THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 286 OF 2019

WATSON BURUGU.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF JUSTICE & PRESIDENT OF

THE SUPREME COURT OF KENYA.....2ND RESPONDENT

THE PRINCIPAL JUDGE, EMPLOYMENT &

LABOUR RELATIONS COURT.....3RD RESPONDENT

JUDGEMENT

1. Through the petition dated 21st August, 2018 the Petitioner, Watson Burugu, an advocate of the High Court specialising in employment and labour relations matters seek to invalidate Gazette Notice No. 6024 dated 10th June, 2018 published in Kenya Gazette Volume CXX-No. 74 of 22nd June, 2018 (hereinafter simply referred to as the Gazette Notice).

2. Through the impugned Gazette Notice the then Chief Justice, David K. Maraga, in exercise of the powers conferred upon him by Section 29(3) and 4(b) of the Employment and Labour Relations Court Act, 2011 appointed all magistrates of the rank of Senior Resident Magistrate and above as special magistrates to hear and determine specified employment and labour relations cases within their respective areas of jurisdiction.

3. The Petitioner avers that the decision of the Chief Justice violates Articles 162(2)(a), 165(5), 163(7), 48, 27(1) and 50(1) of the Constitution. He therefore prays for orders as follows:

(a) Pending the hearing and determination of the Petition, the Honourable Court be pleased to grant an interim conservatory order restraining the Respondents whether by themselves or through any person whomsoever from implementing Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume CXX-NO. 74 of 22nd June 2018.

(b) Pending the hearing and determination of this Petition, the Honourable Court be pleased to grant an interim conservatory order staying implementation of Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume CXX-NO. 74 of 22nd June 2018.

(c) A declaration that the Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume CXX-NO. 74 of 22nd June 2018 would lead to infringement of the Petitioner's and general public's fundamental rights under Articles 27(1), 48 and 50(1) of the Constitution.

(d) A declaration that the Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume CXX-NO. 74 of 22nd June 2018 is inconsistent with Articles 162(2) (a), 165(5) and 163(7) of the Constitution.

(e) A declaration that Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume

CXX-NO. 74 of 22nd June 2018 is null and void.

(f) The Court be pleased to remove to this Court the decision of the 2nd Respondent contained in Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume CXX-NO. 74 of 22nd June 2018 and quash it by an order of certiorari.

In ADDITION to prayers "a" and "b" above but in the ALTERNATIVE TO PRAYERS "c", "d", "e", and "f" above:

(g) The Honourable Court be pleased to issue an order of prohibition restraining the Respondents whether by themselves or any other person whomsoever from implementing Gazette Notice Number 6024 dated 10th June 2018 and published in the Kenya Gazette Volume CXX-NO. 74 of 22nd June, 2018 until and unless:

i. Special Magistrates from the current pool of Magistrates are set apart and designated and they be trained for purposes of handling employment and labour relations matters exclusively;

ii. The Special Magistrates so set apart and designated take oath of office to exclusively hear and determine employment and labour relations matters.

In ADDITION to any of the prayers above where granted.

(h) Such other or further orders as this Honourable Court shall deem just.

(i) Costs of this Petition be provided for.

4. The Attorney General is the 1st Respondent, the Chief Justice & President of the Supreme Court of Kenya is the 2nd Respondent and the Principal Judge, Employment and Labour Relations Court is the 3rd Respondent.

5. A perusal of the pleadings and submissions disclose that the Petitioner's case is that although the Court of Appeal in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR** (hereinafter simply referred to as the **LSK Nairobi Branch case**) had determined that Parliament could properly enact legislation conferring jurisdiction on magistrates' courts with respect to employment and labour relations, and environment and land matters, the issue that he seeks this Court to determine through this petition is whether under the framework of the Constitution any and all magistrates can be clothed with jurisdiction or whether only some special magistrates should have jurisdiction. The Petitioner narrows his grievance to the part of the Gazette Notice which gives jurisdiction to magistrates of the rank of Senior Resident Magistrate and above to handle civil disputes arising out of employment and labour relations.

