



**Attorney General & another v Muiu & another (Civil Appeal
E146 of 2021) [2025] KECA 816 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KECA 816 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E146 OF 2021
P NYAMWEYA, AO MUCHELULE & GV ODUNGA, JJA
MAY 9, 2025**

BETWEEN

THE HON ATTORNEY GENERAL 1ST APPELLANT

THE NATIONAL POLICE SERVICE COMMISSION 2ND APPELLANT

AND

DR MAJOR (RTD) SHADRACK MUTIA MUIU 1ST RESPONDENT

THE SALARIES AND REMUNERATION COMMISSION 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (O. Makau, J.) dated 2nd July 2020 in ELRC Petition No. 115 of 2018)

JUDGMENT

1. The history of this dispute is that on 2nd October 2012, the 1st respondent was appointed a Commissioner at the National Police Service Commission (the Commission), the 2nd appellant herein, for a term of 6 years till 2nd October 2018. Sometimes in February 2013, in the company of other commissioners of the 2nd appellant, the 1st respondent went Nai Civil Appeal No E146 of 2021 Page 1 of 30 on a 3-week benchmarking tour to Sweden, United Kingdom and Germany, and while there, he suffered a stroke and was hospitalised for a number of days. Upon his return to the country on 23rd February 2013, he continued with treatment at Nairobi Hospital where he was admitted for 2 weeks after which he continued with medication at home. He did not report back to work until his term ended on 2nd October 2018.
2. By a letter from the 2nd appellant to the Principal Secretary, Treasury, dated 10th February 2014, the 1st respondent's salary and allowances including his medical cover were stopped on the ground of his absence from work with effect from March 2014. It was this action that provoked the filing of Petition No. 115 of 2018, before the Employment and Labour Relations Court, on the grounds that



the withholding of the 1st respondent's salary and allowances was unconstitutional and discriminatory, contrary to Article 27 of *the Constitution*. In that petition, the 1st respondent sought the following reliefs:

- a. A declaration that the withholding and/or stoppage of the 1st respondent's salary and benefits to his detriment was unfair and unconstitutional, null and void.
 - b. A declaration that the appellants and the 2nd respondent violated the 1st respondent's right to fair labour practice and lawful expectation.
 - c. An order of certiorari calling into the Court for the purposes of quashing forthwith the 2nd appellant's purported decision to withhold and/or stop the 1st respondent's salary and benefits.
 - d. An order of Mandamus compelling the appellants and the 2nd respondent to pay the 1st respondent's withheld and/or accrued salary amounting to Kshs. 35,145,000/-.
 - e. Punitive damages in favour of the 1st respondent against the appellants and the 2nd respondent for discrimination.
 - f. Damages for unfair labour practices and violations.
 - g. The appellant and the 2nd respondent to bear the costs of the Petition in any event.
 - h. Such further orders as the Court may deem just and expedient.
3. The claim against the 2nd respondent was later withdrawn.
 4. The appellants, opposed the petition through the replying affidavit sworn on 29th March 2019 by Joseph Vincent Onyango, the 2nd appellant's Chief Executive Officer, in which, while admitting that that the 1st respondent was a commissioner and that he fell ill while on duty abroad, it was contended that he never reported back to work even after his discharge from the hospital. It was deposed that as a result of his long absence and after seeking his doctor's comprehensive report in vain, the Commission resolved that the 1st respondent be placed on sick leave in accordance with the prevailing Government Rules and staff regulations as follows; full pay from 1st July 2013 to 30th September 2013; half salary from 1st October 2013 to 31st December 2013; and nil salary from 1st January 2014 to 30th June 2014. According to the appellants, although an attempt was made to have the 1st respondent appear before a Medical Board convened by the Director of Medical Services, the 1st respondent could not be reached.
 5. In September 2015 a petition was presented to the National Assembly on behalf of Juhudi Community, by Simon Kalei, in which it was sought that the Assembly recommends the 1st respondent's removal on grounds of misconduct and incapacity to perform functions of office. Although the petition was passed, and the President was advised to appoint a tribunal in accordance with Article 251(5) of *the Constitution*, no action was taken till the lapse of the 1st respondent's term.
 6. The 1st respondent, testifying as PW1 restated his case as set out above and added: that on the flight back to Kenya he was downgraded to Economy Class and his colleagues abandoned him; that on arrival, he was immediately admitted to Nairobi Hospital where he was bedridden and underwent medical treatment throughout; that despite being aware of his medical condition, the appellants stopped his salary from March 2014 to October 2018 when his term lapsed; that his medical cover was also cancelled and the appellants never paid his medical bills; that he was neither invited to show cause why he could not be terminated for failure to attend work nor was he given prior notice before his salary was stopped; that he was never taken to the Medical Board to assess his capacity and his medical reports were never challenged by the 2nd appellant; and that he was never removed from office before his term ended.



