



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E006 OF 2021

(Before D.K.N.Marete)

RACHEAL MUTHONI WANYOIKE1ST PETITIONER

KENNETH MAINA KUNGU.....2ND PETITIONER

VERSUS

MENTOR SACCO SOCIETY LIMITED.....RESPONDENT

RULING

This application is originated by way of a preliminary objection dated 4th June, 2021 and comes out thus;

1. *The Petitioners' petition has failed the test of specificity established in the celebrated case of Anarita Karimi vs Republic (No.1) (1979) 1 KLR 154.*
2. *The Petitioners' petition is fatally defective and should be struck out in limine.*

The Respondents in their written submissions dated 4th June, 2021 submit that the petition has failed the specificity test as enumerated in the celebrated authority of Anarita Karimi Njeru(No.1) (1979) 1 KLR 154 and should therefore be struck out *in limine*.

She further submits that the law on preliminary objections was set out on the case of **Dismas Wambola v Cabinet Secretary, Treasury 7 5 others (2017) eKLR** where the court referenced the locus classicus case of **Mukisa Biscuit Manufacturers Ltd v West End Distributors Limited (1969) EA 696** as follows;

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

On the other hand, discrimination was defined by a three judge bench of the High Court in **Peter K.Waweru v Republic (2006) e KLR** as follows;-

Blacks Law Dictionary 11th Edition defines “discrimination” as under:

“Discrimination” in constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

In the foregoing, it is the respondent's humble submission that the petition has failed the specificity test established by the authority of **Anarita Karimi Njeru** (supra). The test was stated thus;

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The objectors further submission is that it is crystal clear that the instant petition fails the test as a result of which the petition is fatally defective and should be dismissed in limine. The courts have previously ruled that the court cannot breathe life to a petition that is dead on arrival. We wish to buttress this issue with the holding in **David Mathu Kimingi v SMEC International PTY Limited (2021)eKLR** where the court held thus;

The main issue for determination in the application before me is whether the petition raises any issues on violation of the Constitution to meet the threshold of a constitutional petition. In the Petition while the Petitioner has cited Article 41 (1) of the Constitution as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR.

To her, this is an employment dispute disguised as a constitutional petition and should therefore fail

The Petitioners opposes the preliminary objection vide their written submissions dated 16th June, 2021. This opens thus;

...the preliminary objection herein is metamorphosing, as raised in the notice, the Respondents allege that the Petitioners have not specified the particulars of the violation with specificity. The said ground is abandoned in the submissions and instead, the Respondent alleges that the Petitioners have not proven that they are married because they have not produced a marriage certificate. They further allege that the Law on marriage requires that all marriages should be registered. They however concede that for the preliminary objection to succeed, the matter needs to be heard and evidence proffered. It is hard to decipher the foundation in which the preliminary objection is anchored in but we nevertheless are going to respond.

The Petitioners/Respondents further submits that the clauses 16, 10.9 and 68.1 that cater for cases of conflict of interest in the affairs of the Respondent/applicant do not necessarily debar marriage between employees as is the issue in the petition. This is taken care of.

The Petitioner/Respondents again submits that the threat of termination of employment arising out of their marital relationship is a violation of their rights under Article 45 of the Constitution and should therefore be repudiated. It is discriminative and repulsive.

The Petitioner/Respondents in conclusion submits that their petition has particularized and detailed the involvement of the issues before court. These stand out and are clear on the petition. The petition therefore passes the standard set out in Anarita Karimi's case. The foregoing acts on the part of the respondent is a gross violation of articles 27, 41 and 232 of the Constitution of Kenya, 2010.

And this is the elephant in the room. It is well articulated and particularized.

From the foregoing, the application must fail. The reliance on the authority of Anarita Karimi Njeru does not stand out in the circumstances of this case. This is because the petitioners have issued a detailed and particularized data of the alleged violation of their constitutional rights.

I am therefore inclined to dismiss the application with costs to the Petitioner/Respondents.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Kiroko Ndegwa instructed by Triple N W & Company Advocates for the Petitioner/Respondents.
2. Mr.Kihara holding brief for Mr.Juma instructed by Chege Kibathi Advocates for the Respondent.