



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO 195 OF 2016

BETWEEN

SUMAYYA ATHMANI HASSAN.....APPELLANT

AND

PAUL MASINDE SIMIDI.....1ST RESPONDENT

NATIONAL OIL CORPORATION OF KENYA.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment & Labour Relations Court

at Nairobi (Lady Justice Ndolo) delivered on 30th November 2015

in

ELRC Constitutional Petition No. 37 of 2013

JUDGMENT OF THE COURT

[1] The appellant is the Managing Director/Chief Executive Officer of **National Oil Corporation of Kenya (Corporation)**, a government parastatal. The 1st respondent was an Internal Audit Manager employed by the Corporation on a three-year contract with effect from 1st November, 2009. The contract was terminated by a letter dated 15th June, 2011 with immediate effect. However, the Board of Directors of the Corporation rescinded the termination at a meeting held on 20th June, 2011 and, instead, the Board interdicted the 1st respondent with effect from 15th June, 2011. The interdiction was communicated to the 1st respondent by a letter dated 18th July, 2011. The 1st respondent was eventually employed by Wananchi Group as Internal Auditor with effect from 16th April, 2012 after which he tendered his resignation to the Corporation with effect from 30th July, 2012. By a petition filed in the Employment and Labour Relations Court(ELRC) on 4th November, 2013 and dated 28th October, 2013, against the appellant and the Corporation, the 1st respondent claimed that the two had breached his various rights under the Constitution.

By a judgment dated 30th November, 2015, the court made a finding that the 1st respondent's constitutional right to fair labour practices under **Article 41** of the Constitution was breached by the appellant and the Corporation, and entered judgment against the appellant and the Corporation jointly for Kshs. 3,000,000 as general damages with costs. The appeal is against judgment and decree.

[2] The petition was brought under various Articles of the Constitution; provisions of the Employment Act and those of Public Officers Ethics Act, 2003. The 1st respondent indicated in the petition that it was brought in his personal capacity; on behalf of many audit professionals in Kenya and on behalf of general public.

In the petition, the 1st respondent alleged that his constitutional rights to equality, human dignity, right to information, fair administrative action, rights against psychological torture, right to fair labour practices and right against discrimination had been violated. He also alleged that his rights under the Employment Act had been violated including the right to notice of termination of employment; reasons for termination; right of hearing and right of remedies of reinstatement and other remedies.

[3] The 1st respondent sought numerous declaratory orders including a declaration that the purported summary termination of his contract of

service was a contravention of his rights to fair labour practices and fair hearing; that the termination of contract was unconstitutional; and a declaration that the purported summary termination of the contract was unfair and unlawful termination.

The specific orders sought were:

“(a) An order that the interdiction and subsequent summary dismissal of the petitioner by the respondents was in gross violation of the Constitution of Kenya and the Employment Act, 2007 and the Public Officer Ethics Act, 2003 and therefore unconstitutional, illegal and invalid.

(b) An order that the respondent do pay general damages and compensation for contravention the petitioner’s rights and fundamental freedoms secured in the Bill of Rights.

(c) Kshs. 2,404,112 being terminal benefits.

(d) An order that the respondent do issue the petitioner with the letter of service of the time served.”

[4] The petition was opposed on the grounds contained in the replying affidavit sworn on 30th January, 2014 by *Cecilia Kalungu (Cecilia)*, the Acting Human Resource Manager of the Corporation. In the replying affidavit, the deponent referred to the facts showing the circumstances under which the 1st respondent was interdicted, and denied the claim. In addition, *Cecilia* stated that the 1st respondent had failed to show how the Articles of the Constitution pleaded relate to employment claim; that the court ought to distinguish between the employment dispute and irrelevant allegations raised under the guise of constitutional provisions; that there were no violations of the Constitution; and that the dispute is strictly employment based and ought not to be entertained.

[5] The relevant facts as derived from the petition, the documents filed and the replying affidavit can be stated briefly.

(i) By a contract dated 18th October, 2006, the 1st respondent was employed by the Corporation as an Internal Auditor for a renewable term of three (3) years. After the expiry of the initial contract, it was renewed by another contract dated 19th November, 2009 for a further renewable term of three (3) years from 21st November, 2009. Under the renewed contract, the 1st respondent was employed as an Internal Audit Manager at a monthly gross salary of Shs. 242,115 with other benefits including gratuity. The contract was terminable by either party giving a notice of not less than one month or payment of one month’s salary in lieu of the notice. The other terms of contract included confidentiality clause and compliance with the Company’s policies. The confidentiality clause provided:

“It is a condition of employment that any confidential information which may come into your possession by reason of your appointment with the Corporation must be treated as such and may not be divulged without proper authority, to any person outside the Corporation or to other company personnel or as provided under the official Secrets Act (Chapter 187 of the Laws of Kenya).”

