Muya v Judicial Service Commission & 3 others (Petition 199 of 2019)
[2019] KEHC 5002 (KLR) (Constitutional and Human Rights) (25 July 2019) (Ruling)

Martin Muya v Judicial Service Commission & another [2019] eKLR

Neutral citation: [2019] KEHC 5002 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 199 OF 2019

WK KORIR, J

JULY 25, 2019

BETWEEN

THE HON. MR. JUSTICE MARTIN MUYA ..... PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

THE JUDICIAL SERVICE COMMISSION ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

Any dispute between an employee and an employer belongs to the Employment and Labour Relations Court (ELRC).

Reported by Moses Rotich

Constitutional Law*–judicial officers-appointment and termination of judges–role of the Judicial Service Commission in the appointment and termination of judges-nature of a judicial officer's employment-test for determining the existence of an employment relationship-whether a judge was an employee of the Judicial Service Commission-what was the procedure for appointment to and removal from office of a judge of a superior court-what were the factors for determining the existence of an employment relationship-Constitution of Kenya, 2010, articles 166(1) and 168(1), (2), (3) & (4); Employment and Labour Relations Court Act, section 2; Employment Act, section 2*

Constitutional Law*-Judiciary-independence of the Judiciary-role of the Judicial Service Commission in promoting independence and accountability of the Judiciary-control and supervision of judges by the Judicial Service Commission and the Chief Justice-whether the supervision and control of judges could impinge on the*

independence of the judges, consequently violating the doctrine of judicial independence-Constitution of Kenya, 2010, articles 160(1) & 172(1)

Jurisdiction*–jurisdiction of the High Court vis-à-vis that of Employment and Labour Relations Court (ELRC)-proper forum for challenging removal from office of judges of superior courts-claim that the process of removal of a judge from office was a purely constitutional process devoid of any employment issues-whether the ELRC had jurisdiction to address constitutional issues raised in a matter that fell within its jurisdiction-whether the High Court had jurisdiction to hear and determine a dispute relating to removal of a judge from office-Constitution of Kenya, 2010, articles 162 & 165; Employment and Labour Relations Court Act, section 12(1)*

Brief facts

The petitioner was serving as a judge of the High Court of Kenya. Exercising its mandate under article 168(1), (2) and (4) of the Constitution, the Judicial Service Commission (1st respondent) conducted removal proceedings against the petitioner. The 1st respondent subsequently submitted its findings to the President with a recommendation that a tribunal be appointed to investigate the conduct of the petitioner. Aggrieved, the petitioner petitioned the High Court. Subsequently, the 1st respondent filed the instant application challenging the jurisdiction of the High Court to hear and determine the petition.

The respondents argued that the instant petition was one between an employer and an employee and its proper forum was the Employment and Labour Relations Court (ELRC) pursuant to article 162(2)(a) as read with article 165(5) of the Constitution of Kenya, 2010, (the Constitution) and section 12 of the Employment and Labour Relations Court Act, 2011(the ELRC Act). On his part, the petitioner contended that the role and mandate of the 1st respondent pursuant article 168(1), (2), (3) and (4) of the Constitution was purely a constitutional function which could not imply a dispute between an employer and an employee. He submitted that the proceedings of the 1st respondent, its findings, recommendations, the presentation of a petition to the President for the appointment of a tribunal to investigate his conduct, and the subsequent appointment of a tribunal was a constitutional process which could not be termed as a dispute between an employer and employee.

Issues

i. Whether the High Court had jurisdiction to hear and determine a dispute relating to removal of a judge from office.
ii. What was the nature of a judicial officer's employment?
iii. What was the procedure for appointment to and removal from office of a judge of a superior court?
iv. Whether the ELRC had jurisdiction to address constitutional issues raised in a matter that fell within its jurisdiction.
v. Whether there was an employer – employee relationship between the Judicial Service Commission and judges.
vi. What were the factors for determining the existence of an employment relationship?
vii. Whether the supervision and control of judges could impinge on the independence of the judges, consequently violating the doctrine of judicial independence

Relevant provisions of the Law

The Constitution of Kenya, 2010

Article 168 - Removal from office

1. *A judge of a superior court may be removed from office only on the grounds of—*
    a. *inability to perform the functions of office arising from mental or physical incapacity;*
    b. *a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;*
    c. *bankruptcy;*
    d. *incompetence; or*
    e. *gross misconduct or misbehaviour.*

2. *The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.*
3. *A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judges removal.*
4. *The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.*

Employment and Labour Relations Court Act

Section 2

"employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;

"employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

Section 12

Jurisdiction of the Court

1. *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 including—*

1. *disputes relating to or arising out of employment between an employer and an employee;*
2. *disputes between an employer and a trade union;*
3. *disputes between an employers' organisation and a trade union's organisation;*
4. *disputes between trade unions;*
5. *disputes between employer organisations;*
6. *disputes between an employers' organisation and a trade union;*
7. *disputes between a trade union and a member thereof;*
8. *disputes between an employer's organisation or a federation and a member thereof;*
9. *disputes concerning the registration and election of trade union officials; and*
10. *disputes relating to the registration and enforcement of collective agreements.*

Employment Act

Section 2

"employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;

"employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

Held

1. The constitutional underpinning of the High Court's jurisdiction and its limits was found in article 165(3), (5) and (6) of the Constitution. Jurisdiction was everything, and without it, a court had no mandate to proceed further with the determination of any other matter before it. Where the issue of jurisdiction was raised, it had to be determined first and once a court concluded that it had no jurisdiction, it had to down its tools.

2. In accordance with article 166(1)(b) of the Constitution, judges were appointed to office by the President with the recommendation of the 1st respondent. The Constitution stipulated that a judge of a superior court could only be removed from office on the grounds listed under article 168(1). The removal process could be initiated by the 1st respondent acting on its own motion or upon the petition of any person to the 1st respondent.

3. Section 12(1) of the Employment and Labour Relations Court Act provided for the jurisdiction of the ELRC. The section gave the ELRC original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations.

4. A reading of section 2 of the ELRC Act and articles 166 and 168 of the Constitution meant that judges were not in the strict sense employees of the 1st respondent. That was because their appointment and removal was a constitutional process which started with the 1st respondent, moved to the President for appointment of a tribunal, went to the tribunal, then to the Supreme Court (if there was an appeal), and eventually settled on the desk of the President for action on the recommendations of the tribunal or decision of the Supreme Court. The terminating office of the tenure of a judge was therefore not a single office. All the named organs had important roles to play in the process.

5. The ELRC had jurisdiction to address constitutional issues raised in a matter that fell within its jurisdiction. The petitioner's submission that jurisdiction of the ELRC in the interpretation of the Constitution was limited to issues arising from Chapter Four (the Bill of Rights) was erroneous. The presence of constitutional questions in a matter concerning employment and labour relations did not oust the jurisdiction of the ELRC. Accordingly, any constitutional issue arising in a matter in which the ELRC had jurisdiction ought to be dealt with by that court otherwise an absurd situation would arise where any constitutional issue arising outside the bill of rights would have to be referred to the High Court for determination.

6. There was no local jurisprudence on whether or not a Kenyan judge was an employee. South African jurisprudence on the topic was that a judicial officer could not be an employee in view of the fact that the South African Constitution provided that the courts were independent and subject only to the Constitution. As such, it would be difficult to reconcile an employment relationship between a magistrate and the State (as the employer) with judicial independence. An employment relationship between a magistrate and the State and the maintenance of an independent judiciary could not co-exist. The same position would probably apply to the independence of a judge of the superior courts in Kenya.

7. It was doubtful whether the place of a judge in the constitutional matrix could give room to supervision and control of the judge. Were a judge to be controlled and supervised by anybody, such action would impinge on the independence of the judge and consequently violate the doctrine of judicial independence, which was jealously guarded by the Constitution. That was not to say that a judge was for that reason not an employee. Decisions from the courts in England had acknowledged that the office of a judge was highly independent but with characteristics of an employment relationship.

8. A judge of any of the superior courts of Kenya could not be termed an "employee" in the common parlance. He/she took no instructions from anybody on how they should discharge their mandate. A judge was a creature of the Constitution, and the President, the Supreme Court, the Judicial Service Commission, and a tribunal formed to inquire into the suitability of a judge to continue holding office were merely facilitators in the appointment or removal of a judge. All those persons and offices were not acting as employers but were just discharging their constitutional responsibilities. Indeed a judge was only answerable to the Constitution and the laws of the country. If a judge had any master, that master had to be the people of Kenya.

9. The independence accorded to judges was however not without limits. The Constitution talked of independence and accountability. Article 172(1) of the Constitution required the 1st respondent to promote and facilitate the independence and accountability of the Judiciary. It was also supposed to ensure that there was efficient, effective and transparent administration of justice. It could only do that by having some supervision or control of judges. That power, which was limited, could not be said to take away the independence of the judges.

10. The constitutional provision for the independence of the Judiciary could not therefore be good reason to hold that a judge was not an employee. Although the 1st respondent or the Chief Justice could not instruct a judge on the decision to make in a case, the Chief Justice had some supervisory jurisdiction over judges. A good example was the fact that he/she could transfer a judge from one station to another.

11. There were three main criteria used to determine whether a contract of employment existed;

1. the principal's right to supervision and control;
2. the extent to which the person formed an integral part of the organisation of the principal; and,
3. the extent to which the person was economically dependent on the employer.

Therefore, subjected to the criteria, a judge was an employee. Firstly, there was some form of supervision and control over a judge, however limited that might be. Secondly, a judge formed an integral part of the Judiciary. Finally, a judge was economically dependent on public finances.

12. Any dispute between an employee and an employer belonged to the ELRC. The meaning of that statement was that the High Court had no jurisdiction to hear and determine the petitioner's case.

Preliminary objection allowed.

