



**Okumu v Catholic University of East Africa (Employment and Labour Relations
Petition E187 of 2021) [2023] KEELRC 3168 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3168 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E187 OF 2021**

K OCHARO, J

NOVEMBER 2, 2023

**IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND
FREEDOMS AS ENshrINED UNDER ARTICLES 22[1], 23 [1], 23 [3], 24 [1], 24 [2]. [B], [C],
25 [A, B & C], 27 [1, 2, & 5], 28, 29 [D & F], 30 [1 & 2], 33 [1] & [C] 41 [1], [2][A] & [B] 43 [1A,
B, C, D, E & F], 45 [1], 47 [1 & 2], 48, 50 [1, 2 & 3] OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT NO.11 OF 2007

AND

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT
NO.4 OF 2015, SECTIONS 4[1], 4 [2], 4 [3] [A, B, C, D, E, F & G AND 4 [4].**

BETWEEN

JOSEPH OKUMU PETITIONER

AND

THE CATHOLIC UNIVERSITY OF EAST AFRICA RESPONDENT

JUDGMENT

1. Through a petition dated 25th November 2021, the Petitioner approached this Court seeking the following reliefs:
 - a. Thesis/Dissertation Supervision Allowance for academic year 2019/2020 and 2020/2021.....Kshs. 200,000.00.
 - b. Payable salary from November 2020 to October 2022 @ Kshs. 148, 172.00 X 24.....Kshs. 3, 552, 000.00.



- c. Damages for the violation of the Petitioner’s fundamental Constitutional rights to fair labour practices and fair administrative action by unfair termination/non-renewable of employment Contract.....Kshs. 3,000,000.00.
 - d. Damages for psychological torture, mental anguish resulting in depression, pecuniary embarrassment, loss of reputation and opportunities and interest at applicable Court ratesKshs. 5,000,000.00.
 - e. Damages for malicious and discriminatory non-renewable/termination of employment contract.... KShs. 2, 160, 000.00.
 - f. Damages for defamation and loss of reputation in the manner of unfounded sexual harassment allegations and unfair termination.....Kshs. 5,000,000.00.
 - g. Damages for reduced employability.....Kshs. 3,600,000.00.
 - h. Compensation for period of suspension on half salary.....Kshs. 270,000.00.
 - i. Compensation for permanent disability of 30% as a result of a road accident and loss occasioned by the Respondent’s non-Claim of the Petitioner’s Medical Insurance award for the disability.....Kshs. 3,000,000.00.
 - j. Reasons/evidence/minutes/findings of the disciplinary hearing/for the Suspension.
 - k. Interest on [i], [ii], [iii], [iv], [v], [vi] & [vii].
 - l. The cost of the suit.
 - m. Further or other relief within the jurisdiction of the Court.
2. Contemporaneously with the filing of the petition, the Petitioner filed a Notice of Motion Application dated 24th May 2022 seeking numerous orders, pending the hearing and determination of his petition herein.
 3. The Respondent opposed the Petition upon premise of the grounds obtaining on the Replying affidavit sworn by Eric Omondi Njiri, its Human Resource Manager, sworn on 15th September 2022.
 4. On 19th September 2022, this Court gave the following directions:
 - a. That the parties move straight to the main Petition. Consequently, the Petitioner to file a supplementary affidavit if need be, contemporaneously with written submissions on the Petition within 14 days of today.
 - b. The Respondent to file Response submissions within 21 days of service of the Petitioner’s.
 - c. Mention on the 14th of December 2022 to check on the compliance and fix the matter for judgment.
 5. The parties complied with the Court’s directions on filling of submissions. Each of them has written submissions on record. The judgment herein is therefore with the benefit of all the parties’ submissions.

The Petitioner’s case

6. The Petitioner contends that he worked for the Respondent as a Lecturer for twenty years [2000 to 2020]. During the period of service, he also served as head of Department. It is further contended that he first entered into the employment of the Respondent on a fixed term contract of three years. The



- contract of service could thereafter be renewed every three years, till the time he separated from the Respondent.
7. The Petitioner avers that on the 26th of November 2019, the Respondent wrote to him informing him that his contract was coming to an end and required him to apply for renewal. Through his letter dated 3rd December 2019, he made the application.
 8. However, through a letter dated 9th December 2020, the Vice Chancellor, wrote to him and copied to the Human Resource Manager SAVC and Chief Financial Officer, informing him that his contract would not be renewed. The letter didn't bring forth the reasons for the decision. Further, he was not heard before the decision he was not given any opportunity to be heard.
 9. It is the Petitioner's case that where the employer decides not to renew a contract, particularly after requesting the employee to make such an application for renewal and the employee doing so, an employer must communicate the unsuccessfulness of such an application and state reasons thereof. The notification must be made within a reasonable time of the application. A need for justification for the non-renewal heightens more especially where the employee has served diligently and has taken up financial and other obligations on the understanding that they would serve another full term.
 10. The Petitioner avers that having served with distinction and diligence without any disciplinary issue, and having had his contract renewed severally through a laid down process, he had legitimate or reasonable expectations that his contract would be renewed for another full term through a transparent process.
 11. The Petitioner states that the decision to terminate his employment was a product of a flawed disciplinary process. The tenets of natural justice were violated. The statutory procedure was not followed. He was not at all furnished with details of the sexual harassment claims. The maker of the allegations was not interrogated to establish the veracity of the said claims.
 12. It is the Petitioner's contention that in view of the sexual harassment claims, he and his wife suffered mental trauma. This resulted in the wife miscarrying in the process. Furthermore, the said unsubstantiated claims have seriously damaged his reputation and diminished his employability substantially.
 13. The Petitioner avers that the Respondent failed to make a claim on his behalf in relation to his insurance medical cover, even after being notified that he had suffered 30% disability as a result of an accident. The failure caused him financial loss.
 14. The petitioner further contends that he exhausted all the available local remedies including writing to the Respondent pleading for an amicable out-of-court settlement in vain, he the decision to institute legal proceedings as a last resort.
 15. The Petitioner avers that before the non-renewal of the contract, he had been suspended unlawfully without pay and without adherence to the due process and the rules of natural justice.
 16. The Petitioner further avers that the Respondent breached his right to administrative action as it failed to give him notice and reasons for the proposed non-renewal. During the disciplinary process in regard to the alleged sexual harassment, he was; denied the opportunity to be heard and make representations; not given a notice of a right to review or internal appeal against the administrative action taken; not allowed to cross-examine the accusers; and denied the information, evidence and materials were being relied upon in the two cases, the non-renewal and sexual harassment.



17. The Petitioner contends that the Respondent's actions were borne of malice and discrimination. The Respondent decided to initiate a sexual harassment disciplinary process without availing him details of the allegation after writing to the Vice Chancellor for the said details vide his letter dated 21st May 2019 thus denying him the opportunity to prepare for the process, he was denied the opportunity of giving his side of the story and cross-examining the accuser to test the veracity of the claims, denied the opportunity to exhaust the locally available remedies including appeals Further, the Respondent failed to expeditiously and within reasonable time communicate to him its decision of not renewing the contract.
18. The Petitioner further contend that the Respondent discriminated against him by failing to communicate to him the fate of his Application for renewal expeditiously as it is the practice and procedure in the Respondent's institution, refusing the Petitioner the opportunity of a fair hearing by denying him the right of appeal as provided for in the Human Resource Manual and the practice of the Respondent's institution, Withholding the Petitioner's terminal dues; [Supervision allowance, gratuity/pension] and lastly refusing to avail the details of the claims against him as it is the practice of the Respondent's institution.
19. The particulars for defamation and loss of reputation are that the petitioner has lost face before teaching colleagues and students as a result of the said claims which have portrayed him as immoral and without integrity. Furthermore, he has been painted by the Respondent as a person who cannot be entrusted with taking care of his female students thus lowering his esteem.
20. Lastly it is the Petitioner's contention that as a result of the unsubstantiated sexual harassment claims and non-renewal of his employment contract, he has been portrayed negatively thus reducing his chances of employment. Furthermore, the said claims placed him in a situation of being held in suspicion thus reducing his chances of employment.

The Respondent's case

21. The Respondent contends that the Petitioner approached this hasn't this Court with clean hands as he did not exhaust all the internal dispute resolution mechanisms at the Respondent's institution as alleged. He failed to attend the hearing of his appeal on the non-renewal of his employment contract that was scheduled for 3rd December 2021. Further, the Petitioner failed to disclose to the Respondent that he was employed at Maseno University on full time basis contrary to the Respondent's policies, moreover, he deliberately refused to clear with the Respondent to enable the processing of his terminal dues.
22. It is the Respondent's case that the Petition filed herein in a non-starter as the same has been prematurely filed since the Petitioner had not exhausted all the available dispute resolution mechanisms before approaching the Court. The Petitioner appealed to the University Council against the decision of the Respondent not to renew his contract which was in line with section 35 of the [Universities Act](#) and the University Human Resource Policies and Procedure Manual but failed to attend the hearing of his Appeal on the 3rd December 2021 despite ample notice.
23. It is the Respondent's contention that the nature of the dispute as alleged by the Petitioner falls squarely within the statutory ambits of the Employment and Labour laws and does not raise any novel issues of Constitutional law to warrant the intervention of this Court as a Constitutional court in the manner envisaged in the Petitioner's pleadings. The Petition was filed in bad faith, only aimed to embarrass the Respondent and occasion untold financial loss. The same should be struck out.



24. The Respondent avers that the Petitioner was employed as a Part time lecturer in the Department of Philosophy in the year 2000. The Petitioner proceeded to Belgium in 2001 for his predoctoral and Doctoral Studies and returned in 2009 where he applied for the position of Lecturer at the Respondent's Department of Philosophy. He was employed as a lecturer at the Centre for Social Justice & Ethics where he was placed on a six [6] months' probation effective 1st January 2010. He was confirmed on the 24th of September 2010 for a contract period of three years from 1st July 2010 to 30th June 2013. During the pendency of his employment contracts, the Petitioner was deployed to perform other tasks within the department in an acting capacity where he was duly paid the requisite allowances as stipulated in the appointment letters.
25. It is averred that at all times, the Petitioner and the Respondent had a fixed term contracts for periods of three years. The Respondent would renew the Petitioner's contract for another three years and which renewal was pegged, among other things, availability of the vacancy at the institution. The general principle of law regarding fixed-term contracts is that the same carry no rights, obligations or expectations beyond the date of expiry and the same will not be renewed automatically even in the instances where there exists a clause allowing such renewal. Moreover, the Respondent reserved the right to renew the fixed term contract based on the prevailing exigencies at the institution and whether the services of an employee are required.
26. The Respondent avers that upon the expiry of his contract on 31st July 2019, the Petitioner applied for renewal of his contract on fresh terms by the Respondent which was not renewed and as such, there was no employment relationship between the parties that subsisted after the expiry of the said contract on the 31st July 2019.
27. The Respondent contends that as a prerequisite upon receipt of a complaint, the Respondent's Dean of Students conducted a preliminary investigation and submitted a report on the 10th of April 2019 to the Vice Chancellor who invited the Petitioner for a hearing of a complaint against him. The Petitioner was never discriminated against as he was given ample time and space to prepare for the hearing and respond to the allegations against him.
28. The Respondent further contends that the Petitioner was summoned to appear for the hearing at the Sexual Offences Committee on the 23rd May 2019 at 9.30 am in order to respond to the complaint. He voluntarily submitted to the Jurisdiction of the Committee. After the hearing, the Respondent carried out an independent and objective review of the complaint and the response by the Petitioner to ascertain its veracity and decide on the appropriate course of action in line with the University Charter and other regulations. As a result, the Committee decided that he be suspended for a period of three months which took effect immediately.
29. It is averred that the Respondent notified the Petitioner of the decision of the Committee. Further, the Committee found that the Petitioner's relationship with the female students was inappropriate, improper and unprofessional contrary to Chapter 12 of the Respondent's Human Resource Policies and Procedures Manual.
30. Aggrieved by the decision of the Committee, the Petitioner appealed to the Vice Chancellor who upon considering the appeal dismissed the same as being unmerited but advised him to prefer an appeal against the decision to the University Council pursuant to the HR Policies and Procedure Manual.
31. It is the Respondent's case that the Petitioner's contract expired on the 31st of July 2019 at a time when he was on suspension. Subsequently, the Petitioner without the knowledge and approval of the Respondent, reported back to the institution on the 28th of October 2019, yet it was within



- his knowledge that at that time there was no contract of service in existence between him and the Respondent.
32. The Respondent avers that on the 26th of November 2019, its Human Resource Manager demanded that the Petitioner regularizes his stay at the Respondent's institution by applying for renewal of his contract on fresh terms by the Respondent. The said Application for renewal was declined and the decision was communicated to the Petitioner vide a letter dated 9th November 2020. The letter also served as a three months' notice to allow him to hand over all that appertains to his then office and clear with the Respondent. Unfortunately, the Petitioner is yet to clear with the Respondent and as such, it cannot process his final dues for payment to him.
 33. It is the Respondent's case that the Petitioner's Petition is premature as there is a pending appeal at the University Council that was lodged by him. The said pending appeal on the non-renewal of the employment contract was duly communicated to him through his Advocates on the 28th of October 2021. Furthermore, the Petitioner was invited by the University Council to attend to the hearing of his appeal on the 3rd December 2021 but failed to attend. The same amounted to insubordination and the Petitioner cannot claim unfairness when he wasted his opportunity to be heard by the University Council.
 34. The Respondent avers that it had taken Medical Cover for its staff. The Respondent received a letter from the Petitioner's doctor which indicated that he had been involved in an accident and was admitted on the 9th of August 2018. It was the Policy of the Insurance Company that any such claims be reported immediately or within a period of seven days after the accident. The Respondent was notified way after the lapse of seven [7] days after the accident. Further Clause 7.2.9 of the Human Resource Policies and Procedures Manual provides that the Human Resource Officer should be informed in time in the case of such an incident. Additionally, vide a letter dated 7th August 2020, Waumini Insurance Brokers Limited who was the Respondent's insurer advised that the Petitioner's claim was time barred.
 35. The Respondent contends that the Petitioner was employed on fulltime basis by two institutions contrary to the Respondent's Human Resource Policies and Procedure Manual. The Petitioner had failed to disclose to the Respondent that he was concurrently employed by Maseno University and vide a letter dated 21st May 2018 the Respondent advised the Petitioner to relinquish either position with immediate effect and provide proof of so or explain his actions.
 36. It is further contended that in response to the Respondent's letter, the Petitioner alleged that he was merely consulting for Maseno University. However, Maseno University via email dated 9th December 2020 informed the Respondent that in fact, the Petitioner was serving them as a Lecturer.
 37. The Respondent avers that the Petitioner's Petition is founded on lies and deliberate distortion of truth. The Respondent did not breach the Petitioner's right to fair administrative action. The Petitioner's contract ended on the 31st of July 2019, consequently his relationship with the Respondent too. In the absence of a renewed contract, his service to the Respondent became a month-to-month one.
 38. The Respondent further avers that the Petitioner has an outstanding loan balance with the Waumini Sacco amounting to Kenya Shillings Two million Two Hundred and Thirty Five Thousand and Ninety [Kshs. 2, 235, 090] which was guaranteed by some employees of the Respondent.
 39. Lastly, the Respondent avers that it is more than ready and willing to hear the Petitioner's appeal which was due for hearing on the 3rd December 2021 when the Petitioner deliberately failed to attend. Furthermore, the Petitioner in the circumstances has not demonstrated a merited Petition to warrant



this Court grant the orders sought. Consequently, the same should be dismissed with costs to allow the hearing of the appeal pending before the University Council to its logical conclusion.

The Petitioner's Submissions

40. The Petitioner filed his submissions on the 28th January 2023 submitting that his constitutional rights were adversely infringed by the Respondent. The Petitioner submitted that the non-renewal of his contract breached his legitimate expectation. Further, the non-renewal pushed him into early retirement contrary to the constitutional provision of equality and freedom from discrimination.
41. The Petitioner submitted that the non-renewal of the contract and, the unlawful termination caused visited joblessness on him. As a result, he was no longer able to dutifully pay school fees and rent. His exclusion from the medical cover by the Respondent breached his constitutional right to inherent dignity and have his dignity respected under Article 28 of the [*Constitution*](#).
42. The Petitioner submitted that the unlawful termination of his contract leading to the withdrawal of the medical insurance in the middle of the COVID-19 pandemic threatened his and his family's right to the highest attainable standard of health.
43. The Petitioner submitted that the refusal to renew his contract and to retire him prematurely rendered him jobless threatening his family as a natural and fundamental unit of the society and the necessary basis of social order. Reliance was placed on the case of *Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others* [2014] eKLR, to support the submission of the need to protect the family.
44. The Petitioner further submitted that he was not given reasons for the non-renewal of his contract, in violation of Article 47 of the [*Constitution*](#).
45. It is submitted that the Respondent has condemned and continues to condemn the Petitioner unheard contrary to Article 50 [1] of the [*Constitution*](#). The tenets of natural justice were breached thereby. To buttress this submission, reliance was placed on the case of [*Egal Mohamed Osman v Inspector General of Police & 3 others*](#) [2015] eKLR where it held:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and any law that contravenes or offends against any of the rules of natural justice is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”
46. The Petitioner submits that the doctrine of legitimate expectation is designed to protect and facilitate the rights of persons in general in fortification of his submission, he cites holding in the case of [*Justice Amraohael Mbogholi Msagha v the Chief Justice of Kenya & 7 others*](#) [2006] eKLR, thus:

“Legitimate expectation is but one variant aspect of the duty to act fairly and natural justice is a manifestation of a broader concept of fairness.”
47. The Petitioner lastly relied on the case of *Abmed Ishiola Akande v Lilgate Nigeria Ltd* as well as the case of *Health Professionals v MC Gown* that emphatically amplified the doctrine of legitimate expectation in the fortification of his submission.



48. Lastly, the Petitioner submitted that he is entitled to the reliefs sought as in his Petition.

The Respondent's submissions

49. The Respondent's counsel filed its submissions on the 13th of March 2023 distilling six issues for determination thus:

- i. Whether the alleged infractions as framed in the Petition meet the threshold for Constitutional Petition or can be redressed by statutorily provided mechanism.
- ii. Whether the Petition is premature on grounds of failure to exhaust internal dispute/grievance doctrine and whether the Petitioner can be allowed to approbate at the same time on the issue of internal dispute resolution mechanism.
- iii. Whether the doctrine of legitimate expectation is applicable in fixed term contracts.
- iv. Whether the Respondent violated the Petitioner's rights and fundamental freedoms by its actions and decisions.
- v. Whether the orders and reliefs as prayed in the Petition should issue.
- vi. Who should bear the costs?

50. For the first issue it was submitted that the Petitioner's grievances fall squarely within the ambits of the *Employment Act*. The Petitioner should not be allowed to avoid the provisions of the *Employment Act* by quoting constitutional provisions. To buttress this, reliance was placed on the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another* [2016] eKLR where it was held:

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.”

51. Similarly, the case of *Josphat Ndirangu v Henkel Chemical [EA] Limited* [2013] eKLR where it was held:

“In my view, a litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the *Constitution* on the right to fair labour practices. The purpose of the *Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary.

The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to constitutional rights.”

52. It was further submitted that a party who wishes to file a constitutional reference claim must plead with precision, the provision of the *Constitution* which he alleges to have been infringed and the manner in which the same has been breached. Reliance was placed on the case of *R v Anarita Karimi Njeru* [1979] eKLR.



53. On the second issue, it was submitted that where the procedure and processes exist for the resolution of disputes, such processes must be exhausted before a party approaches the Court for reliefs. The exhaustion principle does not permit an election as to the parts of a statute that one should rely on.

54. The Respondent further submitted that the doctrine removes the discretion on the part of the litigant from choosing whether to follow the provision or not. In this case, the Petition was filed before the exhaustion of the remedy under the law. The Petitioner ought to have prosecuted his appeal before moving to court. Reliance was placed on the case of the *Speaker of the National Assembly v Karume* [2008] 1 KLR [EP] in which it was stated:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

55. The Respondent relied on the definition of exhaustion of remedies as provided under the Black's Law Dictionary 10th Edition as:

“Exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a Claimant must seek relief first from the administrative body before the judicial relief is available. The doctrine's purpose is to maintain comity between the courts and the administrative agencies and to ensure that the courts will not be burdened by cases in which judicial relief is unnecessary.”

56. The Respondent submitted that the Petitioner had not pleaded the existence of exceptional circumstances to warrant an exemption from the doctrine of exhaustion. His petition should be for failing. Reliance was placed on the case of *Fleur Investment Limited v Commissioner of Domestic Taxes & Another* [2018] eKLR where it was held:

“Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

57. On the fourth issue, it was submitted that the Petitioner cannot claim legitimate expectation when there was no employment contract or an implied or express intention to renew the same by the Respondent. Furthermore, the Respondent was not bound to inform the Petitioner of the reasons for declining to renew his contract or employ him at all. Reliance was placed on *H. W. R Wade & C. F. Forsyth* where it was stated:

“It is not enough that an expectation should exist; it must in addition be legitimate.... First of all, for an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.... Second, clear statutory words, of course, override an expectation howsoever founded.... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....”



“An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.”

58. The Respondent also relied on the case of *Samuel Chacha Mwita v Kenya Medical Research Institute* [2014] eKLR where it was held:

“Fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not necessarily constitute a dismissal, as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. There is a definite start and a definite end. Thus, the contract terminates automatically when the termination date arrives; otherwise, it is no longer a fixed term contract. See the case of *SA Rugby (Pty) Ltd v CCMA & Others* (2006) 27 ILJ 1041 (LC) at 1044 par 6). This decision is comparable to the common law position where fixed-term contracts expire automatically upon arrival of the stated date.”

59. The Respondent submitted that it is willing to process the terminal dues, if any, immediately after the Petitioner clears with the institution following the right procedure.

60. For the fifth issue, it was submitted that there are no rights of the Petitioner that were infringed or violated as there is no evidence in support thereof. The Petitioner was duly invited for a disciplinary process as prescribed in law, afforded an opportunity to defend himself, ample time to prepare for the hearing, and duly served with a suspension letter. The internal appeal mechanism was available to him.

61. On the last issue, it was submitted that the Petitioner is not entitled to the reliefs sought and thus his Petition should be dismissed with costs to the Respondent.

Analysis and determination

62. I have carefully considered the material placed before me by the parties herein as well as their submissions and in my considered view, the following issues emerge for determination:

- a. Whether the petitioner’s petition herein meets the threshold for a properly crafted and presented petition.
- b. Whether the Respondent violated the Petitioner’s rights put forth in the petition or any of them.
- c. Whether the termination of the petitioner’s employment was procedurally and substantively unfair.
- d. Whether the Petitioner is entitled to the reliefs sought in the petition or any of them.
- e. Who should bear the cost of the Petition?



Whether the petitioner’s petition herein meets the threshold for a properly crafted and presented petition.

63. The Respondent vigorously and firmly contended throughout its replying affidavit as well as the submissions that the Petitioner’s Petition does not meet the threshold of a well-presented petition. The Respondent presents this position on two fronts. First, the constitutional avoidance principle militates against the petition. Second, the petition has been prematurely filed, and the exhaustion doctrine sets in against it.

64. It is worth stating that after the promulgation of the 2010, Constitution there has been a surge in litigants constitutionalising every dispute, a practice that the Court abhor. Based on the doctrine of constitutional avoidance, such litigations often fail.

65. The Court 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 justifiability. In broad terms, justifiability 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 [s], 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....”

66. 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.”

67. 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 Appellant 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.....”

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

“Of justice and right that should guide and inform the law and actions of man. While an infringement of the *Constitution* might in certain cases give rise to redress for under Section 1



11. 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 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.....”

69. In the case of *Dr Wambua Kituku v The Council of Legal Education and another* Petition number E209 of 2022, this court held as follows:

“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 be under those processes. It matters not that alternatively, they can be dealt with under a constitutional litigation.”

70. It is worth stating therefore that where legislation is enacted to give effect to a constitutional right, a litigant cannot bypass that legislation and directly rely on the Constitution, without challenging that legislation as falling short of constitutional standards or alleging that the statute in question is deficient in the remedies that it provides. If direct reliance on the Constitution is not avoided, two streams of jurisprudence shall result. A situation that won't be pleasant both the Courts and the Citizenry.
71. I have carefully considered the issues raised and presented, in the Petitioner's petition. They are largely on the procedural and substantive fairness of the non-renewal of the Petitioner's fixed-term contract of employment with the Respondent, employment defamation, and entitlement to earned but unpaid benefits. Consequently, I come to an inevitable conclusion that the substantive remedies sought by the



Petitioner, do not depend upon the “Constitutional issues” raised in his petition. The reliefs sought are reliefs that ought to have been under the *Employment Act* and *Fair Administrative 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.

72. It is here that 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 to attract the Court to engage its jurisdiction under the provisions of the *Constitution*, instead of the jurisdiction under statute.
73. By reason of the premises, I find that the applicability of the 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.
74. Having found as I have hereinabove, I find it unnecessary to consider the other issues. By reason of the foregoing premises, I strike out the petitioner’s petition herein. Each party is to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Situma for the Respondent

No appearance for Petitioner

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