As regards compliance with Company’s policies, the contract provided:

“you will be required to comply with the company policies as and when it is necessary.”

The appellant’s duties were expanded to include Risk Management and to Chair the Internal Corruption Prevention and integrity Committee.

(ii) On various occasions and in the course of his duties, the 1st respondent prepared and submitted internal audit reports, showing non-compliance with procurement law, irregular payments and corruption against some employees of the corporation. In March, 2013, the 1st respondent submitted cases of alleged corruption to the Ethics and Anti-Corruption Commission.

(iii) By a warning letter dated 23rd May, 2011 written by the appellant, the Corporation brought to the notice of the 1st respondent complaints by the staff which included breach of confidentiality by leaking the Corporation’s confidential information to unauthorized persons, victimizing staff by reactive audits, intimidation and abuse of office by threatening the staff with punitive action. The letter warned the 1st respondent that the Corporation would not countenance the situation. The 1st respondent denied the allegations by a letter dated 8th June, 2011. The 1st respondent also received a warning letter from the appellant indicating that he was absent from office for two days and warning him that the management would not accept such conduct. Again, the 1st respondent responded denying the allegations.

(iv) The 1st respondent complained to Criminal Investigations Department (CID) that he had received threats to kill him from employees of the Corporation, and by a letter dated 9th June, 2011, the Provincial CID Officer, Nairobi Area informed the appellant that his office had started investigations. Further, by a letter dated 13th June, 2011, the 1st respondent appealed for protection from Kenya Anti-Corruption Commission alleging that he had received death threats from the appellant. He sought protection of himself and family and security of his job.

(v) By a letter dated 15th June, 2011 written by the appellant, the Corporation terminated the 1st respondent’s employment with immediate effect and asked him to hand over his current responsibilities to the Internal Auditor –Technical Services. It seems that the Board of Directors of the Corporation held a meeting on 20th June, 2011 at which the decision to terminate the 1st respondent’s

employment was rescinded and instead the Board interdicted the 1st respondent pending further investigations.

By a letter dated 23rd June, 2011, the 1st respondent requested the appellant to provide documents of the allegations against him that led to termination and responded to the allegations. By a letter dated 18th July, 2011, the appellant interdicted the 1st respondent with effect from 15th June, 2011 on account of gross misconduct and misdemeanor. The misconduct alleged against the 1st respondent were breach of confidentiality, absenting himself from duty without authority and forgery. The 1st respondent was required to respond within 14 days. By a letter dated 1st July, 2011, KACC informed the Corporation that the termination of the 1st respondent's employment was contrary to **section 65** of the **Anti-Corruption and Economic Crimes Act** and requested the letter of termination be withdrawn. Meanwhile, the 1st respondent by a letter dated 1st August, 2011 denied the allegations in the interdiction letter.

(vi) After the interdiction of the 1st respondent, the Corporation asked the Inspectorate of State Corporations based at the Office of the Prime Minister to investigate the accusations against the 1st respondent and to do a special audit of the Corporation. By a letter dated 8th June, 2012 the 1st respondent informed the Corporation that he had been informed of the decision by the Board of Directors clearing him of the accusation raised against him and requested that the decision of the Board be communicated to him in writing. Subsequently, by a contract dated 13th March, 2012, the 1st respondent was employed by Wananchi Group as a Group Internal Auditor with effect from 16th April, 2012. By a letter dated 30th July, 2012, the 1st respondent tendered his resignation to the Corporation with effect from the date of the letter and claimed his terminal dues.

[6] The court considered the petition and made a finding that only the complaint of violation of the right to fair labour practices merited examination by the court. Upon analysis of documentary evidence, the court made findings, *inter alia*, that the allegations against the 1st respondent bordered on gross misconduct; that the 1st respondent was not subjected to mandatory disciplinary procedures set out in **Section 41** of the **Employment Act**; that the appellant and the Corporation did not give any explanation why the 1st respondent's inquiries on the status of interdiction was not responded to; that there was no explanation why the Board's decision to reinstate the 1st respondent was not implemented; that keeping the 1st respondent on interdiction for one year amounted to constructive dismissal; and that the appellant was properly joined in the proceedings as she failed to implement the decision of the Board. The court awarded Shs. 3,000,000 as general damages to the 1st respondent and ordered that terminal benefits be tabulated by the parties within the next thirty days. The court further ordered the respondents to issue a certificate of service to the 1st respondent and to pay the costs of the petition.

[7] The appeal is against the whole judgment. The 2nd respondent has filed a cross-appeal against the award of damages. The first ground of appeal states:

“The learned Judge erred in law in failing to appreciate, whether sufficiently or at all, that the 1st respondent's contract of employment did not have statutory underpinnings as to render a breach thereof actionable by way of a constitutional petition rather than by way of an ordinary suit”.

This is the main ground of appeal and it is expedient to determine it first as it goes to the root of the petition and the validity of the impugned judgment.

In support of this ground of appeal, **Mr. Isaac Wanjohi**, learned counsel for the appellant relied on the written submissions and the authorities cited. It is submitted that the learned Judge lacked jurisdiction to entertain an employment claim formulated under **Article 41** of the Constitution and misdirected herself in law by upholding the petition as competent and by proceeding with its merit hearing and determination; that the 1st respondent's cause of action was purely contractual as between employer and employee; that the learned Judge did not do analysis of the 1st respondent's claim for purposes of ascertaining jurisdiction; that the right to fair labour practices has been given effect by the provisions of **section 41- 49** to the **Employment Act**; that a litigant cannot by-pass the Employment Act, 2007 and seek to establish a cause of action under Article 41 of the Constitution unless the cause of action is based on challenging the constitutionality of provisions of **sections 41- 49** of the Constitution; that the learned judge lacked jurisdiction to entertain the employment claim formulated in terms of a petition under Article 41 of the Constitution; and that the entire judgment and decree on the merits of the claim was without jurisdiction.

Mr. Paul Munjla, learned counsel for the 1st respondent relying on the written submissions submitted that the issue of jurisdiction was neither raised nor canvassed; that the issue of jurisdiction cannot be raised for the first time in the appeal; that **section 12** of the **Employment and Labour Relations Court Act** confers jurisdiction on the court to hear all disputes relating to Employment and Labour Relations including disputes arising out of the employment between employer and employee; and that there is no express provision in the Employment Act that directs that violation of an employee's fundamental rights cannot be addressed by a constitutional petition.

Mr. Kisaka for the 2nd respondent did not address the court on the issue of jurisdiction.

[9] The appellant's counsel relied on **Barbara De Klerk v Cape Union Mart International (PTY) Ltd. Case No. C 620/2011 [2012] ZALCCT 22** – a decision of the Labour Court of South Africa, Cape Town (**Barbara De Klerk**). In that case, the claim for unlawful dismissal was based on a provision of Labour Relations Act (LRA), South Africa and section 23 of the Constitution which provides that everyone has a right to fair labour practices. A legal objection, that is a preliminary objection, was raised to the suit on grounds, *inter alia*, that a claimant could not rely directly on the Constitution without challenging the Labour Relations Act which had been enacted to give effect to the right of fair labour practices. The court upheld the objection holding at paragraph [28] of the judgment:

“The applicant has not challenged the constitutionality of the LRA in her statement of claim. It lacks the particularity it needs to sustain a cause of action as pleaded.”

In arriving at the finding the Labour Court relied on the local decisions particularly the Minister of Health & Anor v New Clicks SA (PTY) Ltd & Others 2006 (2) SA 311 (CC) where *Ngcobo, J.* stated at paragraphs 437:

“Where as here, the Constitution requires Parliament to enact legislation to give effect to constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”

The appellant’s counsel also relied on Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, a decision of this Court (KRA appeal). In that case, the respondent averred in his suit that his contract of employment which was governed by the appellant’s **Code of Conduct** was wrongfully terminated in breach of the provisions of the Code of Conduct. In his submission at the trial, the appellant’s counsel submitted that the appellant’s right of fair hearing under **section 77** of the repealed Constitution and the rules and the right of natural justice were breached. The **Code of Conduct** stipulated the steps to be taken in disciplinary process. The trial court upheld the submission and stated:

“A court of law cannot in our view, import into a written contract of service rules of natural justice and constitutional provisions relating to a right of hearing.”

The Court further stated:

“...the introduction of a constitutional dimension concerning the right of hearing into a contractual setting was a misapprehension of the law.

...

Any departure by appellant, as employer, from the strict provisions of the Code of Conduct would in the worst case scenario, only constitute a breach of contract and such breach spring from a contractual obligation and not from exercise of power conferred by statute or the Constitution.”