7. In cross-examination, he admitted that *the Constitution* provided for his removal as a commissioner on medical grounds but contended that during such removal, the correct procedure has to be followed. According to him, the letter dated 10th February 2014, that led to the stoppage of his salary, was neither addressed to nor copied to him. He admitted that he had been paid his full salary from July to September 2013 and half salary from October to December 2013 but the salary was stopped effective from 1st March 2014. According to him, his medical condition did not permit him to go to the office to apply for sick off but his doctor informed the 2nd appellant of his condition. He admitted that he was advising administration police and commanders and that there was no other person with expertise with respect to uniformed officers, and agreed that his absence from office deprived the Commission of his advice on important matters. He, however, maintained that he was not removed from office under Article 251(5)(c) of *the Constitution*, although he learned through the media that there was a petition seeking his removal.
8. On behalf of the appellants, George Okida Okoth, the 2nd appellant's Deputy Director Human Capital testified as RW1. His evidence was: that 10 months after the 1st respondent fell ill but failed to resume work, the Commission wrote to the 1st respondent's doctor on 29th November 2013, seeking details of his progress but the doctor did not respond; that as a result, the Commission resolved to place the 1st respondent on sick leave under the Government of Kenya Staff Rules and Regulations section N (8) clause (1)(i) while liaising with the appointing authority; that on 10th February 2014, the Commission wrote to the Treasury to stop the 1st respondent's salary, and also requested the Director of Medical Services to convene a Medical Board to assess the 1st respondents suitability; that the Commission also wrote to the Chief of Staff to liaise with the appointing authority about the 1st respondent's continued absence from duty; that on 23rd June 2014, the Chief of Staff wrote to the 1st respondent imploring him to resign on medical grounds; that the deponent could not confirm whether or not the 1st respondent responded to the letter; that one Simon Kalei, petitioned the National Assembly for the removal of the 1st respondent as a commissioner which petition was supported by the Commission, but he was not sure whether or not the President formed the tribunal to investigate the case; that the 1st respondent's salary was from a consolidated Fund at the Treasury; and that the 1st respondent served the Commission for only 5 months out of his 6-year term.
9. On cross-examination, RW1 admitted that he never received any approval stopping the 1st respondent's salary; that the Commission never referred the 1st respondent to any other doctor for medical examination; that they never doubted that the 1st Respondent was sick; that the letter dated 12th June 2013 recommended for light duties but he was not sure whether the 1st respondent was given any light duties; that he did not know if the 1st respondent was served with the letter dated 29th May 2014 requiring him to attend the Medical Board and he did not have any evidence to prove that the 1st respondent received the letter from the Chief of Staff; that the 1st respondent was never retired on medical grounds; and that there was no letter stopping his salary after the Commission notified Treasury that he was not attending work.
10. In his judgement, the learned Judge identified the following issues for determination:
 - i. Whether stoppage of salary and allowances was unlawful and unconstitutional;
 - ii. Whether the 1st respondent's fundamental rights and freedoms under Article 27 and 41 of *the Constitution* were violated;
 - iii. Whether the 1st Respondent was entitled to the reliefs sought.



11. On the first issue the learned Judge found: that vide the letter dated 10th February 2014, the 2nd appellant advised the Principal Secretary National Treasury that the 1st respondent's salary be stopped effective 1st March 2014 due to his absence from work resulting from the prolonged sickness as his case was being pursued with the relevant authorities including the Director of Medical Services; that by the same letter the 2nd appellant purported to put the 1st Respondent on sick leave pursuant to the provisions of the Regulation N (8) Clause 1 (i) of Code of Regulations, although the letter was never served on the 1st respondent; that from its Preamble, the Code of Regulations applies to Civil Servants whose definition does not cover the 1st respondent, a State Officer serving in an Independent Commission under Article 260 of *the Constitution*; that the application of the said Code of Regulation for Civil Servants to stop the 1st respondent's salary and allowances was unlawful as it violated his right to protection from unfair disciplinary action as guaranteed by Article 236(b) of *the Constitution*; that the said unlawful stoppage of the salary was also done while the 1st respondent was still in office and contrary to the protection of his remuneration by Article 250(8) of *the Constitution*; that in light of the foregoing constitutional provisions, the 1st respondent's contract had a Constitutional underpinning because the terms of his appointment, remuneration and removal are all expressly provided under Articles 250 and 251 of *the Constitution* which do not provide for suspension of remuneration of a commissioner; and that the drafters of *the Constitution* did not contemplate taking of any action against a sick commissioner other than removal from office under Article 251.
12. As regards that procedure, the learned Judge found: that pursuant to Article 251 of *the Constitution*, it involves a petition to the National Assembly, which then recommends to the President to appoint a tribunal to investigate and make recommendations on the removal; that in this case, a petition for removal of the 1st respondent was presented to the National Assembly by a citizen, and the National Assembly recommended to the President for setting up of a tribunal to investigate the case but that was never done; that instead the Head of Public Service wrote a letter to the 1st respondent imploring him to resign voluntarily but the said letter was never served on him; that as a result, the 1st respondent served his entire term of 6 years; that in the circumstances, the appointing authority, who is the President, waived the right to remove him from office on ground of physical or mental incapacity to perform functions of his office; and that, consequently, the appellants stopped the 1st respondent's salary and allowances without any legal basis.
13. Regarding the second issue whether the 1st respondents fundamental rights and freedoms under Article 27 and 41 of *the Constitution* were violated, the learned Judge found that on the authority of the Supreme Court case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, a petition alleging constitutional violations must define the dispute to be decided with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of; that although paragraph 29 of the petition sets out the provisions of *the Constitution* that were material and germane to this case, the 1st respondent did not plead, with precision, the particulars of the alleged violations and the manner in which the said provisions of *the Constitution* were breached. The learned Judge, therefore, declined to entertain the petition on alleged violation because of the inadequate pleadings.
14. On reliefs, the learned Judge issued an order of certiorari quashing the decision by the appellants withholding and /or stopping the 1st respondent's salary and other benefits and held that the 1st respondent was entitled to all his salary and other benefits from the period it was stopped on 1st March 2014 to 2nd October 2018 when the term of his contract lapsed. According to the learned Judge, the decision to award the withheld salary and benefits was grounded on the express provisions of *the Constitution* that were violated with impunity by the appellants. In the learned Judge's judgement, the



- 1st respondent failed to prove that he was discriminated in receiving a lower remuneration as compared to other commissioners since no evidence was tendered to support the allegation that the minimum pay was Kshs. 640,681, and that the other commissioners were earning Kshs.710,000 compared to his salary of Kshs. 639,000 per month. Accordingly, he issued an order of mandamus directing the appellants to pay the 1st respondent, all his rightful salary withheld from 1st March 2014 to 2nd October 2018 being the monthly salary of Kshs.639000 x 55 months = Kshs. 35,145, 000. Based on his findings above, the learned Judge declined to award punitive damages for discrimination and general damages for unfair labour practices and violations.
15. In disposing of the matter, the learned Judge entered judgement for the 1st Respondent against the appellants in the following terms:
- a. An order of certiorari quashing the 2nd appellant's decision to withhold and/or stop the 1st respondent's salary and benefits.
 - b. An order of mandamus compelling the appellants pay the 1st respondent Kshs. 35,145,000 being the amount of his salary withheld from 1st March 2014 to 2nd October 2018 when his term of office lapsed, subject to statutory deductions.
 - c. An award of costs plus interest at court rates from the date of filing the suit.
16. Dissatisfied with the judgement, the appellants have challenged the decision on 23 the grounds which can be summarised into two: whether the learned Judge erred in finding that the 1st respondent's stoppage of the payment of his salary and allowances was lawful; and whether the learned Judge erred in awarding the 1st respondent Kshs. 35,145,000 as salary withheld from 1st March 2014 to 2nd October 2018.
17. When the appeal was called out for hearing on the Court's virtual platform on 13th November 2024, learned counsel, Ms Beatrice Akuno, appeared for the appellants, while learned counsel, Mr Sichangi, appeared for the 1st respondent. There was no appearance for the 2nd respondent notwithstanding due service of the hearing notice. Nevertheless, the claim against the 2nd respondent had been withdrawn. Both learned counsel relied on their written submissions in their entirety.
18. On behalf of the appellants, it was submitted: that that the learned Judge having found that the 1st respondent's employment was not governed by the *Employment Act*, 2007, on the authority of this Court's decision in *Attorney General & 2 Others v Okiya Omtata Okoiti & 14 Others* [2020] eKLR, the learned Judge failed to refer the matter to the correct court having appreciated the court's jurisdiction under section 12 of the *Employment and Labour Relations Court Act*; that the learned Judge erred in making an award in favour of the 1st respondent notwithstanding that he had found that the petition was not properly pleaded; that in the circumstances, the award was not anchored on any provision of the law; citing this Court's decision in *Rodgers Titus Wasike v General Motors East Africa Limited* [2020] eKLR, the decisions of the ELRC in *Banking Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd* [2014] eKLR and *Rhoda Faith Angwenyi v Narok County Republic Service Board & 2 Others* [2020] eKLR, it was submitted that since, from the medical evidence adduced, the 1st respondent willingly and without any justifiable reason, absconded duty, he was not entitled to any pay and the stoppage of his salary and benefits was proper; and that, based on the authority of *United States International University v Eric Rading Outa* [2016] eKLR in which an award of damages for the maximum 12 months was set aside, the award of Kshs 35,145,000 to the 1st respondent covering the period that the 1st respondent never served was unreasonable, excessive and outside the law.



19. For the 1st respondent, it was submitted: that the decision in *Attorney General & 2 Others v Okiya Omtata Okioti & 14 Others* (supra) does not oust the jurisdiction of the Employment and Labour Relations Court from hearing and determining matters pertaining to appointment, terms of service, and removal from office of members of constitutional commissions; that the appellant has not raised concrete points of law that this Court can consider in order to determine the appeal; that this Court should find no fault with the decision of the trial court and should uphold the same.
20. We have considered the material placed before us. This is a first appeal. We are enjoined to consider the submissions made before us as well as the record of the proceedings before the trial court. In so doing we are under a duty to analyse and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal. Caution must however, be exercised that in so doing since, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify and we must give allowance for that handicap. This position was restated in *Selle v Associated Motor Boat Co.* [1968] EA 123 where this Court held that:
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 E. A. C. A. 270).”
21. The Court, sitting as the first appellate court, must however appreciate, while undertaking its said obligation that, as held in *Alfarus Muli v Lucy M Lavuta & Another* [1997] eKLR, it will interfere with the findings of the first trial court:
- “only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”
22. The first issue for determination is whether the trial court had jurisdiction to entertain the matter. In this regard, the appellant relied on *Attorney General & 2 Others v Okiya Omtata Okioti & 14 Others* (supra). In that case, this Court was clear that:
- “it is obvious that the jurisdiction of the ELRC is precise and limited rather than unlimited. The straight forward jurisdictional question in this appeal therefore is whether recruitment of members of the National Land Commission falls within the meaning of a dispute relating to employment and labour relations. We have already set out the provisions of *the Constitution* regarding the Commission which indicate that it is an independent constitutional Commission whose members are appointed in accordance with a special procedure provided by *the Constitution* and the Act; upon appointment they are only subject to *the Constitution* and the law and not subject to the direction or control of any person or authority; they enjoy security of tenure and cannot be removed from office except for cause and following a specific procedure entailing recommendations of an independent tribunal as is the case with judges; and their terms and benefits cannot be varied to their prejudice, again just like judges.”



23. The Court concluded that:

“What all this suggests to us is that the appointment and removal from office of the commissioners of these independent commissions is not a labour and employment issue as the ELRC erroneously held, but a special constitutional innovation, a sui generis devise to address challenging governance needs and gaps. The appointment of the chairperson and members of the Commission did not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act. With due respect, it was completely off the mark for the learned judge to hold that the recruitment of the chairperson and members of the commission raised employment and labour relations issues merely because they were to be remunerated from the Consolidated Fund. On the parity of that reasoning, the election or removal from office of the President of the Republic or appointment and removal of Judges of the Superior Courts would amount to employment and labour relations issues, merely because they are remunerated from the consolidated fund. We have no doubt in our minds that the ELRC did not have any jurisdiction to entertain the three petitions that led to this appeal. A burning and well founded desire to remedy what are perceived to be violations of *the Constitution* does not justify seeking redress from a forum in which *the Constitution* has not vested the power to issue a remedy. It is a sad case of assuming that a wrong can be made right by another wrong. There is no fidelity to *the Constitution* in seeking to enforce *the constitution* through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. *The Constitution* has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.”

