57. Counsel submitted that Article 27 of the *Constitution* provides for equality and freedom against discrimination. It prohibits discrimination on those grounds listed in sub-Article 4.
58. As to what amounts to discrimination, Counsel placed reliance on the decision in the case of *Barclays Bank of Kenya Ltd & Anor. n Constitution}}*. *Gladys Muthoni & 20 others* (2018) eKLR.
59. Counsel further submitted that the deliberate exclusion and/or failure to include the Petitioner in meetings organized by his immediate supervisor, while ensuring the Petitioner's team members would attend the meetings, directly compromised his work output, negatively impacting his performance improvement.
60. The Respondent through the Petitioner's immediate supervisor Mr. Serge, would persistently and deliberately fail to attend meetings organized by the Respondent and further declined to approve the Petitioner's requests to go to client meetings despite having been informed by the Petitioner of the meetings. This caused the Petitioner to lose business opportunities, leading to his alleged 'poor performance'. The supervisor was determined to frustrate the Petitioner making his working environment difficult.
61. It was submitted that out of the entire team of 13 members who were under Mr. Serge, it was only the Petitioner who was subjected to the PIP process. It was no hidden secret that 10 of the team members had not closed a single business at the material time. He was a top achiever, it is incomprehensible why his employment would be terminated on account of poor performance, yet the 10 were not.
62. Counsel for the Petitioner further submitted that the Respondent violated the Petitioner's right to human dignity. He submitted that under Article 28 of the *Constitution*, every person has inherent dignity and the right to have that dignity respected. On the purpose and scope of the right, Counsel cited the case of *Ahmed Issack Hassan v Auditor General* (2015) eKLR, where the court held:

“..... the right to human dignity is the foundation of all other rights and together with the right to life forms the basis for the enjoyment of all other rightsput differently thereof, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated.”



63. And the Constitutional Court of South Africa's holding in *Dawood and Another v. Minister of Home Affairs & others* (CST 35 99) (2020) ZALC, thus:

“Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that confirms the interpretation of many, possibly all, other rights. Human dignity and also a constitutional value that is of central significance in the limitations analysis.”

64. The Respondent through Mr. Serge was in the habit of calling and texting the Petitioner and would threaten and harass him in the said calls and send messages, causing the Petitioner immense embarrassment, emotional and mental anguish, fear trauma, infringing on his right to human dignity.

65. On the alleged infringement of the Petitioner's right to fair Labour Practice, it was submitted that prior to joining the Respondent's employment, his salary was negotiated and agreed upon. It was an infringement on his right to fair remuneration for Mr. Serge to push the narrative that the Petitioner was undeserving of the pay.

66. Submitting in support of the allegation that the Petitioner's right to fair administrative action under Article 47 had been violated, Counsel for the Petitioner stated that the PIP process was a process that was designed to eliminate members of staff whom the supervisor did not like.

67. It was submitted that prior to being put on PIP, the Petitioner was placed under the Respondent coaching plan where he performed exemplary well. Consequently, there was no poor performance upon which he needed to be placed on the Performance Improvement Plan. To support the point, reliance was placed on the cases of *June Wairimu Machira v. Mugo Waweru & Associates* (2012) eKLR, and *Jane Samba Mukala v. Ol Tukai Lodge Limited* Cause No. 823 of 2010; (2010) LLR 255 (ICK).

68. On the issue as to whether the petitioner is entitled to damages for violation of his constitutional right, it was submitted that having violated the Petitioner's constitutional rights, the Respondent as the offender should be made to bear the consequence of the violation. This will go a long way to preserve the sanctity of the *Constitution*. To fortify the Submission reliance was placed on the holding in *Edward Achongo Oyugi and 2 others v. Attorney General* (2019) eKLR.

“Law is the bloodline of every nation. The end of law is justice. It gives justice meaning. It is by yielding justice that the law is able to preserve order, peace and security of lives and property, make society secure and stable, regulate and shape the behaviour of citizens safeguard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice, through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of power changes.”

69. It was further submitted that the evaluation of damages for the violation of constitutional rights entails the exercise of Judicial discretion which should be exercised judicially. To buttress this point reliance was placed on the case of *MWK & Advocates & Another v Attorney General & 3 others* (2017) eKLR.

70. Lastly, it was submitted that section 49 of the *Employment Act* bestows authority upon the court to grant a compensatory award for unfair dismissal. The award is discretionary. It is influenced by circumstances peculiar to that case. In this case the court was urged to consider the fact that the Petitioner was head-hunted from his previous employment. The court should award him 12 months' gross salary.



Respondent's Submission

71. The Respondent filed twenty-three-page written submissions. They are elaborate and relevant. They have brought forth a number of authorities that I have found very useful. However, with great respect to Counsel, the Submissions are unnecessarily lengthy and draining. The Respondent should take comfort that I have considered them, but I am reluctant to venture into the business of summarizing them here.

Analysis and Determination

72. From the Petition, the affidavit in support thereof, the Respondent's replying affidavit, and the respective submissions by the parties, the following issues present themselves for determination:

- a. Whether the Petitioner's petition herein meets the legal threshold of a properly crafted and presented constitutional petition
- b. Whether the Petitioner has established a violation of his constitutional rights put forth in the Petition.
- c. Whether the termination of the Petitioner's employment was lawful and fair.
- d. Whether the Petitioner is entitled to the reliefs sought.

a. Whether The Petitioner's Petition Herein Meets The Legal Threshold Of A Properly Crafted And Presented Constitutional Petition

73. It is a trite principle in constitutional litigation that a party seeking relief[s] through a constitutional petition on the premise that his or her constitutional rights and fundamental freedoms, or the Constitution have been violated, he or she must plead with a reasonable degree of precision, the rights violated, the constitutional provisions, the foundation of the alleged violated rights, and how the violation occurred. The locus classicus case on this is the case of Anerita Karimi v. The Attorney General (1579) eKLR where the court aptly stated;

“We should 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 that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

74. In the Petition, the Petitioner seeks for reliefs inter alia:

- a. A declaration that the Respondent violated the Petitioner's rights under Articles 27, 28, 41 and 47 of the Constitution.

It was imperative for him therefore to describe with a reasonable degree of precision how his rights under these provisions of the Constitution occurred.

75. Article 28 of the Constitution of Kenya 2010, provides:

“Every person has inherent dignity and the right to have that dignity respected and protected.”

Article 41 provides:



- "(1) Every person has the right to fair labour practice.
- (2) Every worker has the right –
 - (a) to fair remuneration
 - (b) to reasonable working conditions
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.
- (3) Every employer has the right: -

.....

And Article 47:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) if a right or fundamental freedom of a person has been or is likely to be severely affected, by administrative action, the person has the right to be given written reasons for the action.
- (3)

- 76. I have carefully read the petition, and it is clear to my mind that though the Petitioner seeks a declaration that his rights under Articles 28, 41 and 47 were violated, nowhere therein does he reasonably or at all describe how these rights have been violated by the Respondent.
- 77. This court has not lost sight of the fact that on page 3 of the petition, he has put forth a sub-heading _
 “Particulars of the violations, infringements and threats to the rights and fundamental freedoms to Article 27, and 28 of the Constitution and Section 5 of the Employment Act.”
- 78. In my view, the “reasonable degree of precision” referred to in the Anerita case (*supra*) requires that the description of the manner the alleged violation occurred, be one that when looked at, clearly reveals in substance a connection between it (the description) and the contravened rights(s). The description must in an unambiguous way speak to the specific right[s] alleged to be infringed.
- 79. Having said this, I take a firm view that in the instant Petition, I am only to determine whether the Petitioner’s right under Article 27 of the Constitution of Kenya was violated. However, this is not to say that the petitioner’s claim that his guaranteed right against discrimination was well presented. Shortly hereinafter, I shall demonstrate that it wasn’t and it should fail on the count.
- 80. The Respondent’s Counsel has submitted that the issues in dispute as pleaded are all in the category of an employment dispute and not a constitutional dispute. The issues are issues that ought to be litigated under an ordinary employment claim, and not through a constitutional litigation. In essence, the Respondent’s Counsel is telling the court that the doctrine of constitutional avoidance operates heavily against the Petitioner’s instant petition. The court notes with concern that the petitioner did not make any submissions in response to this vital issue raised by the Respondent’s Counsel.
- 81. Impelling to state that after the Promulgation of the 2010, Constitution there has been a surge in litigants constitutionalizing every dispute, a practice that courts are highly reluctant to approve.



82. In *KKB V SCM & 5 others* [Constitutional Petition 014 of 2020] KEH 289[KLR] on the doctrine, Justice Mativo, stated and I agree, thus;

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on Constitutional arguments that courts will entertain. It encompasses three main principles which are standing, ripeness and mootness. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor.* [2001] [2] ZLR 501, in which Ebrahim JA said the following: -

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

83. The Constitutional Court of Zimbabwe in *Chewira & others - v.- Minister of Justice Legal and Parliamentary Affairs & others* held;

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

84. The Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others v – Royal Media Services Limited & 5 others* [2014] eKLR stated on the principle;

“256. The Appellants in this are seeking to invoke the “principle of avoidance”, also known as “Constitutional avoidance”. The principle of avoidance entails that court will not determine a constitutional issue, when a matter may be properly decided on another basis.....”

85. In *COD & another v- Nairobi City Water & Sewerage Company Limited* [2015] eKLR, the Court stated;

“.....Similarly, in *Papinder Kaur Atwal v- Masnjit Singh Amrit*, Nairobi Petition No. 236 of 2011 where after considering several authorities Justice Lenaola remarked as follows;

” All the authorities above would point to the fact that the *Constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within the Administrative processes..... I must add the following; the Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

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



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

the Constitution sets out to declare in general terms the fundamental concepts 4, yet, as has been proclaimed by the highest Court in the land, it is not a general substitute for the normal procedures for invoking judicial control of Administrative Action. [see *Harrison v- A.G* [1979]3 WKR.....”

86. The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow, only to be travelled on, in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under the Constitution . Where a matter can be handled through other processes, the best course is to allow them to be under those processes. See ELRC Petition No. E209 of 2022- Dr. Emmanuel Wambua Kituku v. The Counsel of Legal Education & Anor. It matters not that alternatively, they can be dealt with under a constitutional litigation. I have carefully considered the issues raised and as presented, in the Petitioner’s petition and the affidavit in support thereof, they are largely on the procedural and substantive fairness of the termination of the Petitioner’s employment with the 1st Respondent on account of poor performance.
87. A keen consideration of what the petitioner has set out on the above stated documents can at best be helpful to demonstrate why he holds the termination on account of poor performance was mal fides, without a valid and or fair reason, and not to demonstrate an infringement of a constitutional right[s].
88. This Court has not lost sight of the fact that Section 5 of the Employment Act provides for a prohibition against workplace discrimination in a substantive manner. In my view, any litigation based solely or substantially on workplace discrimination should be initiated as an ordinary claim. The provisions of Article 27[4] and [5] shall then be read together with those of the above stated section.
89. After carefully weighing the material presented before me, I come to an inescapable conclusion that the substantive remedies sought by the Petitioner, do not depend upon the “constitutional issues” raised by the Petitioner. The reliefs sought are reliefs that ought to have been under the Employment Act in an ordinary claim through the procedure provided for under the Employment and Labour Relations Court Act, and the Practice and Procedure Rules of this court.
90. This brings me to a point where I must state that a mere allegation that a human right or fundamental freedom, or the Constitution has been or is threatened to be violated is not sufficient enough to attract the Court to engage its jurisdiction under the provisions of the Constitution , instead of the jurisdiction under statute.
91. By reason of the premises, I find that the applicability of the constitutional avoidance principle militates against the petitioner’s petition herein. The grievance of the petitioner is improperly presented to this Court for interrogation. The petition should fail at this point, therefore.
92. Having found as I have hereinabove, I hesitate to delve into the other two issues for determination conscious that the Claimant might desire to litigate his claim elsewhere.
93. By reason of the premises, I hereby strike out the petitioner’s petition. Each party to shoulder its own costs.

READ, SIGNED AND DELIVERED THIS 5TH DAY OF OCTOBER, 2023.

OCHARO KEBIRA

JUDGE



In the Presence of:

Ms Onyango holding brief for the Petitioner.

Ms Wetende for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