[10] Our research has also revealed that in Communication Commission of Kenya & Others v Royal Media Services Limited & 5 others [2014] eKLR (Communications Commission case), the Supreme Court of Kenya considered the question whether where a legislation has provided a remedy and prescribed a clear procedure for address of a particular grievance, a litigant can invoke the provisions of the Constitution for redress of such grievance. In that case, three media companies filed a constitutional petition in the High Court alleging breach of constitutional rights by the Communications Commission and others, including breach of media freedom and right to property guaranteed by **Articles 34** and **40** respectively of the Constitution. They sought various reliefs and one of the issues which arose and which was framed by the trial court was whether there had been a breach of violation of the petitioner’s intellectual property rights. On that issue, the High Court held that the petitioners had not established that the intellectual property rights had been infringed and that a violation of intellectual property rights was a matter to be addressed by Copyright Act and not by a petition to enforce fundamental rights. On appeal to the Court of Appeal, the Court of Appeal held, among other things, that there was a violation of appellant’s intellectual property rights. The issue was canvassed in the Supreme Court. Noting that **section 35(4)** of the **Copyright Act** provides an avenue for redress in the event of violation, the Supreme Court said at paragraph [256]:

“The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

After citing two foreign decisions, the Supreme Court concluded at paragraph [258]:

“From the foundation of principle well laid in the comparative practice, we hold that – 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights was a plain copyright – infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

[11] The 1st respondent’s counsel has even cited the case of Speaker of the National Assembly v Karume [2008] KLR 425 for the principle that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed”.

[12] The right to fair labour practices is part of the human rights secured by the Bill of Rights under Article 19 of the Constitution. By Article 21(4) of the Constitution, the State is required to enact and implement legislation to fulfill its international obligations in respect of Human Rights and Fundamental Freedoms.

By **Article 22(1)** as read with **Article 22(3)** and the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No. 117 of 2013**, the Bill of Rights is enforced by filing a petition in the High Court and by

Article 23(3), the Court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The **Employment Act, 2007 as revised in 2012** – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to “*declare and define the fundamental rights of employees*”. **Section 3** thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The employment and Labour Relations Court Act stipulates the procedure for the enforcement of employment rights.

[13] Turning to the current appeal, the contention by the 1st respondent’s counsel that the issue of jurisdiction of the court was not raised, is with respect erroneous. **Cecilia Kalungu** in her replying affidavit pleaded that the 1st respondent had failed to show how the Articles of the Constitution pleaded relate to employment claim and that there were no violations of the Constitution as alleged, as the disputes were strictly employment based. In addition, she asked the court to distinguish between the employment dispute and allegations of violation of the Constitution and stated that the petition ought not be entertained. Moreover, the issues raised by the appellant’s counsel in his written submissions in the trial court were whether the 1st respondent’s constitutional rights had been violated as alleged. Those issues relate to the cause of action and the competency of the petition. The trial court did not decide these issues.

[14] The 1st respondent’s counsel further submitted that the ELRC had no jurisdiction under **Article 23(3)** to entertain the constitutional issues raised in the petition and to grant the orders that it made. The issue raised in this appeal is not whether or not ELRC has jurisdiction to enforce the Bill of Rights particularly the labour rights under Article 41. Indeed, in **Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR**, this Court in essence, held that in any matter falling within the statutory jurisdiction of ELRC, it has jurisdiction to enforce not only Article 41 rights, but also fundamental rights ancillary and incidental to the employment and labour relations including the interpretation of the Constitution within the matter before it.

Rather, the issue raised in the appeal is broadly whether the ELRC had jurisdiction to entertain a constitutional petition alleging breach of a contract of employment governed by the Employment Act and the Employment and Relations Court Act, which is a different issue altogether.

[15] It is evident that the petition was hybrid combining violations of various constitutional rights; employment rights under the Employment Act and breach the Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st respondent by the Corporation and appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act.

[16] The **Article 41** rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

We adopt and uphold the general principle in the persuasive authority in **Barbara De Klerk** (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in **Communications Commission** case (supra).

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. That finding disposes of the entire appeal including the cross-appeal filed by the 2nd respondent.

[18] In the premises:

- (i) the appeal is allowed,**
- (ii) the judgment of the lower court is set aside in its entirety,**
- (iii) the cross-appeal is dismissed,**
- (iv) the 1st respondent shall pay the costs of this appeal and costs in the court below to the appellant,**
- (v) there shall be no orders as to costs in respect of the cross-appeal.**

Dated and delivered at Nairobi this 6th day of December, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR