



**Juma v Hans Kenya Limited (Constitutional Petition E235 of 2021)
[2022] KEHC 17165 (KLR) (Constitutional and Human Rights) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E235 OF 2021**

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

PATRICK WABWIRE JUMA PETITIONER

AND

HANS KENYA LIMITED RESPONDENT

RULING

Introduction

1. From 29th September 2017, until 4th May 2019, Patrick Wabwire Juma the Petitioner herein, claimed to have been a cleaner at Hans Kenya Limited, (Respondent herein), a company that deals in heavy commercial vehicle parts, mechanical engineering and the manufacture of all types of trailers.
2. However, at the close of business on 3rd May 2019, the Petitioner alleged to have been subjected to inhuman degrading treatment by directors of the Respondent namely, Mr. Ajitesh Kapur and Mr. Riyaz on the accusation of stealing merchandise belonging to Hans Kenya Limited.
3. The Petitioner claimed to have been tortured, held in comunicado, locked up in a toilet for the entire night and released the morning of 4th May 2019 without being subjected to investigations and protection of his human rights.
4. Through the Petition dated 19th February 2021, supported by the Affidavit of Patrick Wabwire Juma deposed to on a similar date, the Petitioner approached this Court seeking justice for what happened to him at the hands of the Respondent's directors.
5. He averred that getting locked up in the toilet and being held in comunicado for the entire night amounted to violation of his constitutional right against torture protected under Article 29(d)(e) and (f) whether physical or psychological or treated or punished in a cruel inhuman or degrading manner.



The Objection

6. In opposition to the Petition, the Respondent filed the Preliminary Objection dated 7th September 2021 in the following terms;
 1. That this Petition is bad in law, inadmissible and incurably effective and incompetent for want of jurisdiction.
 2. That this dispute involves a dispute between employer and an employee.
 3. That section 12 of the *Employment and Labour Relations Court Act* ousts the jurisdiction of this Honourable Court.
 4. That accordingly, the Honourable Court lacks Jurisdiction to hear and determine this Petition.

The Submissions

7. The Respondent urged its case through written submissions dated 22nd November 2021.
8. It was its case that the Petitioner was employed by the Respondent as a cleaner 29th September 2017 on a renewable three-month contract on daily wages.
9. The Respondent contended that on 3rd May 2019, while signing off duty, the Petitioner was caught stealing one scrap metal and two Isuzu rear wheel studs belonging to the Respondent.
10. It was submitted that the Petitioner confessed that it was not his first time stealing the Company's property, but admitted and apologized in writing that granted another opportunity, he would not repeat the actions.
11. On the basis that the Petitioner's actions amounted to gross misconduct, the Respondent terminated his contract on 4th May 2019 pursuant to section 44(g) of the *Employment Act*.
12. On the foregoing, the Respondent asserted that this Court's Jurisdiction was ousted by the nature of the dispute.
13. Reliance was placed on the *locus classicus* decision in *Owners of Motor Vessel Lillian S v Caltex Oil Kenya Ltd* (1989) KLR 1 where it was observed that the challenge on jurisdiction must be raised and addressed at the earliest opportunity.
14. Further support was drawn from the decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & another and 2 others* to demonstrate that this Court's jurisdiction was not properly sourced and invoked.
15. The Respondent submitted that under Article 162(2) of the *Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*, disputes such as the instant Petition fall within the exclusive and appellate jurisdiction of the Employment and Labour Relations Court.
16. To further demonstrate the proper court for determination of the dispute, reference was made to the decision in *Chunky Limited & another v Patrick Ndune & 11 Others* (2018) eKLR where it was held that;

“Whereas the jurisdiction to determine whether there had been a violation of any rights of under the bill of rights was vested in the High Court under Article 165(3)(b), the said jurisdiction was subject to clause 5 which prohibited High Court from exercising



Jurisdiction over matters that fell within the province of the Courts established under Article 162(2).”

17. The Respondent sought to fortify its case while relying on the case of *Daniel Mugendi v Kenyatta university and 3 Others* (2013) eKLR where in similar circumstances, the High Court declined jurisdiction for a matter that arose from an employment relationship it was observed;

In order to do justice, in the event where the High Court, the industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts it should be prudent to have the matter transferred to that Court for hearing and determination...”

18. In addition to the foregoing, the respondent submitted that the specialized Courts have jurisdiction to deal with redress of violation of Constitutional rights in matters falling within their jurisdiction. support to that end was drawn from the decision in *Attorney General & 2 Others v Okiya Omtata & 14 Others* (2020) eKLR where it was observed *inter alia*;

“We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in *United States International University (USIU) v The Attorney General & 2 Others* (2012) eKLR and in *Daniel Mugendi v Kenyatta university and 3 Others* (2013) eKLR...”

The Petitioner’s Case

19. In opposition to the Preliminary Objection, the Petitioner filed Ground of Opposition dated 29th October 2021.
20. It was its case that the Preliminary Objection does not disclose any valid grounds to support its case, is fatally defective and amounts to abuse of Court process.
21. Despite acceding to existence of a fixed contract, The Petitioner maintained that in view of the nature of the dispute, Jurisdiction of this Court is donated by Article 22(1) of the *Constitution* which entitles every Kenyan to institute court proceedings claiming that a right or a fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

The submissions

22. In its written submissions dated 20th December 2021, the Petitioner reiterated jurisdictional propriety of this Court based on provision of Article 22(1) as read with Article 165(3)(b) which vests the High Court Exclusive Original Jurisdiction to deal with matters of violation of fundamental rights.
23. Further to the foregoing, the Petitioner challenged the standing of the Preliminary Objection stating that it did not conform to the dictates of raising pure points of law, a settled requirement established in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors* (1969) EA.
24. The Petitioner submitted that the issues raised by the respondent were highly contested and derive their foundations on evidence.
25. On the foregoing, the Petitioner urged the Court to dismiss the Preliminary Objection with costs.

Analysis:

26. Deriving from the respective parties’ arguments’, the issues that arise for determination are as follows;



- i. The propriety of the preliminary objection.
 - ii. Depending on (i) above, the validity of the jurisdictional contest.
27. This Court will deal with the issues in seriatim.

(a) The propriety of the preliminary objection:

28. As a settled principle of law, preliminary objections are considered only if they align with the requirement that they raise pure questions of law capable of disposing off the dispute without delving into contested facts that demand the calling of evidence.
29. Therefore, for a preliminary objection to be valid, it must not be caught up or seen to be raising contested issues of fact amenable to evidentiary proof by either party.
30. The decision in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd*, (1969) EA. 696 at page 700 is hailed for crystallizing the foregoing position when it made the following findings: -

...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.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

31. Further to the foregoing, in Civil Suit No. 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit v West End Distributors (supra)* when he spoke to the operation of preliminary objection in the following manner: -

.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

32. In the process of ascertaining the validity of preliminary objections, the Court’s hands are not tied strictly to the objection. It has the liberty of perusing the pleadings and looking at other relevant documents. This was the position in *Omondi v National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, where it was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of



the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.

33. Flowing from the foregoing, it is now set to interrogate the validity of the Respondent's objection.
34. The objection was tailored as follows: -
5. That this Petition is bad in law, inadmissible and incurably effective and incompetent for want of jurisdiction.
 6. That this dispute involves a dispute between employer and an employee.
 7. That section 12 of the *Employment and Labour Relations Court Act* ousts the jurisdiction of this Honourable Court.
 8. That accordingly, the Honourable Court lacks Jurisdiction to hear and determine this Petition.
35. The Respondent mainly argues that Section 12 of *Employment and Labour Relations Court Act* is a complete bar to these proceedings and as such, the dispute before this Court ought to be instituted before the Employment and Labour relations Court.
36. Taking cue from the decision in *Omondi v National Bank of Kenya Ltd & Others* case (*supra*) I have had the liberty of perusing the pleadings and the accompanying documents.
37. Of notable importance is the concession by both parties that there appears to have been an employer-employee relationship subsisting between them when the cause of action allegedly arose.
38. In the Grounds of Opposition, the Petitioner expressly confirms as follows: -
2. The Petitioner was on a fixed term contract with the Respondent and his contract was ending on that day when he was subjected to detention, torture and
39. On the foregoing basis, this Court is convinced that the factual aspect in this matter is dispensed with.
40. What is outstanding is the question as to whether jurisdiction is a pure question of law. In resolving the issue, the Court reverts to the Supreme Court in Petition No. 7 of 2013, *Mary Wambui Munene v Peter Gichuki Kingara and Six Others*, [2014] eKLR, where the Apex Court affirmed its earlier position in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited Kenya & 2 Others* (2010) eKLR on jurisdiction and observed as follows: -
- ... jurisdiction is a pure question of law' and should be resolved on priority basis.
41. In the end, the Court is satisfied that the Respondent's objection is within the ambits of established principles and is proper for consideration on merits.

(b) The validity of the jurisdictional contest:

42. What pits the parties herein at different ends of the legal scale is the assertion by the Petitioner that, irrespective of the nature of the dispute or the cause of action, Article 165(3)(d) of the *Constitution* as appreciated alongside Articles 22(1) and 23 of the *Constitution*, are the panacea to the High Court for redress for any constitutional infractions.
43. The contrary view of the Respondent is that by virtue of Article 162(2)(a) of the *Constitution* as read with Section 12 of the *Employment and Labour Relations Court Act*, this Court's jurisdiction is ousted in favour of the Employment and Labour Relations Court.