24. We are alive to the fact that the issue before the learned Judge did not directly revolve around the recruitment of the 1st respondent. What we have to determine is whether the dispute fell within the four corners of section 12 of the *Employment and Labour Relations Court Act* which provides that:

“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.”

25. In its judgement in *Attorney General & 2 Others v Okiya Omtata Okioti & 14 Others* (supra), this Court emphatically found

that the appointment and removal from office of the commissioners or holders of independent offices is not a labour and employment issue as it does not involve any of the parties or raise any of the employment and labour relations issues contemplated by section 12 of the Act. The Court found that:

“Pursuant to Article 249(2), the Commission is subject only to *the Constitution* and the law and is independent and not subject to the direction or control of any person or authority. The remuneration and benefits payable to, or in respect of the members of the Commission are a charge on the Consolidated Fund and cannot be varied to the disadvantage of the member during his or her term of office. (See Article 250 (7) and (8)). Article 250 (6) (b)



bars members of the Commission, from holding any other office or employment for profit, whether public or private. Once appointed to office, members of the Commission enjoy security of tenure and cannot be removed from office except for the specific grounds set out in Article 251 of *the Constitution*, namely serious violation of *the Constitution* or any other law, gross misconduct whether in the performance of duty or otherwise, physical or mental incapacity to perform the functions of the office, incompetence or bankruptcy. *The Constitution* prescribes a specific procedure for removal of a member of the Commission, which is largely similar to the procedure for removal of a judge of the Superior Courts. Upon receiving a petition for the removal of a member of the commission and being satisfied that it is merited, the National Assembly refers the same to the President, who in turn is required to appoint an independent tribunal to investigate the matter and make recommendation to the President. Under Article 251(6), the recommendations of the Tribunal are binding.”

26. The appellant took issue with the holding by the learned Judge that:

“The foregoing provision [section 30 of the *Employment Act*] does not, in my view, apply to this case because as already stated above, the contract of service herein was firmly grounded on express provisions of *the Constitution* which bound the respondents.”

27. For the sake of clarity, section 30 of the *Employment Act* provides that:

1. After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.
2. For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.
3. For the purposes of sub-section (1) and (2) "full pay" includes wages at the basic rate excluding deductions from the wages allowable under section 19.
4. For purposes of subsection (1), the twelve continuous months of service shall be deemed to commence on the date of the employment of the employee and on such subsequent anniversary dates of employment.
5. An employer shall have the right to place all his employees on an annual cycle of an anniversary date falling on a day to be determined by the employer.

28. According to the appellant, if section 30 did not apply to the case, then it necessarily follows that section 12 of the Employment and *Labour Relations Act* was also inapplicable, with the result that the court had no jurisdiction to entertain the matter. The reason given by the learned Judge for inapplicability of section 30 aforesaid was that:

“...the contract of service herein was firmly grounded on express provisions of *the Constitution* which bound the respondents.”

29. With due respect to the learned Judge, if the contract of service was firmly grounded on the express provisions of *the Constitution*, and section 30 of the *Employment Act* was inapplicable, section 12(1)



(a) thereof, which grants jurisdiction to the Employment and Labour Relations Court to deal with disputes relating to or arising out of employment between an employer and an employee, would similarly not apply. In his determination, the learned Judge found that the unlawful stoppage of the 1st respondent's salary, while he was still in office, was contrary to the protection of his remuneration by Article 250(8) of *the Constitution*. In his view, the 1st respondent's contract had a constitutional underpinning because the terms of his appointment, remuneration and removal are all expressly provided under Articles 250 and 251 of *the Constitution*. This being the position, it must necessarily follow that the 1st respondent's terms of appointment, remuneration and removal could only be determined with reference to *the Constitution* itself and not to the *Employment Act*. This Court, in the case of Governor, County Government of Kakamega & 4 others v Omweno & 12 others (Civil Appeal E176, E177 & E179 of 2024 (Consolidated)) [2025] KECA 190 (KLR) (7 February 2025) (Judgment) expressed itself as follows:

“It is impossible to deny that this is not a plain vanilla employment dispute between the members of the County Service Board and the County Assembly of Kakamega. Indeed, there is a real question whether the members of the County Service Board can, strictu sensu, be said to be employees for purposes of the ELRC Act. What is readily obvious is that the dispute is about the appropriate constitutional and statutory procedures and thresholds for the removal of members of a County Service Board. Implicated in that inquiry, is the question whether, for example, the *Evidence Act* has application to proceedings for the removal of members of the County Assembly Board or any constitutional body whose removal is regulated by Article 251 of *the Constitution*. It seems obvious to us that what *the Constitution* and the Statute envisaged is not an employment disciplinary hearing in order to remove the Chair or a member of the County Assembly Board. By making reference to Article 251 of *the Constitution*, the Statute is making clear that a constitutional process is intended. Such a constitutional process is not subject to the rules of employment law and disciplinary procedures but to rules attending to constitutional processes. Any person aggrieved by such a process – whether a participant or a public spirited individual – can seek redress – not at the Employment and Labour Relations Court but at the High Court. Differently put, the law envisages that any matters related to the appointment and removal of constitutional office holders – including holders of offices which are derivative of constitutional provisions such as County Service Board members – are to be ventilated as constitutional questions before the High Court and not as labour and employment issues before the ELRC.”

30. The dispute before the learned Judge was whether the 1st respondent, whose terms of employment, (which terms include appointment, remuneration and dismissal), were underpinned by *the Constitution*, could have those terms varied or curtailed, without reference to *the Constitution*. In our view, the dispute had a constitutional connotation and could not be said to strictly fall under section 12 of the *Employment Act*. As appreciated in Attorney General & 2 Others v Okiya Omtata Okioti & 14 Others (supra) the jurisdiction of the Employment and Labour Relations Court is precise and limited rather than unlimited. Therefore, whereas the Employment and Labour Relations Court has jurisdiction, in appropriate cases, to interpret and apply *the Constitution* in matters that arise in the context of disputes on Employment and Labour Relations, the ELRC has no original or unlimited jurisdiction to interpret and apply *the Constitution*.



31. The Supreme Court, in County Assemblies Forum v Attorney General & 3 others; Parliamentary Service Commission (Interested Party) [2022] KESC 66 (KLR), pronounced itself on the matter in the following terms:

“On the question of appropriate forum of the dispute, the trial court found that the question of enforcement of rights and fundamental freedoms even touching on the employment and labour is within the competence of the High Court pursuant to article 22. We are inclined to agree with the trial court and add that articles 23 and 165 of *the Constitution* fortifies this position as they are the provisions that gives the High Court jurisdiction to hear and determine applications for redress of denial, violation or infringement of rights or fundamental freedoms in the Bill of Rights.”

32. We associate ourselves with the above position, as we are bound to do, and find that the dispute that was before the learned Judge revolved around the enforcement of rights and fundamental freedoms of the 1st respondent pursuant to Article 250(8) of *the Constitution* which provides that:

The remuneration and benefits payable to, or in respect of, a commissioner or the holder of an independent office shall not be varied to the disadvantage of that commissioner or holder of an independent office.

33. It does not matter that the dispute touched on employment and labour. The 1st respondent’s complaint was that the only action that could be taken against him was the invocation of Article 251 of *the Constitution*. We, accordingly, find that the Employment and Labour Relations Court had no jurisdiction to determine the dispute which ought to have been heard and determined by the High Court. That being our finding, it is both unnecessary and inappropriate to deal with the other issues raised before us, so that we do not prejudice litigation, if any, that the 1st respondent may institute before the appropriate forum.

34. In the premises, we allow the appeal, set aside the judgement of the Employment and Labour Relations Court made on 2nd July 2020, in Nairobi ELRC Petition No. No.115 of 2018. We substitute therewith an order striking out the petition. We direct each party to bear own costs since the issue of jurisdiction was never taken up before the trial court.

35. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

NYAMWEYA

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL

.....

G.V. ODUNGA



JUDGE OF APPEAL

