



Odongo v Radar Security Limited (Employment and Labour Relations Petition E033 of 2020) [2023] KEELRC 2909 (KLR) (14 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2909 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E033 OF 2020
NJ ABUODHA, J
NOVEMBER 14, 2023**

BETWEEN

MILICENT AKINYI ODONGO PETITIONER

AND

RADAR SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Petitioner through an amended Petition dated 28th April, 2021 alleged inter alia;
 - a. That she was employed by the Respondent herein as a security guard since the year 2009 as a casual with a starting salary of Kshs. 8,888/= and was later confirmed as a permanent and pensionable employee with salary increment over the years to Kshs. 16,783/= until June 2020 when she was constructively dismissed from employment by the Respondent.
 - b. That during the commencement of the employment her basic human rights were and are still being violated for reasons that at the time of employment the Respondent requested for her original certificates and testimonials which have been retained and have never been returned to her despite numerous requests; she was verbally sent away upon her return from annual leave in the month of June, 2020 and has not been paid her salary. Further upon asking for the original documents the Petitioner was coerced and forced to resign in order to get back her original documents. The Petitioner filed a petition dated 17th August, 2020 seeking release of the said documents which the Respondent released on 15th September, 2020 after service of petition upon itself. The said certificates and testimonials were defaced with permanent markings of red indelible ink and she stands to lose all her benefits she has worked hard for eleven years should she resign.



- c. That the Petitioner served the Respondent diligently for the 11 years served and she was sent home upon returning from annual leave being told verbally that there was no work since June 2020 and she was not paid.
 - d. The Petitioner alleged violation of her constitutional rights ranging from Articles 20, 21, 23,24,29,36(1),40(1), 41,165(30(b) and 258 of *the Constitution* and section 43,46,45 and 49 of the *Employment Act* on reason for termination; unfair termination and the remedies.
2. The Petitioner prayed for;-
- a. A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 26,27,28,35,43 and 47 of *the Constitution* have been contravened and infringed upon by the Respondent and that the Petitioner is entitled to payment of damages as compensation to be assessed by the court.
 - b. A declaration that the termination of the Claimant’s contract of employment was constructive, unlawful, unprocedural and unfair for want of valid reason and damages for unfair termination of employment are payable.
 - c. A declaration to issue that any withholding of original academic certificates of an employee by an employer is unconstitutional and amounts to unfair labour practice
 - d. The Petitioner be immediately reinstated and assigned duties and or in the Alternative
 - e. Be paid a one-month salary in lieu of notice, 12 month’s pay for unlawful termination and payment of all outstanding dues and benefits until retirement from date of termination.
 - f. The Respondent bear the costs of replacement of testimonials
 - g. The Respondent does issue the Petitioner with certificate of service.
 - h. Costs and interests.
3. The Respondent in reply to the amended Petition filed a
Replying Affidavit sworn on 17th May, 2023 alleging inter alia that;
- a. The Respondent denied the legal basis of the Petition and alleged breaches, limitation of rights and fundamental freedoms from security of the person freedom of association, protection of the right to property, labour relations, unfair termination and wrongful termination.
 - b. The Respondent averred that the Petitioner was employed by the Respondent in late 2009 as a casual employee which was duly confirmed on 14th January,2016 and she proceeded on annual leave from 9th May,2020 and failed to report back on duty as expected without any lawful reason.
 - c. The Respondent further denied coercing, forcing or using unlawful means to have the Petitioner resign and further that the said Petitioner’s testimonial documents were duly released to her and denied allegations by the Petitioner that it unlawfully retained her testimonial documents terming it false and untrue as the said documents were handed over to the Petitioner’s Advocates and the same were never mutilated, altered, destroyed and or damaged by it.
 - d. The Respondent further averred that due to COVID-19 pandemic on or about August,2020 that caused economic recession worldwide the Petitioner was granted unpaid leave by the



Respondent for sixty days effective 10th August,2020 and that this court has no mandate to declare that the Petitioner's fundamental rights and freedoms as contravened since the Respondent relied on Employment Act in terminating the Petitioner's contract of Employment as indeed there were valid reasons of Global pandemic of Covid-19 that caused economic recession worldwide.

e. The Respondent further averred that the issues before this court do not constitute a constitutional petition as held in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 others(2014) eKLR and Sumayya Athnami Hassan v Paul Masinde Simidi & Another(2019) eKLR as such claims should be filed under Memorandum of claim and not a petition hence the Petition should be struck out.

