IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & MURGOR JJ.A)

CIVIL APPEAL NO. 279 OF 2013

BETWEEN

FRANCIS GATHUNGU……APPELLANT

AND

KENYATTA UNIVERSITY…….RESPONDENT

(Appeal from the Judgment and Decree of the High Court at Nairobi (Lenaola, J) dated 2nd August, 2012

in

H.C. Petition No. 633 of 2008)

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JUDGMENT OF THE COURT

The appellant, **Francis Gathungu**, was employed by Kenyatta University (Respondent) in the year 1979 as a Chief Technician in the workshop of the Faculty of Science.

Sometime between January and April, 1996, it was alleged that a compressor motor in the yard outside the respondent's science workshop was stolen. Pending investigations, the appellant was suspended effective 8th May, 1996. Subsequently, on 6th June; 13th June; 25th July, and 24th August, 1997 he was summoned to the Senior Staff Disciplinary Committee but no proceeding took place.

However, on 3rd March, 2000, the proceeding took place wherein the charges laid against Francis were read out as follows:-

- ***Loss/theft of a compressor motor and***
- ***Negligence while performing duties as a Chief Technician leading to loss/theft of the compressor motor.***

He was found innocent for gross misconduct and reinstated to his job but the respondent refused to pay his salary arrears in spite of the assurances contained in the letter of 21st June, 1996 reinstating him.

He challenged the action of the respondent as being unlawful on the grounds that it contravened his rights under Sections 73, 74, 75, 77 (a), 82 of the Repealed Constitution. In his Claim before the High Court he sought;

a. A declaration that his rights under section 73, 74, 75, 77 and 82 of the Constitution were contravened by the respondent between 8th May, 1996 and 3rd March, 2000;

b. A declaration that he is entitled, in restitution, to Kshs. 18,967,737 the salaries withheld between 8th May, 1996 and 3rd March, 2000 together with compound interest from 8th May, 1996 to date of judgment;

c. 8th May, 1996 to 3rd March, 2000 salary of Ksh. 18,967,737;

d. General damages for violation of his rights under sections 73, 74, 75, 77 and 82 of the Constitution;

e. Exemplary damages; and

f. Costs of this petition.

The respondent filed a Replying Affidavit sworn by its Deputy Vice-Chancellor, **Mr. Geoffrey Muluvi**, on the 28th January, 2009. He denied the appellant's averments and maintained that its action to withhold the appellant's salary was undertaken within the context of the appellant's contract of employment. It was the respondent's further contention that Francis should have brought a claim in the civil courts as opposed to a claim under the Bill of Rights. During the investigations into alleged misconduct, he was expressly informed that the proceedings before the Disciplinary Committee were internal and were not in the nature of a hearing before a Tribunal or a Court and therefore representation by Counsel was not an expected right.

Upon consideration of the matter the learned judge dismissed Francis's claim by his judgment dated 2nd August, 2012 and made these concluding observations;

"In the end therefore, I see no reason to find that any of the fundamental rights and freedoms cited by the Petitioner have been infringed upon and I have chosen to say nothing of the substance of the claim for Ksh. 18 million and the reasons are obvious from the aforegoing. Parties should not use the sacrosanct Bill of Rights in our Constitution to pursue ends that do not meet its expectations. This Court will grant Orders to deserving litigants but will in equal measure turn away those that abuse its processes and the limits set by the Law."

In a rather inelegantly and argumentatively crafted memorandum of appeal contrary to the express provisions of rule 86(1) of the Rules of this Court, the appellant complains that the learned judge erred in law and in fact by;

- ***Misconstruing his jurisdiction and powers under section 84 of the independence constitution.***
- ***Failing to appreciate and hold that the appellant had a cause of action for contravention of his fundamental rights and freedoms under section 84 of the independence constitution and not an industrial one for hearing by the ordinary Civil Courts.***
- ***Holding and finding, outside of the parties? pleadings, that the appellant was attempting to avoid limitations for causes of action based on contracts and ignoring and failing to employ the approach advised by this Honourable Court in the case of Rashid Odhiambo Alogoh and 245 Others vs Haco Industries Limited, Civil Appeal No. 110 of 2001.***
- ***Failing to find and hold that the appellant?s retained/withheld salary constituted property within the meaning of section 75 of the formerconstitution and therefore, his right to property had been violated.***

- ***Failing to hold that even under the common law, the respondent was under obligation to pay full salary and that there is no right to suspend without pay and holding as a fact that the appellant was paid half of his salary during the period of his suspension.***
- ***Failing to find and hold that the appellant?s fundamental rights and freedoms under***

section 73, 74, 77(9) and 83 of the former Constitution had been violated and therefore, not finding and holding that the appellant was entitled to the reliefs he has sought under section 84 of the former Constitution.

