



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**PETITION NO 10 OF 2020**

**IN THE MATTER OF SECTION 26, 28 (1) & 2 OF THE MENTAL HEALTH ACT CAP 248 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 28, 41, 43,47, 48, 54, 165 and 259 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE EMPLOYMENT ACT 2007 CAP 246 LAWS CAP LAWS OF KENYA**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT CAP 84 LAWS OF KENYA**

**AND**

**IN THE MATTER OF NATIONAL POLICE SERVICE COMMISSION ACT CAP 185C LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION & FUNDAMENTAL FREEDOM) PRACTICE AND PROTECTION RULES 2013**

**IN THE MATTER OF UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**IN THE MATTER OF SOM (A PERSON SUFFERING FROM MENTAL DISORDER)**

**RULING**

1. By a Notice of Motion application dated 17<sup>th</sup> August 2020 applicant herein crave the following reliefs:

*“2. THAT pending the hearing and determination of the instant application, the honourable court be pleased to grant an order directing the Director Personal Human Resource Manager of the National Police Service Headquarters to unconditionally pay to the petitioner/applicant Kshs 500,000/- (Five hundred thousand) only being part of unpaid salaries of the mentally ill person MR. SOM to cater for his hospital treatment.*

*3. THAT pending the hearing and determination of the instant petition, the honourable court ne pleased to grant an order directing the Director Personnel Human Resources Manager of National Police Service Headquarters to unconditionally pay to the petitioner/Applicant Kshs 500,000/- (Five hundred thousand) only being part of unpaid salaries of the mentally ill person MR. SOM to cater for his hospital treatment.*

*4. THAT the Honourable court be pleased to compel the respondent to produce the originals in their custody of all documents mentioned in the supporting the (sic) affidavit of DOO sworn on.....August 2020 in support of this application during the hearing of the petition herein.”*

2. The application is on the ground that SOM (‘M’) was a police officer with PF NO. [...] until he was mentally incapacitated while on duty. His mental incapacity was confirmed by Dr. Jumba, a psychiatric consultant attached at Kisii Level 5 Hospital on 27<sup>th</sup> June 2012. According to the applicant, M’s salaries for 13 years remain unpaid by the respondent. The applicant claims that M is supposed to undergo urgent treatment at Moi Teaching and Referral Hospital after sustaining serious injuries attributed to a fall. Despite the respondent receiving several complaints from the applicant in respect to unpaid salaries, no step has been taken towards payment of the arrears.

3. The applicant contends that the withholding of the unpaid salaries amounts to violation M’s constitutional and fundamental rights and

requires urgent redress and protection. The applicant contends that the respondent has failed to follow the laid down procedures of handling workers who get mentally sick while in the line of duty thus perpetuating a culture of impunity.

4. The application is further supported by the supporting affidavit filed by DOO filed on 19<sup>th</sup> August 2020. He avers that he has legal powers to receive the unpaid salaries on behalf of M pursuant to the ruling in Misc. Civil Application No 42 of 2020.

5. I shall commence by analyzing whether this is the appropriate forum for ventilation of the applicant's dispute. The applicant contends that M was an employee of the respondent. The application is centered on the respondent's non-payment of M's salary between 1999 and 2012 due to his mental illness. It is clear from the onset that the dispute herein relates to an employer and employee relationship. It calls for the determination whether an employer and employee relationship existed between the parties and secondly, whether the respondent has withheld its employee's salary.

6. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent; jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein (see **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR**). The *locus classicus* on jurisdiction is the case of **Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited** [1989]KLR 1, the Court stated;

*"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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*

7. **Article 162 (2) of the Constitution of Kenya** gave Parliament the mandate to establish courts with the status of the High Court to hear and determine disputes relating to Employment and Labour Relations. This led to the enactment of **the Employment and Labour Relation Court Act. Section 12 of the Act provides as follows:**

*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—*

- (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.*

8. **Article 165 (5) of the Constitution of Kenya provides that 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).*

9. The employment and labour relations court thus has jurisdiction on issues of interpretation of the Constitution that are intricately interwoven with a labour. The Court of Appeal in **Registrar of Trade Unions vs. Nicky Njuguna & 4 Others [2017] eKLR, CIVIL APPEAL NO 251 OF 2014 where the court held as follows:**

*"This same issue was central in the following matters; Prof. Daniel N. Mugendi v Kenyatta University & Others Nairobi Civil Appeal No. 6 of 2012 (Unreported); U.S.I.U v A.G &Others (2012) eKLR Seven Seas Technologies v Eric Chege Nairobi HC Misc. Appl. No. 29 of 2013 (Unreported) and Judicial Service Commission v Gladys Boss Shollei & Another Civil Appeal No 50 of 2014.*

In all the aforesaid decisions by this Court differently constituted, it was emphasized that although Article 165(3) (c) of the Constitution gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of ELRC to deal with such issues especially when the interpretation of the Constitution is intricately interwoven with a labour issue or is central to the determination thereof. In any case the Court found that under Article 20, the Constitution gives all courts and bodies powers to deal with constitutional matters; thus the court had jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes.

We will say no more on the jurisdiction of the ERLC to interpret the Constitution on fundamental rights that are germane and intricately connected with labour issues, as it has adequately been dwelt with and we fully agree with the above findings.”

10. It is now a well settled principle that where it is possible to decide a case without reaching a constitutional issue then a party should file his claim before such forum that can effectively deal with the cause of action. The Court of Appeal **Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another** [2016] eKLR stated that:

*“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.*

*... this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights....*

*Of course violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.*

*A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”*

11. However, if a party files a constitutional petition, then he must ensure that his pleading, sets out with reasonable precision that of which he complains of. This principle was echoed by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR, CIVIL APPEAL NO. 290 OF 2012, where the court held as follows;

*“The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:*

*“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”*

*(43) The petition before the High Court referred to **Articles 1, 2, 3, 4, 10, 19, 20 and 73** of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.”*

12. In the conclusion, I find that this court lacks jurisdiction to entertain this instant application and consequently the application dated 17<sup>th</sup> August 2020 is hereby dismissed.

**DATED, SIGNED and DELIVERED at KISII this 8<sup>TH</sup> day of OCTOBER 2020.**

**A.K NDUNG’U**

**JUDGE**