



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO 95 OF 2018**

**HARRIET MWIHAKI MUCHIRI..PETITIONER**

**VERSUS**

**CRESCENT TECH LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. This ruling relates to the Respondent's Notice of Preliminary Objection dated 16.3.2020 by which the court was urged to strike out the petition herein with costs on ground that it involves a labour dispute and it does not raise any constitutional issue.
2. The petitioner filed replying affidavit sworn on 17.9.2020 to oppose the objection. Thereafter the objection was disposed of by written submissions.
3. The factual background of the objection is that the petitioner was employed by the respondent from 16.5.2013 as a sales account manager until 24.4.2018 when she was summarily dismissed on account of poor performance. Aggrieved by the said dismissal the petitioner filed the petition herein seeking declaration that her rights and freedoms under Article 27,28 and 41(1) of (2) (b) of the Constitution were infringed by the respondent during her two pregnancies and also in the manner in which she was dismissed.
4. The Petitioner from then prayed for Kshs 1,500,000 as compensation for contravention of her right to equality and non-discrimination as protected under Article 27(4) and (5) and right to dignity protected under Article 28 of the constitution. She also prayed for Kshs 1,641,816 being 12 months' salary compensation for unlawful and unfair termination of her employment. She further prayed for unpaid house allowance for the entire period of employment totaling to Kshs 1,068,057, Kshs 136,818 being one month salary in lieu of notice, Kshs 136,818 being salary for April 2018, Kshs 27,363.60 being accrues leave and finally certificate of service under section 51 (1) & (2) of the Employment.
5. The respondent opposed the petition by filing a Replying Affidavit sworn on 19.2.2019 by its HR Manager Ms Elizabeth Mwangi in which she denied the alleged unfair termination of the petitioner. It is the respondent's position that the petitioner performed poorly contrary to performance agreements signed scoring below targets in the five key performance indicators. Therefore, it is further respondent's case that it was justified to dismiss the petitioner from service.
6. It denied the alleged redundancy of the petitioner's position and averred that the position is still in existence and it is occupied. It further denied the alleged discrimination on account of pregnancy and averred that the petitioner and other employees in her unit caused a loss to the business by selling stock to clients and failing to receive or account for the sales proceeds. It also averred that the claimant retained a laptop and the price was deducted from her salary formally but denied the alleged violation of the petitioner's constitutional rights and prayed for the petition to be dismissed for lack of merits. Thereafter the respondent brought the instant objection.

**Submissions**

7. The respondent submitted that the petitioner's grievance is premised on termination of her employment on ground of poor performance and alleged redundancy situation, which claims, can find relief under the provisions of the Employment Act. It further submitted that the general principle in law has been stated in decided cases that a wrong action or decision does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby to institute proceedings by way of a constitutional petition.
8. It relied on **James Gacheru Kariuki being a member of The Interest Group of Persons T/A Constituyen Traders Vs County**

**Government of Kiambu [2015] eKLR and Raphael Otieno Odumo & 27 Others Vs Kenya Engineering Workers Union Headquarters & 2 Others [2017] eKLR** for emphasis. It maintained that the petitioner's grievances arises from contract of employment and relief is provided for under the Employment Act and the ELRC Procedure Rules 2016.

9. The petitioner however, submitted that the petitioner is properly before the court because Article 22 of the Constitution and Rule 7 of the ELRC Procedure Rules permit a person to institute proceedings for enforcement of any constitutional rights and freedoms on constitutional provision in accordance with the Constitution of Kenya (Protection of Rights and fundamental freedoms of the Constitution ) Practice and Procedure Rules 2012.

10. The petitioner further submitted that her petition has met the competence threshold set out by **Anarita Kariuki Njeru Vs Republic [1979] eKLR** by pleading clearly and with precision, the constitutional right which have been violated and the manner in which the rights were infringed. She reiterated that she was discriminated on account of pregnancy and thereafter summarily dismissed for the same reason. She further submitted that Article 22 of the Constitution and the rule of procedure of this court entitles her to institute her claim by way of a petition.

11. For emphasis she relied on **Emmanuel Wambua Muthusi & 6 Others Vs Khoja Slica Ithna Ashari Education Board t/a Jaffrey Academy [2020] eKLR** where the court held that a party can seek remedy by either claim or petition. She further relied on **Salesio Njeru Mbogo & 112 Others Vs Kenya Planters Co-Operative Union [2017] eKLR** where the court held that enforcement of employee's rights can be done by a statement of claim or petition provided the nature of the remedy sought is clear. Therefore, she prayed for the objection to be dismissed with costs.

### **Issues of determination**

12. The main issues for determination are:

- a. Whether the petition meets competency threshold for a constitutional reference.
- b. Whether the remedy and procedure for pursuing petitioner's grievance is specifically provided for by the law.

13. The petitioner contended that her petition meets the threshold for a constitutional reference because she has pleaded clearly and with precision the right which was violated and the manner in which they were violated.

14. I have perused the petition carefully and noted indeed the petitioner has clearly pleaded the rights alleged to be violated being rights to Equality and freedom from discrimination under Article 27 of the Constitution and right to dignity under Article 28 of the Constitution. The petitioner has also pleaded the manner in which the said rights were violated being that she was paid half salary during the period of pregnancy and that she was also a victim of harassment and partial treatment for the same reason of pregnancy. Consequently, I am satisfied that the petition herein meets the competence threshold set out by **Anarita Kariuki Njeru Vs Republic [1979]eKLR** which was affirmed by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where the Court of Appeal held;**

**"Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.**

...

**We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru ..."**

### **Specific procedure and remedy under the law**

15. The respondent contended that the petitioner's grievance has remedy under the Employment Act and the ELRC Act. Indeed under section 49 of the Employment Act, an employee who alleges that her employment has been terminated unfairly including termination on account of pregnancy under section 46 of the Act, has a remedy.

16. There is no doubt that under Article 41 and 47 of the constitution, employment and Labour rights have been elevated to Constitutional rights under the Bill of Rights. It is also clear in **Speaker of National Assembly Vs James Njenga Karume [1992] eKLR** the Court Of Appeal held 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."**

17. The case before the court is a mixture of grievances which fall strictly under the procedure under Article 22 of the Constitution and Rule 7 of the ELRC procedure Rules, while others can be pursued under the Employment Act and the ELRC procedure Rules. In the circumstances, one cannot say that the dispute is restricted to either petition or statement of claim.

19. In view of the special circumstances of this case, therefore the matter will proceed as filed. The alternative is separating the Constitutional violation grievance from the employment contract claim. However, that would only lead to a duplicity of suits which is not necessary. The respondent's objection is therefore overruled and dismissed with no order as to costs.

**Dated and delivered at Nairobi this 11th day February, 2021**

**ONESMUS N MAKAU**

**JUDGE**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**