



**Kairo v John Hopkins Program for International Education in
Gynecology and Obstetrics [JHPIEGO] Kenya (Petition 11 of 2019)
[2022] KEELRC 12876 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12876 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 11 OF 2019
AK NZEI, J
OCTOBER 13, 2022**

**IN THE MATTER OF: ARTICLES 20(1), (2), (3), (4), (22), (23), (27), (28), 41(2) (B),
162 AND 165 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF:
CONSTITUTION OF KENYA [PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS
AND ENFORCEMENT OF THE CONSTITUTION PRACTICE AND PROCEDURE
RULES (2013)] AND IN THE MATTER OF: EMPLOYMENT ACT NO. 11 OF 2007**

BETWEEN

DR. JUDY NJERI KAIRO PETITIONER

AND

**JOHN HOPKINS PROGRAM FOR INTERNATIONAL EDUCATION IN
GYNECOLOGY AND OBSTRETICS [JHPIEGO] KENYA RESPONDENT**

JUDGMENT

1. The Petitioner, Dr Judy Njeri Kairo, filed a Constitutional Petition in this Court on December 4, 2019 and pleaded:-
 - a. that the Petitioner was on March 6, 2017 employed by the Respondent as a Regional Senior Program Delivery Advisor and posted to Kilifi prior to institution of the suit, earning a gross monthly salary of Kshs 723,060.
 - b. that the Petitioner offered the Respondent with diligent and faithful services until December 3, 2018 when the Respondent wrongfully and unlawfully summarily terminated her services, allegedly on redundancy.
 - c. that during the period of service, the Petitioner was never subjected to disciplinary process, and never took her annual leave.



- d. that on or about 2018, while undergoing a training at Mombasa, the Petitioner received a visit from a senior member of management in her room, demanding for sex, which advances the Petitioner rebuffed, thereby bruising the said person's ego.
 - e. that the Petitioner was offended and she took up the matter with the Respondent's Human Resource Director (Kenya office), Mr. Mbugua, who was a personal friend of Peter Kagwe, and that on ascertaining that there was no substantive response on the matter, the Petitioner escalated the same to the Respondent's head office in United States of America, and that it took the intervention of the head office to stem the tide.
 - f. that despite several complaints to the Respondent's Human Resource and Country Director, no attempts were made to investigate the complaint and no communication was effected towards any efforts taken by the Respondent to communicate the same.
 - g. that subsequent to denying Peter Kagwe's advances, the Petitioner was deliberately excluded from attending field work activities, was openly reprimanded whenever she raised queries as to the reason for the exclusion and was subjected to unwarranted harassment over performance of her obligations at work.
 - h. that in a bid to avert the constant discrimination and being sidelined, the Petitioner contacted the Respondent's Country Director and sought re-assignment, only to receive threats from Mr. peter Kagwe for making the complaints known to a higher authority, an indication that there might have been breach of confidence.
 - i. that following numerous complaints in 2018 against the Respondent's program lead Mr Peter Kagwe, a new organization chart was deliberately developed in order to terminate the Petitioner's employment status, along with any other female staff who did not align, in the guise of redundancy.
2. The Petitioner further pleaded that the Respondent's decision to terminate her was not only unfair and in breach of the Respondent's statutory duty owed to the Petitioner, but was also a flagrant breach of the Respondent's own Human Resource Policy/Manual for failure to hear and to determine an appeal within a reasonable time frame.
 3. The Petitioner pleaded violation by the Respondent of Articles 20(1) (2) (3) (4), 22,23,27,28 and 41 of the *Constitution of Kenya*, Section 5(6) of the *Employment Act* and several international conventions which Kenya has ratified.
 4. The Petitioner set out the following claim against the Respondent:-
 - a. Compensation under Section 49 of the *Employment Act* (12x5x723,060)43,383,600
 - b. Unpaid leave days (21/30x723,060)..... 2,530,710
 - c. Unpaid January 2019 salary 723,060

Total 46,637,370
 5. The Petitioner further sought the following reliefs:-
 - a. a declaration that the Respondent created a hostile working environment for women and is discriminative to female employees.



- b. a declaration that the Respondent violated the Petitioner’s rights under Articles 20(1) (2) (3) (4), 22,23,27,28 and 41 (2) (b) of the Constitution.
 - c. an award for damages for violation of the Petitioners’ Constitutional rights.
 - d. a declaration and finding that termination of the Petitioner’s employment with the Respondent was unlawful and unfair.
 - e. damages for sexual harassment.
 - f. special damages for wrongful dismissal.
 - g. special damages for wrongful redundancy.
 - h. an order directing the Respondent to reinstate the Petitioner to her employment without loss of position, status or benefits with back pay from the date of termination.
 - i. costs and interest.
6. The Petition was supported by the Petitioner’s affidavit sworn on November 28, 2019. Documents annexed to the supporting affidavit included the Petitioner’s contract of employment signed on February 28, 2017 with commencement date being 6th March 2017, payslip for December 2018, Petitioner’s letter of complaint on harassment and forwarding email dated September 12, 2018, the Petitioners emails complaining of exclusion from field work and termination of contract/redundancy notice dated November 2, 2018; among others. The termination letter states in part:-

“Re: Termination of contract/redundancy Notice

This is further to the earlier communication shared on the TCT structural project changes and end of your scope on December 3, 2018. We are therefore hereby notifying you that your employment contract with Jhpiego will be terminated on 3rd December 2018...”

7. On February 5, 2020, the Respondent filed a replying affidavit sworn by one Miriam Tharao, the Respondent’s Senior Human Resource Manager, on January 31, 2020. The Respondent admitted having employed the Petitioner as pleaded by the Petitioner at paragraphs 3 of the Petition, at a gross monthly salary of Kshs 723,060. The Respondent further deponed:-
- a. that under the Petitioner’s employment, the Petitioner’s continued employment was subject to availability of funds from the Respondent’s donors, the Respondent’s determination of continuing need of the Petitioner’s services and the Petitioner’s satisfactory performance and conduct; and that the Respondent could terminate the Petitioner’s employment by giving her one (1) month notice based on one or more of the reasons aforesaid.
 - b. that in 2018, the Respondent and its main donor, Gates Institute, conducted mid-course review of the TCI Project and the donor raised concern over the project’s costs, and particularly the staffing approach in the East African region, thus necessitating changes to the TCI Project structure and declaration of redundancy on the position of Senior Program Delivery Advisor.
 - c. that following the said changes, the Respondent created the positions of County Managers/ Coordinators in line with the feedback received from the project donors.
 - d. that the position of County Managers did not have the same job description as that previously held by the Petitioner.



- e. that redundancy of the post of Senior Program Delivery Advisor affected the Petitioner and another member of staff namely, Assumpta Matekwa.
 - f. that the deponent (Miriam Tharao) met the Petitioner on various dates, including September 28, 2018 and October 17, 2018, and explained to her the changes in the TCI Project, and send her an email on October 23, 2018 notifying her of the intended redundancy.
 - g. that on November 2, 2018, the Respondent duly notified the Petitioner and the said Assumpta Matekwa of the changes in the TCI Project structure and the Respondent's decision to declare the Senior Program Delivery Advisor position redundant, and gave one month notice in that regard.
 - h. that the Respondent send a notification to the County Labour Officer of the termination of the Petitioner's and Assumpta Matekwa's contracts of employment on account of redundancy.
 - i. that prior to November 2, 2018, the Respondent (Miriam Tharao) held consultative meetings with the Petitioner and Assumpta Matekwa with a view to offering support to them, and informed them that there were new/alternative positions in the re-organized structure of the Respondent (County Managers/Coordinator) and invited the Petitioner and Assumpta to apply for the newly created positions upon lapse of the redundancy notices. That the Petitioner declined to apply for the new position.
 - j. that termination was carried out in accordance with Section 40 of the *Employment Act* and other applicable laws.
 - k. that upon termination, the Petitioner was paid all he dues and was issued with a Certificate of service.
 - l. that the Petitioner was not sexually harassed and bullied by the Respondent's Program lead as pleaded by her, and that between the Petitioner's date of employment and August 2018, no sexual harassment complaints were received in the Respondent's HR; and that the Petitioner brought her allegation against Peter Kagwe more than a year after the alleged sexual harassment.
 - m. that the Respondent's Code of Conduct, which binds all staff, contains the Respondent's Sexual Harassment Policy which prohibits any form of harassment or discrimination.
 - n. that the Petition does not disclose any constitutional violation, and that the Petitioner was never discriminated upon on the basis of gender or any other grounds.
8. Oral evidence was virtually presented by both parties at the hearing of the Petition. The Petitioner adopted her affidavit sworn on November 28, 2019 and witness statement dated the same date as her testimony in chief. She was cross-examined and re-examined, and she closed her case.
 9. On its part, the Respondent's three witnesses, namely, Paul Nyachae, Peter Kagwe and Miriam Tharao, adopted their respective filed witness statements and were cross-examined and re-examined. Written submissions were thereupon filed by Counsel for both parties.
 10. Although the Petitioner presented her claim by way of a constitutional Petition, what she is seeking to enforce are purely employment rights. The issue as to whether rights in employment and labour relations matters covered and/or addressed in a contract of employment should be addressed through a



constitutional Petition was addressed by the Court of Appeal in the case of *Summaya Athmani Hassan v Paul Masinde Simidi & Another* [2019] eKLR as follows:-

“It is evident that the petition was hybrid combining violations of various rights, employment rights under the *employment Act* and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the *Employment Act*.

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 authority in *Barbara 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. That principle has been reinforced by the Supreme Court in the *Communications Commission Case* (supra).”

11. Still on the fact that parties enforcing rights outlined under the *Employment Act* should file a claim and not a (constitutional) Petition, the Court in *Francis Atonya Ayeka v Kenya Police Service & Another* [2017] eKLR stated as follows

“...the cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.

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.”

12. Indeed, Section 6 of the *Employment Act* defines, and makes elaborate provision on sexual harassment at the work place; while Section 5 of the Act outlaws discrimination in employment on grounds of colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.
13. In my view, the pleadings filed herein and evidence adduced do not disclose violation of the Petitioner’s constitutional rights or threat of such violation. Further, the Petition did not raise any question of interpretation or application of the Constitution. Matters pleaded by the Petitioner fall within the



purview of the *Employment Act*, and I will proceed to address the case before me as an ordinary employment and labour relations suit.

14. Having said that, and having considered the pleadings filed and evidence adduced by both parties, issues which fall for determination are, in my view, as follows:-

- a. whether the Petitioner was a victim of sexual harassment.
- b. whether termination of the Petitioner's employment was unfair.
- c. whether the Petitioner is entitled to the reliefs sought.

15. On the first issue, the Petitioner pleaded as follows at paragraph 6 of her Petition dated November 28, 2018:-

“6. 6. On or about 2018, the Petitioner while undergoing training at Mombasa received a visit from a Senior Member of the management at her room, demanding for sex, to which the Petitioner rejected the said advances thereby bruising his ego. This incident was forwarded to the Human Resource director (Kenya office) who was a personal friend to Peter Kagwe.”

16. The foregoing averment is repeated at paragraph 6 of the Petitioner's affidavit sworn in support of the Petition. Peter Kagwe is named in that paragraph as the senior member of management who visited the Petitioner's room and demanded for sex.

17. In her oral evidence in Court, however, the Petitioner testified as follows:-

“...we went on assignment (workshop) with the Country director and Country lead Mr Kagwe. We were in Voyager Beach Hotel in Mombasa. In the course of an evening after work, Mr Kagwe called me on my personal mobile phone and requested to come to my room. I told him if it was work we could meet at the reception. I also received another call from Country director Keyonzo who asked me over to his room for a glass of wine. I declined.

The workshop was done and we went back to Nairobi. Since that date I stopped being included in trips outside Nairobi.”

18. The Petitioner's foregoing oral evidence materially contradicted the averments made in paragraph 6 of the Petition and paragraph 6 of her affidavit sworn in support of the Petition whereby it was pleaded that Peter Kagwe visited the Petitioner's room and demanded for sex.

19. In her written complaint send to the Respondent's global HR via email in September 2018, the Petitioner stated:-

“...I was hired on March 6th 2017 and soon after my 2 weeks orientation I started work. My problems began when I went on assignment to Mombasa accompanied by Nelson Keyonzo (Program Director), Peter Kagwe and our Program Assistant. On one evening after workshop while in my room in the evening, Peter Kagwe called me and requested to come to my room to check on something work related. I told him he can't come to my room and instead we could sort it out the next day or we could meet at the reception. He stated it did not matter anymore and he hung up.

...I was sidelined on all activities and even denied work. I discussed with my supervisor during my 3rd month end of probation meeting and informed him how Kagwe made me



uncomfortable when we had gone on a trip together but he did not say anything to address that....”

20. In view of the foregoing major contradiction between the Petitioner’s pleadings and evidence adduced by the Petitioner in Court, I am unable to make a finding that the Petitioner was a victim of sexual harassment and was indeed subjected to sexual harassment. Parties will forever be bound by their pleadings.

21. On the second issue, the Respondent terminated the Petitioner’s employment on account of redundancy vide a letter of termination of contract dated November 2, 2018. *Black’s Law Dictionary* defines redundancy as :-

“a situation in which an employee is laid off from work because the employer no longer needs the employee.”

22. The Respondent stated as follows in paragraph 6(d) of the affidavit of Miriam Tharao sworn on January 31, 2020 in response to the Petition: -

“6(d)...I informed the Petitioner and Assumpta that there were new positions and/or alternative positions in re-organized structure of the Respondent – positions of County Managers/Coordinators and invited the Petitioner and Assumpta Matekwa to apply for the newly created positions upon lapse of the redundancy notices. While Assumpta Matekwa agreed to take up the County Manager Position, the Petitioner declined to apply for the new position...”

23. The foregoing situation, which was restated by Miriam Tharao (RW-3) in her evidence in Court whereby she adopted her filed witness statement as her testimony, is not a characteristic of redundancy. A process that is undertaken by an employer that includes re-absorption of terminated employees back to the employer’s employment/work force at lower or even higher levels of employment is not redundancy. Such a process bears the countenance and hallmark of an illegal process whose end goal may be to illegally change employees’ terms and conditions of employment without consulting the employees as contemplated in Section 10(3) (6) of the *Employment Act*.

24. Section 40(1) of the *Employment Act* states that an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extend of, the redundancy not later than a month prior to the date of the intended termination on account of redundancy.
- (b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer.
- (c) the employer has, in the selection of employees to be declared redundant, had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.
- (d) where there is in existence a collective bargaining agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union.



- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash.
 - (f) the employer has paid an employee declared redundant not less than one month's notice or one month wages in lieu of notice; and
 - (g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”
25. In the wording of the foregoing provision of the statute, all the conditions set out therein are to be complied with to the letter, and failure to comply with any one of the conditions renders the entire process illegal, invalid and unfair.
26. In the present case, the Respondent did not disclose or demonstrate the procedure or criteria used in selecting the two employees declared redundant, and whether the same was based on seniority in time, skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. This failure on the part of the Respondent rendered the entire process unprocedural, unlawful and therefore unfair. The entire process amounted to unfair termination of employment. I so find and declare.
27. On this issue, Counsel for the Petitioner cited the celebrated case of *Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others*[2014] eKLR where the Court expressed itself on the requirement for a precise selection criteria as follows:-
- “ 57. The other important aspect of procedural fairness is the criteria employed to determine the employees to be laid off. This requirement is expressly provided for in Section 40(1) (c) of the *Employment Act* which places the burden of proving its compliance on the employer...the selection of workers to be affected by a reduction of the workforce should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which gives due weight both to the interest of the undertaking establishment or service and to the interests of the workers...”
28. Having made a finding that termination of the Petitioner's employment was unfair, and there being an admission by the Respondent that the Claimant was earning a gross monthly salary of Kshs 723,060 at the time of termination of her employment, I award the Claimant the equivalent of eleven months salary in compensation for unfair termination of employment (Kshs 723,060x11= 7,953,660). I have taken into account the circumstances in which the Petitioner's employment was terminated.
29. The prayers for declaratory orders on violation of the Petitioners' constitutional rights and award of damages thereon are declined. The prayer for damages for sexual harassment is declined. The prayer for reinstatement of the Petitioner to her employment is declined, termination in issue having occurred over three years ago. The claims for unpaid leave and salary were not proved.
30. Ultimately, and having considered written submissions by Counsel for both parties, judgment is hereby entered for the Petitioner against the Respondent for Kshs 7,953,660.
31. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
32. The Petitioner is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this Judgment.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Kihanga for Petitioner

Miss Kithinji for Respondent