44. The foregoing calls for a sneak peek into the concept of jurisdiction and its implication on forum of instituting suit.
45. A Court of law knows it has jurisdiction over a dispute where its authority is clearly provided for by either the Constitution or the legislation or both.
46. Therefore, even in instances where parties purport to consent to submit to a Court's jurisdiction, where such jurisdiction is not anchored in law, the Court must down its tools. This was the position in *Aderov Ulinzi Sacco Ltd* [2002] 1 KLR 577, as affirmed by the Court of Appeal in Civil Appeal 621 of 2019 (Consolidated with Civil Appeal 74 of 2020) *Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others* [2020] eKLR where it was observed: -
- ...And as regards the consent order of 1.3.00, it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which resume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal....
47. In *Samuel Kamau Macharia & Anther v Kenya Commercial Bank limited Kenya & 2 Others* (2010) eKLR the Supreme Court in a similar fashion observed as follows: -
- A court's jurisdiction flows from either the constitution or legislation or both. That a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law.
48. Coming back to the issue at hand, it is, hence, necessary to have a look at what the Constitution and legislation provides.
49. Article 162(2) and (3) of the Constitution states as follows: -
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to -
- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2). (emphasis added)
50. In delineating the jurisdiction and functions of the Courts contemplated under Article 162(2) of the Constitution, Parliament enacted Employment and Labour Relations Court Act, No. 20 of 2011 (hereinafter referred to as 'the ELRC Act').
51. The purpose of the ELRC Act was to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment labour relations.
52. Section 12 of the ELRC Act provides for the jurisdiction to the Court to hear disputes relating to employment and labour relation as follows: -
- (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 employer’s organisation and a trade union’s organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employer’s organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer’s organisation 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.
53. The question of jurisdiction under Section 12 of the [ELRC Act](#) has, so far, been finally settled by superior Courts.
54. In Civil Appeal 621 of 2019 (Consolidated with Civil Appeal 74 of 2020) *Attorney General & 2 others v Okiya Omtatab Okoiti & 14 others* [2020] eKLR, the Court of Appeal clarified the import of Section 12(a) of the [ELRC Act](#) in reference to the position previously taken by the High Court in *United States International University(USIU) v The Attorney General & Others* [2012] eKLR and in [Daniel N. Mugendi v Kenyatta University & 3 Others](#) [2013] eKLR to the effect that the specialized Courts have the leeway to interpret the Constitution.
55. The Learned Judges of Appeal appreciated the jurisdictional difference between the High Court and the specialized Courts, but acknowledged the jurisdiction by the specialised Courts to interpret the Constitution by observing as follows: -

We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution.

.... However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters. In *Daniel Maingi Muchiri Jubilee Insurance Co Ltd, CA No 138 of 2016*, this Court expressed the position as follows:

“The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction.” (Emphasis added).

56. The Supreme Court has also spoken over the issue. In *Petition 3 of 2016, Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, the Apex Court spoke to Articles 165 and 162(2) of the [Constitution](#) and Section 12 of the [Employment and Labour Relations Court](#) and in distinguishing the forum where the dispute properly fell, the Apex Court stated as follows: -

...the first port of call is to determine the nature of the dispute. Whether in the circumstances of the case, it is a dispute contemplated to be adjudicated by the High Court under Article 165 of the [Constitution](#) or it revolves around those disputes reserved for resolution by the



Employment and Labour Relations Court pursuant to Article 162(2) and Section 12 of the Employment and Labour Relations Court.

57. In concurring with the Court of Appeal in Civil Appeal 621 of 2019 (Consolidated with Civil Appeal 74 of 2020) *Attorney General & 2 others v Okiya Omtata Okiiti & 14 others* [2020] eKLR, the Learned Apex Court Judges referred to *Abdalla Osman & 628 others v Standard Chartered Bank (K) Limited & 11 others* ELRC Cause No. 59 of 2018 [2018] eKLR in affirming the position that the nature of the dispute in question is paramount in determining the forum of resolution. In the case it was observed: -

... In the case of the suit herein is between former employees of the first respondent and their former employer on one hand and also between pensioners and their respective pension schemes. Under section 12 of the ELR Act this Court has jurisdiction to determine disputes between employers and their employees and by extensions, former employees and their former employers. The said jurisdiction is donated by the said Act pursuant to provisions of Article 162 (2)(a) of the constitution of Kenya. There is therefore an inherent jurisdiction of this court to entertain any sort of dispute which arise from the context of employer employee relationship.

58. The foregoing, therefore, puts to rest the fact that the proper forum, to conclusively address the Petitioner's claimed constitutional violations is the Employment and Labour Relations Court as provided for under Article 162(2) of the Constitution and Section 12 of the ELRC Act.

Disposition:

59. In the premises, this Court finds and hold that the Preliminary Objection dated 7th September 2021 is merited and hereby issues the following final orders: -

- a. The Notice of Preliminary Objection dated 7th September, 2021 is hereby allowed to the extent that this Court has no jurisdiction over the dispute.
- b. The Petition dated 19th February, 2021 is hereby transferred to the Employment and Labour Relations Court for hearing and final determination.
- c. Costs of the preliminary objection to be borne by the Petitioner.

60. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually in the presence of: -

Mr. Namada, Learned Counsel for the Petitioner.

Mr. Oduol, Learned Counsel for the Respondent.

Kirong/Regina – Court Assistants.