Mr. Kuria, learned Senior Counsel for the appellant, filed submissions on 2nd May, 2017 in which he stated that the appellant lodged a claim for violation of his rights in 2008 under **Sections 72, 73, 74, 75, 76, 82 and 84**of the **former Constitution**, given that it was before the promulgation of the Constitution of Kenya, 2010.

Counsel contended that at the time of institution of the petition, the Employment Act of 2007 had been enacted and that under **Section 87 (2)** thereof the Industrial Court had exclusive jurisdiction to determine complaints arising from the rights or liabilities of either party.

Placing reliance on ***UNITED STATES INTERNATIONAL UNIVERSITY (USIU) vs. ATTORNEY GENERAL [2002] eKLR***, for the proposition that the Parliament did not have the constitutional authority under the former Constitution to create a court of equivalent status with the High Court. He submitted that the Industrial Court existed before the promulgation of the Constitution of Kenya, 2010 and did not have jurisdiction to hear the appellant's dispute which involved the contravention of his rights and fundamental freedom under the former constitution. Instead, it is the High Court that had the jurisdiction to determine the appellant's petition as required by **Section 84** of the **former Constitution**.

He went on to point out that the High Court went outside of the pleadings of the parties to find and hold that the appellant was attempting to avoid the time limitation for causes of action based on contracts by presenting the claim as a constitutional one. Counsel cited in aid of those submissions this Court's decision in ***INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER vs. STEPHEN MUTINDA MULE AND 3 OTHERS [2004] eKLR***, where this Court had opined that the court is bound by pleadings of the parties as they are themselves. He asserted that even were the claim to be subjected to **Section 4** of the **Limitations of Actions Act**, it was still not time barred, having been filed on 13th October, 2008 which was within the stipulated 6 years from the date of the accrual of the cause of action.

Counsel next faulted the learned judge for failing to examine whether or not the appellant's rights and fundamental freedoms alleged to have been violated were really contravened. He relied on this Court's decision of ***RASHID ODHIAMBO ALLOGOH AND 245 OTHERS vs. HACO INDUSTRIES LIMITED [2005] eKLR*** to the effect that as to whether there had been a contravention of rights and freedoms, the learned judge ought to have examined that evidence of the appellant and the facts of the appeal against each and every right and fundamental freedoms alleged to have been contravened. He contended that it was obvious that the appellant's rights and fundamental freedoms were violated by the respondent.

Counsel proceeded to submit that the right to property under Section 75(1) of the Constitution was violated by the respondent's act of withholding the appellant's salary during suspension. In elaborating this, he cited *Chanan Singh J.,* who in his article

„Nationalisation of Private Property and Constitutional Clause Relating to Expropriation and Compensation' posited that money under a contract of service or any other contract has been defined as property. He also relied on ***CABIAKMAN vs. INDUSTRIAL ALLIANCE LIFE INSURANCE CO. [2004] SCC 55***, to assert the underlying principle that requires an employer to treat dismissal and suspension as different incidents and that during suspension one should be paid.

The appellant then contended that it was clear from the record that the right to a fair hearing, due process and right not to be subjected to torture, cruel and inhuman treatment of the appellant was violated. This is because the appellant was subjected to two and half years without pay and yet he had two wives and ten children who depended on him for upkeep. He relied on ***NUUTINEN vs. FINLAND, Application No 32842/96***, in which the European Court of Human Rights considered the reasonableness of the time taken

to determine a matter. He argued that for the disciplinary proceedings to take two and half years to commence and thereafter about a year to complete was unreasonable. Relying on ***KIMANI vs. ATTORNEY GENERAL [1969] EA 29*** which held that a want of right and want of remedy are reciprocal, Counsel urged this Court to grant the remedies as prayed in the petition.

In conclusion, **Mr. Kuria** submitted that by virtue of the labour law statutes and also under article 41 of the Constitution of Kenya, 2010 that protects the right to fair labour practices, the appellant should not have been exposed to the difficulties in his condition which were exploited by the respondent. He therefore urged this Court to set aside the orders of 2nd August, 2012.

For the respondent, learned counsel **Mr. Imende** also filed submissions dated 23rd June, 2017 stating that the appellant's claim arose from an employment contract relating to unpaid salary during the suspension period. There was therefore no real constitutional question to be determined by the court. The appellant thus violated the principle of avoidance as propounded by the Supreme Court in ***COMMUNICATIONS COMMISSION OF KENYA AND OTHERS vs. ROYAL MEDIA SERVICES AND OTHERS [2014] (CONSOLIDATED) eKLR:*** a court will not determine a constitutional issue, when the matter before it may properly be decided on another basis.

Counsel next stated that **Section 90** of the **Employment Act** stipulates a limitation of 3 years for civil action or proceedings based or arising out of a contract of service. The appellant's claim for reimbursement of the withheld salary was barred by statute by the time the petition was filed. He faulted the appellant for failing to take any action to enforce his perceived rights under the employment contract despite being informed by the respondent through a letter dated 15th March, 2000 that he would not be paid that money.

Counsel argued that 15th March, 2000 is the effective date from which limitation period ought to be computed. He dismissed the appellant's explanation that the limitation period started running on 10th December, 2003 as unsatisfactory because nothing could change the fact that his claim for payment of withheld salary was declined on 15th March, 2000. The learned judge was right, counsel argued, to find that the petition was filed mischievously with intention to circumvent the strictures of limitation of actions.

On the question whether the petition was sustainable as against the respondent, he referred to this Court's previous holding that *under the rubric of the repealed Constitution of Kenya*, the custodian of fundamental rights was the State, and no petition raising alleged breaches of fundamental rights could be sustainable against the respondent. See ***THOMAS PATRICK GILBERT CHOLMONDLEY vs. REPUBLIC [2008] eKLR***.

He extolled the learned judge for having analyzed the facts of the case against each and every allegation of breach of right and fundamental freedoms made by the appellant and found no substance in the same. Counsel's comment on ***Section 75(1)*** of the ***Constitution*** was that the learned judge did not use it as a basis for finding that the respondent violated the appellant's right to property. He contended that the right to property did not envisage a claim of the nature the appellant presented in the High Court. Instead **Section 75(1)** dealt with compulsory acquisition that could only be undertaken by the State.

Mr. Imende argued further that under ***Section 77(9)*** of the ***repealed constitution***, the right to fair hearing was protected but that it does not apply to the respondent or its Disciplinary Committee. This is because it was neither a court nor other adjudicating authority prescribed by law, he contended. He cited ***DEEPAK CHAMANLAL KAMANI vs. PRINCIPAL IMMIGRATION OFFICER & 2 OTHERS [2007] eKLR*** where it was held that in the case of the Kenyan Constitution *"the law"* must be statute law and the disciplinary committee was not the creature of any statute.

It was argued that in light of employment related disciplinary proceedings the learned judge correctly found that there was no right to legal representation under the repealed Constitution. According to the respondent, the Disciplinary Committee had autonomy over its own procedure. He referred to the decision of this Court in ***JUDICIAL SERVICE COMMISSION vs. MBALU MUTAVA & ANOTHER***

[2005] eKLR which cited with approval the decision by Lord Denning, MR, in ***SELVAJAN vs. RACE [1976] 1ALL ER 12,*** to the effect that an investigating body is the master of its own procedure.

Regarding the liquidated claim for unpaid salaries, Mr. Imende contended that in so far as the appellant had not filed an ordinary suit to recover the same, he was not entitled to it as an action in restitution is a common law remedy and has no constitutional character. Moreover, the appellant did not demonstrate how he arrived at the cumulative sum claimed while the compound commercial bank interest rates applied on his salary has no basis in law.

Counsel finally countered the cases cited by the appellant, namely, ***FELIX NJAGI MARETE vs. ATTORNEY GENERAL [1987] KLR 690, WANYIRI KIHORO vs. THE ATTORNEY GENERAL, CIVIL APPEAL NO 155 OF 1988 and DOMINIC ARONY AMOLO vs. ATTORNEY GENERAL [2010] eKLR***, by urging that they were all cases of alleged breaches of fundamental rights against the State but herein the claim arose from a contract of employment, and as the respondent was not the state nor an arm of the State, the remedy of general and exemplary damages could not lie. He contended that the justice system should discourage, by not accepting jurisdiction over them, ordinary disputes dressed up as constitutional matters in a bid to avoid following procedures provided for in law. He urged us to dismiss the appeal with costs.

We are aware of this Court's jurisdiction on a first appeal under ***Rule 29 (1) (a)*** of the ***Court of Appeal Rules*** to re-appraise the evidence and to draw independent inferences of fact. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is unsustainable or bad in law. We further take cognizance that ***Section 17 (2)*** of the ***Industrial Court Act*** which restricted appeals from the Industrial Court to matters of law only was deleted by Act No. 18 of 2014 in November 2014 thus extending our jurisdiction to consideration of actual issues as well.

Having considered the entire record of appeal, the submissions of learned counsel and the law, the main issue for determination in this appeal is whether the petition was premised on employment contract only or it raised constitutional issues.

We say at the outset that the first port of call in the legal relationship between the petitioner and the respondent is the contract of employment dated 27th February, 1979. In case of a dispute arising between the parties, it would be the first place to look in attempting a resolution. The petitioner's contract adopted terms of service for technical grades of which ***Clause 9.4*** deals with ***removal for good cause*** providing, *inter alia*:

> ***"When in the opinion of the Vice Chancellor, there has been good cause as defined below, the Vice Chancellor shall have the power to suspend the appointment of a member of staff, and refer his case to a committee appointed by Council with powers to terminate with good cause a member of staff?s services on these terms."***

In the view of the learned judge, the dispute was whether the appellant was entitled to payment of his salary and other benefits during the period of his suspension. It is clear to us, as it was to him, that the dispute is really an industrial one which ought to have been made as a civil claim and not a constitutional matter. In the graduated scheme of dispute resolution envisaged in the contract, where no settlement is arrived before the Council, either of the parties could refer the matter to the Industrial Court for further action. Thus, the contract, general terms of service and the Employment Act were and remain paramount in determining any dispute between the parties.

We respectfully agree with and endorse the sentiments expressed in ***SPEAKER OF THE NATIONAL ASSEMBLY vs. KARUME [1990-1994] EA*** that;

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

We find and hold, as did the learned judge, that the appellant did not present a sufficient basis to persuade the Court that his grievances are constitutional violations, which could be addressed by way of ordinary suit. He did not and has not shown that the facts in this dispute demanded that the courts apply the Bill of Rights to the perceived grievances. We cannot ourselves find nor have we been shown any logical, lawful or reasonable basis upon which the claim can be elevated to the level of a constitutional dispute implicating and involving violation of his fundamental rights on account of non-payment of salary during his suspension.

We think, with respect, that a willy-nilly attempt at constitutionalizing every common dispute must be discovered, named and rebuffed. This is by no means a manifestation of hostility towards upholding the Bill of Rights or fundamental of freedoms but rather a pragmatic approach to adjudication. The courts must be vigilant to confine constitutional determination to disputes that raise and invoke authentic and genuine constitutional questions. In the South African decision of ***CARMICHELE vs. MINISTER OF SAFETY AND SECURITY*** ***[2001] [4] SA 938, 2001 [10] BCLR***, the court gave guidance on the demarcation between constitutional grievances and contractual or common-law grievances, with which we respectfully agree;

> ***"Where the Court determines rights asserted by a Party do not relate directly to the Bill of Rights, it may still apply the Bill of Rights to the dispute. It must always infuse any law with the general spirit, purport and objects of the Bill of Rights. The Court is not confined by the Pleadings filed by the Parties; it must be prepared to raise of its own accord constitutional issues that may affect a legal relationship, interpretation of legislation or the development of the common-law. Simply because an interpretation of a statute, or common law rule, would in the abstract raise some kind of constitutional issue does not mean Parties adopt constitutional argument in every dispute. The Court likewise need not provide a constitutional analysis of the status of common-law or piece of legislation in every case which such rule is dispositive."***

These sentiments also accord with the principle of avoidance as propounded by our Supreme Court in the ***COMMUNICATIONS COMMISSION OF KENYA & OTHERS*** case (supra), our following and application of which persuade us to eschew an attempt at deciding this ordinary, straight-forward dispute on constitutional grounds when the general law suffices on the point.

We find the dispute herein was not a suitable matter to be characterized as or presented as a constitutional petition. It was no more than a regular employment dispute between an employer and an employee based on the contract of employment, and statutes governing that contract. The remedies sought were, on the facts, unavailable under the Constitution and the learned Judge was within rights and entirety justified in dismissing the petition.

Ultimately we are unpersuaded and therefore see no reason to interfere with the learned Judge's decision. This appeal is devoid of merit and we order it dismissed with costs to the respondent.

Dated and delivered at Nairobi this 26th day of January, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR