IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA, KIAGE, MURGOR & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 222 of 2012

BETWEEN

KENYATTA UNIVERSITY.....APPELLANT

AND

UNIVERSITY ACADEMIC STAFF UNION.....1ST RESPONDENT

LUCY MUGWERE.....2ND RESPONDENT

(Being an appeal from the Award of the Industrial Court at Nairobi (Mukunya, J) and Mr. N.N. Odolo and Mr. M.H. Alumande (Members) dated 10th September 2009

in

Industrial Court Cause No. 160 of 2009)

****

JUDGMENT OF THE COURT

1. By an Order dated 31st May 2016, this Court directed the instant appeal be heard by a five judge bench in order to determine if this Court has jurisdiction to hear appeals emanating directly from the former Industrial Court as was established under the **Trade Disputes Act, Cap 324** of the **Laws of Kenya.** The Order was made pursuant to submission by the appellant that the decision of this Court in **The Director Kenya Medical Research Institute vs. Agnes Muthoni & 35 Others, Civil Appeal No. 15 of 2011** delivered on 10th May 2013 casts doubt on whether this Court has jurisdiction in this matter.

2. The background facts germane to this appeal are that the appellant, ***Kenyatta University***, is a Public University incorporated under the **Kenyatta University Act (Cap. 210 C of the Laws of Kenya).**

3. The 2nd respondent, ***Lucy Mugwere***, was employed by the appellant on 16th December 2002 as a tutorial fellow and later promoted to the position of Assistant Lecturer on 10th November 2003. Her contract of employment was terminated on 19th May 2007 on the ground of misconduct for failing to set an open learning examination paper – CBA 609: Employee Reward and Compensation. The 2nd respondent contended that the termination of her employment was unfair and unlawful in that she was not the one designated to teach the unit but another lecturer, one ***Dr. George Gongera***, who was paid for teaching the unit and that the said Dr. George Gongera admitted to teaching the unit and setting the exam.

4. The 3rd respondent, ***Joel Menya Otedo***, (now deceased) was employed by the appellant on 7th March 2001 as a lecturer. On 25th October 2006, he was suspended for not teaching a unit known as SCT 302: Operating Systems. He contested the suspension stating that he actually taught the unit at Hall No. W202 to those students who were available. Upon the appellant noticing the mistake, the 3rd respondent was unconditionally reinstated to his employment by letter dated 29th October 2006. However, surprisingly, on 5th December 2006 the appellant terminated his contract of employment on the ground of failure to perform his duties and participating in a strike called by the University Academic Staff Union (UASU).

5. Aggrieved by the appellant's decision to terminate their contracts of employment, the 1st, 2nd and 3rd respondents lodged a Claim dated 7th May 2009 before the then Industrial Court established under ***Section 14*** of the **Trade Disputes Act, Cap 234** of the Laws of Kenya. The

Industrial Court as then established comprised of a Judge sitting with two members or assessors. In this matter, the late Mukunya, J. sat with Messrs. N.N. Odolo and M.H. Alumande (Members). Upon hearing the parties, the Industrial Court as then constituted delivered an award dated 10th September 2009.

6. In the award, the Industrial Court issued, *inter alia,* the following orders and decree:

> *"(i) The appellant to reinstate the 2nd and 3rd respondents to their employment from the date of their respective wrongful termination with no loss of benefits which include wages and seniority.*
>
> *(ii) The salaries of the 2nd and 3rd respondents be payable from the date of their respective suspensions.*
>
> *(iii) Each party shall bear its costs.*
>
> *(iv) The salary of the 2nd respondent, Lucy Mugwere, from the date of her suspension without pay till the date of issuance of the decree is Ksh. 15,355,232/=."*

7. Aggrieved by the award, the appellant has lodged the instant appeal as a direct appeal from the Industrial Court to this Court. A preliminary point of law occasioning constituting a five judge bench is whether this Court has jurisdiction to hear an appeal filed directly from the then Industrial Court.

8. At the hearing of this appeal, learned counsel Mr. Emmanuel Wetangula appeared for the appellant; learned counsel Mr. Andrew Ombwayo appeared for the 2nd respondent while learned counsel Mr. Anthony Kiprono appeared for the 3rd respondent. Counsel informed us that the 1st respondent had stopped being active in the matter and since the 2nd and 3rd respondents are directly affected by the dispute they have opted to pursue the appeal on their own account.

9. In this appeal, whereas the appellant contends this Court has jurisdiction to hear the appeal, the 2nd and 3rd respondents urged us to find that this Court has no jurisdiction.

