



**Lukorito v Central Bank of Kenya & another (Constitutional Petition E011 of 2022) [2023] KEHC 21387 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21387 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL PETITION E011 OF 2022**

**DK KEMEL, J**

**JULY 28, 2023**

**IN THE MATTER OF THREATENED VIOLATION OF RIGHT TO LIFE, FAIR ADMINISTRATIVE ACTION AND RIGHT TO FAIR HEARING IN FLAGRANT CONTRAVENTION OF THE LAW CONTRARY TO ARTICLE 2(4), 3,10, 19, 26, 31, 47, 50,129 (1) & (2), 156, 160, 171, 172, 173, 248,249(1) & (2), 250, 251, 252, 253, 254 & 255 OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF SECTIONS 70 (A) AND (B) , 72 (1), 74(1), 78(1), 79(1), 80(1) AND 81(1) OF THE REPEALED CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013.**

**AND**

**IN THE MATTER OF UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948 AND AFRICAN CHARTER ON UMAN AND PEOPLES RIGHTS UNDER OAU (NOW AU)**

**AND**

**IN THE MATTER OF ENFORCEMENT AND INTERPRETETION OF THE CONSTITUTION UNDER ARTICLES 19, 20, 21,22,23,258,259 AND 280 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**FRANCIS WW LUKORITO ..... PETITIONER**

**AND**

**THE CENTRAL BANK OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner through a Petition dated 22<sup>nd</sup> August 2022 and filed on 5<sup>th</sup> September 2022 supported by an affidavit sworn by Francis W. W. Lukorito seek the following reliefs:-
  - a. A declaration that the Petitioner's fundamental rights and freedoms were infringed on account of arrest, detention, torture and bungling of his professional career.
  - b. A declaration that as a result of the Petitioner's arrest, detention, torture and bungled professional career his whole living conditions, his professional working income and deteriorating health ruined his expectations and achievements which the Respondents are liable and responsible.
  - c. A declaration that the Petitioner's right, human dignity, freedom and proprietary rights under Articles 21(1), 22, 23, 28, 29, 47 and 48 of *the Constitution* of Kenya, 2010 and the repealed constitution as cited were violated, disregarded and or breached by the Respondents.
  - d. A declaration that the Petitioner's rights under Articles 12, 17 and 31 of the Universal Declaration of Human Rights 1948 relating to protections of private and professional property under the law have been infringed and violated by the Respondents.
  - e. Special damages: unpaid salary arrears, benefits and emoluments amounting to Kshs. 50,000,000 /=-; loss of future earnings and expectation multiplicand of 20 years Kshs. 10,000,000/=and medical treatment and related expenses for over 20 years, Kshs. 8,000,000/=
  - f. General damages for the torture, infringement of the Petitioner's human rights and dignity.
  - g. Costs and interests.
  - h. Any other relief this Honourable Court deems fit.
2. The Petitioner averred that he worked with Central Bank of Kenya from 2<sup>nd</sup> August 1976 to 7<sup>th</sup> July 1993 in the Investment Division, National Debt Division and Development Division for a period of 17 years. According to him, he joined the Bank as a graduate management trainee after successful completion of his Bachelor of Commerce Degree programme at the University of Nairobi in 1976.
  1. During the 17 years with the 1<sup>st</sup> Respondent, he went through progressive operational positions in central banking, commercial banking and all financial institutions and other international affiliations working in partnership with the 1<sup>st</sup> Respondent. He averred that with the assistance of OMO, a new monetary policy instrument by the 1<sup>st</sup> Respondent he was able to uncover large movements of funds from the Central Bank of Kenya and Government to the banking systems which allegedly made people at the 1<sup>st</sup> Respondent and Treasury uncomfortable with him.
  2. He averred that he decided to put something in writing and draw the attention of his superiors. The contents of the memo to the Chief Banking Manager through the Principal Development Division dated 21<sup>st</sup> January 1992 and his reply to that effect dated 24<sup>th</sup> January 1992.
  3. He averred that from the Treasury he came to learn that one Mr. Kibunja who was the Officer in-charge of the paymaster General Account alerted Dr. W. Karuga Koinange and Mr. Donald Kimutai about his having uncovered their dubious payments and that the same group alerted



the management of the 1<sup>st</sup> Respondent comprising of Messrs Erick C. Kotut, Eliphaz Riungu, J.K Waiguru and G.K Ndubai who had him targeted for removal from the 1<sup>st</sup> Respondent.

