



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 459 of 2011**

**SAMSON ONYANGO NGONGA.....PETITIONER**

**VERSUS**

**THE PUBLIC SERVICE COMMISSION.....1ST RESPONDENT**

**THE COMMISSIONER OF POLICE.....2ND RESPONDENT**

**THE PROVINCIAL POLICE OFFICER**

**RIFT VALLEY PROVINCE.....3RD RESPONDENT**

**OFFICER COMMANDING POLICE**

**DIVISION, NAKURU.....4TH RESPONDENT**

**OFFICER COMMAMNDING STATION,**

**NAKURU.....5TH RESPONDENT**

**THE HON. ATTORNEY GENERAL.....6TH RESPONDENT**

**RULING**

1. The Petitioner, Samson Onyango Ngonga, is an ex-police officer having been enlisted in the police force on the 30th of March 1988 and served as such until dismissal on 25th September 1998. In his Petition dated 7th March 2011, he seeks an order declaring that the decision to dismiss him from the police force is unlawful, unconstitutional, null and void and should be set aside and that he should be deemed as an officer in the police force. He also seeks an order of mandamus to compel the Respondents to enlist him in the police force with no loss of seniority. He further seeks orders that he is entitled to all his accrued benefits from the date of his employment to date and finally an order for costs of the Petition. The Petition is supported by an affidavit sworn by him on 7th March 2011.

2. In opposing the Petition, the Respondents filed a Replying Affidavit sworn on 24th September 2012 by Titi Ayiera, an Acting Superintendent of Police.

3. On 28th September 2012, upon an Application made by the Respondents that this Court has no jurisdiction to determine this Petition as it arises from an employment claim, this Court directed the parties to submit on the issue of jurisdiction and the same to be determined in *limine*. That is the import of this Ruling.

4. It is the Respondents' contention in that regard that under **Article 162 (2)** as read with **Article 165(5)(b)** of the **Constitution**. This Court has no jurisdiction to hear and determine the dispute as it relates to an employment dispute between an employer and an employee which are matters to be dealt with by the Industrial Court and they seek orders to have the matter transferred to that Court. The Respondents relied on the decision of **United States International University v Attorney General, Constitutional Petition No. 170 of 2012**, where Majanja J. held that the Industrial Court has jurisdiction to determine and entertain disputes relating to labour and employment even where such disputes relate to alleged violation of the Bills of Rights.

5. Tactfully, while not disputing that the Industrial Court has jurisdiction to determine employment and labour relations matters, the Petitioner contends that labour law deals with labour matters and all the employment statutes bar their application to members of the Kenya Police and the Armed Forces. The Petitioner relied on the provisions of **Section 3(1)** of the **Employment Act, Cap 11 Laws of Kenya, Section 4(1)** of the **Labour Institutions Act Cap 12, Section 3** of the **Labour Relations Act, No. 14 of 2007** all which provide that those statutes do not apply to the members of the Armed Forces, the Kenya Police, the Administrative Police, the Kenya Prisons and also the National Youth Service. In addition, the Petitioner submitted that under the **Work Injuries Compensation Act**, a member of the Armed Forces as defined under the **Armed Forces Act**, is not an employee, for the purposes of that Act. The Petitioner thus submitted that the dispute before this Court is one in which the Industrial Court has no jurisdiction at all and added that if the Court found in the negative, then the various provisions of the labour Laws which excludes the applicability of those statutes to members of the Kenya Police and Armed Forces are unconstitutional and requested the this Court to declare them as such.

6. It is common ground that the Industrial Court has jurisdiction to determine all matters relating to employment and labour relations. The issue for determination therefore is whether the Industrial Court has jurisdiction in matters relating to employment and labour relations, where members of the Kenya Police are involved.

7. **Article 162 (2)** of the **Constitution** provides for the establishment of a Court with the status of the High Court to deal with matters relating to employment and labour relations. On the other hand, the jurisdiction to determine whether there has been a violation of any of the rights under the Bill of Rights is vested in the High Court. **Article 165 (3)** provides as follows;

*“subject to clause (5), the High Court shall have-*

*(a) ....*

*(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) ....”*

8. The jurisdiction of the High Court under **Article 165(3)** is 'subject to Clause (5)' which prohibits the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the courts established under **Article 162(2)**. In July, 2012 one of the Courts contemplated by **Article 162(2)** was established following the enactment of the **Industrial Court Act, 2011**. The Judges of that Court were appointed on 12th July 2012 and their appointment published in the Kenya Gazette vide Gazette Notice No. 9797 of 19th July 2012. As Majanja J. held in **United States University v Attorney General, (Supra)**;

*“Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is a parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of*

***employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.”***

9. Whether the Labour relations statutes apply or do not apply to members of the Kenya Police Force does not in itself grant this Court jurisdiction to determine issues involving employment and labour relations. In so holding I am alive to **Article 165(3)** of the **Constitution** which states as above that the jurisdiction of this Court is ‘*subject to clause (5)*’ which prohibits the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the Courts established under **Article 162(2)** which includes the Industrial Court.

10. It therefore follows that issues of employment and labour relations are in entirety under the purview of the Industrial Court. Indeed the preamble of the **Industrial Court Act No. 20** reads;

***“An Act of Parliament to establish the Industrial Court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes.”***

The Industrial Court is established by **Section 4(1)** of the enabling Act and reads thus;

***“In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya”***

The specific Jurisdiction of that Court is granted by **Section 12** of the **Industrial Court Act** which reads thus;

“The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 62(2) of the Constitution (emphasis mine) 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 trade union;***
- (c) disputes between an employers’ organisation and a trade unions organisation;***
- (d) disputes between trade unions;***
- (e) disputes between employer organizations;***
- (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”.***

11. It is my opinion therefore that the Industrial Court has jurisdiction to hear and determine both disputes relating to employment and labour relations including those involving members of the Kenya Police Force where such violations arise in an employment context. Once the Industrial Court was

established and was functional, then this Court had no jurisdiction to entertain disputes relating to labour and employment. It matters not that the employee may be in the Police Service or the Defence of Forces.

12. As regards the issue whether labour relations statutes are unconstitutional, I am convinced that this is an issue in which the Industrial Court would be the proper forum to address especially in determining what Laws are applicable in determining the Petitioner's case. In my view, that Court has jurisdiction to enforce labour rights as provided for by **Article 41** of the **Constitution** and also the jurisdiction to interpret the Constitution especially over matters within its exclusive domain.

13. In conclusion therefore it is clear that this Court has no jurisdiction to entertain the present dispute as argued by the Respondents and as Nyarangi J. stated in **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited [1989] KLR 1;**

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.” (Empasis mine)***

14. That being the case, the final orders here are that this matter be transferred forthwith to the Industrial Court for hearing and final determination. All issues raised by the parties should be ventilated there.

15. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Coram: Irene – Court clerk*

*Mr. Obwayo for Petitioner*

*Mr. Opondo for Respondents*

**Order**

*Ruling duly read.*

**ISAAC LENAOLA  
JUDGE**

**Further Order**

*Mention on 5/2/2013 before the Principal Judge of the Industrial Court.*

**ISAAC LENAOLA - JUDGE**