IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO 251 OF 2014

BETWEEN

REGISTRAR OF TRADE UNIONS.......................................APPELLANT

VERSUS

NICKY NJUGUNA.. 1ST RESPONDENT

STEPHEN M. KYALO...2ND RESPONDENT

STEPHEN M. KARANO...3RD RESPONDENT

PAUL GICHERU MARUA...4TH RESPONDENT

CENTRAL ORGANIZATION OF

TRADE UNIONS KENYA..5TH RESPONDENT

(Appeal from the Ruling and order of the Industrial Court of Kenya at Nairobi, the Hon Onesmus Makau J., dated 14th June, 2013

in

Industrial Court Appeal No. 1 of 2007)

****

JUDGMENT OF THE COURT

On 5th December, 2002 Nicky Njuguna (1st respondent) describing himself as Interim-Secretary General of Kenya Police Union, submitted an application for registration of a Police Trade Union under **Section 10** of the then Trade Disputes Act. The Registrar of Trade Union took considerable amount of time to communicate the outcome of the said application; but after a series of some back and forth communications, the Registrar finally declined the application for registration of a Police Trade Union vide a letter dated 9th January 2007. The letter was accompanied by a notification that stated as follows;-

> **“NOTIFICATION OF REFUSAL OF REGISTRATION**
>
> **It is hereby notified that the registration of THE KENYA POLICE UNION as a Trade Union under the Trade Unions Act is hereby refused. The grounds for such refusal are as follows;-**
>
> **Police Officers are not qualified to belong to a trade union under Cap 234 Section 3.**
>
> **Under Section 29 of Cap 233, you don’t quality to be officials of the union as none of you are members of the police force”**

Dated 8th December 2006."

The respondents were dissatisfied with the above refusal to register their Union therefore they filed an appeal against the decision or order of the Registrar of Trade Unions on or about 24th July, 2007 before the Industrial Court (now Employment and Labour Relations Court). The appeal by the respondents was supported by the 5th respondent (COTU) which is the Umbrella Body of Trade Unions with many affiliated Trade Unions that represent employees in diverse economic activities including professional services. COTU threw its weight behind the respondents and supported the registration of a Police Union under the Trade Union Act. This appeal seems to have taken such a trajectory, it was never heard, instead parties decided to visit other jurisdictions. Eventually, all the parties including the Industrial Court Judge presiding over the matter went to Norway to benchmark on how Police Unions operate and a report on the visit was duly filed.

The record seems to indicate as the appeal was pending for hearing, counsel for the respondents sought leave of the Court to file fresh proceedings because the law had dramatically changed. Counsel for the respondents therefore filed a Notice of Motion, within the same appeal proceedings seeking various declaratory orders, declaring **Sections 3(b)** of the Labour Relations Act No. 14 of 2007 and **47 (e**) of the National Police Service Act, No. 11A of 2011 unconstitutional.

The record of proceedings indicates the Registrar of Trade Union was served with the aforesaid motion, but no reply was filed, and he/she did not attend court during the hearing. The learned trial Judge proceeded to hear the respondents and the interested party COTU who were in support of the prayers sought in the motion. Upon considering the motion, on the 14th June, 2013 the learned Judge issued the following orders that are subject of this appeal;-

> **(a) Section 3 (b) of the Labour Relations Act No. 14 of 2007 is hereby declared unconstitutional, null and void for being inconsistent with Article 41 and 24 of the Constitution to the extent that the same entirely takes away the right of all the members of the National Police Service to form, join and participate in all the activities of a trade union.**
>
> **(b) Section 47 (e) of the National Police Service Act, No. 11A of 2011 is hereby declared unconstitutional, null and void for being inconsistent with Article 41 and 24 of the Constitution to the extent that the same entirely takes away the right, of all the members of the National Police Service, to form, join and participate in all the activities of a trade union.**
>
> **(c) The police officers should remain prohibited from calling or participating in any strike as per Section 47 (3) (g) of the NPSA No. 11 of 2011 or any other law.**
>
> **(d) There shall however, be stay of order (a) and (b) above for four months from the date hereof to allow the state to amend the aforesaid statutory, provisions and to lay down a legislative framework to guide and facilitate the new phenomenon of Police Unions. The said new legislations should strictly comply with Article 24 of the Constitution.**
>
> **(e) This ruling and order shall be served on all the parties, Attorney General and Inspector General of police within 10 days from today.**

In the appellant's memorandum of appeal, there are no less than 20 grounds of appeal which we intend to summarize so as to avoid obvious repetition in compliance with the strict provisions of **Rule 86(1)** of the **Court of Appeal Rules**, which are mandatory terms thus:

> **"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."** Emphasis added.

That the learned Judge erred in law by;-

Adopting wrong procedure

(a) In entertaining a challenge on the constitutionality of **Sections 3(b)** of the Labour Relations Act and **Sections 47 (3) (e)** of the National Police Service Act within an appeal against the Registrar of Trade Unions which ought to have been heard and determined under **Sections 18 (a)** of the Industrial Court Act; failing to file a substantive petition as required under the High Court Practice and Procedure Rules 2006 (Gicheru Rules)

Failure to join Attorney General

(b) In failing to join the Attorney General who is a defender of public interest as provided under Article 156 (6) of the Constitution; by placing a burden of justifying the limitation of Article 41 of the Constitution with respect to persons serving in the National Police Service as per Article 24(3) of the Constitution upon a Registrar of Trade Unions instead of the Attorney General; finding the respondents had the necessary locus standi when they were not serving members of the National Police Service.

Jurisdiction of the Court

(c) Embracing jurisdiction to interpret the constitutionality of statutes outside the mandate conferred upon the Industrial Court by Article 162 (2) (a) and Section 12 of the Employment and Labour Relations Act; jurisdiction to interpret inconsistencies of statutory provisions and their constitutionality is the preserve of the High Court within a petition as per the Rules which is properly filed against the Attorney General and parties who will be adversely affected by the orders.

Erroneous interpretation of the respective sections of statutes

(d) Failing to appreciate limitation of rights under Article 24 of the Constitution; to consider the overall object and purpose of an Act and the general rules of interpretation that enjoin a court to embrace a purposeful liberal interpretation which requires the Constitution be read as a whole, without any one particular provision destroying the other and each sustaining the other.

Impartiality of the court

(e) Descending into the arena of litigation by accompanying litigants on sturdy tours to South Africa and Norway in regard to an aspect of a dispute before it; violating the principle of separation of powers by impliedly directing Parliament to amend legislation; granting orders that were not prayed for.

During the plenary hearing, Ms Wambui, learned counsel for the appellant expounded on the above grounds of appeal by way of written submission and made some brief highlights. She emphasized that in a matter where there is a challenge of constitutionality of a statute such as in the instant appeal, it was imperative to enjoin the Attorney General who is given power to defend public interest; the registrar of Trade Unions who was party in the proceedings has no power or role to amend the laws concerned; his role is only to Register Trade Unions; it was also necessary to enjoin the National Assembly being the body concerned with law making; joinder of the Attorney General and the National Assembly cannot be viewed as a procedural technicality as it went to the substance of the matter.

Counsel for the appellant submitted that the jurisdiction of the Employment and Labour Relations Court is as contemplated in the Act. The interpretation of the constitutionality of the statutes was outside the scope of the mandate of the specialized court; this was not a redress of fundamental rights by an aggrieved party that was sought within an employment and labour relations matter; this was a suit filed within an existing appeal, by parties whose fundamental rights were not an issue as they were not serving within the National Police Service; thus it was incumbent upon the court to deal with the appeal that was in court and direct the parties to invoke the proper procedure that is established under the Constitution for interpretation of inconsistencies in statutory provisions. According to counsel, the learned Judge heavily relied on the report on a study tour carried out in other countries without considering there was a conflict of interest in the said tour as the court that was determining the issue was included in the study tour thereby descending into the arena of the dispute. Counsel for the appellant urged us to allow the appeal.

This appeal was opposed by Mr Gitonga, learned counsel for the 1st to the 4th respondents. Counsel filed detailed submissions and a list of authorities. In his oral highlights, he submitted that the registrar of Trade Unions declined to register a police trade union, during the pendency of the appeal, the legal regime changed; there came the Constitution of Kenya 2010, heralding a new plethora or rights which in his view consolidated the police right to form a trade union; nonetheless, members of the Police Service were limited unconstitutionally to form a trade union under **section 47 (3**) of the Police Act and **section 3 (b)** of the Labour Relations Act; it was necessary for the parties to seek an amendment of the law that was impeding freedom of association by members of the police service; it was not necessary to enjoin the Attorney General because the Registrar of Trade Unions was involved throughout the proceedings.

