



**Nyarwati v Action Africa Help International (Petition
E199 of 2021) [2022] KEELRC 1201 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1201 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E199 OF 2021
NZIOKI WA MAKAU, J
JUNE 15, 2022**

**IN THE MATTER OF: ARTICLE 22, AND ARTICLE
258(1) & (2) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: THE ALLEGED THREAT OF VIOLATION
OF ARTICLES 3 & 10 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: ALLEGED THREAT TO AND CONTRAVENTION
OF ARTICLES, 19, 20, 21, 22, 23, 24, 25(C), 27, 28, 29(D), 31,
35, 41, 47, 50 OF THE CONSTITUTION OF KENYA 2010**

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

BETWEEN

JACOB MANG'ONDI NYARWATI PETITIONER

AND

ACTION AFRICA HELP INTERNATIONAL RESPONDENT

RULING

1. The Petitioner herein filed a Petition seeking the following orders:-
 - a) A declaration be issued that the Petitioner's enjoyment of his rights and fundamental freedoms secured in the Bill of Rights under Articles 19, 20, 21, 22, 23, 24, 25(c), 27, 28, 29(d), 31, 35, 41, 47 and 50 of *the Constitution* of Kenya, 2010 have been threatened and infringed by the Respondent by the invasion of bank account, dismissal from employment and subsequent publication of the Petitioner's name and image on the Daily Standard of 24th November 2021 conducted by the Respondent was without regard to due process of law, was unlawful, illegal, null and void.



- b) A Declaration that the Respondent violated the Petitioner's fundamental rights to privacy and human dignity under Articles 28 and 31 by illegally accessing his Equity Bank details and by publishing the Petitioner's image in the Daily Standard of 24th November 2021 without his consent.
 - c) An order of a permanent injunction do issue restraining the Respondent jointly and severally, either acting on their own and or through its agents, employees, servants, and/or any other person acting and/or purporting to act under their instructions and or orders from further accessing and/or invading the Petitioner's bank accounts without his express authority.
 - d) An order of permanent injunction restraining the Respondent from publishing and/or using the Petitioner's image and likeness in any way in its further publications without the Petitioner's consent and compelling the Respondent to stop any further publication featuring the Petitioner's image.
 - e) An order that the Petitioner be paid his terminal benefits and compensation for unfair termination and loss of employment totalling to Kshs. 9,271,279.19
 - f) The Court do find that the Petitioner is entitled to both general and exemplary damages for violation of his constitutional rights as enumerated above.
 - g) The Respondent be directed to bear costs of this Petition.
 - h) Interest on (5), (6) & (7) above.
2. Upon service of the Petition upon the Respondent, it filed a replying Affidavit dated 10th December 2021 opposing the Petition. In the said Replying Affidavit sworn by Job Githaiga Kamau, he avers that the Petition has been brought in bad faith because the Petitioner was not maliciously dismissed and/or wrongfully terminated as alleged in the Petition. On the contrary, the Respondent avers that the Petitioner was justifiably summarily dismissed on grounds of gross misconduct and that the Petition was- calculated at unjust enrichment hence fit for dismissal.
3. It is common ground that the Petitioner was an employee of the Respondent engaged as an Operations Manager. The Petitioner had been serving in that position since 24th January 2017. The Petitioner asserts that on 22nd November 2021, the Respondent unlawfully dismissed him without offering him any hearing nor following the procedure envisaged under Section 41 of the *Employment Act* and Article 47 of *the Constitution*. The Petitioner asserts that the Respondent has through his actions of dismissing him without any hearing violated his Constitutional rights. The Petitioner asserts he appealed the said dismissal and instead of the Respondent calling the Petitioner, they decided to publish his name in the Standard. The Petitioner asserts that Respondent has through her actions of publishing his image in the local dailies tarnished his name by maligning him and diminishing his chances of getting employed for no justifiable reason.
- i. The Respondent by dismissing the Petitioner interfered with, cancelled and denied the Petitioner benefits and rights that had accrued to him and frustrated his right to his lawful expectation.
 - ii. The decision to sack the Petitioner was made by the Regional Director without due regard to the Constitutional rights of the Petitioner.
 - iii. Without the authority of a lawful meeting and after an explanation of reasons for termination given and the Petitioner allowed to make responses the dismissal was wrongful and unfair in the circumstances.



The Petitioner submits that the sole issue for determination is whether the Petitioner has satisfied the criteria for granting the reliefs sought.

4. The Petitioner asserts that he has filed a detailed supporting affidavit in which he has given details relating to his unlawful and unfair termination, infringement of privacy and subsequent publication of his image in the local dailies. The Petitioner submits that he therefore has sufficiently demonstrated that his constitutional rights and guarantees under *the Constitution* and the *Employment Act* were violated and what now remains is for this Court to assess the quantum of the damages payable to the Petitioner. From the evidence on record, the Petitioner submits that he was unfairly terminated, mistreated after the termination by the Respondent. The Petitioner submits that the Respondent should be held liable for such acts by its servants or agents who falsely made unfounded allegations against the Petitioner and proceeded to hurriedly have him out of the organization. The Petitioner submits the violations of his rights can be summarised as the grievance that the Respondent through its principals and/or representatives unlawfully acquired the Petitioner's bank account statements to which they formed an opinion that he was engaging in fraudulent activities warranting immediate dismissal without giving the Petitioner any valid or justifiable reasons and thereafter terminating, dismissing and/or removing the Petitioner from his employment in total disregard to the express provisions of *the Constitution* and the *Employment Act*. The Petitioner asserts that his second principal grievance is that the Respondent through its principals and/or representatives caused an advert to run in the local dailies tarnishing his image, name and a career that had taken him years to build in that the said publication made rounds on the social media platforms and was shared to the extended international web effectively diminishing my employability and this in total disregard of the express provisions of *the Constitution* and the *Data and Privacy Protection Act*. The Petitioner submits that his term of service was terminated based on malice and the failure to pay his terminal dues and/or retract the advertisement was deliberate and based on ulterior motives that was meant to jeopardize the Petitioner's career.
5. The Petitioner submits that this Honourable Court has a duty to defend and protect *the Constitution* of Kenya and its vulnerable citizens like the Petitioner whose rights are being violated by the Respondent. The Petitioner submits his Petition is about infringement of his fundamental rights and freedoms as guaranteed by the Bill of Rights. The Petitioner submits that this Court has power to grant the Orders sought under Section 12 of the *Employment and Labour Relations Court Act*. The Petitioner therefore submits that this is a case in which, on the material presented to the court indicates that there exists a number of legal rights which have been infringed by the Respondent. It is the Petitioner's submission that he was never given a chance to defend himself of the allegations made by the alleged whistleblower or at the very least be shown the charges as levelled. He submits that Sections 43 and 45 of the *Employment Act* 2007 requires the Employer to establish valid and fair reason or reasons for termination and that Sections 41 and 45 requires the decision is made following a fair procedure where the employee under consideration for employment is given an opportunity to defend himself. The Petitioner submits that the Respondent illegally accessed the Petitioners account at Equity Bank without the Petitioner's prior authorization and or notification infringing on his right to privacy. The Petitioner submits that his personal data was exposed to the Respondent's management and which data was used as a basis to dismiss him from employment. The Petitioner submits that the Respondent violated its own Human Resource policies and which actions are contrary to the basic principles of natural justice and Section 41 of the *Employment Act*. He submits that in all cases of termination, an employee shall be called to a meeting and explained of the reasons for termination and given an opportunity to make responses. The Petitioner argues that this meeting shall be documented and the notes signed off by all parties present including the affected employee. He submits that the allegations of acts of fraud and corruption were thrown around but were never substantiated.



6. The Petitioner submits that the Respondent's conduct of failure to notify, inform the reasons and/or criteria employed by the Respondent in arriving at the decision to terminate him amounted to an infringement of Article 35 (1)(b) of the Constitution of Kenya, 2010 which entitles the Petitioner the right to access information which information is paramount in enforcement of Petitioner's fundamental rights. The Petitioner submits that after the dismissal on 22nd November 2021, he wrote an appeal on 23rd November 2021 to which he has never received a reply. Instead the Respondent, caused an advert to run on 24th November 2021 in the Daily Standard newspaper which has nationwide circulation with the Petitioner's photo without his consent thus infringing on his right to privacy and data protection.
7. The Petitioner thus submits that the accusations, deliberations, dismissal and subsequent publication in the dailies were all done in an opaque manner, devoid of procedure and in total breach of the Constitution, 2010 and in particular Article 41(1), 47 and 50 occasioning the Petitioner substantial loss and damage on the account of poor leadership, irrational character and mindset of the Respondent's officers who were in a rush to dismiss and publish the Petitioner's image in the local dailies. The Petitioner submits that on 25th November 2021 through his advocates on record, he wrote a letter to the Respondent informing them that he had not given them permission to use his photo or his image in any of their advertisements in the local dailies which letter was received by the Respondent on 26th November 2021. Through his said advocates, he on 29th November 2021 received a letter dated 26th November 2021 from the Respondent wherein the Respondent's advocates denying any wrong doings on their part and beseeched the Petitioner to take them to court. The Petitioner submits that the Respondent's action violated the Petitioner's right to human dignity and privacy as envisaged at Articles 28 and 31 of the Constitution since the Respondent did not have permission and/or consent from the Petitioner to use his image and likeness in their said publication. The Petitioner submits that the Respondent's conduct; invasion of privacy, dismissal and subsequent publication violated his right to human dignity and privacy and in total disregard of the provisions of Articles, 25(c), 35, 41, 47, 48, 50 and 51 of the Constitution of Kenya, 2010 and contrary to section 41 of the Employment Act, 2007.
8. It is the Petitioner's humble submissions that the Respondent's conduct in the process leading to the impugned dismissal and publication contravened the Constitution of Kenya 2010 and the Employment Act 2007 and as a result the Petitioner is entitled to the payment of one month's salary in lieu of notice – Kshs. 368,047/-, salary for 22 Days in November 2021 – Kshs. 269,901.13. He also claims the balance of the contractual period being 38 days – Kshs. 466,192.87, 25 days leave balance 25/21 x 368,047 amounting to Kshs. 438,151.19 The Petitioner also seeks pension 15% x 368,047 x 12months x 5 years – Kshs. 3,312,423/- The Petitioner submits that there were deductions done and made to the Respondent's established fund and that the employer has no business holding onto them. The Petitioner sought 12 months' compensation for wrongful loss of employment – Kshs. 4,416,564/-. The Petitioner submits that there was no valid reason existing to warrant the dismissal and that fair procedure was not adopted to wit; show cause letter, summoning him to a disciplinary hearing and giving him a chance to exonerate himself from the allegations levelled against him. The Petitioner submits he is entitled to compensation once the Court makes a finding that the termination of employment was not justified in terms of Sections 45 and 49 of the Employment Act. He cites the Court of Appeal decision in Kenfreight (E.A) Limited v Benson K. Nguti [2016] eKLR where it upheld an award of 12 months compensation where the claimant was unnecessarily subjected to an unfair and shabby treatment such as this one where no one from the Respondent can aptly state the reason for the Petitioner's dismissal. The Petitioner additionally seeks a certificate of service in compliance with Section 51 of the Employment Act. The Petitioner also seeks general damages for privacy infringement as the Respondent illegally accessed the Petitioner's Equity Bank statements without permission and/



or authorization. The Petitioner submits that there is no dispute that he has suffered psychological injuries as a result of the unlawful actions that were vested on him by the Respondent's officers. He submits that it has been difficult to imagine what other information the Respondent's might have dug up and not told him. He seeks exemplary damages for the photo/image publication in The Standard newspaper. He submits that he was called by his colleagues on the international community enquiring why his image and name had been printed. The Petitioner asserts that he was unable to explain since no explanation or discussions were held with him prior to the publication. He submits that this publication tainted his image and reputation as it portrayed the Petitioner as a person of questionable character and integrity.

9. The Respondent on its part submits that the issues for determination are:-
 - a) Whether the Petition is proper and if there are any Constitutional violations?
 - b) Whether the Petitioner's dismissal was justifiable?
 - c) Whether the Respondent violated and/or infringed the Petitioner's constitutional rights to privacy and human dignity under Article 28 and 31?
 - d) Whether the Petitioner is entitled to the orders of permanent injunction sought
 - e) Whether the Petitioner is entitled to the reliefs sought?
 - f) Whether the Petition is proper and are there are any Constitutional violations?
10. The Respondent submits that the issues and allegations raised in the petition are misleading as the Petitioner has failed to adequately and satisfactorily respond to matters made against him relating to gross misconduct and warranted summary dismissal. The Respondent submits that the Petitioner has made unsubstantiated claims of unlawful termination of employment and damages for breach of privacy and human dignity. It is the Respondent's submission that the petition is misconceived as constitutional yet the dispute between the parties is ordinary and use of the constitutional interpretations or alleged violations do not apply. It is the Respondent's further submission that the petition offends constitutional doctrine of avoidance as the parties were in an employer/employee relationship governed under the Employment Act and the Rules of the Employment and Labour Relations Court which allow for addressing any dispute through a claim and not a constitutional petition. The Respondent submits that the foregoing was held in the cases of the Communication Commission of Kenya & Others v Royal Media Services Limited & 5 Others [2014] eKLR and Sumayya Athmani Hassan v Paul Masinde Simidi & Another [2019] eKLR where the Court of Appeal held that Article 41 of the Constitution rights are enacted in the Employment Act and which provide adequate remedies and orderly enforcement mechanisms and that filing of a constitutional petition for enforcement of contractual rights is not available under a petition. The Respondent submits that similarly in the case of Terry Muringo Muchiri v K-Rep Group Limited [2021] eKLR the court found that the petition lacked merit and struck it out because it sought declaratory orders with regard to the right to privacy, dignity and fair labour practices anchored on the employment relationship and the payment of terminal dues and damages. The Court found that the alleged constitutional violations were not particularised with any precision and where there exists legislation governing employment between the parties and a clear procedure for redress of any particular grievance prescribed by the Court Rules that procedure should be strictly followed. Based on the foregoing, the Respondent urged the court to find that the petition does not disclose a cause of action anchored on the Constitution and proceed to strike it out with costs to the Respondent.
11. As to whether the Petitioner's dismissal was justifiable, the Respondent submits that the Petitioner was summarily dismissed from employment following allegations of fraud and corruption at the Kakuma



Station where the Petitioner was working as the Operations Manager. The Respondent submits that during verification, its Regional Finance Coordinator noticed some mishaps and inconsistencies on the finance documents involving procurement and brought it to the attention of the Petitioner on 9th November 2021 and 15th November 2021. The Respondent submits that the Petitioner casually responded to the concerns raised and therein took responsibility for the issues raised. The Respondent submits that the admission by the Petitioner that he only noticed the anomaly after the same was brought to his attention is an outright demonstration of negligence on his part. The Respondent submits that Section 44(c) of the *Employment Act* provides that it would constitute a justifiable or lawful ground for dismissal on ground of gross misconduct if “an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.” The Respondent submits that the Petitioner had a duty under his employment contract to perform his work carefully and ensure that as the Operations Manager, all operations at the Kakuma station including finances and procurement were running properly. This, it submits, he failed to do and has clearly admitted the same. The Respondent submits that the above actions in and of themselves amounted to gross misconduct and were justifiable grounds for summary dismissal pursuant to the provisions of Section 7.4 (g) of the Respondent’s human resource manual.

12. The Respondent submits that the Petitioner despite being aware of its policies as far as dismissal on account of gross misconduct is concerned, still chose not to prudently implement and comply with the provisions of the Human Resource Manual thus putting the Respondent’s work and entire organisation in jeopardy. The Respondent further submits that under Section 44(3) of the *Employment Act*, the Petitioner’s misappropriation of funds through fraud and corruption amounted to fundamental breach of the employment contract. The Respondent further submits that the Petitioner breached clause 12 of his employment contract which provides for conflict of interest. The Respondent submits that the Petitioner’s conduct of authorizing release of Kshs. 9,623, 164/- to two suppliers in Kakuma, who later wired a total of Kshs 3,500,000/- to his account was an indication of collusion with vendors and showed he had personal interest in those transactions. Based on the foregoing, the Respondent submits that there was justification of the decision to dismiss the Petitioner.
13. As to whether the Respondent violated and/or infringed the Petitioner’s Constitutional rights to privacy and human dignity under Article 28 and 31, the Respondent submits that the Petitioner asserts it violated his right to privacy and human dignity when it without his authorisation acquired his bank account statements and also caused an advert to run in the local dailies about his termination thus tarnishing his image, name and career. On the first issue of access to the Petitioner’s bank accounts, the Respondent submits that the Petitioner has not adduced any evidence to show that the Respondent through its representatives accessed his bank account. The Respondent further submits that it did not need to access the Petitioner’s bank account statements, for it to realise the loss of colossal sums of money. It is the Respondent’s submission that the Petitioner’s involvement in the fraud and corruption had already been noticed by the Regional Finance Coordinator, the same was further confirmed by a whistle blower within the Kakuma Station and eventually the Petitioner admitted and confessed to have participated in activities that amounted to gross misconduct. On the second issue of publication of the Petitioner’s image in the local daily newspaper, the Respondent submits that this was done as standard procedure, due to the nature of business the organization engages in and the people it serves, who are members of the general public. The Respondent further submits that the publication only notified the general public that the Petitioner was no longer its employee and is therefore not authorized to transact or act on behalf of the organization.
14. It is the Respondent’s submission that it would only have been a violation of Article 28 of *the Constitution* if the newspaper advert/publication, stated the reasons for the Petitioner’s dismissal. The



Respondent submits this was not the case. The Respondent therefore urged the Court to find that the Petitioner's name/image was not maligned in any way and the publication was not actuated by malice or done deliberately to disparage the Petitioner's reputation and/or character. The Respondent submits that even though the Petitioner urges the fact that, the publication was done without his consent, the Respondent owed a greater duty to inform the public as opposed to seeking the consent of the Petitioner. The Respondent submits that the Petitioner merely states that the Respondents' actions adversely affected him by tarnishing his image, name and a career that had taken him years to build. While the Petitioner says that the publication made rounds on the international web thereby diminishing his employability, the evidence produced only indicates one colleague's enquiry. The Respondent thus urged the Court to find that the Petitioner has failed to establish and/or demonstrate that his human dignity was demeaned. The Respondent urged the Court to find that there was no breach of the Petitioner's right to privacy and human dignity as alleged.

15. As to whether the Petitioner is entitled to orders of a permanent injunction, the Respondent submits that grant of the said permanent injunctive orders will not be necessary because:
- a) It did not in any way access and/or invade the Petitioner's bank account. If anything, the alleged invasion has not been established, to warrant an injunctive order
 - b) The initial publication was done on a one-off basis, just to notify the public. The Respondent has therefore no further need/intent of publishing the Petitioner's image in the newspaper or on any other platform.

The Respondent submits that the Petitioner has not met the threshold required for grant of a permanent injunction as set out in the case of *Giella v Cassman Brown Co. Ltd* [1973] EA 358.

16. As to whether the Petitioner is entitled to the reliefs sought, it is the Respondent's humble submission that the Petitioner is not entitled to any of the other reliefs sought as exemplary damages or the sum of Kshs 9, 271,279.19 as terminal dues. The Respondent submits that if there is to be any compensation, the same ought to be made to the Respondent by the Petitioner as a way of recovering all the money that may have been fraudulently acquired, while the Petitioner was in the Respondent's employment. The Respondent submits that it is entitled to benefit from the funds claimed on application of the equitable principles of restitution as well as principles of law on unjust enrichment. The Respondent thus urges the dismissal of the Petitioner's case with costs.
17. The Petitioner seeks a raft of reliefs and it is the Respondent's assertion that the Petitioner ought to have moved the Court by way of a memorandum of claim. Under the rubric of the employment law, it is recognised that where are rights that may be impacted precipitating the filing of petition asserting that rights have been violated. In this case, it is clear there are allegations of infringement of rights to privacy which cannot be brought in the ordinary memorandum of claim and neither can infringement to the right to dignity under Article 28 of *the Constitution* be brought in an ordinary claim. Indeed, the Respondent recognises this in its submissions where it cites Article 28 and sets out the parameters arguing the Petitioner cannot complain as the advert in the newspaper did not state the reason for the fact the Petitioner was not allowed to transact on its behalf.
18. Whereas the employer is entitled to terminate the employment of an employee for alleged gross misconduct, any termination for alleged misconduct is not a right for the employer to trample on the rights and dignity of an employee. The Respondent asserts that it owed a greater duty to inform the public as opposed to seeking the consent of the Petitioner as regards the newspaper publication. The Court finds that there is no industry practice that dismissal of the employee should be advertised to the whole world. Indeed, where such adverts are placed it is inferred the employee committed criminal acts and as such the Respondent cannot obtain cover under the amorphous 'duty' to inform the



public. It may well be that the public does not care what the Respondent thinks on this issue. The Respondent asserts that it dismissed the Petitioner for gross misconduct. Article 41 of *the Constitution* as well as Section 41 of the *Employment Act* provide that an employee is entitled to fair labour practices. These rights include the right to be heard before dismissal whether the grounds for dismissal are gross misconduct as is the allegation in the case of the Petitioner. The Petitioner's dismissal was therefore unfair and unlawful for not availing the Petitioner the inherent dignity required in any exit from employment. The Petitioner was not heard prior to his dismissal as provided for under the law and the rules of natural justice. For any dismissal to pass muster there must be an adherence to the procedural and substantive fairness well enunciated in legal precedent from this Court. It is apparent fair procedure was not adopted to wit; show cause letter, summoning the Petitioner to a disciplinary hearing and giving him a chance to exonerate himself from the allegations levelled against him. The Petitioner seeks a permanent injunction and the threshold required is such as to take the Petitioner's prayer out of reach as he was not able to demonstrate the high bar set by the locus classicus *Giella v Cassman Brown* (supra) as such he would not be granted such an injunction. The Petitioner did not make out a claim for exemplary damages either and as such would not recover on this limb.

19. In the final analysis, the Petitioner is entitled to the following reliefs:-
- i. A declaration that by publishing his image in The Standard Newspaper as the Respondent did on 24th November 2021 the Respondent infringed in his right to the fundamental right to privacy and human dignity.
 - ii. Compensation of Kshs. 5,000,000/- for the breach in (i) above and tarnishing the Petitioner's name.
 - iii. One month's salary in lieu of notice – Kshs. 368,047/-
 - iv. Unpaid salary for 22 days worked in November 2021 – Kshs. 269,901.13.
 - v. 25 days leave balance – Kshs. 306,705.83
 - vi. Pension 15% x 368,047 x 12months x 5 years – Kshs. 3,312,423/-
 - vii. 12 months' compensation for wrongful loss of employment – Kshs. 4,416,564/-.
 - viii. Interest at Court rates on the sums in (ii), (iii), (iv), (v), (vi) and (vii) above from date of termination till payment in full.
 - ix. Costs of the Petition.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