Orders

i. *Costs to be in the cause*

ii. *Petition to be transferred to the Employment and Labour Relations Court for hearing and determination.*

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

1. By a Notice of Preliminary Objection dated 31st May, 2019, the 1st Respondent, the Judicial Service Commission, is challenging the jurisdiction of this court to hear and determine the instant petition filed by the Petitioner, Hon. Mr. Justice Martin Muya. The 1st Respondent contends that the present dispute arises from an employer-employee relationship and the dispute is thus governed by the provisions of Articles 162(2) and 165(5) of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act, 2011.

2. Mr. Wamaasa appearing for the 1st Respondent relies on the case of Hon. Justice D.K Marete v Judicial Service Commission, Nairobi ELRC Petition No. 88 of 2019 where the petitioner in that case filed a petition under certificate of urgency before the Employment and Labour Relations ("the ELRC") seeking conservatory orders against the Judicial Service Commission and the Court entertained the matter.

3. Secondly, counsel contends that the Tribunal which was established on 4th June, 2019 to determine the Petitioner's suitability to serve as a judge was sworn in on 3rd July, 2019. He therefore urges the court to find that this petition has been overtaken by events. Counsel asks this court to strike out the petition or transfer the same to the ELRC for lack of jurisdiction.

4. The 2nd Respondent, the Attorney General, did not file any response or submissions but during the hearing his counsel indicated support for the Preliminary Objection.

5. On his part, Mr. Nyachoti appearing for the Petitioner filed written submissions dated 3rd July, 2019 in opposition to the Preliminary Objection. His position is that although the respondents are challenging the jurisdiction of this court by dint of Article 162(2) as read with Article 165(5) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, 2011, the role and mandate of the 1st Respondent pursuant to Article 168(1), (2), (3) and (4) of the Constitution is purely a constitutional

function which cannot infer a dispute between an employer and employee. Accordingly, he submitted that the proceedings of the 1st Respondent conducted on 18th March, 2019 and 8th April, 2019, the findings, recommendations and the report made on 18th May, 2019, the presentation of a petition on the 20th May, 2019 to His Excellency the President for the appointment of a tribunal to investigate the conduct of the Petitioner and the subsequent appointment of a Tribunal on 4th June, 2019 is a constitutional process which cannot be termed as a dispute between an employer and employee.

6. Counsel for the Petitioner therefore submitted that the 1st Respondent's role under Article 168(2) and (3) of the Constitution is by operation of law and any challenge to the proceedings and decisions made thereto cannot fall under the ambit of Section 12 of the Employment and Labour Relations Court Act, 2011.

7. It was further counsel's contention that though the process of removal of a judge under Article 168 of the Constitution may be initiated by the Judicial Service Commission on its own motion, the proceedings that took place before the 1st Respondent's Committee on 18th March, 2019 and 8th April, 2019 were not at the behest of the 1st Respondent but on the strength and basis of the letter dated 17th August, 2017 by Onyinkwa & Company Advocates to the Chief Justice. In counsel's view therefore, the first limb of Article 168(2) on the commencement of the process for removal of the Petitioner from office was not available to the 1st Respondent. He also asserted that Article 168(4) of the Constitution is to the effect that the Judicial Service Commission shall consider the petition and if it is satisfied that the petition discloses a ground for removal under Article 168(1) sent the petition to the President.

8. Counsel further submitted that according to the above provision, the petition that was presented to the President by the 1st Respondent on 20th May, 2019 is taken to be and should be the letter dated 17th August, 2017 by Onyinkwa & Company Advocates which complaint does not emanate from the 1st Respondent who is the Petitioner's employer. As such, the grievances on how the proceedings, leading into the report of 18th May, 2019, were conducted by the 1st Respondent cannot not fall within the provisions of Section 12 of the Employment and Labour Relations Court Act, 2011.

9. In counsel's view, the issues raised by the Petitioner in the instant petition are not disputes in relation to an employer-employee relationship. The Petitioner posits that he is challenging the 1st Respondent for acting in excess of jurisdiction and without jurisdiction. Further, that the report, findings and recommendations by the 1st Respondent do not meet the standards and threshold set out in Article 168(1) of the Constitution and the Judicial Service Code of Conduct and Ethics as read together with the Public Officers Ethics Act No. 4 of 2003 for presentation of a petition to His Excellency the President to appoint a tribunal in the circumstances. The Petitioner further contends that he was not accorded a fair hearing by the 1st Respondent as envisaged in Article 50(2)(1) of the Constitution and the right to fair administrative action under Article 47(1) of the Constitution among other grounds.

10. It is was submitted that although the ELRC is a Court of equal status with the High Court and is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes within the provisions of Section 12 of the Employment and Labour Relations Act, 2011 as was held by the Court of Appeal in the case of Daniel N. Mugendi v Kenyatta University & 3 others (2013) eKLR, the Petitioner herein seeks the interpretation of Article 168(1), (2), (3) and (4) of the Constitution which does not fall within the Bill of Rights. Accordingly, counsel submits that interpretation of Article 168(1), (2), (3), (4), (5) and (6) of the Constitution regarding removal of a judge from office is not a matter contemplated by Section 12 of the Employment and Labour Relations Court Act, 2011 and therefore this court is clothed with the jurisdiction to entertain the present petition.

11. Further, counsel for the Petitioner submitted that the process under Article 168(4), (5) and (6) of the Constitution is a constitutional process which culminates in the suspension of a judge and appointment of a tribunal by the President who is not the judge's employer. It is submitted that the Gazette Notice suspending a judge is signed by the President and not the 1st Respondent as was affirmed by the Court of Appeal in Judicial Service Commission v Joseph Mbalu Mutava & another [2015] eKLR when it stated that the appointment of a tribunal by the President is a pure imperative of the Constitution through the independent act of the President. This, counsel submits, is the process the Petitioner seeks to nullify hence this dispute is not a dispute for the ELRC.

12. As such, counsel submits that the only court in which the exercise of the 1st Respondent's constitutional functions, and by extension, those of the President can be challenged is this court where the 1st Respondent can be heard as a conductor of investigations before recommendations to the President. He cited the Court of Appeal in Joseph Mbalu Mutava (supra) where it was acknowledged that ultimately the suspension of a judge is a performance of a constitutional duty by the President.

13. The Petitioner's counsel therefore submits that the performance of the function by the President under Article 168(5) is distinct from that of the 1st Respondent under Article 168(4) and is not contemplated in Section 12 of the Act and Article 165(5) of the Constitution. In the same breath, he contends that performance of a mandatory constitutional obligation by the 1st Respondent under Article 168(4) is an independent consequence of a decision by operation of law and the Constitution and cannot therefore be termed as an employer-employee dispute by all standards. He therefore urges this court to dismiss the Preliminary Objection dated 31st May, 2019 with costs to the Petitioner.

14. Having considered the instant petition, the Preliminary Objection, submissions by counsel for the parties and authorities relied on, the only issue for determination before me is whether this court is clothed with the jurisdiction to hear and determine the petition.

15. The constitutional underpinning of this court's jurisdiction and its limits is found in Article 165(3), (5) and (6) of the Constitution which states as follows:-

> (3) Subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
>
> (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.

(4) ....

(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).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court,"

16. The Supreme Court in the case of Republic v Karisa Chengo & 2 others [2017] eKLR held as follows with regard to jurisdiction:-

> " (35) In the above regard, we note that in almost all the legal systems of the world, the term "jurisdiction" has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:
>
> > "By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".
>
> From these definitions, it is clear that the term "jurisdiction", as further defined by The Black's Law Dictionary, 9th Edition, is the Court's power to entertain, hear and determine a dispute before it."

17. It is trite law that jurisdiction is everything and without it a court of law has no mandate to proceed further with the determination of any other matter before it. Where the issue of jurisdiction is raised, it has to be determined first and once a court of law comes to the conclusion that it has no jurisdiction, it has to down its tools. This cardinal principle was well articulated in the case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1.

18. The respondents argue that the instant petition is one between an employer and an employee and should rightly be before the ELRC pursuant to Article 162(2)(a) as read with Article 165(5) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, 2011. The Petitioner on the other hand holds a different view. He contends that performance of the function by the President under Article 168(5) which is distinct from that of the 1st Respondent under Article 168(4) is not contemplated in Section 12 of the Employment and Labour Relations Court Act, 2011 and Article 165(5) of the Constitution and therefore the only court in which the exercise of the 1st Respondent's constitutional functions and by extension those of the President can be challenged is this court.

19. Article 166(1)(b) stipulates that the President shall appoint "all other judges, in accordance with the recommendation of the Judicial Service Commission." It therefore follows that judges are appointed by the President in accordance with the recommendation of the 1st Respondent as was affirmed by the Supreme Court in the Karisa Chengo case when it stated that:-

> " In our view, it is clearly manifest from the Gazette Notices and from the above decision of the Court of Appeal that the President, in exercise of his duty as outlined in Article 166(1)(b), and in appointing Judges as recommended by the Judicial Service Commission, appoints Judges of the High Court, the ELC and ELRC separately, and not on the basis of a general scheme covering Judges of the superior Courts."

20. Pursuant to Article 168(1), a judge of a superior court may be removed from office only on the grounds of:-

a. inability to perform the functions of office arising from mental or physical incapacity;

b. a breach of code of conduct prescribed for judges of superior courts by an Act of Parliament.

c. bankruptcy; or

d. incompetence; or

e. gross misconduct or misbehavior."

21. Further, the 1st Respondent's constitutional powers under Article 168(2), (3) & (4) are as follows:-

(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.

(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.

(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President."

[Emphasis added]

22. Section 12(1) of the Employment and Labour Relations Court Act, 2011 which the respondents seek to rely on provides for the jurisdiction of the ELRC in the following terms:-

> " Jurisdiction of the Court
>
> (1) 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 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' organisation and a trade union's organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' 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."

23. An 'employee' is defined in Section 2 of the Employment and Labour Relations Court Act, 2011 as "a person employed for wages or a salary and includes an apprentice and indentured learner" while an 'employer' has been defined as "any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company." The same definitions are replicated in Section 2 of the Employment Act, 2007.

24. From my reading of the above provisions of the law, I am of the view that judges are not in the strict sense employees of the 1st Respondent since their appointment and removal is a constitutional process which starts with the 1st Respondent, moves to the President for appointment of a tribunal, goes to the tribunal, lands at the Supreme Court (if there is an appeal), and eventually settles on the desk of the President for action on the recommendations of the tribunal or decision of the Supreme Court. The terminating office of the tenure of a judge is therefore not a single office. All the named organs have important roles to play in the process.

25. That the tenure of a judge is unique was acknowledged in the previous constitutional dispensation when the Court of Appeal observed in the Eric V. J. Makokha & 4 others v Lawrence Sagini & 2 others [1994] eKLR; Civil Application No. Nai. 20 of 1994 (12/94 UR) that:-

> "....some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning". If this is correct, we can readily conceive of some of such public positions. For instance, under Section 61 of the Constitution of Kenya, judges are appointable by the President and removable by him. But he cannot lawfully exercise the

power of removal unless for specified misdoings and unless a tribunal appointed specially for the purpose after investigating such conduct, recommends to him such removal. So it can accurately be said that the tenure of judges was protected by the Constitution. The same applies to other constitutional office holders such as the Attorney General, Auditor General and others. Even an ordinary office holder can be protected by statute."

26. In Judicial Service Commission v Mbalu Mutava & another [2015] eKLR, the Judges of the Court of Appeal dealt extensively with the status of the 1st Respondent and held as follows:-

> " The issue of the constitutional status of JSC has arisen in this appeal – more specifically whether in initiating the process or removal of a judge it is exercising administrative function or a constitutional function.
>
> By article 1, all sovereign power belongs to the people and that power is delegated to various institutions, including the national executive, judiciary and independent tribunals. The JSC is established by article 171 and its functions are stipulated in article 172(1). Its main function is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice. It is one of the independent commissions and independent offices established by article 248(2) whose members enjoy security of tenure (article 257) and which is a body corporate with a perpetual succession and a seal and capable of suing or being sued in its corporate name. The independent commissions and independent offices are however subject to the Constitution and the law.
>
> A commission is included in the definition of a "state organ" in article 260. More relevantly, JSC as a state organ is bound by national values and principles of governance entrenched in article 10 and as provided by article 20(1) also bound by the Bill of Rights.
>
> JSC is not part of the national executive as defined in article 130(1). Thus, although JSC is not a substructure of the national executive to which sovereign power is delegated, it is nevertheless subject to the Constitution and the law and like other independent commissions and independent offices, has the duty to protect the sovereignty of the people (see article 249(1)(a)."

27. The Court of Appeal went on to state as follows:-

> " The act by JSC of initiating the process of removal of a judge, either on its own motion through information or through investigation; the act of receiving the petition from a member of the public, the consideration of the petition, the process by which it satisfies itself whether or not the petition discloses a ground for removal, the determination of that question; the act of formulating a petition and the recommendation, and the act of sending the petition to the President are indistinguishably a series of administrative actions which adversely affects a judge forming a single whole – an administrative action within the meaning of article 47(1).
>
> It is true that it was performing a constitutional mandate but in performing that mandate JSC was subject to the Constitution and, in this case, subject to 1st respondent's constitutional right to fair administrative action. I have no doubt that on this aspect the High Court made a correct finding."

28. Although counsel for the Petitioner made extensive submissions to the effect that this is a constitutional issue rather than an employer-employee dispute, the truth of the matter is that the ELRC has

jurisdiction to address constitutional issues raised in a matter that falls within its jurisdiction. I do not subscribe to the submission put forward by counsel for the Petitioner that the jurisdiction of the ELRC in the interpretation of the Constitution is limited to issues arising from Chapter Four (the Bill of Rights). In my view, the presence of constitutional questions in a matter concerning employment and labour relations does not oust the jurisdiction of the ELRC. I do not understand the Court of Appeal in the case of Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR; Civil Appeal No. 6 of 2012 (Nairobi) to have limited the jurisdiction of the ELRC to Chapter Four of the Constitution when it stated that:-

> "It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & 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. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice.
>
> In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."

29. It is therefore my finding that any constitutional issue arising in a matter in which the ELRC has jurisdiction ought to be dealt with by that Court otherwise an absurd situation will arise where any constitutional issue arising outside the Bill of Rights will have to be referred to this Court for determination.

30. There is, however, a question not posed by the parties and which needs to be answered in order to completely determine the question of jurisdiction. Is a judge an employee of the Judicial Service Commission or any other body? In the case of D K Njagi Marete v Judicial Service Commission [2019] eKLR which was cited by counsel for the 1st Respondent the issue of jurisdiction was never raised.

31. In the case of Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR, the question of the jurisdiction of this Court was challenged and Odunga, J held as follows:-

> "Similarly, pursuant to Article 23(3) of the Constitution as read with section 12(3) of the Employment and Labour Relations Court Act, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matters and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court's jurisdictional

competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution....

That the Employment and Labour Relation's Court's jurisdiction is restricted to where there exists employer and employee relationship has been the subject of several decisions in our jurisdiction."

32. Odunga, J cannot be faulted for his decision as it appears that the petition that was placed before him was not even initiated by an employee of the Judiciary. This can be contrasted with the case of Charles Oyoo Kanyangi & 41 others v Judicial Service Commission of Kenya [2018] eKLR, where in allowing a preliminary objection to the jurisdiction of this Court E. C. Mwita, J held that:-

> " 35. Applying the jurisprudence flowing from the above decisions, it is clear to me that the nature of the pleadings, the tenor and the reliefs sought in the petition herein are such that they can be granted by the ELRC because that Court as a creature of the Constitution, has jurisdiction in terms of Article 23(3) as read with section 12 of the Employment and Labour Relations Court Act to determined issues of fundamental freedoms in the Bill of Rights."

33. It is clear from all the cited authorities that in matters touching on employment and labour relations the jurisdiction of the High Court is expressly ousted by the Constitution.

34. I have in the short period of time that I had to prepare this ruling looked for local jurisprudence on whether a Kenyan judge is an employee but I have not been successful. A search on the internet led me to an article titled "The Employment Status of Magistrates in South Africa and the Concept of Judicial Independence" authored by Leana Diedericks and published on 1st November, 2017 in the Potchefstroom Electronic Law Journal. The author writes that:-

> " In the case of Khanyile[1] the question arose whether a magistrate as a member of the judiciary is an employee and therefore entitled to rely on the protection afforded by labour legislation. In that case a magistrate had been denied promotion to the status of senior magistrate and as a result filed an unfair labour practice dispute under the auspices of the LRA[2] against the Minister of Justice, whom the magistrate regarded as his employer. The court held that at face value it would seem that a magistrate could be categorised as an employee, taking into consideration the definition of an "employee" in terms of the LRA[3] and the fact that magistrates are not explicitly excluded from the ambit of this Act.[4] However, the court noted that the statutory definition of an employee should be construed within a broader constitutional framework.[5] The court took the enquiry of the employment status of a magistrate beyond the traditional tests for the existence of employment or an employment relationship. It was held that a judicial officer cannot be an employee, in view of the fact that

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the South African Constitution[6] provides that the courts are independent and subject only to the Constitution and the law.[7] The Constitution requires the judiciary to apply the law and Constitution without interference from any person or organ of state.[8] Accordingly the court refused to bring magistrates within the protective measures of the LRA and found that the constitutional guarantee of an independent judiciary would be compromised if judicial officers were to be categorised as employees. The court concluded that it would be difficult to reconcile an employment relationship between a magistrate and the state (as the employer) with judicial independence. It was clear to the court that an employment relationship between a magistrate and the state and the maintenance of an independent judiciary cannot co-exist.[9]"

[Citations omitted]

35. The author went ahead and disclosed that a higher court had in a case decided after Khanyile held that a magistrate was entitled to labour law protection. The author nevertheless observed that the statement was obiter. This is what the author said:-

> "In 2010 the issue of the employment status of magistrates again arose in the matter of Reinecke v The President of South Africa,[10] where a magistrate claimed that the chief magistrate had repudiated the contract of employment between the parties by making his (the magistrate's) continued employment intolerable. Although the High Court took cognisance of the constitutional right to fair labour practices, it remarked that the LRA was not directly applicable to a judicial officer.[11] The court concluded, however, that a contract of employment existed between the parties, and awarded a substantial amount of damages to the aggrieved magistrate for breach of contract. On appeal, the Supreme Court of Appeal[12] left open the question whether a magistrate is entitled to protection under the LRA. However, the court remarked on the issue of judicial independence and stated that it is not a valid justification for excluding magistrates from labour law protection. In this regard the court stated:
>
> Nothing in the judgment affects the constitutional position of magistrates as part of the judiciary and the judicial authority in this country in terms of chapter 8 of the Constitution. The narrow question is simply whether ... magistrates were employees of the State in terms of contracts of employment ... A finding that they were so employed does not impact upon their independence, which is constitutionally guaranteed.[13]

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The above quotation raises the question whether the Reinecke case overturned the precedent set by Khanyile, namely that magistrates cannot be employees due to the fact that the Constitution guarantees judicial independence. In this regard the difference between the ratio decidendi and the obiter dicta of a case becomes relevant. The ratio decidendi sets a precedent and consists of the legal principles upon which the court based its decision, while obiter dicta are mere remarks which the court makes in passing and do not set any precedent.[14]

If the above statement formed part of the ratio decidendi, it overturned the Khanyile decision on the basis of stare decisis.[15]

In my view, the court's statement relating to judicial independence and employment was made in passing and therefore formed part of the obiter dicta of the judgement. This is so, because it was never argued before the court that judicial independence was a basis for excluding magistrates from employment status. The statement made by the court was also the only reference to the co-existence of employment and judicial independence in the entire case. Therefore it is submitted that the principle set in Khanyile prevails, that judicial independence and employment are mutually exclusive."

[Citations omitted]

36. Although Leana Diedericks was writing about the status of the employment of magistrates in the South African context, I suspect that the same position would apply to the independence a judge of the superior courts in Kenya. I am doubtful whether the place of a judge in the constitutional matrix can give room to supervision and control of a judge. Were a judge to be controlled and supervised by anybody, such action would impinge on the independence of the judge and as a consequence violate the doctrine of judicial independence which is jealously guarded by the Constitution. This is not to say that a judge is for this reason not an employee.

37. In England, it is acknowledged that the office of a judge is highly independent but with characteristics of an employment relationship. This was stated by the Court of Justice of the European Union (CJEU) in O'Brien v Ministry Justice C-393/10 when answering two questions referred to it by the Supreme Court of the United Kingdom for a preliminary ruling. The CJEU stated that:-

> " 20 The Supreme Court observes that judicial office is one of the oldest and most important offices known to English law. It also states that a recorder holds an office marked by a high degree of independence of judgment and is not subject to the directions of any superior authority as to the way in which he performs the function of judging. Nevertheless that court states that judicial office partakes of most of the characteristics of employment...
>
> 45 With that in mind, the rules for appointing and removing judges must be considered, and also the way in which their work is organised. In that connection, it is apparent from the order for reference that judges are expected to work during defined times and periods, even though this can be managed by the judges themselves with a greater degree of flexibility than members of other professions.

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46 Furthermore, as appears from the order for reference, that judges are entitled to sick pay, maternity or paternity pay and other similar benefits.

47 It must be observed that the fact that judges are subject to terms of service and that they might be regarded as workers within the meaning of Clause 2.1 of the Framework Agreement on part-time work in no way undermines the principle of the independence of the judiciary or the right of the Member States to provide for a particular status governing the judiciary.

48 As the Supreme Court of the United Kingdom observed in paragraph 27 of its order for reference, judges are independent in the exercise of the function of judging as such, within the meaning of the second subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union."

38. When the matter went back to the United Kingdom Supreme Court, the Court in O'brien v Ministry of Justice [2013] UKSC 6 held that:-

> " In Percy v Board of National Mission of the Church of Scotland [2005] UKHL 73, [2006] 2 AC 28, para 141, Lady Hale referred to the authors' comment in Harvey on Industrial Relations and Employment Law, para A[4] that the distinction as to whether a person is in an employment relationship is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed. This was the same distinction that in para AG48 Advocate General Kokott said must be made in order to have regard to the spirit and purpose of the Framework Agreement. In para 145 Lady Hale quoted the passage from Sir Robert Carswell's judgment in Perceval-Price v Department of Economic Development [2000] IRLR 380, 384, where he said that judges are not free agents to work as and when they choose as are self-employed persons, and that their office partakes of some of the characteristics of employment: see para 31, above.

In para 146 Lady Hale went on to say this:

> " I have quoted those words ... because they illustrate how the essential distinction is, as Harvey says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrine of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be 'workers' or in the 'employment' of those who decide how their ministry should be put to the service of the Church."
>
> As that was a case about the rights of a member of the clergy, she did not say, and did not have to say, in so many words that judges can be "workers". But in their case too, and especially in the case of those who work as part-time judges, the same essential distinction between the employed and the self-employed can be drawn. The fact is, as the matters referred to above make clear, that they are not free agents to work as and when they choose. They are not self-employed persons when working in that capacity."

39. A judge of any of the superior courts of Kenya cannot be termed an "employee" in the common parlance. He/she takes no instructions from anybody on how he/she should discharge his/her mandate. A judge is a creature of the Constitution and the President, the Supreme Court, the Judicial Service Commission and a tribunal formed to inquire into the suitability of a judge to continue holding

office are merely facilitators in the appointment or removal of a judge. All these persons and offices are not acting as "employers" but are just discharging their constitutional responsibilities. Indeed a judge is only answerable to the Constitution and the laws of the country. If a judge has any master, that master must be the people of Kenya.

40. The independence accorded to judges is however not without limits. The Constitution talks of independence and accountability. Article 172(1) of the Constitution requires the 1st Respondent to promote and facilitate the independence and accountability of the Judiciary. It is also supposed to ensure that there is efficient, effective and transparent administration of justice. It can only do this by having some supervision or control of judges. This power, which I must state is limited, cannot be said to take away the independence of the judges.

41. Leana Diedericks (supra) on the effect of an employer-employee relationship on the independence of a judicial officer opined as follows:-

> " It is submitted that the mere fact that control and direction may be present does not mean that the state or any other person will be authorised to demand or instruct a magistrate to act in breach of the constitutional duty of judicial independence. The Code of Good Practice clearly states that control and direction entail that the person will be required to obey only the lawful and reasonable demands of the employer. Also, in terms of the regulations under the Magistrates Act, a magistrate may be accused of misconduct only if he or she failed to execute a lawful order.[16] The common law also requires an employee to carry out the lawful and reasonable instructions of the employer.[17] The LRA furthermore protects employees in that they may not be prejudiced for a failure to do something that an employer may not lawfully permit an employee to do.[18] If an employee is dismissed on the basis of refusing to carry out an unlawful instruction, such a dismissal will automatically be unfair.[19]
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> In the light of the above, it is submitted that it would not be lawful and reasonable for the state to instruct a magistrate to reach a specific outcome in a case, for example. Such interference would be contrary to the Constitution, which expressly provides that the courts are independent. Therefore, in terms of the Constitution a magistrate would not be obliged to obey instructions from the state which would have the effect of breaching judicial independence.
>
> Should a magistrate indeed submit to such unlawful demands, judicial independence would be infringed by the individual magistrate and not by virtue of magistrate's being an employee. The judiciary has been appointed as the guardian of judicial independence and

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should they be swayed to compromise the principle, the judiciary itself would be responsible for it.[20]

FOOTNOTE 20

Although the constitutional guarantee of an independent judiciary and the structures to protect courts and judicial officers against interference[21] are aimed at protecting the judiciary from improper pressures, it cannot assure that they will indeed apply independence.[22] The state of mind of the magistrate or his or her attitude in the actual exercise of judicial independence is referred to as individual independence."

FOOTNOTE 21

FOOTNOTE 22

[Citations omitted]

42. The constitutional provision for the independence of the Judiciary cannot therefore be good reason to hold that a judge is not an employee. Although the 1st Respondent or the Chief Justice cannot instruct a judge on the decision to make in a case, the Chief Justice has some supervisory jurisdiction over judges. A good example is the fact that he/she can transfer a judge from one station to another.

43. What then are the factors that determines if a person is in an employment relationship? Leana Diedericks (supra) has this to say:-

"Almost a decade after McKenzie, in State Information Technology Agency (Pty) Ltd v CCMA,[23] the court reduced the criteria used to determine whether a contract of employment exists. The court identified three main criteria, namely:

FOOTNOTE 23

a. the principal's right to supervision and control;

b. the extent to which the person forms an integral part of the organisation of the principal; and

c. the extent to which the person is economically dependent on the employer.[24]"

FOOTNOTE 24

[Citations omitted]

44. In the case of Everret Aviation Limited V Kenya Revenue Authority (Through The Commissioner of Domestic Taxes) [2013] eKLR, G. K. Kimondo, J highlighted the ingredients of an employment relationship by stating that:-

"There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the

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employer's business. See Beloff vs Preddram Limited [1973] ALL ER 241. The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. See Simmons Vs Heath Laudry Company [1910] 1 KB 543, O' Kelly Vs Trusthouse Forte [1983] 3 ALL ER 456. That test is however not conclusive....The court has then to proceed carefully and objectively. It cannot rely on the descriptions of work that the parties put forward. There will be contracts of service where the master cannot control the manner in which the work is done. But they remain contracts of service. It is thus important to distinguish between a contract of service and contract for service...Recent case law suggests that persons possessed of a high degree of professional skill and expertise such as surgeons and civil engineers may be employed on contracts of service notwithstanding that the employer has little control on use of their skills."

45. In George Kamau Ndiritu & another v Intercontinental Hotel [2015] eKLR, Linnet Ndolo, J cited with approval the decision of G. K. Kimondo, J in Everret Aviation Limited and went ahead to add another test. She stated that:-

> "In Mwalimu Kalimu Gamumu & 35 Others v Coastline Safaris Limited & 2 Others [2013] eKLR Radido J restated the test of control of an employee by an employer as a determinant of the existence of an employment relationship. I think however, that this facet of law has grown beyond this and in this regard I agree with the holding of Kimondo J in Everret Aviation Limited Vs the Kenya Revenue Authority [2013] eKLR that in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into the employer's core business are no longer conclusive.
>
> In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical. In the letter issued to the Claimants on 20th February 1990, which I have reproduced in full, the Claimants were required to work under the supervision of the Regional Chief Engineer. Further, the job assigned was an integral part of the Respondent's core business."

46. The question therefore is whether a judge meets the characteristics of an employee or worker. In view of the law as stated above, I would align myself with the position prevailing in England and hold that a judge is an employee. Firstly, there is some form of supervision and control over a judge, however limited this may be. Secondly, a judge forms an integral part of the Judiciary. Finally, a judge is economically dependent on public finances.

47. As I have already stated, any dispute between an employee and an employer belongs to the ELRC. The meaning of that statement is that this court has no jurisdiction to hear and determine the Petitioner's case. The upshot is that the Preliminary Objection is merited and the same is allowed. Consequently, this petition is transferred to the ELRC for hearing and determination.

48. As for costs, I direct that the same shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2019

W. KORIR,

JUDGE OF THE HIGH COURT