4. He averred that following the sudden death of the late Mzee Masinde Muliro on 14<sup>th</sup> August 1992 he participated in the funeral arrangements and thus providing the authorities with an excuse to arrest him on 19<sup>th</sup> August 1992 and that he was locked up over night at Parklands Police Station. He averred that his release happened after he was tortured at Nairobi Area CID Headquarters and that he fell sick while in police custody leading to his hospitalization for six days.
5. He averred that during his time at the hospital, the government mouth piece, the Kenya Times, on 21<sup>st</sup> August 1992 on page one falsely and maliciously printed and published that A Political Associate of the late veteran politician Masinde Muliro, Mr. Francis Lukorito is now admitted at the Nairobi Hospital.” The 1<sup>st</sup> Respondent used this as an excuse to interdict him on the same.
6. He averred that on 5<sup>th</sup> July 1993 he was summoned by the former President the late Moi who directed Prof. Mbithi to reinstate him at his job with the 1<sup>st</sup> Respondent. On 7<sup>th</sup> July 1993 he received a letter that lifted his interdiction and he was asked to report back to his department at the 1<sup>st</sup> Respondent. On 8<sup>th</sup> July 1993, while in the office, he received another letter from J. Waiguru redeploying him and asking him to report to the Deputy Governor who told him to report to Professor Mbithi for assignment of duties but he never managed to see the Professor.
7. He averred in February 1994, he came across a letter OP 274/018 dated 10<sup>th</sup> February 1994 from the office of the President to DR. W. K. Koinange about his case and that the information in the same was false as he was never struck off the 1<sup>st</sup> Respondent’s payroll and that he did not have any disciplinary case. The letter to him dated 21<sup>st</sup> August 1992 only stated that he was interdicted following the police arrest and later asked him to tell them why he was arrested by the police.
8. He averred that he was well versed with the officer who ordered for his arrest namely the former Provincial CID for the Nairobi Area the late Kimurgor, the brother of Mr. Kimurgor the then presidential escort commandant. He further averred that many employees of the 1<sup>st</sup> Respondent were blood relatives of the people in the establishment and unless a check is put on their recruitment mega swindles of public funds will continue.
9. He finally averred that he was made to retire from the 1<sup>st</sup> Respondent and that he was not prepared to work for the institution anymore.
10. The 1<sup>st</sup> Respondent opposing the application swore a replying affidavit vide Elizabeth Njogu on 17<sup>th</sup> January 2023 where she deponed that she is the Deputy Manager Legal Services in the Human Resources Department and that the allegations giving rise to these proceedings took place over 28 years ago.
11. According to her, the Petition is incurably defective as it is anchored and predicated on the provisions of Sections 70 (a) & (b), 72 (1), 74 (1), 78(1), 79(1), 80(1) and 81(1) of the repealed constitution. She deponed that by dint of Article 264 of *the Constitution* of Kenya, 2010, *the Constitution* in force immediately before the effective date stood repealed on the effective date save for provisions relating to such matters as were reserved and provided for under the Sixth Schedule of the 2010 Constitution.



12. She deponed that the Petition is anchored and predicated on seeking relief for an alleged wrongful termination of the Petitioner by the 1<sup>st</sup> Respondent in the year 1994 and further a claim for medical treatment and related expenses does not raise any constitutional issues or breach of his fundamental rights and freedoms.
13. She deponed that the Petitioner after the separation of employment with the 1<sup>st</sup> Respondent, settled his terminal debt owing to the 1<sup>st</sup> Respondent and at no time did the Petitioner raise any issues.
14. She urged this Court to dismiss this Petitioner with costs to the 1<sup>st</sup> Respondent.
15. The 2<sup>nd</sup> Respondent opposing the application, filed a Notice of Preliminary Objection on point of law that this Honourable Court has no jurisdiction to entertain, hear and determine a matter whose cause of actions is on employment as the Employment and Labour Relations Court has a statutory mandate to deal with matters related to employment and that the Petitioner's right to claim compensation in a civil Court on the tort of malicious prosecution after 19 years is contrary to section 3 (1) CAP 39 of the Laws of Kenya.
16. The Petition was canvassed by way of written submissions. Both the Petitioner and the 1<sup>st</sup> Respondent filed and exchanged their respective submissions.
17. Upon consideration of the Petition, the 1<sup>st</sup> Respondent's replying affidavit, the 2<sup>nd</sup> Respondent's Preliminary Objection, the parties rival submissions and authorities relied upon as well as provisions of law relied upon, I find that at this stage only one (1) issue arise for consideration thus:-
  - i. Whether the High Court has jurisdiction to hear and determine the petition herein dated 22<sup>nd</sup> August 2022.
18. The Respondents contend that pursuant to Article 165(5) read with Article 162(2)(a) of *the Constitution* of Kenya 2010 that the High Court lacks jurisdiction to entertain the Petition by the Petitioner herein. Article 165(5) of *the Constitution* provides as follows:-
 

“ 165 (5) The High Court shall not have jurisdiction in respect of matters-

  - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).”
19. Whereas Article 162(2)(a) of *the Constitution* provides thus:-
 

“ 162(2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

  - a. employment and labour relations;”
20. The Petitioner refers to Article 23 of *the Constitution* which it contends gives this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. Article 23(1)(a) –(f) of *the Constitution* provides:-
 

“ 23. Authority of courts to uphold and enforce the Bill of Rights



- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
  - (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
  - (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
    - a. a declaration of rights;
    - b. an injunction;
    - c. a conservatory order;
    - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
    - e. an order for compensation; and
    - f. an order of judicial review.”
21. The 1<sup>st</sup> Respondent in view of the foregoing, contends that this Petition is about a dispute over labour relations as it touches on the employment relationships of the Petitioner and the 1<sup>st</sup> Respondent, and the relief sought was also the kind to be granted by the relevant Employment and Labour Relations Court.
22. Article 162(2)(a) of *the Constitution* establishes Courts with status of the High Court to hear and determine disputes relating to Employment and Labour Relations. The Respondents contend that it is mandatory that such courts must hear and determine labour relations disputes. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent further argue that the present Petition touches on matters in labour relations and as such the Court created under Article 162(2) of *the Constitution* is the only Court with jurisdiction to hear and determine a dispute involving issues of that nature.
23. Under Section 12(1) of the *Employment and Labour Relations Court Act* No. 20 of 2011, the same supplements Article 162(2) of *the Constitution* by providing as follows with respect to the Employment and Labour Relations Court:-
- “The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations...”
24. From the above section it appears that the law expressly provides that in a dispute involving an employment matter for which its remedy is available under statute, the dispute should be adjudicated upon by the Employment and Labour Relations Court after the conciliation



process has been satisfied. It is elaborate that the Petitioner's Petition is major on his unlawful termination by the 1<sup>st</sup> Respondent and that the bulk of the monetary claims (special damages) touch on unfair dismissal as well as unpaid salary arrears, benefits and emoluments as well as future earnings which fact have been specifically pleaded in the Petition.

25. The 1<sup>st</sup> Respondent argued that the Petitioner has deliberately chosen to disguise his claim for unfair dismissal as a constitutional matter to avoid the limitation of time under the applicable legislations being Section 90 of the [Employment Act](#).
26. In order to determine the issue of whether this Court is vested with jurisdiction to determine the present Petition, the Court should consider the facts of the matter and reliefs sought. Looking at the reliefs sought and facts of the Petition, it appears the Petition raises serious questions of contravention of constitutional and statutory provisions, violation of constitutional rights, and constitutionality of acts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. This Court's jurisdiction in constitutional matters is expressly spelled out under Article 23 and 165 of [the Constitution](#) in respect of matters raised in the instant Petition.
27. Considering clear provisions of Article 165(3) (d) (i) and (ii) of [the Constitution](#) this Court has unfettered and wide jurisdiction to entertain and determine constitutional matters However, [the constitution](#) does confer jurisdiction to both the High Court and the Employment and Labour Relations Court.

Article 165(3)(d) (i) and (ii) of [the Constitution](#) provides:-

“165(3) Subject to clause (5), the High Court shall have—

- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

28. Section 12(1) of the [Employment and Labour Relations Court Act](#) No. 20 of 2011 provides thus:-

“ 12. Jurisdiction of the court

- (1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of [the Constitution](#) and the provisions of this Act or any other written law which extend jurisdiction not the Court relating to employment and n labour relations including: -



- a) Disputes relating to or arising out of employment between an employer and an employee;
- b) Disputes between an employer and a trade union;
- c) Disputes between an employers' organization and a trade union's organization;
- d) Disputes between trade unions;
- e) Disputes between employer organizations;
- f) Disputes between an employers' organization and a trade union;
- g) Disputes between a trade union and a member thereof;
- h) Disputes between an employer's organization or a federation and a member thereof;
- i) Disputes concerning the registration and election of trade union officials; and
- j) Disputes relating to the registration and enforcement of collective agreements.

29. From clear reading of section 12(1) of the [Employment and Labour Relations Court Act](#) there was a relationship that has been established to exist between the Petitioner and the 1<sup>st</sup> Respondent herein falling to what can be referred to as employment and Labour Relationship between Petitioner and the 1<sup>st</sup> Respondent. The constitutional questions raised in the Petition and relief sought in the Petition fall within the categories or classes as captured by section 12 of the [Employment and Labour Relations Court Act](#) No. 20 of 2011.

30. The Court is alive to the fact that both the High Court and Employment and Labour Relations Court have concurrent and coordinate jurisdiction to determine violations of constitutional rights but the Employment and Labour Relations Courts jurisdiction is invoked when the dispute relates to employment and labour relations. I find from the constitutional questions and issues raised that this dispute does relate to employment and labour relations and that the Petitioner herein ought to have filed this Petition before the said court as it has jurisdiction to determine all the issues raised in the petition. The 1<sup>st</sup> Respondent has contended that the petitioner herein brought this claim in order to circumvent the limitation of time under the [Employment Act](#). This simply means that the [Employment Act](#) regulates the right to fair administrative action and fair hearing and hence the Petitioner herein ought not to be allowed to avoid the provisions of the [Employment Act](#) by merely quoting constitutional provisions (see. Maxwell Sifuna vs Teachers Service Commission (2022) eKLR). The petitioner ought to have approached the said court for redress and ventilate his grievances. Indeed, the petitioner's petition contains a mixed grill of various constitutional violations as well as claims against his employer (1<sup>st</sup> Respondent) ranging from unfair dismissal from employment to claims for



unpaid salary arrears, benefits and emoluments etc. It seems the bulk of the claims fall in the category of employment and labour related disputes. This then poses a dilemma to this court as to whether it can adequately handle all the issues including those slated for the Employment and Labour Relations Court. As noted above, it is appropriate that these claims be resolved before the said forum. At this stage, the doctrine of constitutional avoidance must kick in in that this court will not determine the constitutional issues as there is the ELRC which can handle the same appropriately as it is the proper forum and in any case the bulk of the petitioner's claims relates to unfair dismissal from employment and compensation in form of salary arrears and other emoluments.

31. It is the Court's considered view on the authority of the Court of Appeal decision in *Mumo Matemo vs Trusted Society of Human rights Alliance* (2014) eKLR where it cites *Anita Karimi Njeru vs Republic* (No. 1)-1979 KLR 154 as follows:

“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 which they are alleged to be infringed”

32. After carefully analysing the has no jurisdiction to issue prayers sought under the Petition as the same does raise employment and labour related issues and reliefs. The issue of jurisdiction was laid down in the case of *Owners of the Motor Vessel "Lillian s" V Caltex Oil (K) Limited* [1989] Eklr where Nyarangi JA held:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

33. A keen look at the petition leaves no doubt that the petitioner has cleverly framed an employment issue as a constitutional petition in a bid to circumvent the application of statutes dealing with employment. In the case of *Gabriel Mutava & 2 Others Vs Managing Director Kenya Ports Authority & Another* [2016] Eklr the Court of Appeal held:

“Time and again it has been said that if there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the constitutional court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.”

As noted from the above authorities and the prayers sought in the petition, it is clear that the bulk of the petitioner's claim falls within the jurisdiction of the Employment and Labour Relations Court. Even if this court were to hear the suit, the same would still come a cropper in view of the fact that the bulk of the prayers fall in the arena of the Employment and Labour Relations Court. Hence, I find that this petition has been filed in the wrong forum. I have no option but to down my tools at this juncture.



34. Accordingly, and for the foregoing observations, I it is my finding that the Petition herein lacks merit. The same is dismissed. In view of the nature of the matter, it is appropriate to order that each party bears their own costs.

3 Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY .2023.**

**D.KEMEI**

**JUDGE**

**In the presence of:**

**Sichangi for Petitioner**

**Brian Onyango for 1<sup>st</sup> Respondent**

**No appearance for 2<sup>nd</sup> Respondent**

**Kizito Court Assistant**

