



**Jaji v Kenya Ports Authority (Petition E009 of 2023)
[2023] KEELRC 3028 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3028 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E009 OF 2023
AK NZEI, J
NOVEMBER 23, 2023**

BETWEEN

BENSON KIRINGI JAJI PETITIONER

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. Vide a petition dated 20th February 2023 and expressed to be founded on Articles 2, 19(2), 22(1), 41 and 258(1) of *the Constitution* of Kenya 2010, and Sections 3(2) and 12 of the *Employment and Labour Relations Court Act*, the Petitioner pleaded:-
 - a. that until 1st January 2023, the Petitioner was an employee of the Respondent in the capacity of Ship Operation under Grade HM4, tasked with managerial and supervisory duties as opposed to Berth Tally Clerk as erroneously captured in the Respondent's retirement letter dated 28th September 2022.
 - b. that the Petitioner worked for the Respondent since the year 1995, and was promoted from the position of a Berth Tally Clerk to that of Ship Operation Grade HM4 on 1st April 2009; though he was not given a letter effecting the promotion and his salary remained that of a Berth Tally Clerk (at Kshs. 98,999) as opposed to the salary of a Ship Operation Grade HM4, which was Kshs. 115, 000.
 - c. that from 1st April 2009, the Petitioner never received the salary and/or allowances for the position of Ship Operation Grade HM4; and that he faced verbal threats through the Respondent's Managers and Human Resource Personnel, and feared loss of his employment, and that after 14 years of serving as Ship Operation Grade HM4, he was served with a retirement letter indicating that he would be retiring as a Berth Tallying Clerk.



- d. that the Respondent's acts were in contravention of the provisions of Article 41 of *the Constitution* of Kenya 2010 regarding fair labour practices and fair Remuneration Rules of Natural Justice and International Labour Conventions and Declarations. The Petitioner pleaded:-
 - i. that the Respondent underpaid the Petitioner.
 - ii. that the Respondent failed to pay the Petitioner's rightful salary and accrued allowances, failed to issue the Respondent with an appointment/confirmation letter as Ship Operation Grade HM4, and failed to issue the Petitioner with a Certificate of Service stating his capacity as Ship Operation Grade HM4.
 - iii. that the Respondent constantly threatened the Petitioner with termination for constantly demanding for his right to be issued with a letter cementing his designation.
 - iv. that the Respondent failed to remunerate the Petitioner fairly for work done and services rendered to the Respondent.
 - e. that the Respondent contravened the Petitioner's rights as enshrined in Articles 41(1) and 42(2)(a) of *the Constitution* of Kenya, 2010 regarding fair labour practices and right to fair remuneration.
2. The Petitioner sought the following reliefs against the Respondent:-
- a. a declaration that the Petitioner was employed by the Respondent in the capacity of Ship Operation Grade HM4 from 1st April 2009.
 - b. a declaration that the Respondent's actions amounted to a breach of the Petitioner's right to fair labour practices and fair remuneration as guaranteed under Article 41 of *the Constitution* of Kenya, 2010.
 - c. general damages for breach of the Petitioner's right to fair labour practices and fair remuneration as guaranteed under Article 41 of *the Constitution* of Kenya, 2010.
 - d. punitive and exemplary damages against the Respondent.
 - e. a mandatory injunction compelling the Respondent to calculate all balances due to the Petitioner in the capacity of Ship Operation Grade HM4, and award the same to the Petitioner forthwith.
 - f. a certificate of service do issue in favour of the Petitioner stating his job designation as that of Ship Operation Grade HM4.
 - g. costs and interest.
 - h. any other reliefs as the Honourable Court may deem fit to grant.
3. The Petition is opposed by the Respondent vide a replying affidavit of Daniel Okwiri, the Respondent's Human Resource Officer (man power services) sworn on 27th April 2023. It is deponed in the said affidavit:-
- a. that the Petitioner has not laid any evidence to prove unlawful and unfair labour practices, and that his petition should be disallowed.
 - b. that the Petitioner was appointed to the Respondent Authority with effect from 10th July 1995 to the post of Docker PA.12, and was later translated to Docker (pool) Grade HG.4 Post No.



431-2670 with effect from 1st September 2002; and that he was confirmed to permanent and pensionable status with effect from 10th July 1995 after satisfactory completion of a two years' probationary period.

- c. that the Petitioner was promoted to the post of Clerical Assistant (Shipment) Grade HG.1 post No. 431-2310 with effect from 28th August 2007.
 - d. that the Petitioner was last promoted to the post of Berth Tally Clerk Grade HG.1 as opposed to his averments that he was an employee in the capacity of Ship Operation under Grade HM4.
 - e. that the Petitioner was later translated as a Senior Operations Assistant (Import Yard) Grade KPA8 with effect from 23rd July 2022 until he lawfully retired on 1st January 2023 after serving the Respondent Authority for 27 years on permanent and pensionable terms.
 - f. that the Petitioner was never promoted from the post of Berth Tally Clerk to Ship Operation Grade HM4; and that the latter position does not exist and is alien to the Respondent.
 - g. that the Respondent's Human Resource Department has never, at any time, threatened the Petitioner with termination; and that the Respondent has never underpaid the Petitioner or failed to remunerate him for work done.
 - h. that the Respondent's Human Resource Department is responsible for making appointments by issuing appointment letters to all staff in the Respondent organization, and is the custodian of all records; and that there is no record of the Petitioner having been appointed at Grade HM4, even on acting capacity.
4. Documents annexed to the said replying affidavit include:-
- a. a letter by the Respondent dated 25th July 1995 appointing the Petitioner on permanent and pensionable terms.
 - b. a confirmation letter (on permanent and pensionable terms) dated 14th November 2003.
 - c. a letter dated 3rd September 2007 promoting the Petitioner to the post of Clerical Assistant (Shipment) Grade HG2 post No. 431 – 2310 with effect from 28th August 2007, and
 - d. a letter dated 23rd July 2022 translating the Petitioner to the post of Senior Operations Assistant (Import Yard) Grade KPA 8, post No. 120 – 4058 (in the new KPA establishment.)
5. On 4th March 2023, I gave directions on filing of written submissions. Submissions have since been filed.
6. It is to be noted that the only documents that the Petitioner annexed to his affidavit sworn on 20th February 2023 in support of his petition herein are copies of his National Identity Card and his retirement letter dated 28th September 2022. The said letter addresses the Petitioner by his name and rank (Berth Tally Clerk) and states in part:-

