



**Moya v Service Commander Kenya Army & 2 others (Civil Appeal
36 of 2018) [2022] KECA 117 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 117 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 36 OF 2018
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA
FEBRUARY 18, 2022**

BETWEEN

JOMO KAMAO MOYA APPELLANT

AND

SERVICE COMMANDER KENYA ARMY 1ST RESPONDENT

DEFENCE COUNCIL 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(An appeal arising from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nakuru (Stephen Radido, J.) dated 19th January, 2018 in Petition No. 24 of 2016)

JUDGMENT

1. This judgment is in respect of a ruling by Radido, J. dated 19th January 2018 in Petition No. 24 of 2016 where the learned judge declined an application for review of his earlier ruling delivered on 2nd October 2017.
2. The background of the matter is that on 23rd May 2015 the appellant instituted a constitutional petition in the Employment and Labour Relations Court (ELRC) at Nakuru challenging his dismissal from the Kenya Army. The hearing of the petition was concluded on 19th June 2017. The trial court set the date for delivery of the judgment as 29th September 2017 but on that day it was adjourned to 2nd October 2017. Come that other day the learned judge delivered a ruling to the effect that he would not render a judgment until the Court of Appeal heard and determined Nyeri Civil Appeal No. 35 of 2016, Teachers Service Commission vs Henry Kamau Ngare and Another, which was an appeal against the decision of Ongaya, J. in Henry Kamau Ngare vs Teachers Service Commission 2016 eKLR which the appellant had relied on in his submissions.



3. Being aggrieved by the said ruling, the appellant applied for review of the same vide an application dated 10th November 2017. The learned judge dismissed the application for the following reasons:

- “ 6. First, one of the primary remedies sought by the Petitioner herein was a declaration that his dismissal without terminal benefits was unconstitutional, and an order for payment of the benefits.
7. A Court of concurrent jurisdiction sitting in Nyeri declared as unconstitutional, an unfair labour practise and deprivation of property the denial of terminal benefits to a dismissed employee.
8. An appeal on the legal question is still pending before the Court of Appeal.
9. As this Court noted in the ruling of 2nd October 2017, the determination by the Court of Appeal of that question will not only implicate this Petition but nearly all unfair termination/dismissal cases in this country.
10. Secondly, legal certainty and constitutional litigation practice dictate that where a law has been declared unconstitutional, a concurrent Court should not undeclare the unconstitutionality, especially where an appeal to a higher Court is pending.
11. Three, legal certainty and constitutional validity of a statutory or contractual provision should triumph over procedural timelines/technicalities on when a decision ought to be delivered after close of hearing. The contention that the Court has breached Order 21 of the Civil Procedure Rules therefore ought not to be decisive in this type of case.
12. Four, the contention by the Petitioner that he should have been heard before the direction/order deferring judgment was rendered is misplaced as clear reasons were given for the decision, and further the Court has the authority under the Rules to manage its docket.”

4. The appellant preferred this appeal on two grounds, namely:

- “ 1. That the learned judge of the superior court erred in law and in fact in dismissing the application for review.
2. That the learned judge of the superior court erred in law and in fact in failing to consider the legal issues raised before him”.

5. The appellant urged us to allow his application of 10 November 2017 and set aside the trial court’s orders; remit the matter to the ELRC for delivery of the judgment by any judge other than Radido, J. and award him costs of the application as well as costs of the appeal.

6. When the appeal came up for hearing on 23rd November 2021, Mr. Konosi appeared for the appellant while the respondents or their representative did not show up despite service of hearing notice upon the Attorney General’s office on 27th October 2021.

7. The appellant’s learned counsel relied entirely on his submissions dated 8th November 2021. The gist of the appellant’s submissions is that it was wrong for the trial judge to deliberately withhold delivery of his judgment to await determination of Nyeri Civil Appeal No. 35 of 2016 by this Court. Counsel submitted that Article 50 (1) of *the Constitution* safeguards every person’s right to have any



dispute that can be resolved by the application of law decided in a fair and public hearing before a court; that the appellant had relied on the decision of Ongaya, J. in *Henry Kamau Ngare vs Teachers Service Commission* (supra) which was the subject matter of the appeal before this Court, and that the learned trial judge, having fully heard the matter ought to have proceeded to craft and deliver his judgment without waiting for the Court of Appeal's decision. He added that the decision by Ongaya, J. having been rendered by a court of coordinate jurisdiction, was not binding upon Radido, J. It was merely persuasive and nothing stopped the trial judge from departing from it and reaching his own independent decision.