1. The parties agreed to dispose this Petition by written submissions.

Petitioner's Submission

5. Through her submissions dated 27th June, 2023 the Petitioner on the issue whether the Petitioner's fundamental rights and freedoms in the constitution were infringed the Petitioner submitted that her rights under Article 20, 21, 23, 24, 29(d), 36(1),40(1) and 41 of the Constitution were violated. It was the Petitioner's submission that the Respondent infringed on those rights by denying her to join others in business or as a colleague. She could not join another organization when the Respondent withheld her original certificates and testimonials until filing of this suit which prompted the Respondent to release the said documents to her. This was against fair labour practices and she relied on the cases of Joseph Maina Theuri v Gitonga Kabugi & 3 others(2017) eKLR and Kenya County Government Workers Union v County Government of Nyeri & Another (2015) eKLR.
6. It was the Petitioner's submission that the Respondent's assertion that they sent her on unpaid leave for 2 months vide a letter attached to its Replying Affidavit was not true since she never received the letter. She relied on the case of Galgalo Jarso Jillo v Agricultural Finance Corporation (2021) eKLR and Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others(2019) eKLR where the Respondent had to prove that they believed the reason for termination to genuinely exist. The Petitioner reported for duty after her annual leave and was told verbally to go back home since there was no work. Her salary was withheld for two months until the time of filing of this suit.
7. On the doctrine of constructive dismissal the Petitioner relied on the cases of Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited(2016) eKLR, Coca Cola East & Central Africa Limited v Maria Kagai Ligaga(2015)eKLR and JWN V Securex Agencies (K) Limited92018 eKLR to submit that failure to reassign the Petitioner duties when she reported on duty after annual leave amounted to unfair termination.
8. On the issue of remedies available for the Petitioner she submitted that since she was told that her academic documents would be returned upon resignation and only returned after she filed this suit it means the employer-employee relationship had irretrievably broken down hence the prayer for reinstatement could not stand. She relied on section 49 of the Employment Act and the Galgalo case above on the remedies available after finding there was unfair termination.
9. The Petitioner on the issue of certificate of service submitted that she was entitled under section 51 of the Employment Act and relied on the case of Transport Workers Union v African Safari Diani Adventure92013) eKLR.



10. In conclusion the Petitioner submitted that the Respondent returned her academic documents which were defaced a fact which was not denied by the Respondent. This was against fair labour practices and sought redress from the court.

Respondent's Submissions

11. Through their Submissions dated 23rd June, 2023 the Respondent submitted on the issue of whether the Petitioner's fundamental rights and freedoms were infringed that the Petitioner just paraphrased the articles of *the Constitution* as pertains to her bill of rights with no relationship with employment between parties and relied on the case of Okiya Omtatah Okoiti v Principal Secretary for Health, Board of directors & 3 others(2022) eKLR and Kiambu County Tenants Welfare Association v Attorney General & Another(2017) eKLR.
12. The Respondent relied on the doctrine of constitutional avoidance and submitted that the Petitioner had abused the doctrine by filing an employment matter in the guise of a constitutional petition but failed to expressly plead the same as they are mere allegations and the Petition should be dismissed as bad law and unmerited.
13. On the issue of who should pay costs the Respondent submitted that the court should take in to account section 27 of the *Civil Procedure Act* and the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya& another (2016) eKLR.

Determination And Disposal

14. I have reviewed and considered the pleadings and submissions by both counsels in support and opposition to the case; I have also considered authorities relied on by Counsels and I have come up with three main issues;
 - a. Whether the Petitioner's Constitutional fundamental rights and freedoms were infringed by the Respondent.
 - b. Whether the Petitioner's employment was unfairly terminated.
 - c. Whether Whether the Petitioner is entitled to reliefs sought

Whether The Petitioner's Constitutional Fundamental Rights And Freedoms Were Infringed By The Respondent.

15. The Petitioner alleged that her constitutional rights and freedoms were infringed by the Respondent. She therefore needed to prove, first if there were any constitutional issues raised in this petition and illustrate clearly the infringement of those constitutional rights. The Court has however noted that the prayers sought by the Petitioner could well be handled by this court as employment claim without having to be filed as a constitutional petition. All the reliefs are provided for under section 49 of the *Employment Act* and the other enabling laws. It was therefore not necessary to present the claim as a constitutional petition. The same attitude was adopted by the court in Judicial Service Commission v Gladys Boss Shollei & Another (2014) eKLR which relied on principles established in Anarita Karimi and Mumo Matemu cases.
16. As was stated in the above cases, the Petitioner herein has not met the set test of pleading with particularity the infringed rights. Apart from the issue of withholding the academic and testimonial documents which was released to her upon filing of this case and which she alleged were defaced, this did not amount to constitutional unfair labour practice and could not reasonably prevent her from securing another employment.



Whether The Petitioner’s Employment Was Unfairly Terminated.

15. The court has stated previously that it is not within its realm to over-analyze the reason for which employment has been terminated. The test usually is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss”? If the answer be in the affirmative, the court will not interfere.
16. In this case, the Petitioner has alleged that when she returned from annual leave she never assigned any work but was instead verbally told to go home because there was no work. The respondent on the other hand contended that the Petitioner after going for annual leave never returned to work which was a lawful reason for termination and further that the Petitioner was terminated due to Covid-19 pandemic which affected the economic times of the world.
17. The court however asks why the Respondent never communicated with the Petitioner asking her whereabouts when she failed to report to work after the expiry of her leave. In addition, if at all the Respondent was affected by Covid-19 financially then it ought to comply with Section 40 of the Employment Act and terminated the claimant’s service on account of redundancy. In *Kenya Airways Limited vs. Aviation and Allied Workers Union of Kenya and 3 Others* (2014) eKLR, the Court of Appeal pronounced itself as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

15. The Respondent did not produce any financial documents to show it was affected by Covid-19 to justify this as a reason for termination of the Petitioner as was held in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR that;

There was no evidence from the Respondent to confirm that it was experiencing financial difficulties. The Respondent would have done this by way of producing audited financial statements to dislodge the allegation by the Claimant.

15. On the issue of the reason for termination the Court is guided by Section 43 which requires the employer to prove the reason for termination; the reason to be valid and fair and if the employer fails to do so the termination shall be deemed unfair under Section 45 of the Act.
16. In the case of *Prof. Macha Isunde vs Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated:

“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47



(5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

15. As observed before, the reason given by the Respondent of termination on account of COVID 19, came after the Petitioner had been verbally terminated.
16. Regarding procedural fairness, it was held in the case of Walter Ogal Anuro -vs- Teachers Service Commission (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.
17. The Respondent never raised any issue concerning the petitioner’s misconduct. They did not follow the requirements of section 41 of the Employment Act by according the petitioner a hearing before termination. In conclusion of this point, the court is of the view that the Petitioner’s termination was substantively and procedurally flawed hence unfair under section 45 of the Employment Act.

Whether The Petitioner Is Entitled To Reliefs Sought

15. The Petitioner prays for declaration of infringement of her constitutional rights and freedoms as well as damages for the said infringement and I am of the view this prayer fails for there being no specific clarity on the infringement of the petitioner’s constitutional rights.
16. The Petitioner dropped the prayer for reinstatement since the Respondent released her academic documents and testimonials which was a condition for parties to part ways hence this prayer will not be considered.
17. The Petitioner having been terminated without notice is entitled to one month pay in lieu of notice. Regarding compensation under section 49 of the Act, the claimant stated that she was employed in 2009 as a security guard and worked until July, 2020 when her services were terminated. The respondent did not adduce any evidence concerning previous misconduct. According to the respondent, the claimant was terminated on account of absconding duties although the Court took the view that the this was not proved. The respondent further alleged that the termination was due to financial challenges paused by Covid-19 pandemic. The contract of employment could have terminated by causes such as death or the petitioner herself leaving. In the circumstances an award of ten month’s salary is reasonable compensation for unfair termination.
18. In conclusion the Court awards the petitioner as follows:
Kshs.
 - i. One month’s salary in lieu of notice 16,783
 - ii. 10 month’s salary as compensation 167,830
Total 184,613
 - iii. Costs of the suit.
 - iv. The respondent shall further issues the petitioner with a certificate of service.
 - v. Items (i) and (ii) shall where applicable attract statutory deductions but shall accrue interest at Court rates from the date of judgment until payment in full.
15. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2023



ABUODHA NELSON JORUM
JUDGE

