



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, WARSAME & G.B.M. KARIUKI, JJ.A.**

**CIVIL APPEAL NO. 215 OF 2007**

**BETWEEN**

**JAMES MUKUHA GICHANE ..... APPELLANT**

**AND**

**THE NATIONAL HOSPITAL INSURANCE FUND..... 1ST RESPONDENT**

**MAJOR NDUNDA ..... 2ND RESPONDENT**

**ATTORNEY GENERAL ..... 3RD RESPONDENT**

**INSPECTOR JOSEPH NZIOKA ..... 4TH RESPONDENT**

***(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh & Emukule J) delivered on 9th day of May 2007***

**in**

**H.C.C.C. NO. 1150 of 2005)**

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**JUDGMENT OF THE COURT**

- 1.** The record of appeal shows that the appellant, James Mukuha Gichane, was an employee of the National Hospital Insurance Fund (NHIF), the 1st respondent, from 1992 until 2003 when he was dismissed on account of gross misconduct.
- 2.** The appellant appeals to this court against the decision of the High Court (Emukule & Wendoh, JJ) delivered on 9th May 2007 dismissing as an abuse of the process of the court, his claims against the National Hospital Insurance Fund (NHIF), Major Ndunda, The Attorney General, Inspector Joseph Nzioka and Constable Sawe, the 1st, 2nd, 3rd, 4th and 5th respondents respectively in the Originating Summons dated 24th September 2005.
- 3.** The claims made by the appellant against the respondents were for arrears of salaries and damages allegedly for destruction of his career. The appellant sought a multiplicity of declarations and orders against the 1st and 2nd respondents requiring the latter to undertake investigations with regard to the appellant's rights under section 77 of the repealed Constitution.

4. In his affidavit in support of the originating summons, the appellant averred that the 1st respondent terminated his employment on 1st November 2003. He averred that the termination was illegal and followed improper investigations by the 2nd respondent, a security officer of the 1st respondent. The appellant alleged that the 1st and 2nd respondents used the 4th and 5th respondents, both police officers, to harass and intimidate him.

5. It was the appellant's case that the termination of his employment on 1st November 2003, was based on an allegation that he assisted one Ayub to make a fraudulent claim for benefits from the 1st respondent. When the matter was referred to the police, the appellant claims to have been made to sign an admission that he had assisted Ayub to make a fraudulent claim to the 1st respondent. Although the appellant was arrested on account of that, he was not charged with a criminal offence. However, he averred that as his employment was terminated by the 1st respondent on the grounds of forgery and perpetrating fraud, he has become unemployable. The appellant submitted that he started receiving half salary in December 2003 when he was interdicted and "on 6th July 2004 his employment was terminated with effect from 1st November 2003". He claims that he was held in servitude by the 1st respondent and that the respondents violated his fundamental rights enshrined in the repealed constitution particularly the rights to dignity and protection to his means of livelihood. These allegations were denied by the respondents.

6. On his part, learned counsel for the respondent relied on the written submissions filed in Court on 3rd July 2015. In highlighting the same, the learned counsel pointed out that the High Court had interrogated whether the appellant's claim was a contractual dispute relating to employment or whether it related to breach of fundamental rights under section 84 of the repealed constitution. Counsel distinguished the decision in the case of **Wanyiri Kihoro v. The Attorney General** (Court of Appeal (Nbi) Civil Appeal No.151 of 1988) which he said related to torture and was not relevant to the case in this appeal where the germane issue relates to the question whether there was a breach to the contract of employment between the appellant and the 1st respondent or breach of a fundamental right.

7. The suit was heard by the High Court in exercise of its original jurisdiction and a determination was made as aforesaid.

8. Aggrieved by the High Court decision dismissing his claims, the appellant preferred this appeal. In his memorandum of appeal, the appellant put forward a total of 17 grounds of appeal.

9. In a nutshell, the appellant contended in the grounds of appeal that the High Court erred in the impugned judgment in that it did not appreciate the nature and scope of section 84(2) of the repealed constitution; that it erred in holding that the only remedy the appellant could seek was in damages on account of termination of employment; that his right to property had been infringed; that his right also to life under section 71 of the repealed constitution had been infringed as was also his right to protection against torture, cruel and inhuman treatment under section 73 of the repealed constitution; that in failing to grant the reliefs sought, the High Court also erred.

10. When the appeal came up for hearing before us, learned counsel **Mr. P. Gacheru Nganga** appeared for the appellant while learned counsel **Mr. C. N. Maithya** appeared for the 1st and 2nd respondents.

11. Mr. Gacheru had on 14th May 2015 filed written submissions on of the appellant and on 12th and 17th May 2015, a list of authorities and a supplementary list of authorities respectively. Mr. Gacheru adopted and relied on the written submissions and authorities filed and proceeded to highlight the submissions by emphasizing that the High Court erred, in its finding that no breach of fundamental rights was proved; further, that the High Court did not interrogate the matter properly; it was his contention that the High Court had jurisdiction under section 84 of the repealed constitution to deal with the issue of breach of fundamental rights notwithstanding that the appellant also had a civil remedy; in counsel's view, the High Court was more inclined to look at the civil remedy as opposed to fundamental rights; that the High Court ought to have approached the matter in line with the decision in the case of **Rashid Odhiambo Allogoh & 245 Others v. Haco Industries Ltd** [Civil Appeal No.110 of 2001]; that there was misconception as regards the remedy the court could grant; that the appellant was entitled to damages

on account of breach of fundamental rights; that such damages ought to be in the vicinity of Shs.10 million; that the appeal had merit; that as the litigation had taken a considerable amount of time, this Court should eschew sending back the matter to the lower court for hearing.

12. We have duly read the record of appeal and filed written submissions and have duly considered the same as well as the oral highlighting by both counsel. We have also read the authorities cited.

13. We are alive to the fact that this is a first appeal as it springs from the decision of the High Court acting in the exercise of its original jurisdiction. Consequently, we are enjoined to re-appraise the evidence and to draw our own inferences of fact. In our fidelity to the principle in **Selle v. Associated Motor Boat Co** [1968] EA 123, we are enjoined to and shall consider the evidence adduced, evaluate it and draw our own conclusions ***“always bearing in mind that we have neither seen nor heard the witnesses and should make due allowance in that respect...”***

14. In the two judge impugned decision of the High Court, the Court found that ***“what the appellant really wanted to enforce was a contract of service and there was no breach of any fundamental right.”*** The court further expressed the view that if the appellant ***“had any claim, he should have pursued it in the ordinary civil courts but not come by way of constitutional application.”***

15. The High Court further stated-

***“the framers of section 84 of the Constitution cannot have intended that the Constitutional provisions be used in place of the ordinary law of contract. S.84 of the Constitution should only be invoked if there is violation or threatened violation of a fundamental right and even if the court were to entertain other claims outside the Constitution, those remedies or claims should be secondary to or in addition to the claims or remedies sought under the Constitution.”***

***“Was there misfeasance?”***

***“Sir William Wade in ADMINISTRATIVE LAW 9TH ED defines the tort of misfeasance in public office to include deliberate or injurious wrong doing or misadministration or unlawful acts causing injury. After considering this whole Application we find no such deliberate injurious act committed by the respondents. The respondents, after some allegations of fraud, which were followed by investigations, decided to terminate the Applicant’s services. The Applicant and 1st respondent cannot work together if they do not trust each other and his services were terminated.”***

***“We find this is a matter arising out of a purely contractual obligation and should have been adjudicated in the ordinary civil courts where it would have been considered on merit and damages would have been awarded if deserved. We find the application to be an abuse of the court process and dismiss it with each party bearing their own costs.”***

16. The issues that have been raised in this appeal are two, namely, whether the High Court evaluated the evidence properly and secondly whether the appellant had established that his fundamental rights as alleged had been violated and if so the relief thereof.

17. The thrust of the appellant’s case is that his employment with the 1st appellant was a property right, but was it? He cited section 75 of the repealed Constitution and contended that he was deprived of his property by dint of termination of his employment which he considered illegal. Was the appellant’s employment, even if it be of permanent nature, property as understood under section 75 of the Constitution (now repealed)? The section forbade compulsory taking or acquiring of property of any description except where taking of possession of such property or acquisition was necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit and such necessity affords reasonable justification and provision is made for full compensation. The word “property” is defined by Black’s Law Dictionary (Ninth Edition) -

***“as the right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership (the institution of private property is protected from undue governmental interference) also termed bundle of rights [cases: constitutional law – property]***

***“Any external thing over which the rights of possession, use and enjoyment are exercised, the airport is city property.***

**18.** This definition shows that property in relation to section 75 of the repealed constitution connotes tangible things, possession or acquisition of which could be taken. But property rights could also include ownership of intangible things such as trademarks, and patents, etc. It seems that section 77 did not allude to forms of property that were intangible and clearly employment did not come within the amplitude of the term property under the section. The High Court in the case of **A. Mbogholi Musagha v. The Attorney General** [H.C. Misc 1062 of 2004] rightly held that –

***“the office of a judge cannot be regarded as property in which he would have a proprietary interest in the sense of a physical object like land, domesticated animals or machines ...”***

**19.** The appellant was an employee of the 1st respondent. His grievance was with regard to termination of employment. He regarded his employment as property which it was not. He regarded the termination of his employment as illegal and a breach of his constitutional right, on the basis of section 75 of the repealed constitution. If, as is the case, the employment was not property, there can be no question of breach of section 75 (supra).

**20.** The circumstances of this appeal show that the appellant’s claim, based, under the constitution (now repealed) was misplaced. The alleged breach of fundamental constitutional right was not proved. The grievance of the appellant related to termination of employment and the only issue for determination was whether he was lawfully terminated. No matter how broadly the scope of fundamental rights is interpreted, it cannot encompass ordinary tortious and contractual rights between individuals that do not bear on human or fundamental rights. Thus, the rights of an employee vis a vis the employer in ordinary circumstances do not connote breach of fundamental rights. In this appeal, the relationship between the appellant and the 1st respondent being that of an employee and employer relationship, was pegged on contract. The issue of right to life which the appellant alleged was not discernible and could not arise under the contract. It would be a dangerous precedent to hold that termination of employment, if not lawful, would give rise to breach of fundamental rights or would violate the right to life! The amplitude of the appellant’s claims in the circumstances of this appeal does not extend beyond labour law. The allegations of breach of fundamental rights were contrived and bereft of evidence to support them. The high Court was spot on in its finding that the circumstances of the appellant’s claim, if true, hinged on termination of employment and belonged to a civil or labour court. We entirely agree.

**21.** The answers to the issues posed above are in the negative. It is our finding that the High Court correctly evaluated the evidence and arrived at the right conclusion, namely, that the appellant failed to prove breach of fundamental rights or torture and in the end his claim was rightly rejected. We see no merit in the appeal. We uphold the decision of the High Court and dismiss the appellant’s appeal with costs to the respondent.

**Dated and delivered at Nairobi this 3rd day of March, 2017.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI SC**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**