



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC APPEAL NO.E004 OF 2021

(Before D.K.N.Marete)

ALLAN MATHENGE WACHIRA.....APPELLANT

VERSUS

THE CHAIRMAN & COMMITTEE MEMBERS

MATHAKWA-INI A.I.P.C.A.....1ST RESPONDENT

JOSEPH GITAHU KING'ORI.....2ND RESPONDENT

ELIJAH NDUMIA WAIREGI.....3RD RESPONDENT

FRANCIS NDUNG'U MATHAI.....4TH RESPONDENT

LUCY WANGUI KARIUKI.....5TH RESPONDENT

J U D G M E N T

This is an appeal dated 22nd March, 2021 and comes out as follows;

1. *THAT the learned Trial Magistrate erred in law and fact in finding that the A.I.P.C.A's constitution outst the jurisdiction of the court in the first instance.*
2. *THAT the learned Trial Magistrate erred in law and fact in finding that she lacked jurisdiction to hear the matter, yet the issues in dispute and ones among the claimant's prayers in the claim were ones relating to employment and labour matters which were within her jurisdiction as conferred by the Constitution of Kenya, 2010.*
3. *THAT the learned Trial Magistrate erred in law and fact in failing to appreciate that the right for any Kenyan citizen to seek redress in court is a constitutional right and cannot be limited by a society's constitution.*
4. *THAT the learned Magistrate erred in law and fact in finding that the A.I.P.C.A church constitution was not unconstitutional yet it was not within her mandate to hold that.*
5. *THAT the learned Trial Magistrate erred in law and fact in striking out the claimant's claim without granting him an opportunity to be heard on merit thereby denying him justice.*

He prays as follows;

- a) *The appeal be allowed.*
- b) *The ruling and order of the learned trial court be set aside and be appropriately reviewed.*
- c) *Cost of the appeal.*

The Appellant cites the following as a preliminary objection which also forms the basis of this appeal.

- a) *The honourable court has no jurisdiction to hear the suit and the application in view of the provisions of the constitution (2010) governing the operations of the A.I.P.C.A church.*
- b) *The suit is misconceived and incompetent.*
- c) *The claimant has no capacity and or locus standi to institute this suit as against the defendants.*

Of particular interest and reference by the Appellant is the provisions of the A.I.P.C.A church constitution, 2010 chapter V Article vii (1) which spells out that:

“there shall be establishment of a church dispute settlement tribunal herein after referred to as the church tribunal.

(1) No member or organ of the church shall refer any dispute relating to the church and its members to any court of law unless such dispute has been first referred to and determined by the national tribunal.

This debars all persons and church organs from instituting proceedings against the church without a first reference of the disputes to the church organ or tribunal.

The Appellant rubbishes this by arguing that the church tribunal as established in her constitution has no power to deny this court jurisdiction to hear and determine matters touching on a fundamental breach of the rights and freedoms of citizens on employment or any other such disputes.

He further argues that the circumstances of this case are unique and entail the claimant’s search for relief of a breach of rights under the Constitution of Kenya, 2010. This is an employment dispute in which he was suspended without due procedure or even being afforded an opportunity for a fair hearing.

The Appellant further supports the appeal by reference to Article 22 (1) of the Constitution of Kenya, 2010 which imbues all persons with a right to pursue and partake action in pursuit of their fundamental freedoms under the bill of rights. This comes out thus;

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened.

He submits that in view of the nature of his case and the constitutional basis on which it is planted, the learned magistrate erred in denying herself jurisdiction to hear and determine the matter on its merit.

On this the Appellant seeks to rely on the authority of **Rose Wangui Mambo & 2 others vs Limuru Club & 17 others (2014) eKLR**, where the court held thus;

“The respondents cannot be allowed to wave a private entity card to bar this court when properly moved, from assuming jurisdiction where there are allegations of breach of fundamental rights and freedoms by its members or any other person. It cannot be safe in a progressive democratic society, to arrive at a finding that allows private entities to hide the cloak of ‘privacy’ to escape constitutional accountability.

We think that it would be to accord a narrow, constricted interpretation to our supreme law, contrary to the canons of constitutional interpretation that have for ages infused our judicial system and which now find constitutional sanction under article 259 to accede to such a proposition.”

To accede to the respondent’s proposition that private entities are insulated from the constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from this court’s scrutiny is we believe, to reverse the intention of the frames of the constitution. It is to strip individual Kenyans of the very constitutional protection that the constitution of Kenya 2010 meant to jealously guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very person designed to enjoy its protections and would, in our view, amount to abdication of this court’s primary duty conferred on it by the people of Kenya.

The Appellant further argues and submits that the power to determine the constitutionality otherwise of any law lies in the High Court. The learned magistrate therefore lacked jurisdiction and mandate to hold that the A.I.P.C.A constitution is not unconstitutional.

I have had occasion to visit this matter as presented in the lower court. It is a contest between the provisions of the church constitution and the bill of rights as enunciated in the Constitution of Kenya, 2010. The facts of the case are succinct and clear.

This is a delicate balancing exercise. This is more so bearing in mind the nature and authority of the institution we are dealing with vis a-vis the subject matter involved. And here we lie.

The Appellant’s case takes the day. This is because the nature of the dispute touches on employment, a matter enshrined in the bill of rights. It is a fundamental right and freedom provided for in the bill. Courts are therefore guided and guarded to embrace such disputes at the

earliest opportunity and without hindrance.

The provisions of the A.I.P.C.A constitution on her tribunal being a point of first recourse would not apply in situations of a breach of fundamental rights and freedoms. This is because, like is submitted by the appellant, the tribunal would not be the best suited organ to determine this kind of matter. Denying the appellant an opportunity to ventilate his issues in a court of law would be tantamount to stumbling his access to fundamental rights and freedoms.

I am therefore inclined to allow the appeal and order a reversal of the matter to the learned magistrate court for hearing and determination on its merits.

Each party bears their costs of the appeal.

Dated and delivered at Nyeri this 23rd day of March, 2022

D.K.Njagi Marete

JUDGE

Appearances

1. Wambui Mwai instructed by H.K Ndirangu & Company Advocates for the Appellant.
2. Mr.Wahome Gikonyo instructed by Wahome Gikonyo & Company Advocates for the Respondent