“Re: Retirement

I note from the records available in this office that you are due for retirement on 1st January 2023 after serving the Authority for the past 27 years on permanent and pensionable terms.

Accordingly, you are hereby given 3 months' notice of retirement to commence on 1st October 2022. You will therefore be paid salary up-to and including 1st January 2023 and thereafter your retirement benefits due as at that date.”



7. The Petitioner has not faulted the contents of that letter. All he alleges is that in the said letter, “the Respondent captured the Petitioner’s capacity (rank) as Berth Tally Clerk as opposed to Ship Operation Grade HM4 tasked with managerial and supervisory duties; thus ignoring the Petitioner’s 14 years of service as Ship Operation Grade HM4 without pay of lawful dues and allowances.
8. I have looked at the documents filed by both parties herein, and I have not seen any document indicating, or even suggesting that the Petitioner was at any given time promoted to the rank (position) of Ship Operation Grade HM4, which the Respondent deponed does not exist in its organizational structure.
9. Issues that fall for determination in the present petition, in my view, are as follows:-
 - a. whether the Petitioner has demonstrated violation or threatened violation of his fundamental rights guaranteed in *the Constitution* of Kenya.
 - b. whether the Petitioner is entitled to the reliefs sought.
10. On the first issue, the allegations levelled by the Petitioner against the Respondent, whether founded or not, do not raise any constitutional moment. The petition does not demonstrate any question of interpretation or application of *the Constitution*. The Petition demonstrates a simple employment claim directly founded on *the Constitution*. The Court of Appeal had the following to say regarding such scenarios in the case of Summaya Athman Hassan vs. Paul Masine Simidi & Another [2019] eKLR:

“... 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 1st 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 case of Barbra 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 ...”

11. The Petitioner’s allegation of not having been given a letter “to cement” an alleged promotion during his employment with the Respondent falls under Section 10 (1) & (5) of the *Employment Act* which provide:
 - “(1) A written contract of service specified in Section 9 shall state particulars of employment which may, subject to Subsection (3) be given in instalments, and shall be given not later than two months after the beginning of the employment ...
 - (5) Where any matter stipulated in Subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee in writing.”
12. As already stated in this Judgment, it has not been demonstrated that there was any change in particulars of the Petitioner’s employment that was not notified to the Petitioner in writing. Indeed, the



Petitioner was, about five (5) months to his retirement date, notified by the Respondent's Managing Director of the translation of his post (Berth Tally Clerk) to Senior Operations Assistant (Import Yard), Grade KPA8 post No. 1220 – 4058, following review of the Respondent's organization structure. The Petitioner is not shown to have questioned and/or challenged the legality or validity of that communication.

13. Further, the Petitioner's allegations of unfair labour practices against himself were neither substantiated nor proved. The Respondent referred the Court to the following Court decisions:-
 - a. Esther Njeri Maina vs. Kenyatta University [2020] EKLK where the Court stated:-

“Indeed, fair labour practices include adherence to the law through the issuance of an employment contract, confirmation of employment after serving under probationary period or being a casual employee for a period exceeding 3 months.”
 - b. Kenya County Government Worker's Union vs. County Government Of Nyeri & Another [2015] eklr where the Court stated:-

“It is the opinion of the Court that the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaboration set out in Article 41 or promote and protect fairness at work. These include provision for basic fair treatment of employees.”
 - c. George Onyango Akufi vs. G4S Security Services Kenya Ltd [2013] eklr where the Court stated:-

“Fair (unfair) labour practices have not been defined in *the constitution* or statute ...

It is a flexible term not capable of precise definition. Therefore, it is left to the Courts to define and determine the scope, content and extent of what would qualify to be an unfair labour practice, or to put in in the converse, what conduct or practice would amount to an unfair labour practice. I also note that *the constitution* has not talked of lawful or legal labour practices ...”
14. A blanket allegation of unfair labour practices without any material to back it up leaves the Court with nothing to interrogate in search of a finding on whether or not there was unfair labour practices as alleged. As stated by the Court of Appeal in the Summaya Athman Case (supra), the Article 41 rights are enacted in the *Employment Act* and the *Labour Relations Act*. Any act or omission by an employer that contravenes the provisions of the said two Acts may amount to unfair labour practice. No such act or omission has been demonstrated on the part of the Respondent herein.
15. It is my finding that the Petitioner has not demonstrated violation or threatened violation of his rights guaranteed in *the constitution* of Kenya.
16. On the second issue, and as the reliefs sought in the Petitioner's petition are based on alleged violation of the Petitioner's constitutional rights, and since no violation has been demonstrated, it is my finding that the reliefs, which are set out in paragraph 2 of this judgment, are not deserved.
17. The petition herein is without merit, and is hereby dismissed. Each party will bear its own costs of the petition.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD NOVEMBER 2023

AGNES KITIKU NZEI



JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