6. The Petitioner's case is that the *ratio decidendi* in the decision of the Supreme Court in **Republic v Karisa Chengo & 2 others [2017] eKLR** was *inter alia* that judges appointed to the Environment and Land Court ("E&LC") and the Employment and Labour Relations Court ("E&LRC") are appointed for their special qualifications to perform stewardship of the particular office in respect of which they take oath and not a different office. The Petitioner contends that it follows that only specialised judicial officers who are appointed to perform stewardship of presiding exclusively over employment and labour relations matters can be clothed with jurisdiction.

7. The Petitioner avers that an approach where all magistrates of a certain rank and above can handle employment and labour relations matters without exclusivity would be in violation of Articles 162(2)(a) & 165(5) of the Constitution and the Supreme Court's decision in **Karisa Chengo (supra).**

8. The Petitioner contends that the magistrates gazetted under the impugned Gazette Notice are not specially appointed or trained to handle employment and labour relations matters. Further, that they have not taken oath of office to exclusively handle employment and labour relations matters. The Petitioner insists that until and unless special magistrates are appointed, take oath of office and only hear and determine employment and labour relations matters, the respondents would otherwise be acting inconsistently with Articles 162(2)(a) & 165(5) of the Constitution and the decision in **Karisa Chengo (supra).**

9. The Petitioner deposes that unlike the E&LC which has been granted jurisdiction under Section 26 of the Environment and Land Court Act, Cap. 12A, and Section 25 of the Magistrates' Court Act, 2015 to hear appeals from magistrates handling environment and land matters, there are no such provisions in respect of employment and labour relations matters. The Petitioner points out that the High Court has no jurisdiction over matters set aside for specialised courts by virtue of the provisions of Article 165(5)(b) of the Constitution.

10. The Petitioner asserts that the 2nd Respondent did not follow the decision in **Karisa Chengo (supra)** in issuing the impugned Gazette Notice and he therefore violated Article 163(7) of the Constitution which, in his view, also binds State organs and officers to follow the decisions of the Supreme Court.

11. The Petitioner avers that due to lack of specialization and expertise by the appointed magistrates there is a high likelihood that most employment and labour relations matters handled by the gazetted magistrates may end up on appeal to the E&LRC. He deposes that in effect the magistrates will work on a broad array of legal areas but master none thereby producing decisions that, because they do not reflect in-depth expertise, run the risk of being lower in quality and more prone to generate appeals. This, according to the Petitioner, will violate the right to access to justice protected under Article 48 of the Constitution. It is the Petitioner's opinion that specialised courts, manned by judicial officers with greater expertise and jurisdiction-specific experience, are likely to produce higher quality decisions from which no appeal can or needs to be taken.

12. A rise in appeals, the Petitioner asserts, will mean justice for litigants will take longer as the E&LRC which already has a huge backlog of cases will be clogged with matters. He states that the sound and well-advised reasons of expedited hearing and increasing access to justice which may have informed the 2nd Respondent's decision to gazette magistrates to handle employment and labour relations matters will not be achieved.

13. The Petitioner avers that where a judicial officer has an inadequate or a skewed understanding of an area of law, it may so happen that the skewed understanding by the judicial officer is in an area of law that supports one litigant as against the other. The Petitioner deposes that this risk exists in the present circumstances where all-purpose judicial officers without expertise in employment and labour relations matters have been appointed to handle the matters. In the Petitioner's view, this will result in violation of the right to equal protection and equal benefit of the law guaranteed by Article 27(1).

14. The Petitioner deposes that by sending litigants to courts that have not been set aside and trained in employment and labour relations matters there is a high likelihood of a miscarriage of justice. It is the Petitioner's case that a party who appears before a judicial officer who is not fully conversant with the intricacies, rules, customs, practices, doctrines and jurisprudence on employment and labour relations matters will most likely not receive a fair hearing thereby resulting in violation of the right to fair hearing under Article 50(1).

15. Relying on **Karisa Chengo (supra)**, the Petitioner submits that one of the reasons why the Committee of Experts which drafted the Constitution rooted for the establishment of the specialised courts was to achieve specialisation by requiring judges of those courts to possess some measure of experience in the matters falling within their jurisdiction. In that regard, the Petitioner submits that **Karisa Chengo (supra)** demands that any judge or magistrate who is to handle employment and labour relations matters must as a constitutional imperative be specialised and set apart to exclusively handle such matters.

16. The Petitioner urges the Court to note that of all areas of law that exist in Kenya, only the areas of employment and labour relations, and environment and land have their specialised status anchored in the Constitution. He submits that deference must be given to that status without dilution and must come down to the lowest cadre of judicial officer who may be clothed with the mandate to handle those matters.

17. It is the Petitioner's argument it is not necessarily that magistrates who handle general jurisdiction matters are in relation to employment and labour relations matters. What he wants is compliance with the Constitution's demand that employment and labour relations cases be presided over by specialised judicial officers. It is submitted that the jurisdiction that a magistrate possesses is analogous to that of a judge of the High Court as contrasted with the jurisdiction possessed by a judge of the E&LRC or E&LC.

18. It is the Petitioner's submission that a purposive interpretation of Articles 162(2) and 165(5), and **Karisa Chengo (supra)** would demand a segregation between general jurisdiction magistrates and magistrates handling employment and labour relations cases.

19. The Petitioner supports his submission on the important role of the specialised courts by citing a paper titled *"The Re-constituted Industrial Court of Kenya and the Role of the Social Partners"* by Justice Rika and another paper titled *"Labour Courts and Autonomy: Should Labour Courts Maintain Separateness from Other Courts of law?"* by Stein Evju, a Special Adviser for the Labour Court of Norway. It is pointed out that Germany has exclusive labour courts all the way from the courts of first instance to the final appellate court.

20. The Petitioner relied on the decision of the US Supreme Court in **North v Russell, 427 U.S. 328 (1976)** in support of the assertion that the right to a fair trial presupposes that the judge has a firm grasp of a particular area of law.

21. The Petitioner dismisses the suggestion that any errors made by magistrates during the trial can be corrected on appeal. He submits that the opportunity for preferring an appeal does not always cure injustice and other wrongs that may have been committed in a lower court. The Petitioner supports his submissions by citing a paper titled *"Limiting Judicial Incompetence: The Due Process Right to a Legally Learned Judge in State Minor Court Criminal Proceedings"*, Virginia Law Review Vol. 61, No.7 (Nov. 1975), pp. 1454–1499, where it was observed that appeals do not alleviate the type of unfairness that results from judicial incompetence since there are significant barriers to appeals and it may even be difficult in an appeal to show any specific error flowing from the trial court's inability to understand and evaluate the arguments.

22. As for the alleged violation of Article 27(1) of the Constitution, the just cited paper is quoted for the statement that:

> **"If a judge's lack of legal expertise leads him to rely on a prosecuting attorney for advice or summarily to reject a valid legal argument merely because it does not comport with his own common-sense notions of justice, even with an accurate record his biases will be almost impossible to prove on appeal. Furthermore, when a judge finds a defendant guilty merely because the judge cannot understand legal arguments of the defense, the defendant has not received due process of law, regardless his guilt."**

23. The Petitioner submitted that there is no evidence that the magistrates had been trained as alleged in the 2nd and 3rd respondents' reply to the petition. Further, that in any event, training alone will not fulfil the Constitution's dictate for specialization and exclusivity as per **Karisa Chengo (supra).**

24. The Petitioner appreciates that magistrates have always handled criminal offences in labour matters. He therefore emphasises that his case concerns the hearing of the disputes preserved for the Judges of the E&LRC by the gazetted magistrates.

25. The Petitioner contends that the need to access to justice and connected rights cannot grant courts or judicial officers jurisdiction they do not have. The Court is therefore urged to allow the petition as prayed.

26. In their reply to the petition, the 2nd and 3rd respondents contend that the impugned Gazette Notice does not violate Articles 162(2)(a)

& 165(5)(b) or any other constitutional provision as well as the decision in **Karisa Chengo.**

27. It is the 2nd and 3rd respondents' averment that the gazetted magistrates are well trained at the Judiciary Training Institute and ready to hear and determine employment and labour relations matters. Additionally, that any party aggrieved by the decision of any of the appointed magistrates has a right to appeal to the E&L R C.

28. The 2nd and 3rd respondents contend that the Employment and Labour Relations Court Act under which the magistrates were gazetted does not require the taking of another oath. Further, that the impugned Gazette Notice was first published on 27th July, 2011 vide Gazette Notice No.9243.

29. The 2nd and 3rd respondents aver that contrary to the Petitioner's claim that the Gazette Notice violates Articles 27(1) and 48, its objective was to enhance the rights to access justice, and equality and freedom from discrimination by taking justice closer to the people.

30. Counsel for the 2nd and 3rd respondents identified three issues for the determination of the Court. On whether the impugned Gazette Notice violates the provisions of Articles 162(2)(a) and 165(5) of the Constitution and the Supreme Court's decision in **Karisa Chengo,** it is submitted that it does not.

31. The position of the 2nd and 3rd respondents' counsel is that Articles 162(2)(a) and 165(5) have no relevance to the impugned Gazette Notice since the magistrates' courts form part of the subordinate courts established under Article 169.

32. It is urged that the impugned Gazette Notice accorded with the provisions of Article 169(2) and Section 29 of the Employment and Labour Relations Court Act. Reliance is placed on the decision of the Court of Appeal in the **LSK Nairobi Branch case** where it was held that Parliament was empowered to enact legislation to confer jurisdiction to magistrates' court to hear and determine disputes stipulated under Article 162(2). Counsel urged that it is clear from the provisions of Section 29 of the Employment and Labour Relations Court Act and the cited decision of the Court of Appeal that the Chief Justice has powers to appoint a magistrate to hear any dispute, whether criminal or civil, as may be designated in a Gazette Notice with the objective of attaining reasonable, equitable and progressive access to judicial services in all the counties.

33. On the second issue as to whether the gazetted magistrates should take fresh oaths of office before hearing and determining the cases for which they were gazetted, counsel submits that there is no legal rationale for the Petitioner's contention that the gazetted magistrates should take fresh oaths.

34. On the third and final issue as to whether the impugned Gazette Notice impede access to justice, and offends the right to equality and freedom from discrimination, the 2nd and 3rd respondents contend that it does not violate those rights. Further, that to the contrary, the impugned Gazette Notice was intended to enhance the said rights. It is pointed out that the Petitioner admits in his petition that there is a huge backlog in the E&LRC hence confirming that there was need to gazette the magistrates.

35. The Court is consequently asked to find that the petition has no merits and dismiss it with costs.

36. The question to be answered in this judgement is whether the gazettement of magistrates of the rank of Senior Resident Magistrate and above by the Chief Justice to hear and determine employment and labour relations cases violated any constitutional provision.

37. Although the Petitioner suggested that his petition speaks to a novel issue being the need for specialised magistrates to handle employment and labour relations disputes, I find that most of the arguments he relies upon were addressed by the Supreme Court in **Karisa Chengo (supra)** and the Court of Appeal in the **LSK Nairobi Branch case**.

38. The Petitioner anchors his claim for the need of specialised magistrates on Articles 162(2)(a) and 165(5)(a) and the decision of the Supreme Court in the **Karisa Chengo case.** However, the fact that the Constitution does not provide for specialisation of those who serve in the specialised courts was confirmed in **Karisa Chengo** as follows:

> **"[63] Thus, as to any special condition regarding the position of Judges of the specialized Courts, the Constitution is silent. The Employment and Labour Relations Court Act is also silent on any special qualification for the appointment of Judges of the ELRC."**

39. In the **LSK Nairobi Branch case,** the Court of Appeal offered a solution to the Petitioner's concern as follows:

> **"65. In our view, conferring jurisdiction on magistrates' courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates' courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates' courts and the specialized courts would therefore undoubtedly imprint the "specialized jurisprudence" on the magistrate's courts."**

40. It is acknowledged that there is need for magistrates handling disputes concerning employment and labour relations to be up to speed with the jurisprudence in that area of law. That knowledge will come from the jurisprudence of the E &LRC, the Court of Appeal and the Supreme Court (in applicable cases).

41. Training is also another important source of knowledge. The 2nd and 3rd respondents have indicated that the gazetted magistrates will

receive training at the Judiciary Training Institute.

42. Indeed, the law does not require that an advocate obtains further training before practising in a particular area of law. It must, however, be appreciated that a judge or a judicial officer must embrace continuous learning in the modern legal environment since legal concepts and their application keep evolving. Even so, the statement of Madan, JA in **Butt v Rent Restriction Tribunal [1979] eKLR** remains true to date that:

> **"A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen. Both are conscientious and judicious individuals and imbued with reason. Both are dependable and do not make wild surmises. Both act upon consecrated principles. Both get a fair share of juristic spills. Both are jealously scrupulous and impartial. Both are 24 carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision. Both speak no ill of any litigant. Both are torch bearers for stability of society. Both are strugglers for liberty. Neither should, however, become an advisor instead of an adjudicator. The litigants and their professional advisors are the best judges of their affairs."**

43. The Petitioner additionally argue that allowing magistrates who are not specialised in employment and labour relations matters to handle such disputes violates the right to access justice under Article 48. The argument is not convincing. In my view, placing the fate of litigants in a few Employment and Labour Relations Courts found in a small number of counties is more likely to violate the right to access to justice than allowing magistrates who are found allow over the country to handle the matters where they have pecuniary jurisdiction. This was indeed the opinion of the Court of Appeal in the **LSK Nairobi Branch case** when it held that:

> **"67. Devolution, access to services and access to justice, among others, are critical pillars of our constitutional architecture. Article 6(3) of the Constitution demands reasonable access to services. Article 48 demands that the state "shall ensure access to justice for all persons." Access to justice has many facets. One facet is the geographical location of the courts and proximity of the courts to the people intended to be served by the courts. There are undoubtedly more magistrates' courts in Kenya than there are specialized courts or even High Court stations for that matter. The close proximity of magistrates' courts to the people ensures efficiency and access to justice at reasonable cost. It would be illogical and unreasonable to prohibit magistrates' courts from determining land and employment disputes, when it is undeniable that their reach to the citizenry is much wider than that of the specialized courts. Public interest, in our view, would be better served by increasing the number of courts with the capability of resolving such disputes."**

44. In view of the decision of the Court of Appeal, the Petitioner's claim that the impugned Gazette Notice violates Articles 48 of the Constitution is therefore without merit.

45. The Petitioner alleges that subjecting litigants to judicial officers who lack knowledge in Article 162(2) matters is likely to result in violation of Article 27(1). This, in my view, is a speculative argument. The Petitioner has not placed any evidence before this Court to show that the gazetted magistrates are not capable of competently determining civil disputes in the employment and labour relations field. Without evidence to show that the magistrates will not be able to understand employment and labour relations matters, there is no good reason for agreeing with the Petitioner's arguments.

46. In summary, I find the Petitioner has failed to establish that the impugned Gazette Notice violates any of the cited constitutional provisions. In the circumstances, I find that the petition is without merit and I dismiss it. The parties will bear their own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 11th day of February, 2021.

W. Korir,

Judge of the High Court