On the issue of jurisdiction of the Employment Labour Relations Court to determine a constitutional petition, Mr Gitonga was emphatic that the **ELRC** being a creature of the Constitution is clothed with mandate to give effect to the interpretation of the Constitution in matters that touch on fundamental rights to work and on labour relations matters. The respondents were complaining of a fundamental right to form a trade union; every person has a right to institute court proceedings claiming against a violation of his or her fundamental rights under the Bill of Rights. In this regard, proceedings can be instituted even by another person, who is not affected but is doing so in public interest. Counsel cited the case of **MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** e KLR to support the above argument that the scope of *locus standi* was expanded by **Article 22** and **258** of the Constitution.

Counsel for the respondents further stated that **Article 2(4)** of the Constitution provides any law that is inconsistent with the Constitution is void to the extent of the inconsistency. In his view, the learned Judge was right in finding **Section 47 (3) (e)** of the National Police Act and **Section 3 (b)** of the Labour Relations Act in as far as they purport to take away the rights of the members of the Police Service from forming and participating in the activities of a trade union were inconsistent with the Constitution. The limitation provided under **Article 24 (5)** of the Constitution permits limitation of rights, but the limitation must be fair and reasonable. Freedom to form a trade union is a fundamental right that cannot be taken away. Commenting on the procedural defects alluded to by the appellant; counsel urged us to be guided by the overarching principle in the administration of justice that shifted the focus from paying attention to procedural technicalities and look at the substantive justice as the court settled to resolving the dispute that was pending for many years and which had been caught up by the change of legislation. It was in the interest of justice that the petition was filed while bringing on board the new laws.

As demonstrated from the summary above, we have taken time to appreciate the background information and the impugned ruling, this being a first appeal; we have to analyse and re-evaluate the material on record afresh and reach our own conclusions bearing in mind that although no *viva voce* evidence was adduced in this matter, which was brought by way of a notice of motion, it is the trial court that had the advantage of even calling the deponents of the affidavits if that was necessary to clarify a matter(s). (See **Selle v Associated Motor Boat Co. [1968] EA 123**). In **Kiruga v Kiruga & Another [1988] KLR 348**, where this court observed that:-

> **'An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.'**

Upon considering the record, the grounds of appeal, respective submissions and authorities cited, we think the first issue to determine should be jurisdiction bearing in mind the established principle that jurisdiction is everything. The Supreme Court of Kenya in the case of;- **Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 Others** [2012] e KLR had this to say;-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred (to it) by the Constitution or other written law. It cannot abrogate to itself jurisdiction exceeding that which is conferred upon it by the law"

This is not the first time an issue of jurisdiction of the Employment Labour Relations Court (ELRC) to determine matters involving the interpretation of the Constitution has been raised. Indeed, way back in 2012, the same issue was before the High Court in **United States International University (USIU) v Attorney General & 2 Others [2012] eKLR** and Majanja J., took the following position:-

"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.

This same issue was central in the following matters; **Prof. Daniel N. Mugendi v Kenyatta University & Others** Nairobi Civil Appeal No. 6 of 2012 (Unreported); **U.S.I.U v A.G &Others (2012) eKLR Seven Seas Technologies v Eric Chege** Nairobi HC Misc. Appl. No. 29 of 2013 (Unreported) and **Judicial Service Commission v Gladys Boss Shollei & Another** Civil Appeal No 50 of 2014. In all the aforesaid decisions by this Court differently constituted, it was emphasized that although **Article 165(3) (c)** of the Constitution gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of **ELRC** to deal with such issues especially when the interpretation of the Constitution is intricately interwoven with a labour issue or is central to the determination thereof. In any case the Court found that under **Article 20,** the Constitution gives all courts and bodies powers to deal with constitutional matters; thus the court had jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes.

We will say no more on the jurisdiction of the ERLC to interpret the Constitution on fundamental rights that are germane and intricately connected with labour issues, as it has adequately been dwelt with and we fully agree with the above findings.

We however find the instant appeal was different from a normal pleading that was before court and an issue of interpretation of the Constitution arose within it. What was before the **ELRC** was an appeal from the whole of the decision order and/or notification of refusal of registration by the registrar of Trade Unions dated 9th January, 2007. That appeal took a trajectory and mutated into other processes and finally its fate remains unknown. As alluded to earlier in this judgment, the appeal was adjourned several times first to allow parties (including the court) conduct a sturdy tour or what is known in local parlance as benchmarking. Such a visit was conducted and a report was filed on 6th May 2011. The delegation comprised of members of COTU, Federation of Kenya Employers, the Judge and member of Industrial Court, a member of staff of the Kenya Police College, the 1st applicant and the Registrar of the Trade Union. The objective of the trip is indicated as;-

> **"The main aim of the trip was to learn best practices in management of trade union relations in the police services in Norway. The need arose out of the refusal by the Government of Kenya to register proposed police union fearing industrial action that might interfere with police service which is considered an essential service. At the same time, the working condition of police force was getting worse by the day. The team was interested in structures and processes in management of trade union and collaboration in the police force and how they engage in social dialogue especially collective bargaining."**

The report was duly considered by the learned Judge in a subsequent application that was filed by the respondents now challenging the constitutionality of the provisions of **Section 47 (3) (e)** of the National Police Act and **Section 3 (b)** of the Labour Relations Act, in as far as they purport to take away the rights of the members of the Police Service from forming and participating in the activities of a trade union which according to the respondents were inconsistent with the Constitution. This is what the Judge stated in the judgment in regard to the tour of other jurisdictions;-

> **"As it has been noted above, the court together with the parties went for study tours abroad to learn from other jurisdiction. The court learnt that police officers have had trade unions and even confederations for over a century. That such unionization of the force has not compromised public security."**

The study visit was highly criticized by the appellant in the grounds of appeal. Counsel for the appellant faulted the court for descending into the arena of the dispute; that the court did not maintain its impartiality as it was biased in considering the dispute. Allegations of bias and lack of impartiality regarding a Judge are serious as these are the values that are the foundation of the rule of law. Bias is the nemesis to impartiality. Ac c o r di ng to Black's Law Dictionary, 9th Edition, has the following definitions in regard to bias.

> **"Bias-Inclination; prejudice; predilection; Actual bias - genuine prejudice that a judge, Juror, witness, or other person has against some person or relevant subject;**
>
> **Implied bias – prejudice that is inferred from the experiences or relationship of a judge, juror, or other person"**

Also the following passage from the judgment of the Court of Appeal in England in ***Medicament and related Classes of Goods (2001) 1WLR 700*** bring insight in understanding bias:

> **"Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one**

outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."

We have considered this matter and especially the circumstances under which the court was part of the group that made the study tour and in our view we think the participation of the court *per se* in the tour of other jurisdictions did not merit the kind of condemnation it received from counsel for the appellant.

The study tour was inclusive of all the parties and the court we assume, was supposed to make its own independent observations, much the same way a court does, while visiting a scene of crime or any other site visit to gather and have a first-hand impression of the *locus in quo*. Where we have a problem with the learned Judge, in regard to this particular report is the fact that the study tour was meant to inform an appeal that was pending before court regarding refusal by the

Registrar of Trade Union to register the respondents as a police union. The report was nonetheless used to determine a completely different application that was filed within an existing appeal. This is what makes the participation of the court in the study tour look un procedural as the Judge hurriedly determined an application that had far reaching implications that is the interpretation of **Articles 24** of the Constitution among others without involving the relevant parties who were affected adversely by the said interpretation.

As alluded to earlier, the appeal was never determined, all parties agreed it was perhaps overtaken by events but instead of either withdrawing it or marking it settled the ELRC being a court of record, another notice of motion was filed within the same appeal and against the same party that is the Registrar of Trade Unions despite the fact that orders sought had far reaching implications on other parties who were not named or notified of the same. The respondents' motion sought declarations that had far reaching effect to wit;-

That Section 3(b) of the Labour Relations Act, 2007 to the extent that it purports to take away the right of Members of the Police Service from forming and participating in the activities of a trade union/or enjoying other related rights is at gross variance and offend Article 41 of the Constitution, thus unconstitutional null and void.

That Section 47(3) of the National Police Service Act, No 11 A of 2011 to the extent it purports to restrict, limit and/or curtail the right of members of the Police Service from forming, joining and /or participating in the activities of trade union violates and is at gross variance with the National Values and Principles of governance set out under Article 10 of the Constitution more particularly the principles of equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

That members of the Police Service are entitled to form, join and participate in the activities of a trade union and to out any such further acts ancillary or incidental thereto to further their interest, social welfare and economic well-being.

That members of the Police Service have a legitimate expectation to form, join or participate in the activities of a trade union and to do such other things as may be ancillary or incidental thereto to further their employment interest, social welfare and economic well-being.

We agree with counsel for the appellant, that the procedure adopted by the respondents to bandwagon a new suit within an existing appeal was not only unprocedural but a substantive matter because the above orders were by themselves very substantive. The orders that were issued principally affected parties who ought to have been enjoined. It is evident even the learned Judge appreciated the ramification and weight of the orders he made, because he directed the ruling and order be served on all parties, the Attorney General and the Inspector General of Police. We would add that it was necessary also to involve the National Assembly perhaps the House of Parliament that was involved in legislations of the two Statutes that were declared unconstitutional as well as the Ministry in charge of Labour matters.

Counsel for the appellant submitted and rightly so, that matters touching on constitutionality of laws should be commenced by way of Constitutional Petitions under the High Court Practice and Procedure Rules and Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 (Mutunga Rules). We agree because as much as counsel dismissed this, as a mere procedural technicality, we reiterate the orders sought had far reaching implications and taking a short cut did not help the respondents. We are not convinced by submissions by counsel for the respondent that failure to join key parties where orders are directed against them to implement is curable under the broad overarching principles in the administration of justice. What concerns even most is the fact that key parties or primary parties who are mandated by the Constitution to defend the Rule of law and public interest such as the Attorney General was not a party to the motion nor was the office served. The constitutional mandate placed upon the Attorney General cannot be assumed by the Registrar of Trade Union. The Registrar of Trade Union has no role in the various provisions of the law that were declared unconstitutional. We also find it was too late for the Judge to determine the matter and merely direct the Attorney General and the Inspector General of the police be served after the event.

This is not just a matter of misjoinder or non- joinder of parties. The proceedings by which **Sections 3(b)** of the **Labour Relations Act, 2007** and **47(3)** of the National Police Service Act, No 11 A of 2011 were declared unconstitutional were matters of great public interest. The orders affected the National Government, the Police Service, the Ministry in charge of Labour matters and the National Assembly. It was imperative the said parties be joined in the proceedings where the court was called upon to give an interpretation of **Article 24 (5)** of the Constitution in relation to the impugned sections of the law.

As matters stand, we think it is not necessary for us to interrogate whether the constitutional interpretation given by the learned Judge was sound or not granted that the views of the affected parties were not considered. It was necessary for the Court to order the application be served upon the necessary parties and consider the opinion, views or submissions by the said parties on their views of the aforesaid provisions of the law. Under **Article 156 (6)** of the Constitution, the office of the Attorney General is charged with the responsibility of promoting, protecting and upholding the rule of law and to defend public interest. The Inspector General of Police, is in charge of the Police Service, and the National Assembly enacted the impugned sections of statutes and was being directed to implement the order by amending the law as per the orders and the Ministry in charge of labour matters would also be affected.

We think we have said enough to demonstrate this appeal has merit, the respondents invoked a totally wrong procedure that is alien to the various Rules of Procedure; in the course of it orders were made against parties who were not parties to the suit thereby going against the established principle that every party is entitled to be heard. See **Article *50(1) of*** the Constitution which provides as follows:

> ***(i)*** **Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body".**

In the upshot, we find merit in this appeal, which we hereby allow with the result that the orders made on 14th June, 2013 and all consequential orders are hereby set aside and the respondent's notice of motion dated 3rd December, 2012 is dismissed. Due to the nature of these proceedings that largely involve public spirited individuals who were seeking interpretation of the law, we make no order as to costs. Each party shall bear their own costs.

Dated and delivered at Nairobi this 30th Day of June, 2017.

ALNASHIR VISRAM

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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.

<u>DEPUTY REGISTRAR</u>19