10. Jurisdiction being at the centre of this appeal, we are reminded of the Supreme Court dictum in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012;** where it was stated:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."**

11. It is not in dispute that this Court has jurisdiction to hear appeals from the post-2010 Constitution Industrial Court which was later renamed the Employment and Labour Relations Court (ELRC), and which is a court of equal status to the High Court. This is in line with ***Section 17*** of the **Employment and Labour Relations Court Act 2011** which states that appeals from the ELRC lie to the Court of Appeal. It is in this context, for instance, that this Court exercised jurisdiction to hear an appeal from the post-2010 Industrial Court in **JMK vs. MWM & another [2015] eKLR, Civil Appeal No. 15 of 2015.** In ***JMK vs. MWM,*** (*supra)* this Court differently constituted (***Makhandia, Ouko & M' Inoti, JJA)***, entertained an appeal from an award of the Industrial Court noting that the Court had already been re-constituted and re-named the Employment and Labour Relations Court and the cause of action arose after promulgation of the 2010 Constitution.

12. For purposes of determining the jurisdiction of this Court in pre-2010 Constitution Industrial Court matters, various statutes come into play. These are: the **Trade Disputes Act, Cap 234 of the Laws of Kenya**; the **Labour Relations Act, 2007** and the **Labour Institutions Act, 2007**.

13. The historical genealogy of the pre-2010 Industrial Court arises from ***Section 14 (1)*** of the **Trade Disputes Act, Cap 234 of the Laws of Kenya** vide Gazette Notice No. [L.N. 163/1971, 4 of 1973, Sch. L.N. 8/1989]. The former Industrial Court was initially established under the Trade Disputes Act. Subsequently, the **Labour Institutions Act No. 12 of 2007** came into force on 2nd June 2008 and ***Section 11*** thereof re-established the Industrial Court to replace the Industrial Court that had been established under ***Section 14*** of the Trade Disputes Act. Subsequently, the Trade Disputes Act was repealed by the **Labour Relations Act, of 2007** which effectively abolished the Industrial Court as was constituted under the Trade Disputes Act. ***Section 2 (4)*** **of the Fifth Schedule to the Labour Relations Act 2007** provides that:

> ***"(4) Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed:***
>
> ***(a) any trade dispute that arose before the commencement of this Act.***
>
> ***(b) any trade dispute referred to the Industrial Court before the commencement of this Act.***
>
> ***(c)any revision or interpretation of an award by the Industrial Court; and***
>
> ***(d) any summary dismissal that took place before the commencement of this Act."*** *(Emphasis supplied)*

14. Under the Industrial Court as constituted under the Trade Disputes Act and the Labour Institutions Act, a judge of the court sat with two

assessors. The Industrial Court in which a judge sat with two assessors is a tribunal subordinate to the High Court and subject to the High Court's supervisory jurisdiction. (See **Kenya Airways Ltd vs. Kenya Airline Pilots Association [2001] eKLR Miscellaneous Application No. 254 of 2001;** see also **Mecol Limited V Attorney General & 7 others [2006] eKLR, HC Misc. App. No 1784 of 2004).**

15. Bearing in mind the chronological evolution of the Industrial Court over the years, we now revert to the issue as to when the cause of action arose in the instant matter. The 2nd respondent's contract of employment with the appellant was terminated on 19th May 2007. The 3rd respondent's contract of employment was terminated on 5th December 2006. It is manifest that the cause of action arose before 27th August 2010 which is the effective date of the 2010 Constitution. It is also manifest the cause of action arose before the Labour Institutions Act No. 12 of 2007 came into effect on 2nd June 2008 and which Act established the Industrial Court that replaced the Industrial Court under the Trade Disputes Act. The law applicable to the Industrial Court under the Labour Institutions Act was the law as per the Trade Disputes Act. The Labour Relations Act which *vide* ***Section 84*** repealed the Trade Disputes Act came into force on 26th October 2007. (See **Alloys Nageri Musumba vs. Kenya Commercial Bank [2008] eKLR Civil Case 705 of 2005).**

16. Of significance to this matter, the dispute between the parties arose when the jurisdiction of the Industrial Court was exercised under Trade Disputes Act. It follows that notwithstanding the repeal of the Trade Disputes Act by ***Section 84*** of the Labour Relations Act 2007, and re-establishment of the Industrial Court under ***Section 11*** of the Labour Relations Act 2007, any dispute before the Industrial Court as established under the Trade Disputes Act is subject to the provisions of **Section 17 of the Trade Disputes Act** which provides:

> ***"17. (1) The award or decision of the Industrial Court shall be final.***
>
> ***(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise."***

17. In our view, pursuant to the provisions of ***Section 17*** of the **Trade Disputes Act** as read with the Fifth Schedule to the Labour Relations Act, any award by the pre-2010 Industrial Court whose jurisdiction was exercised pursuant to ***Section 14*** of the Trade Disputes Act is not appealable. In this matter, the award, the subject of this appeal emanated from the Industrial Court established pursuant to ***Section 14*** of the Trade Disputes Act exercising its jurisdiction subject to ***Section 2 (4)*** of the Fifth Schedule of the Labour Relations Act. In addition, the judge sat with two assessors which means the Industrial Court that heard the dispute in this matter was a tribunal subordinate to the High Court. ***Section 14*** of the Trade Disputes Act applies to the instant dispute and the award of the Industrial Court delivered on 10th September 2009 is final.

18. The legal issue in this appeal is whether this Court has jurisdiction to hear direct appeals from the pre-2010 Industrial Court. At this juncture, it is important to appreciate that the term "Industrial Court" is used in Kenya to denote five different genealogical phases/epochs of the existence of the "Industrial Court". The five phases of Industrial Court are as follows:

> *(1) Industrial Court established vide Section 14 of the Trade Disputes Act and which court ceased to exist on 26th October 2007. (This was akin to a subordinate court or a tribunal that was amenable to the supervisory jurisdiction of the High Court).*
>
> *(2) Despite repeal of the Trade Disputes Act, the Industrial Court established vide Section 14 of the Trade Disputes Act continued to exist and exercised its jurisdiction pursuant to Section 2 (4) of the Fifth Schedule to the Labour Relations Act 2007. (This was subordinate to the High Court).*
>
> *(3) Industrial Court as established by Section 11 of the Labour Institutions Act No. 12 of 2007 whose commencement date is 2nd June 2008. (This was subordinate to the High Court).*
>
> *(4) Industrial Court established by Act No. 20 of 2011 which repealed Part III of the Labour Institutions Act thereby abolishing the pre-2010 Industrial Court and established an Industrial Court under the 2010 Constitution. (This is a court of equal status to the High Court).*
>
> *(5) Statute Law (Miscellaneous Amendment) Act No. 18 of 2014 renaming the Industrial Court established under Act No. 20 of 2011 and renaming it as the Employment and Labour Relations Court established pursuant to Article 162 (2) (a) of the 2010 Constitution. (This is a court of equal status to the High Court).*

19. For each phase of the existence of the Industrial Court, the right of appeal to this Court is circumscribed as follows:

> *(a) For the Industrial Court established under Section 14 of the Trade Disputes Act, there is no right of appeal to the Court of Appeal. This is pursuant to Section 17 of the Trade Disputes Act that makes the award of the Industrial Court final and shall not be questioned or reviewed and not subject to injunction, prohibition or certiorari.*
>
> *(b) As regards the Industrial Court established vide Section 11 of the Labour Institutions Act, a right of direct appeal to the Court of Appeal is established vide Section 27 of the Act. However, this right of appeal was abolished when Part III of the Labour Institutions Act was repealed by Section 31 of Act No. 20 of 2011. In addition, the constitutionality of the said Section 27 was the subject of determination in* **The Director Kenya Medical Research Institute vs. Agnes Muthoni &35 Others, Civil Appeal No. 15 of 2011**, *where it was held the Section was unconstitutional.*
>
> *(c)For the Industrial Court that is a court of equal status to the High Court, appeal lies to the Court of Appeal pursuant to Section*

17 of the Employment and Labour Relations Court Act No. 20 of 2011.

20. Bearing the foregoing in mind, in **The Director Kenya Medical Research Institute vs. Agnes Muthoni & 35 Others, Civil Appeal No. 15 of 2011**, this Court differently constituted (***Kihara Kariuki, Nambuye & ole Kantai JJA)*** had an opportunity to consider the competence of this Court to hear appeals emanating directly from decisions of the pre-2010 Industrial Court as established under the **Labour Institutions Act No. 12 of 2007**. In arriving at the decision that this Court had no jurisdiction, the learned Justices stated:

> **"We are in agreement that both the decision appealed against giving rise to these proceedings as well as the desire to appeal against the said decision were undertaken before the promulgation of the current Constitution of Kenya 2010. We are in agreement with the submissions of learned counsel for the preliminary objector that the current Constitution is silent as to its retroactivity. To us silence means non-existent. There is no jurisdiction for the provisions on direct appeals enshrined in the current Constitution to be made to operate retrospectively to cure the alleged illegitimacy of the appeal objected to.**
>
> **Learned counsel for the respondent/appellant has urged us to take refuge under section 22 of the sixth schedule dealing with the transitional and consequential provisions under the heading "judicial proceedings and pending matters". It provides: -**
>
> **"All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution as directed by the Chief Justice or the Registrar of the High Court"…….**
>
> **The Labour Institutions Act (Supra) under which the proceedings leading to these proceedings were undertaken does not define "a court" but defines "the industrial court," as "means the industrial court established under section 11 of the said Act." This is the same court which did not have the status of the High Court then. The court whose decisions vide section 27 of the same Act were to go direct to the Court of Appeal. That is the jurisdiction the preliminary objector has said it did not and does not exist and has invited us to declare so…. It therefore means that as long as section 3 and 64 of the retired Constitution and section 3 of the Appellate Jurisdiction Act (supra) stood then as at the time appellate process objected to herein were set in motion, the Court of Appeal had no mandate to receive direct appeals from the industrial court as it was then established."**

21. In the instant matter, on the issue as to whether this Court has jurisdiction to hear the instant appeal from a pre-2010 Industrial Court award, counsel for the appellant cited ***Section 27*** of the **Labour Institutions Act** and the decision of this Court in **International Planned Parenthood Federation – vs. Pamela Ebot Arrey Effiom Civil Appeal No. 132 of 2011** where this Court differently constituted (***Warsame, Mwilu & Sichale JJA)*** held it had jurisdiction to hear an appeal directly from the pre-2010 Industrial Court. In holding that this Court had jurisdiction, the learned judges of this Court expressed themselves as follows:

> **"11. The memorandum of claim was filed on 31st August 2009 while the award was made on 4th February 2011. By the time the respondent approached the Industrial Court in August 2009, the said court operated under the provisions of the Labour Institutions Act. Accordingly, appeals to this court from awards of the Industrial Court were governed by section 27 of the Labour Institutions Act. The said section 27 provides as follows: -**
>
> **"27. (1) Any party to any proceeding before the Industrial Court may appeal to the Court of Appeal against any final judgment, award or order of the Industrial Court.**
>
> **(2) Appeals from a judgment, award, or decision of the Industrial Court shall only lie on matters of law (emphasis ours) Part III of the above Act was later deleted in the year 2011 by virtue of an amendment introduced by Act No.20 of 2011(now known as The Employment and Labour Relations Court Act) which came into operation in August 2011. This amendment in effect removed the restriction limiting appeals to this court on matters of law only.**
>
> **12. We have been careful on the question of our jurisdiction to handle this appeal as at the time the appellate jurisdiction was invoked. This is so in light of this court's previous decision in Director Kenya Medical ResearchInstitute v Agnes Muthoni & 35 others [2014] eKLR wherein the provision of section 27 of the Labour Institutions Act was considered with the finding that this court had no mandate to receive direct appeals from the industrial court as it was then established in view of the provisions of section 3 and 64 of the retired Constitution and section 3 of the Appellate Jurisdiction Act. Remedies for grievances on awards by the Industrial Court lay under judicial review, declaratory suit and /or petition.**
>
> **13. Whereas this decision on the unconstitutionality of section 27 of the Labour Institutions Act was rendered in May 2013, the notice of appeal had been filed in May 2010, the Industrial Court award having also been made in May 2010, prior to the promulgation of the current Constitution 2010. At the time of filing the present appeal in June 2011 therefore, appeals to the Court of Appeal only lay on matters of law, the decision being appealed from having been rendered on 4th February 2011 under the current constitutional dispensation which had elevated the Industrial Court, now known as the Employment and Labour Relations Court as a court with the status of the High Court under Article 162(2) (a) of the Constitution of Kenya 2010."**

22. We observe that the decision in **International Planned Parenthood Federation vs. Pamela Ebot Arrey Effiom, Civil Appeal No. 132 of 2011** is correct to the extent that the cause of action arose when the Industrial Court operated under ***Section 11*** of the **Labour Institutions Act** and the right of appeal in the case under ***Section 27*** of the Act arose before repeal of Part III of the Labour Institutions Act by ***Section 31*** of Act No. 20 of 2011.