8. The appellant's counsel further submitted that none of the parties were heard on the question of postponement of delivery of the judgment before the learned judge made the impugned ruling of 2nd October 2017. Counsel cited this Court's decision in *Gideon Munyao Mutiso vs Sarah Wanjiku Mutiso [1984] eKLR* where it was held that a decision made without hearing parties cannot be allowed to stand and it matters not that the court would have come to same conclusion anyway had it afforded the parties a fair hearing.
9. In a rather unrelated argument, the appellant's counsel urged this Court to pronounce itself on the effect of a judge's failure to deliver a judgment within sixty (60) days as prescribed under Order 21 of the Civil Procedure Rules, 2010. He submitted that the hearing having been concluded on 19th June 2017 the 60 days prescribed period lapsed on 18th August 2017 but the learned judge did not forward any reasons to the Chief Justice for the non-delivery of the judgment as required under Order 21 of the *Civil Procedure Rules, 2010*.
10. For those reasons, among others, the appellant urged us to allow the appeal.
11. We have considered the record of appeal and the appellant's submissions. Counsel for the appellant chose to submit on the two grounds of appeal together and we shall likewise consider them together.
12. In the first ruling of 2nd October 2017 Radido, J. stated that going through the appellant's submissions in preparation for drafting a judgment, he noted that the appellant had relied on the decision of Ongaya, J. in *Henry Kamau Ngare vs Teachers Service Commission* (supra) to urge that "it is an unfair labour practice for an employer to deny, withhold or reduce the pension or service pay of a dismissed employee". That holding was directly in issue in the petition that was before the learned judge. He went further to state that the said issue was the subject of Nyeri Civil Appeal No. 35 of 2016 where this Court had already granted a stay of execution in Civil Application No. NYR. 12 of 2016 (UR 7/2016) *Teachers Service Commission vs Kamau Ngare and Another*.
13. Having so observed, the learned judge delivered himself as hereunder:
 - “7. Should the Court of Appeal confirm the holding by Ongaya, J. the legal ramifications would be felt far and wide, and most probably implicate each and every unfair termination or wrongful dismissal case before this Court.
 8. In the view of this Court, it would not be prudent to render judgment in the present petition until the Court of Appeal renders itself on the legal question of whether a dismissed employee is entitled to pension or terminal dues despite and in spite of a dismissal.
 9. The court therefore orders that judgment (sic) in this petition will be rendered after the court of appeal decision, and in this respect the court directs the parties to keep tabs on the progress of the appeal in Nyeri and inform the



court appropriately, and the Respondents are also ordered to file and serve their submissions within the next 10 days”.

That is the ruling that was sought to be reviewed.

14. In our view, the learned judge gave plausible reasons for withholding delivery of the judgment in the matter that he had heard since this Court was seized of an appeal that raised more or less the same issue as the one that had been advanced by the appellant in his petition. As rightly pointed out by the learned judge, where a provision of the law has been declared unconstitutional by a court of concurrent jurisdiction, although such decision is not binding upon other courts of equal status it would create legal uncertainty and absurdity if a court of concurrent jurisdiction were to hold differently, its attention having been drawn to the earlier holding of unconstitutionality of same provision of law. If there is a pending appeal on that same issue it is only proper that pending cases be stayed to await pronouncement by the appellate court on the question or issue of unconstitutionality. Consequently, we are unable to fault the learned judge’s ruling.
15. It is worth stating that on 6th December 2020 this Court overturned the judgment of Ongaya, J. in ELRC Cause No. 47 of 2013 which the appellant had heavily relied upon in his petition.
16. We find no merit in this appeal and decline the appellant’s invitation to pronounce ourselves on the status of a judgment that has not been delivered within 60 days as required by Order 21 of the Civil Procedure Rules, 2010. This is because the issue, though of considerable importance, was not properly raised and argued in this appeal as to warrant a binding pronouncement on the same.
17. Each party shall bear its own costs of appeal.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

