



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 13 OF 2020

IN THE MATTER OF

THE ARTICLES 22, 23, 162 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF

THE CONTRAVENTION AND VIOLATION OF ARTICLES

25, 27, 28, 29, 43, 47 AND 50 OF THE CONSTITUTION

BETWEEN

HARRIET KANORIO GUANTAIPETITIONER

VERSUS

CO-OPERATIVE BANK OF KENYA.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE,

NATIONAL POLICE SERVICE.....2ND RESPONDENT

JUDGMENT

1. The Petitioner was an employee of the 1st Respondent from 6th July 1992 to 27th November 2012 when she was dismissed after the conclusion of a disciplinary process against her. Upon her termination from the employment of the 1st Respondent, she was charged with the offence of “Stealing by servant contrary to Section 281 of the Penal Code” in Meru Criminal Case No. 1557 of 2021. Following full hearing of the matter, she was convicted and sentenced to pay a fine of Ksh 1,000,000/= and in default to serve 15 months’ imprisonment.

2. The Petitioner was dissatisfied with her conviction and sentence and lodged Criminal Appeal No. 155 of 2018. The Court allowed her appeal on the basis that there were serious gaps in the prosecution’s case including omission to call crucial witnesses and a confession by the investigation officers that they had pre-determined that the offence was an inside job and failed to conduct further investigations. The Court found that the prosecution had failed to prove their case beyond reasonable doubt. Following her release, the Petitioner has lodged this Petition claiming violation of her constitutional rights. In her Petition dated 17th August 2020, she seeks the following orders: -

- a) A declaration that the Respondents jointly and severally violated the Petitioner’s rights under Articles 25, 27, 28, 29, 41 and 50 of the Constitution.*
- b) Damages for violation of the Petitioner’s fundamental rights against each right infringed.*
- c) Interest on b) above from the date of the infringement.*
- d) Any other orders and/or reliefs as the Court may deem fit.*

e) Costs of this Petition.

3. The Petition was opposed by the Respondents, with the 1st Respondent raising a preliminary objection and was subsequently canvassed by way of written submissions.

Petitioner's Case

4. The Petition is supported by the facts in support of the Petition and the Petitioner's affidavit sworn on 17th August 2020. The Petitioner also filed submissions dated 24th May 2021 and supplementary submissions dated 7th July 2021. She claims to have been employed by the 1st Respondent from 6th July 2011 to 27th November 2012 when she was dismissed for reasons not known to her. She claims that her dismissal came shortly after her promotion and confirmation to Branch Operation's Manager, Makutano Branch due to her outstanding performance. She claims to have been subjected to psychological torture and inhumane and degrading treatment by the Respondents prior to her termination including constant bullying, harassment and discrimination from her then Branch Manager. She claims that it is because of the said Branch Manager's insecurities that she was framed and falsely accused of a theft incident which took place in the Bank in her absence. She claims that these actions were done in violation of her right not to be discriminated against under Article 27 of the Constitution and her right to have her dignity respected and protected under Article 28 of the Constitution. She further cites Section 5 (3) and 5 (6) of the Employment Act and Article 1 (a) of the International Labour Organization Convention Concerning Discrimination in Respect of Employment and Occupation, 1958 on the prohibition against discrimination of employees. She further urges that her termination was without just cause and was done in total disregard of the provisions of Article 47 (1) & (2) and Article 50 (2) (a) of the Constitution as read with Section 4 (1) of the Fair Administrative Actions Act.

5. She urges that the 2nd Respondent failed to undertake proper investigations as required under Article 244 of the Constitution as read with the National Police Service Act and that the 2nd Respondent's officer admitted under oath to not having done investigations but concluded that this was an inside job and that she, the Petitioner was culpable. She urges that the 2nd Respondent failed to absolve her of any culpability in the theft incident despite having traced the stolen funds in another person's account within Nairobi County, a person who was never presented before Court as a suspect or to answer to any of the charges. She urges that the 2nd Respondent failed to explain the basis upon which he held the Petitioner and that this amounted to unlawful detention, contrary to Article 29 (a) of the Constitution. She claims that her prosecution was malicious.

6. She urges that her socio-economic rights under Article 43 of the Constitution were curtailed and she was exposed to years of suffering, loss of reputation and that her career was negatively impacted. She claims that her child had to drop out of school. She claims that she was subjected to inhumane treatment and psychological torture because she was subjected to a long and lengthy trial that lasted over 7 years from November 2012 to July 2019 and could not secure a job until 2018 but she soon lost it owing to her imprisonment as she was unable to pay a fine. She urges that by the Judgement of Gikonyo J, it was found that she had been wrongfully convicted, by which time she had already served 8 months in prison, during which time she claims that she lost her freedom of movement and residence under Article 39, her freedom of expression under Article 33 and her freedom of association under Article 36. She seeks a declaration that her rights have been violated and she seeks damages for violation of her rights.

7. In her supplementary submissions, she claims that the primary issue in the Petition is her prosecution and not her relationship to the 1st Respondent. She further submits that the ELRC court has limited jurisdiction more so once the employer-employee relationship no longer subsists. She urges that the strata of the subject Petition emanate from criminal judicial process, including the Appeal filed in this Court by which she was released. Citing the case of *Republic vs Karisa Chengo & 2 Others (2017) eKLR* she urges that the High Court, the ELRC and ELC are courts of equal status and thus are different Courts standing in their distinct autonomies each exercising a special dedicated jurisdiction. She urges that the issues raised in her Petition, challenging the investigations and the deliberate and willful omission to present exculpatory evidence before the trial Court go beyond the scope of the ELRC. Concerning the issue of statutory limitation raised by the 1st Respondent, she urges that there is no legislative bar to institution of Petitions in challenging violations of human rights and that it is not possible to determine when time starts running in constitutional petitions.

The 1st Respondent's Case

8. The 1st Respondent opposed the Petition by the replying affidavit sworn on 6th October 2020 by Vera Nyangada Omondi, the Bank's Employee Relations Manager and another replying affidavit sworn on even date by Samuel Magati Osero, the Bank's Investigation Manager. The 1st Respondent also filed a Notice of Preliminary Objection dated 23rd June 2021 and submissions dated 23rd June 2021.

9. It is urged that the Petitioner was its employee (referred to the Bank) until her dismissal on 27th November 2021 following theft of Ksh 13,599,186/= from the Bank's vault at the Bank's Makutano Branch where she was the then Operations Manager and the officer in charge of the Bank's assets including the Bank's vault i.e strong room. It is urged that on 3rd November 2021, Ksh 16,677,845/=, US Dollars 60, Canadian Dollars 1120 and GBP 660 went missing from the Bank's Makutano cash vault. That the Bank made an official complaint to the 2nd Respondent and that the 2nd Respondent arrested and charged the Petitioner along 2 others. Mr. Samuel Magati Osero deposed that he interviewed the Petitioner about the incident and from his analysis, he found the Petitioner's account inconsistent and that he concluded that the loss of money was a well planned theft perpetrated by the staff at the Branch and that the Petitioner and another, namely Wislon Gichuhi accessed the vault through the exit grill door whose key was kept by the Petitioner as the Operations Manager. It is urged that once the matter was reported to the DCI, the DCI conducted their own investigations and the decision to charge the Petitioner alongside two others was arrived at independently by the Police and the Bank had no role whatsoever in that decision.

10. It is further urged by Vera Nyagada Omondi that the Bank conducted an internal disciplinary inquiry and that a show cause letter was sent out to the Petitioner concerning her failure to arm the vault and lock the emergency grill door. That the Petitioner was further invited for a disciplinary hearing but failed to give satisfactory answers and was subsequently dismissed with the reasons for her dismissal being clearly stated in her letter of dismissal. That after her dismissal she was paid benefits and issued with a certificate of service. It is urged that her

termination was lawful. In its submissions, it is urged that a disciplinary hearing does not amount to a trial and thus the 1st Respondent did not violate the right to a fair trial. The 1st Respondent denies infringing any of the Petitioner's rights and denies the claim for malicious prosecution.

Preliminary Objection

11. With respect their preliminary objection, the 1st Respondent urges that the Court lacks jurisdiction to determine the Petition because the underlying issue in the Petition is an employment dispute between the Petitioner and the Bank and it ought to have been filed in the Employment and Labour Relations Court pursuant to the provisions of Section 162 (2) and 165 (5) (b) of the Constitution and Section 12 (1) (a) of the Employment and Labour Relations Act. The 1st Respondent cites the case of *David Ramogi & 4 Others vs The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others (2017) eKLR* and *Judicial Service Commission vs Gladys Boss Sholei & Another*.

12. It is further urged that the underlying issues in the Petition, being alleged unfair termination and alleged malicious prosecution have been overtaken by events. That Section 90 of the Employment Act has a limitation period of 3 years from the time the cause of action arose and that the Petitioner ought to have brought her claim on or before 26th November 2015. It is urged that constitutional petitions like any other applications are subject to fundamental principles of law. The case of *HCC Misc 1052 of 2004 Booth Irrigation vs Mombasa Water Products Ltd* is cited for this proposition.

2nd Respondent's Case

13. The 2nd Respondent opposed the Petition through the replying affidavit of No. 236797 Chief Inspector Gilbert Kitalia. They also filed submissions dated 28th June 2021. Inspector Gilbert Kitalia deponed that he was part of the investigating team of the matter. He urges that while at DCI Meru, it came to their attention that the case in question had already been registered in Court with 3 accused persons being charged one of whom was the Petitioner. He urges that in executing their mandate, the Police complied with Article 244 of the Constitution, Section 24 of the National Police Service Act and he denies violation of any of the Petitioner's rights. Citing the case of *Jackson Muthui Maluki & Another vs Attorney General (2020) eKLR*, they urge that where there are grounds for reasonable suspecting one of having committed a cognizable offence resulting in an arrest and charge, such arrest cannot be deemed as unlawful.

14. They urge that although there was a prosecution set in motion by themselves and that although the Petitioner was acquitted, the element of malice and prosecution without a reasonable and probable cause were not established by the Petitioner as required in a claim for malicious prosecution. They further urge that Section 66 (1) of the National Police Service Act protects police officers from personal liability. They thus urge that the Petitioner has failed to prove her claim for damages. On her termination, they urge that there were valid reasons for the same and that due process was followed and as such the claim for damages for unlawful termination must fail. It is further urged that the Petition is an abuse of Court process and the law clearly outlines the process of addressing both the issue of malicious prosecution and unlawful termination. He also urges that at the trial Court, the Petitioner did not raise the issue of malice or implication and the Court thus ought not to entertain the same.

Issues for Determination

15. Before going into the merits of the Petition, the Court notes that the Respondents have raised a preliminary objection touching on the jurisdiction of the Court to determine the Petition. Matters touching on jurisdiction of the Court have to be given priority because without jurisdiction, the Court has no power to make one more step and must down its tools. See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*.

16. The first objection raised by the 1st Respondent is that the claim before the Court is founded upon an employer employee relationship and that it is the Employment and Labour Relations Court that has jurisdiction over the same. The Petitioner in response claims that the primary issue in dispute is a challenge to the criminal trial process instituted against her. This Court understands this to mean that her primary grievance is her claim for malicious prosecution.

Determination

Human Rights Jurisdiction of ELRC

17. At the outset, this Court points out that not all matters proffered by a Petitioner as constitutional claims qualify to be treated, heard and disposed as such. This Court has a duty to scrutinize the Petition, including the factual basis upon which it is brought and the remedies sought therein, in order to ascertain whether the Petition is properly before this Court as a constitutional claim. I respectfully agree with Mativo J in the case of *Republic v Chief Land Registrar & Another, JR ELC No. 11 of 2010 [2019] eKLR*, where he held as follows: -

"16. Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status."

18. The dispute in the Petition traces its roots from the employment relationship between the Petitioner and the 1st Respondent where she served from 6th July 1992 to 27th November 2012. This Court has observed that from her pleadings, the Petitioner raises questions on alleged

discrimination and she cites among others, sections of employment law prohibiting employers from discriminating against employees including Section 5 (6) of the Employment Act and Article 1 (a) of the International Labour Organization Convention Concerning Discrimination in Respect of Employment and Occupation. In her submissions, one of the issues she frames for determination is the question of ‘Whether or not her termination was unprocedural, unlawful and unfair’ and the subsequent issue of ‘Whether she is entitled to damages for unprocedural, unlawful and unfair termination.’

19. The above reveals that the Petitioner’s grievances are primarily founded upon the employer and employee relationship between her and the 1st Respondent Bank (albeit now former employer) which squarely qualifies as an employment dispute. The Employment and Labour Relations Court has exclusive jurisdiction over employment disputes pursuant to Article 162 (2) (a) of the Constitution and Section 12 (1) (a) of the Employment Act. In fact, Article 165 (5) (b) expressly ousts the jurisdiction of the High Court to hear or make determinations over environment and land matters. It provides as follows: -

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).***

20. The above finding is supported by the holding of the Supreme Court in ***Petition No. 5 of 2015, Republic v Karisa Chengo & 2 others [2017] eKLR***, as follows: -

“[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “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).”

21. The counter argument that the Petitioner raises is that the jurisdiction of the ELRC Court is limited, more so once the employer employee relationship no longer subsists. This Court does not agree that the termination of an employer employee relationship bars either party from instituting claims which are founded on facts tied to that relationship. Such a reasoning would bar very many persons who have valid claims arising out of former employer-employee relationships and thus deny them justice, contrary to the spirit of the Constitution on access to justice. In fact, the limitation clause under Section 90 of the Employment Act requiring parties to file employment claims within three (3) years from the date their causes of action arose is an indication that the Employment and Labour Relations Court has jurisdiction to hear employment disputes even after the employment relationship.

22. This Court observes that the jurisdiction of this Court as a constitutional Court is conferred by virtue of Section 165 (3) (b) of the Constitution. Within that jurisdiction, the Court has power to deal with the questions raised by the Petitioner with regard to her alleged violation of her right to freedom of expression, association and movement respectively under Articles 33, 36 and 39 of the Constitution.

23. However, it has been held by the Court of Appeal in ***Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others, Civil Appeal No. 51 of 2015 [2016] eKLR*** that the Employment and Labour Relations Court as well as the Environment and Land Court have jurisdiction to entertain constitutional claims arising from either employment disputes or environment and land matters respectively. The Court (***Makhandia, Ouko (as he then was) & M’Inoti, JJA***) held as follows: -

“The Constitution has therefore created a specific court, with equal status to the High Court and conferred on it the jurisdiction to hear and determine disputes relating to, among others, use, occupation, title to land and “any other dispute relating to land”. It cannot be gainsaid that when the Constitution has created a specific mechanism for redress of particular grievances, that mechanism must be resorted to. (See *Narok County Council v. Transmara County Council & Another, CA No. 25 of 2000 and Mutanga Coffee & Tea Company Ltd v. Shikara Ltd & Another, CA No 54 of 2014 (Malindi)*). Indeed, Article 165 (5) of the Constitution provides in express terms that the High Court shall not have jurisdiction over matters falling within the jurisdiction of the Environment and Land Court. Again by dint of Article 165 (6) of the Constitution, the supervisory jurisdiction of the High Court does not extend to the ELC, which is a superior court like the High Court itself.

In *Karisa Chengo & 2 Others v. Republic, Cr App Nos. 44, 45 and 76 of 2014 (Malindi)*, this Court considered the rationale of setting up specialized courts like the Environment and Land Court in the Constitution and stated thus:

“We must therefore resort to our peculiar history and circumstances to understand why it was necessary to have an ELC. Land in Kenya is an emotive issue and for good reasons; agriculture is the backbone of the country’s economy. In our view there was need to have expeditious disposal of land and environment matters and a specialized court would ensure that was done as well as provide jurisprudence on adjudication of land and environment disputes. The need therefore for preserving the objective of creating the specialized courts contemplated under Article 162(2) of the Constitution cannot be gainsaid.”

Does the ELC have jurisdiction to entertain an action for enforcement or protection of fundamental rights where the alleged violations arise from or relate to matters within its jurisdiction, such as violation of the right to property? This Court considered the issue in *Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012 and in *Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014, involving the Labour and Employment Court, which, like the ELC, is a court**

of equal status as the High Court under Article 162(2) of the Constitution. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant's claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.

24. Based on the above this Court finds that the Petitioner would have an opportunity to have her constitutional claims entertained by the Employment and Labour Relations Court, in the same way the High Court would have done had this been a proper matter to be adjudicated by the High Court constituted as a constitutional court under Article 23 of the Constitution.

Claim on Criminal Trial Process

25. Finally, the Petitioner urged that her claim is not founded on the employment relationship but on the criminal trial process. This Court has already found that this averment is not representative of the true position because in her pleadings, she has made claims directed at the conduct of the 1st Respondent both during the subsistence of the employment contract and during the disciplinary hearing process. However, in addition to her claims of unlawful termination, she has also raised a claim on failure of the 2nd Respondent to conduct investigations in the matter. Though posited as a constitutional issue, in truth, this further claim is one for unlawful arrest and malicious prosecution which is a claim based on the law of torts. It is the civil court which has jurisdiction to entertain claims for malicious prosecution and not a constitutional court.

26. On the basis of the doctrine of constitutional avoidance, this Court finds that it lacks jurisdiction to entertain the claim for malicious prosecution. The doctrine of constitutional avoidance has been discussed by the Supreme Court in the case of ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others, Petition 14 of 2014 consolidated with Petition 14A, 14B and 14C of 2014 [2014] eKLR*** where the Court held as follows: -

[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

27. This Court finds that the Petitioner's claim for malicious prosecution is a plain law of tort issue, an ordinary civil dispute and it is therefore not properly before this Court as a constitutional issue. Accordingly, this Court finds that it has no jurisdiction to entertain the Petition.

28. Having found that the Court lacks jurisdiction on the grounds that the Petitioner's primary course of action lies in a labour dispute, outside the jurisdiction of the High Court and on the principle of constitutional avoidance with regard to the claim for malicious prosecution, this Court does not find it necessary to proceed with the second aspect of the preliminary objection on limitation of actions under Section 90 of the Employment Act.

Conclusion

29. The Petitioner is a former employee of the 1st Respondent. She was terminated from employment on 27th November 2012 following a disciplinary process in which she was charged with theft of cash from the bank's vault. She was later charged with the offence of stealing by servant, convicted, and sentenced to pay a fine of Ksh 1,000,000/= in default of which she was to serve 15 months' imprisonment. She successfully appealed against her conviction and sentence, and was released.

30. She has now brought this Petition making claims principally for unlawful termination and discrimination by her former employer. This is primarily an employment and labour relations dispute which falls under the exclusive jurisdiction of the Employment and Labour Relations Court pursuant to the provisions of Article 162 (2) (a) of the Constitution. Although she claims that her dispute is not an employment dispute but one challenging the criminal trial process instituted against her, this Court finds otherwise. This Court also considers that the Employment and Labour Relations Court has jurisdiction over constitutional issues arising in the context of an employment dispute as per the Court of Appeal's finding in ***Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others [2016] eKLR***.

31. In the respectful view of the Court, the Petition is about two claims. One is on employment and labour relations, which falls under the exclusive jurisdiction of the Employment and Labour Relations Court. The second is a claim for redress for injury resulting from the criminal trial process that the Petitioner was put through by the Respondents.

32. The Petitioner's claim with respect to the criminal trial process is clearly a claim for false arrest and malicious prosecution based on the law of torts and therefore purely a civil dispute which can be heard and determined by the civil Court. Applying the doctrine of constitutional avoidance, as adopted in Kenya by the Supreme Court in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*** this Court finds that the claim may be redressed by the civil Court.

33. In the end, this Court finds that it has no jurisdiction to entertain the Petition filed by the Petitioner in this matter.

ORDERS

34. Accordingly, for the reasons set out above, this Court makes the following orders: -

- i. The Petitioner's Petition dated 17th August 2021 is hereby struck out.*
- ii. For the avoidance of doubt, the Petitioner is at liberty to file her claims in the Employment and Labour Relations Court and in the Civil Court for appropriate determination.*
- iii. There shall be no order as to costs.*

DATED AND DELIVERED ON THIS 27TH DAY OF SEPTEMBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Olao & Rai Advocates for the Petitioner

Kimondo, Mubea & Co. Advocates for the 1st Respondent

Ms J. Kung'u, State Counsel for the 2nd Respondent