23. In the instant matter, counsel for the respondent urged that whereas it is the appellant's submission that this Court has jurisdiction based on ***Section 27*** of the **Labour Institutions Act**, there is a decision of this Court declaring *Section* **27** of the said Act to be unconstitutional. Counsel referred us to the Ruling by this Court in **Joseph Mchere Aoko vs. Civicon Limited, Civil Application No. NAI 43 of 2012** where this Court held it had no jurisdiction to hear an appeal from the then Industrial Court. This Court (***Kihara Kariuki, PCA, Mwera & Sichale, JJA***)in declining jurisdiction expressed itself as follows:

> **"By terms of section 27 of the Act, a party aggrieved by any final judgment, award or order of the Industrial Court could appeal to the Court of Appeal but such appeals were restricted to matters of law only. The impugned section stipulates that:**
>
> **'...Any party to any proceedings before the Industrial Court may appeal to the Court of Appeal against that judgment, award or order of the Industrial Court.'**
>
> **It follows therefore that an Act of Parliament (the Labour Institutions Act 12of 2007) which was passed in the previous Constitutional dispensation did confer jurisdiction on this Court in respect of matters of law emanating from the former Industrial Court. This is the crux of this appeal.**
>
> **In the present application, the issue for determination is whether the Court of Appeal has jurisdiction to hear appeals from the former Industrial Court established under section 11 of the Labour Institutions Act No. 12 of 2007 before the Constitution 2010. …. there is no express provision either in the Constitution 2010, Appellate Jurisdiction Act, Cap 9, the Court of Appeal Rules 2010 or the Civil Procedure Act, Cap 21 providing for an appeal from the former Industrial Court to the Court of Appeal's appellate jurisdiction under Article**
>
> **164 (3) of the Constitution 2010…..the former Industrial Court established under the Labour Institutions Act, 2007 was a subordinate court to the High Court and therefore amenable to the judicial review jurisdiction of the High Court…..**
>
> **We therefore hold and state for avoidance of doubt that the Labour and Employment Court is a competent court with both *"original jurisdiction"* in labour and employment disputes arising under the new Constitution 2010 and an *"appellate jurisdiction"* for labour and employment disputes arising from the decisions of the former Industrial Court established under the retired Constitution."**

24. Further, we note that ***Section 64(1)*** of the repealed Constitution established the Court of Appeal and delineated its jurisdiction. The jurisdiction of this Court under ***Section 64(1)*** was to hear appeals from the High Court. The Section did not confer jurisdiction to hear direct appeals from any tribunal or subordinate court. In the same vein, the power of Parliament under ***Section 65(1)*** of the repealed Constitution was to establish courts subordinate to the High Court. Consequently, Parliament in enacting ***Section 27*** of the **Labour Institutions Act** conferring a right of direct appeal to this Court acted *utra vires* ***Sections 64(1)*** and ***65(1)*** of the repealed constitution. We find and hold that ***Section 27*** of the Labour Institution Act as enacted was *ultra vires*, null and void.

25. In **Maureen Odero vs. Kenya Pipeline Company Limited [2015] eKLR,Civil Appeal (Application) No. 105 of 2013,** this Court ***(Mwilu, J. Mohammed & Odek, JJA***) held that it had no jurisdiction to hear and entertain appeals from the then Industrial Court. The learned Justices of Appeal expressed themselves as follows:

> **"10. The dispute between the parties was heard by the Industrial Court of Kenya at Nairobi at the time when the said Industrial Court was a Tribunal established under the Labour Institutions Act of 2007 and not the presently constituted Employment and Labour Relations Court established under *Article 162 (2) and (3) of the 2010 Constitution.* The critical issue for determination is whether this Court has jurisdiction to entertain an appeal from the Industrial Court as established under the Labour Institutions Act No. 12 of 2007. It is not disputed that the dispute between the parties was heard by the Industrial Court constituted under the Labour Institutions Act; it is also not in dispute that the award by the Industrial Court was made on 25th May 2012 after the new 2010 Constitution had been promulgated. Jurisdiction is everything and without it a court must lay down its tools. (See Owners of the Motor Vessel "Lillian S' -v-Caltex Oil (K) Limited [1989] KLR 1)**.
>
> **11……...**
>
> **12. Guided by the decision in The Director Kenya Medical Research Institute vs. Agnes Muthoni & 35 Others**(supra)**; we stand by the same decision and hereby find and hold that this Court has no jurisdiction to entertain Civil Appeal No. 105 of 2013."**

26. The decision is **Maureen Odero vs. Kenya Pipeline Company Limited [2015] eKLR, Civil Appeal (Application) No. 105 of 2013,** is correct in law. The basic rule of thumb as regards the jurisdiction of this Court to hear a direct appeal from the Industrial Court is this: in any matter where a judge of the Industrial Court sat with assessors, this Court has no jurisdiction to entertain a direct appeal. The rationale for this is firstly, Section 27 of the Labour Institutions Act was declared unconstitutional and was repealed by ***Section 31*** of Act **No. 20 of 2011** which Act establishes the Employment and Labour Relations Court and deletes the right of appeal to this Court. Secondly, pursuant to **Section 17 of the Trade Disputes Act**, an award of the Industrial Court is final. The Section provides as follows:

> **"Section 17 (1): The award or decision of the Industrial Court shall be final. (2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction,**

certiorari or otherwise, either at the instance of the Government or otherwise."

27. Notwithstanding, the foregoing, appellant has urged us to take into account ***Section 22*** of the **Sixth Schedule** to the **2010 Constitution** which provides:

> **"All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."**

28. In our view, ***Section 22*** of the Sixth Schedule must be read with **Section 7 of the Sixth Schedule to the 2010 Constitution.** ***Section 7*** provides:

> **"Existing Laws.**
>
> **7(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."**

29. The purpose of the ***Section 7*** of the Sixth Schedule is to avoid a legal interregnum in the transition between the two constitutional orders, for it is not practical to immediately enact a whole gamut of laws under the new order. ***Section 7*** legitimizes the laws enacted under the old order and in existence on the effective date and sanctions their continuity, subject to their interpretation and application in a manner that is consistent with the new constitutional order. (See **Kassamali Co. vs. Kyrtatas Brothers[1968] EA 542** and **Royal Media Services Ltd v. Attorney General & 2 Others HC Petition No. 346 of 2012.**

30. Although the 2010 Constitution established the Employment and Labour Relations Court as a court of equal status to the High Court, this does not mean that all decisions of the pre-2010 Industrial Court now *ipso facto* are to be deemed to have been decisions of a court of equal status to the High Court. The pre-2010 Industrial Court is not a court of equal status to the post-2010 Industrial Court. The former Industrial Court was a subordinate court and a tribunal which was not a court of equal status to the High Court. We are fortified in this view as we take judicial notice that the "Judges" of the pre-2010 Industrial Court were not sworn to take oath of office as existing judges under the 2010 Constitution.

31. On the jurisdiction of this Court to hear appeals directly from the Industrial Court, our appraisal of the applicable law leads us to conclude as follows:

> *a. Pursuant to Section 17 of the Trade Disputes Act, this Court has no jurisdiction to hear and entertain direct appeals from the Industrial Court established under Section 14 of the Trade Disputes Act.*
>
> *b. The right to appeal directly to this Court that was conferred by Section 27 of the Labour Institutions Act was repealed by Section 31 of Employment and Labour Relations Court Act No. 20 of 2011 whose commencement date is 30th August 2011.*
>
> *c. This Court has no jurisdiction to hear direct appeals from the Industrial Court established under Section 11 of the Labour Institutions Act as Section 27 of the said Act was declared unconstitutional and subsequently deleted when Part III of the Labour Institutions Act was deleted on 30th August 2011.*
>
> *d. This Court pursuant to Section 17 of the Industrial Court Act No. 20 of 2011 has jurisdiction to entertain direct appeals from the Industrial Court that was established under Act No. 20 of 2011and later renamed the Employment and Labour Relations Court vide Statute Law (Miscellaneous Amendment) Act No. 18 of 2014.*

32. The upshot of our analysis and consideration of the jurisdiction question is that this Court has no jurisdiction to hear and entertain the instant appeal. For avoidance of doubt, this Court has no jurisdiction to hear a direct appeal from the Industrial Court which was a Tribunal subordinate to the High Court. This Court has no jurisdiction to hear and entertain a direct appeal from the Industrial Court in any matter where the judge sat with assessors. The final order is we hereby strike out both the appeal and cross-appeal for want of jurisdiction on the part of this Court. Each party is to bear its own costs.

Dated and delivered at Nairobi this 22nd day of March, 2019

M. WARSAME

……

JUDGE OF APPEAL

D. K. MUSINGA

……

JUDGE OF APPEAL

P. O. KIAGE

……

JUDGE OF APPEAL

A. K. MURGOR

……

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR