



**Kaburuku & 2 others v National Bank of Kenya (Petition E030 of 2021)
[2024] KEELRC 13513 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13513 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E030 OF 2021**

S RADIDO, J

DECEMBER 19, 2024

**IN THE MATTER OF ARTICLES 10, 22, 23, 25, 26, 27, 28, 31, 41,
47, 48, 50 AND 159 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 22, 23, 25, 26,
27, 28 31, 41, 47, 48, 50 AND 73 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE LABOUR INSTITUTIONS ACT, 2007

AND

IN THE MATTER OF THE LABOUR RELATIONS ACT

AND

IN THE MATTER OF THE BANKING ACT

BETWEEN

FAITH MAKENA KABURUKU 1ST PETITIONER

**FAITH MAKENA KABURUKU (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF THE LATE BEN WAWERU KIHANGA**

(DECEASED) 2ND PETITIONER

**FAITH MAKENA KABURUKU (SUING AS MOTHER AND NEXT FRIEND OF
NCWW (MINOR) 3RD PETITIONER**



AND

NATIONAL BANK OF KENYA RESPONDENT

JUDGMENT

1. Faith Makena Kaburuku (on her behalf and 2 others) (Petitioner) sued the National Bank of Kenya (the Respondent) on 25 February 2021, alleging unfair termination of employment, breach of contract and violation of the rights to life and fair labour practices.
2. The remedies sought in the Petition were:
 - i. A declaration that the Respondent's decision to transfer the 2nd Petitioner to the Garissa branch without putting in place any or adequate measures and mechanisms to protect his life was done in bad faith and that the same amounts to unfair labour practice in violation of the deceased's right to reasonable working conditions under Article 41 and the right to life under Article 26 of *the Constitution* of Kenya 2010 hence the Respondent is liable for the death of the deceased Ben Waweru Kihanga.
 - ii. A declaration that the termination of the 1st Petitioner from employment was illegal, unfair, wrongful and without due process.
 - iii. An order directing the Respondent to compensate the 1st and 3rd Petitioners' for:
 - (a) The 2nd Petitioner's loss of expectation of life to the tune of Kenya Shillings Twenty-Two Million Four Hundred Thousand (Kshs. 22,400,000).
 - (b) General damages for violation of the right to life resulting in the 2nd Petitioner's death due to the Respondent's actions and/or omissions.
 - iv. An order that the 1st Petitioner be paid damages amounting to Kenya Shillings Forty-Four Million, Nineteen Thousand and Ninety-Six (Kshs. 44,019,096/-) for wrongful termination from the date of termination to the remainder of her contract of service/date of retirement had the 1st Petitioner continued to be in the employ of the Respondent.
 - v. Any other relief this Honourable Court deems just and fit to grant.
 - vi. That the costs of this suit be given.
3. Upon service of the Petition, the Respondent filed a Notice of Preliminary Objection dated 19 April 2021 contending that:
 - i. The Petition does not raise Constitutional issues.
 - ii. The Petition was filed under pretext as purportedly raising constitutional (sic) to avoid time limitation as provided for under section 90 of the *Employment Act*, 2007.
 - iii. By virtue of section 16 of the *Work Injury Benefits Act*, 2007, the Respondent objects to the jurisdiction of this Court to the extent that the claims made herein (by the Petitioners) relate to and arise from work injury claims.
 - iv. By virtue of section 46 of the *Retirement Benefits Act*, 1997, the Respondent objects to the jurisdiction of this Court as it relates to the Petitioner's claims relating to the pension benefits/



dues to the extent that such disputes are regulated by the Retirement Benefits Act, No. 3 of 1997 which provides for a dispute resolution mechanism for such disputes.

- v. The 1st Petitioner lacks locus to claim reliefs that arise and relate to employment relationship between the deceased and the Respondent as sought on behalf of the deceased 2nd Petitioner.
 - vi. The Petition dated 22nd February 2021 is incurably bad and defective and should be struck out in limine, with costs to the Respondent.
4. On 16 January 2023, the Petitioner filed what she called a Replying Affidavit.
 5. The Respondent filed a replying affidavit in opposition to the Petition on 13 May 2023. The affidavit was filed outside the timelines prescribed in the Rules and the record does not indicate whether leave was granted.
 6. The Court heard the Preliminary Objection and dismissed it in a Ruling delivered on 19 June 2023.
 7. The Petitioner filed a supplementary affidavit on 12 February 2024. This supplementary affidavit was filed without leave.
 8. When the parties appeared before this Court on 28 October 2024, the Court directed them to file and exchange submissions ahead of delivery of judgment on 28 November 2024.
 9. The Petitioner filed her submissions on 8 November 2024, and the Respondent on 22 November 2024 (the Court did not deliver the judgment as scheduled because some of the pleadings had not been uploaded into the Case Tracking System).
 10. According to the Petitioner, the Issues arising for the Court's determination are:
 - i. Whether this Court has jurisdiction to entertain the suit?
 - ii. Whether the 1st Petitioner has locus standi to bring the instant suit?
 - iii. Whether the Respondent has violated the Petitioners' rights as guaranteed under the Constitution?
 11. The Respondent on its part identified the Issues in contention as:
 - i. What is the Court's jurisdiction with respect to the matters raised in the Petition?
 - ii. Was the right to life of the deceased violated?
 - iii. Is the deceased estate owed any benefits by the Respondent?
 - iv. Was the 1st Petitioner lawfully terminated from employment?
 - v. Are the Petitioners entitled to the remedies sought?
 12. The Court has considered the Petition, affidavits and submissions.

Jurisdiction

13. The Respondent contended in its submissions that the Court lacked jurisdiction to adjudicate over the head of the claim relating to general damages for loss of expectation of life. According to the Respondent, the deceased lost his life outside the scope of employment, and thus the head of claim should not have been lodged in this Court.



14. The Respondent cited Owners of the Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (1989) KECA 48 (KLR) on the question of jurisdiction.
15. The Petitioner on her part asserted that the Respondent had earlier objected to the jurisdiction of the Court on several grounds (Petition not raising Constitutional questions; law of Limitation; section 16 of Work Injury Benefits Act; section 46 of the Retirements Benefits Act and locus standi) which the Court considered and rejected in a Ruling delivered on 19 June 2023.
16. The deceased met his death at around 7.30 pm while leaving an establishment in Garissa town.
17. In the submissions in support of the Notice of Preliminary Objection, the Respondent addressed the question of whether the deceased met his death in the course of work and whether the question was one for redress under the Work Injury Benefits Act.
18. The view of the Respondent then, was that jurisdiction lay with the Director of Occupational Safety and Health as prescribed under the Work Injury Benefits Act.
19. The Respondent now asserts that the death of the deceased arose outside the scope of employment and thus this Court lacks jurisdiction.
20. The Court has keenly perused the submissions on jurisdiction.
21. The action for loss of expectation of life is a tort sound under the Fatal Accidents Act and the Law Reform Act.
22. This Court therefore finds that it has no jurisdiction over such a tortious action and that jurisdiction lies elsewhere.
23. If the Court is wrong on that conclusion, it will now examine the merit of the closely related action for violation of the right to life.

Breach of right to life

24. The Petitioner made a plea for Kshs 22,400,000/- on account of loss of expectation of life. The pleadings in this regard were outlined in parts of paragraph 43 of the Petition and paragraphs 9, 15, 18, 19 and 20 of the supporting affidavit.
25. To advance this head of the claim, the Petitioner took the position that by transferring the deceased to Garissa at a time of security challenges, the Respondent was sending the deceased directly to his death.
26. The death of the deceased, the Petitioner asserted was attributable to the actions and omissions of the Respondent. The Respondent, according to the Petitioner ought to have known and appreciated that Garissa was a danger zone and put in place adequate measures and mechanisms to ensure a safe work environment for the deceased.
27. Article 25 of the Constitution guarantees every person’s right to life and the right cannot be deprived except to the extent authorised by the Constitution or any other written law.
28. The right must as of necessity be situated within the rights to human dignity and freedom and security of the person. Not to forget the duties placed on the State through its organs such as the Kenya Defence Forces and Kenya Police Service to ensure the safety and security of all persons in Kenya.
29. Any person and not necessarily state organs that put into peril the enjoyment of the right to life would be susceptible to judicial process and redress, if found liable.



30. The pertinent question here is whether by transferring the deceased to Garissa, the Respondent was imperilling the deceased enjoyment of the right to life.
31. The Petitioner placed before the Court newspaper extracts reporting that the deceased died after an attack by suspected Al-Shabab terrorists.
32. However, no reports, advisories or evidence from formal security sources such as the Kenya Police Service was placed before the Court to show the status of security in Garissa town.
33. Under such circumstances, can the Respondent be said to have been complicit or contributed to the death of the deceased to warrant a finding of liability on a violation of the right to life of the deceased?
34. On the state of the evidence on record, the Court is unable to apportion any liability to the Respondent.
35. This head of the claim was not proved to the required evidential or legal threshold.

Transfer to Garissa: Unfair labour practice

36. One of the substantive remedies sought by the Petitioner was a declaration that the transfer of the deceased to Garissa constituted an unfair labour practice.
37. The Petitioner did not expressly identify this as an Issue for adjudication in their submissions.
38. However, the Petitioner contends that because the Respondent did not favourably consider the concerns on security, educational and family challenges raised by the deceased about the transfer to Garissa, the Respondent treated him unfairly and in breach of the right to fair labour practices.
39. Under the common law, an employer reserves the discretion to decide where the employee may perform a contract. The discretion may be circumscribed by human resource policies in place or statute.
40. According to the Petitioner, the transfer of the deceased was unfair because the Respondent knew or ought to have known the precarious state of security in Garissa at the material time.
41. The Respondent exercised a discretion to transfer the deceased to Garissa. The deceased was killed by bandits shortly after reporting to Garissa.
42. It was incumbent upon the Petitioner to demonstrate that the Respondent violated its own policies, statute or the common law in transferring the deceased to Garissa.
43. The Petitioner did not demonstrate such a violation but sought to rely on the state of security at the material time. The Petitioner did not present any admissible evidence before the Court that the state of security in Garissa at the material at the time was such that the Respondent was in breach of a duty to ensure a safe or reasonable working condition for the deceased.
44. This head of the claim was not proved.

Unfair termination of employment

Procedural fairness

45. The Petitioner was dismissed from employment through a letter dated 20 December 2018. In the Petition, the Petitioner contended that the decision to terminate her employment was unfair.



46. In this respect, the Petitioner asserted that she was not granted the right to a fair hearing or administrative action and that the disciplinary process was undertaken before the carrying out or conclusion of substantive investigations.
47. According to the Petitioner, the process was also unfair and discriminatory because some of the parties copied in the emails underpinning the disciplinary allegations were not taken through a similar process.
48. Further, the Petitioner contended that the minutes of the disciplinary process did not capture correctly the proceedings of the hearing.
49. On or around 11 October 2018, the Respondent issued a show cause notice to the Petitioner after a brief meeting with the Human Resource office. The notice set out the allegations against the Petitioner and requested her to make a written response.
50. The Petitioner responded to the show cause notice through a letter dated 12 October 2018, where she denied sharing confidential information with third parties, save for her advocate.
51. On 29 October 2018, the Respondent's security team engaged in an investigatory session with the Petitioner and this was followed with a suspension on 30 October 2018 to allow for more investigations.
52. Upon completion of the investigations, the Respondent invited the Petitioner through a letter dated 26 November 2018, to appear for a disciplinary hearing on 4 December 2018. The Petitioner was informed of the right to be accompanied to the hearing.
53. The Petitioner attended the hearing and participated in the process after which a decision to terminate was conveyed through a letter dated 20 December 2018.
54. The Petitioner appealed against the decision to terminate her employment and she was afforded an opportunity to be heard.
55. Procedural fairness within the employment contract is guided by sections 35(1) and 41 of the [*Employment Act*](#).
56. The Petitioner was informed of the allegations to confront, and she was requested to make a written response, which she did. Thereafter, she was invited to attend an in-person hearing accompanied by a colleague of her choice. She opted to attend alone and was afforded another opportunity to make representations.
57. The Court is satisfied that the Respondent observed the statutory elements of procedural fairness.

Substantive fairness

58. By dint of sections 43 and 45 of the [*Employment Act*](#), the employer has the burden of proving as valid and fair the reasons leading to the termination of an employment contract.
59. The reasons leading to the termination of the Petitioner's contract was divulging confidential information to third parties without authorisation contrary to the Bank's Code of Conduct (clause 1.9 on Communication Policy and clause 1.10 on Data and Information Confidentiality).
60. During the oral hearing, the Petitioner admitted that she shared with a person stated to be her lawyer (Kimanthi Kamencu) some emails she had exchanged with one of her managers. The subject of the email was a succession dispute involving the Petitioner's daughter and the Respondent. The contents of the email were published by a blogger.



61. The Petitioner admitted that she was aware of the policies in place.
62. The Petitioner was in a dispute with the Respondent over benefits due to her daughter upon the death of her husband. She exchanged emails with a person said to be her lawyer. The contents of the email was subject of a blog the Respondent felt was defamatory.
63. The only persons who were privy to the emails were the Petitioner, the said Kimanthi Kamencu and the Respondent's Human Resource Manager. The blog in contention was publishing the Petitioner's cries. It is probable that the contents of the blog could only have come from the Petitioner.
64. The action of the Petitioner was contrary to the Respondent's policies she knew were in place.
65. The Court finds that the Respondent had valid and fair reasons to terminate the Petitioner's employment.

Lost income

66. The Petitioner claimed Kshs 44,019,096/- being the remuneration she would have earned had she worked until retirement.
67. First, the Petitioner did not place any evidence or material before the Court that life being life, nature and the vicissitudes of life would have allowed her to work until the agreed retirement age.
68. Second, in declining to grant this remedy, the Court endorses the decision of the Supreme Court of Uganda in Bank of Uganda v Tinkamanyire (2008) UGSC that:

the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

69. Before concluding, the Court must observe that the Petitioner mixed causes of action (unfair termination and breach of contract and loss of expectation of life/violation of the right to life) which ought not to have been pursued together in the same Cause.

Conclusion and Orders

70. Flowing from the above, the Court finds no merit in the Petition and it is dismissed with no order on costs, considering the evidence on record that the Respondent had dismissed the Petitioner from its employment.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 19TH DAY OF DECEMBER 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioners Mutuma Gichuru & Associates Advocates

For Respondent Munyao, Muthama & Kashindi Advocates

Court Assistant Wangu

