IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPEAL NO. 67 OF 2015

BETWEEN

GABRIEL MUTAVA……. 1ST APPELLANT

ELIZABETH KWINI AND MARY MARTHA MASYUKI

THE JOINT ADMINISTRATORS OF THE ESTATE OF

JOSEPH M. INDO (Deceased)…….....…..2ND APPELLANT

AND

THE MANAGING DIRECTOR

KENYA PORTS AUTHORITY…….....….....1ST RESPONDENT

THE KENYA PORTS AUTHORITY…….....…2ND RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Mombasa (Makau, J.) dated 17th July, 2015

in

E.L.R.C. Pet. No. 2 of 2015 & Pet. No. 3 of 2015)

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JUDGMENT OF THE COURT

The appellants were employees of the 2nd respondent whereas the 1st respondent was its Managing Director. On 16th April, 2005, the appellants were summoned to appear before the respondents' committee of inquiry "*the committee*" investigating alleged irregular payment of overtime in the respondents' Inspectorate and Bunkering Sections where the appellants were at the time working as Assistant Harbour Inspectors. They were summoned to the committee not as suspects but as witnesses. They appeared and testified. However on 5th July 2005, whilst at their work stations, the appellants were served with letters of retirement in public interest by the respondents. According to the appellants, the decision to terminate their employment in the manner aforesaid was in flagrant contravention of the

provisions of **Section G8** and **G12 (a)** of the respondents' Revised Staff Regulations, 2002 "*the Regulations*" relating to the procedure for dismissing workers who fell in the same grade as the appellants. Secondly, to the appellants the respondents' decision was reached in complete violation of the cardinal principles of natural justice that were protected under the repealed Constitution.

Consequently, the appellants filed respective Petitions in the High Court of Kenya at Mombasa against the respondents that were subsequently amended on 30th June 2011, seeking redress for the gross violation of their constitutional rights with regard to the termination of their employment, and sought the reinstatement of the 1st appellant, and that the deceased's estate be paid his dues for the period up to 30th July 2009, when he would have been expected to retire at the age of 55 years. These were **Petition No. 1 of 2006** filed by the 2nd appellant and **Petition No. 2 of 2006** filed by the 1st appellant. When the Employment and Labour Relations Courts, "*ELRC*" were created, the two Petitions were yet to be heard. They were therefore transferred to the said Court in Mombasa for hearing and final determination and were re-numbered **Petition No. 2** and **Petition No. 3 of 2006** respectively.

The Petitions were opposed through a replying affidavit sworn by **Kiprotich Cheruiyot**, a personnel discipline officer of the 2nd respondent. He deponed that indeed the appellants were summoned before the committee formed pursuant to the provisions of the Regulations, to carry out investigations into the fraudulent payment of overtime in their work stations. That during the hearing the appellants acknowledged the fact that the offence had been committed due to laxity in their supervision of their juniors in the department. With this admission, the respondents were convinced that the appellants had not demonstrated seriousness in the course of performing their duties. It was then decided to retire them in public interest with all the benefits due to them being paid. As a parting short, the respondents maintained that the appellants had not invoked the appropriate procedure to settle the dispute. The appellants should have approached the court by way of a statement of claim or plaint instead of a Constitutional Petition.

Contemporaneously with the filing of the replying affidavits to the Petition, the respondents also took out a notice of preliminary objection in terms that:-

> "(i) the cause of action was based on alleged breach of contract of employment under the Employment Act between the appellants and respondents
>
> (ii) the appellants had come to court under the wrong procedure and the Petitions filed were thus bad in law.
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> (iii) a Constitutional Petition is intended to address matters of summary or *ad hoc* determination of points of law, construction or certain specific facts or for obtaining of specific directions of the court and were unsuitable for determining serious and disputed questions of fact."

On 16th March, 2015, counsel for the respective parties sought the court's directions that the Petitions be disposed of by way of written submissions. In fact the written submissions had already been field before the Petitions were transferred from the High Court to the ELRC. Parties also agreed that the judgment in **Petition No. 2** would bind **Petition No. 3**. It would appear that the respondents opted not to pursue the Preliminary Objection. Before the Petitions could be heard and determined, the initial 2nd appellant passed on. An application for substitution was filed by the current 2nd appellant as an administrator of the estate of the deceased. However, from the record, it is difficult to tell whether the application was ever prosecuted.

Makau, J. isolated the issue for determination as being whether the termination of the appellants' employment was unconstitutional and therefore null and void for breaching the Regulations and rules of natural justice. His verdict after considering the pleadings, the rival submissions and the law was that the decision by the respondents to retire the appellants in the public interest was in breach of the Regulations and indeed, the rules of natural justice. However, he proceeded not to grant any remedies sought by the appellants in the Petitions by holding that their remedy lay not in constitutional agitation. Rather the

appellants should have approached the court by way of a plaint to enforce their rights under the contract of employment which was basically codified in the Regulations. This is how the Judge delivered himself on the issues:-

> " **13. In view of the finding above later** (sic) **the Petitioners where** ***(sic)*** **retired in public interest without being accorded a hearing within the provisions of Section G8 and G12 of the KPA Revised Staff Regulations (2002), it is obvious that their dismissal was in breach of the rules of Natural Justice. Such right of being heard before termination of employment was however not protected under the bill of rights as enshrined in the repealed Constitution. It was contractual right negotiated and agreed by the employees and employer under the province of the private law. It is immaterial that the employer is a public body sustained by public funds. In that regard the court agrees with the defence and the cited precedents that the court was not properly moved because the dispute herein was not founded in Public Law. In this court's view the Petitioners should have filed a normal Plaint to enforce their rights under the contract which was basically codified in the KPA Revised Staff Regulations (2002). Consequently the court answers the second issue for determination in the negative."**

The Judge also held that the 2nd appellant's claim was unsustainable as he had passed on and had not been substituted as required within 12 months.

The above holdings precipitated this appeal on eight grounds which may be compressed into four broad ones; that the Judge erred when he held that the claim by the 2nd appellant had abated following his death and lack of substitution by the administrators of his estate within the stipulated twelve months; that the learned Judge erred in failing to appreciate that under the law, the trial court was under an obligation to determine the dispute between the parties in such a way as to realize substantive justice rather than determining the dispute through a narrow and highly technical legal arguments and arriving at the conclusion that despite the dismissal of the appellants being in obvious breach of the rules of natural justice, such right of being heard before termination of employment was not protected in the repealed Constitution; that the Judge failed to appreciate that, given the circumstances of the case, he should have followed the practice that has evolved where one may move the ELRC by way of Petition. Consequently, it was wrong for the appellants' claim to have been dismissed on account of the procedure that was followed in moving the court; and finally, that the Judge erred in law and in fact in arriving at a decision that was wholly against the weight of the evidence, law and justice.

Pursuant to an agreement struck between the parties and sanctioned by the court, this appeal was canvassed by way of written submissions with limited highlights. We have carefully read and considered the pleadings, rival written as well as oral submissions, the authorities cited as well as the law.

On the first ground, the appellants' submissions through **Mr. Gikandi**, learned counsel, are that though the court held that the claim by the deceased had abated since he was not substituted by the administrator of his estate within 12 months of his demise and no leave for the revival of the cause of action was sought following the abatement, the court did not appreciate that an application for substitution had been filed on 1st July, 2011 by the 2nd appellant, one of the administrators of the estate of the deceased. Counsel further submitted that the matter having been instituted by way of a petition, the same was not subject to the Civil Procedure Rules that required such substitution. In the result, the trial court proceeded on an incorrect exposition of the relevant facts and law and thereby arrived at an erroneous decision regarding the abatement of the claim. Counsel was emphatic that Constitutional Petitions should not be subjected to the rigours of the Civil Procedure Rules and that indeed the Civil Procedure Act and the Rules made thereunder did not apply to the Constitutional Petitions.

Countering these arguments, the respondents through **Mr. Kyandih**, learned counsel, submitted that the appellants had not exhibited the ruling in respect of the application for substitution, secondly, that the application in any event did not seek to revive the abated Petition. That the Petition having abated, it is, in law, dead and non-existent and that the only way to breathe life into it was by way of an application for its revival under **Order 24 Rule 7(2).** No such application had been made. Consequently the Petition was non-existent in law. Counsel in this respect, called in aid the decision in **John Chege Mwangi & 3**

Others v Obadiah Kiritu Methu [2012] eKLR and **Catherine Atieno Okongo & Another v John Mwangi Karanja & Another [2015] eKLR.** Counsel further submitted that the conduct of a Constitutional Petition inclines more towards civil proceedings as was held in the case of **Peter Ochara Anam & 3 others v The Constituencies Development Fund Board & 4 Others [2011] eKLR,** Act and therefore the Civil Procedure Act and the rules made thereunder would only apply in certain circumstances.

It is common ground that the deceased passed on or about 11th August 2007, during the pendency of his Petition. However, there is no evidence on record suggesting that before the year ended, he was substituted by the administrators of his estate or by any one of them. The submission by counsel that he was substituted on 25th September, 2012, through an application filed on 1st July 2011, is clearly erroneous. A mere application cannot by itself be turned into an order of substitution by court. If indeed there was such order of substitution, why was it difficult for the appellants to exhibit it or even the ruling that granted the order of substitution? We have carefully combed through the proceedings of the trial court and we have not come across any order made for the substitution of the deceased. It is quite apparent to us that the application for substitution though filed, was never prosecuted at all. Accordingly, there was no substitution of the deceased. Again, even if there had been such substitution, the suit had already abated. What then was required was yet another application for leave to revive it. No such application was made. As stated in the case of **John Chege Mwangi & 3 others v Obadiah Kiritu Methu** (*supra*):-

> **"…..The law regarding substitution of a deceased plaintiff with his personal representative is found in** Order 24 rule 3 of the Civil Procedure Rules, **under which the court has power, on application for substitution by the legal representatives of the deceased, where the cause of action survives the deceased, to cause the representative of the deceased to be made a party to the suit in place of the deceased plaintiff.**
>
> **Under** Sub-rule 2 of rule 3 **the application for substitution must be made within one year from the date of death of the deceased failing which the suit shall abate so far as the deceased plaintiff is concerned by operation of the law.**
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> **The remedy available upon the suit abating is to apply for the revival of the suit before any other application can be made**. **See** Order 24 rule 7:
>
> *"The person claiming to be the legal representative of a deceased may apply for an order to revive a suit which has abated and if proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."*
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> **The suit herein abated on 30th June 2010, a year after the death of the plaintiff as no application for substitution of the plaintiff was made by the applicants or any other person. The suit therefore, abated**.
>
> **The suit having abated it is, in law, dead and none existent. The only way to breathe life into it is by way of an application for its revival under** Order 24 rule 7 (2) **aforesaid.**
>
> **No such application has been made before this court or any other court. The application before me is therefore premature and fatally defective as the same is based on a none** (sic) **existent suit**….."

See also **Catherine Otieno Okongo & Another** *(supra).*

We agree with this exposition of the law. The claim by the 2nd appellant having abated by operation of the law and there being no order of substitution and revival, there was no Petition before the trial court capable of being determined.

Of course, the appellants have argued, we think, in the alternative, that constitutional litigation is a special breed of litigation that is neither criminal nor civil and therefore the Civil Procedure Act and the Rules made thereunder are inapplicable. This submission was debunked way back in March, 2011 when **Asike-Makhandia, J**. (as he then was) held in **Peter Ochara Anam & 3 Others** (*supra*) that:-

> **"…..In as much as the Constitutional Petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure for handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored or witnesses should not be sworn, pleadings should not be signed and questions in cross-examinations should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agree or subscribe to the submissions of the Petitioners that the petition being neither a criminal nor civil proceedings it must be conducted in vacuum…."**

This position was upheld by the Supreme Court in **Deynes Muriithi & 4 Others v Law Society of Kenya & Another [2016] eKLR** in terms :-

> **"…the High Court at Kisii in** Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others, Constitutional Petition No. 3 of 2010: [2011] eKLR, **found that the particular issue though occurring in a constitutional petition was civil in nature.…it is evident to us that appeals dealing with constitutional issues, may in substance be civil in nature…."**

The appellants did not refer us to any authority in support of their proposition. In any event the 2nd appellant's argument is self defeating in that if she was of the view that the Civil Procedure Rules do not apply to Constitutional Petitions, why then did she file the application for substitution in the first place? Further, if the 2nd appellant's submission was to be upheld then it would mean that the deceased could prosecute his claim from the grave. What an absurdity. This ground of appeal must of necessity therefore fail.

The rest of the grounds regarding whether the Judge was right in holding that although he had determined that the termination of the appellants' employment breached rules of natural justice nonetheless proceeded to dismiss their claims on account of the wrong procedure adopted by the appellants in prosecuting them can all be taken together. The appellants take the view that the court erred in making a finding that it was not properly moved because, according to the trial court, the dispute between the parties was not founded in public law but rather fell in the realm of private law. In the trial court's view, the appellants should have filed a normal plaint or claim to enforce their rights rather than proceeding by way of Constitutional Petitions. The appellants submit that it was proper for them to have moved the court as they did since they were seeking redress of violations of fundamental rights arising from an employer/employee relationship. They were alleging a violation of their fundamental rights as enshrined in **Sections 77, 74 (1), 70(a)** and **82(2)** of the former Constitution. That indeed, **Section 77** which is similar to **Article 50** of the current Constitution provided for the right to a fair hearing which comprises adherence to the principles of natural justice. That the appellants were not given a fair hearing so as to state their case, and neither were they notified that there were charges against them, nor were they made to attend to any hearing as accused persons. That in fact, the appellants' uncontroverted evidence was that they were summoned to appear as witnesses and not as accused persons before the committee.

Counsel submitted that the respondents' decision to terminate the appellants' employment without following due procedure was in contravention of **Section 77** of the retired Constitution which provided for the right to a fair hearing. They also contravened **Section 70(a)** which provided for the right to life which was contravened by the respondents by depriving the appellants' livelihood by irregularly terminating their employment. Moreover, the respondents contravened **Section 74(1)** which protected the appellants from torture, inhuman or degrading punishment in that the appellants were subjected to degrading treatment by the respondents by being forced to retire in public interest. That the respondents also contravened **Section 82(2)** which provided that no person should be treated in a discriminatory manner by persons acting by virtue of any written law or in performance of the functions of a public authority. To the appellants given the above violations, it was proper for them to have moved to court by

way of a Petition. The trial court therefore erroneously applied strained technical rules in making a finding that despite the termination of the appellants' employment in those circumstances, such rights were not enshrined in the repealed Constitution. That the dispute raised issues of constitutional nature and had constitutional underpinning. As such the appellants were at liberty to present a Constitutional Petition before the trial court. For these submissions, counsel relied on the following authorities: **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** and **Philip K. Tunoi & Another v Judicial Service Commission & another [2014] eKLR**.

Turning on the right to a fair hearing, counsel submitted that the right to a fair hearing is a general right, albeit, universal one. That the rules of natural justice applied not only to bodies having a duty to act judiciously but also to the bodies exercising administrative duties. That the three features of natural justice were: the right to be heard by an unbiased tribunal; the right to have notice of charges of misconduct; and, the right to be heard in answer to those charges. In support of these propositions, counsel relied on the **Ridge v Baldwin [1964] AC 40** and **Daniel Nyongesa & 4 others vs Egerton University College [1992] 623**. Counsel further submitted that the fate of a decision reached without observing the rules of natural justice was null and *void abinitio*. Counsel relied on the following authorities **Kadamas v Municipality of Kisumu [1985] KLR 95** and **Onyango Oloo v Attorney General [1986-89] E.A. 456** in support of the proposition. It was therefore erroneous, according to counsel for the trial court to have held that the rules of natural justice were not protected under the bill of rights.

In response, Mr. Kyandih submitted that the trial court was right in finding that under the repealed Constitution, the right of being heard before termination of employment was not protected under the Bill of Rights. That the right breached, if at all was contractual and the remedy lay in the realm of private law. In support of this submissions, counsel relied on the following cases; **Republic v Kenya Airports Authority & Another** *Ex parte* **Moses Echwa [2015] eKLR** and **GMV v Bank of Africa Kenya Ltd [2013] eKLR.**

Counsel further submitted that the trial court could not have applied the laws and the jurisprudence that has since evolved following the promulgation of the current Constitution and the Employment Act, 2007 in the Petitions filed in 2006. In the premises, the **Gladys Boss Shollei** and **Philip K. Tunoi's cases** (*supra*) were of no application in this appeal. Counsel further submitted that the applicability of **Section 77** of the repealed Constitution on matters of employment was frowned upon by this Court in the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**, when it held that a court of law should not import into a written contract of service rules of natural justice and the constitutional provisions relating to the right of hearing. In essence, the submission by counsel was that the bill of rights in the repealed Constitution and the rules of natural justice did not at the time when the Petitions were filed apply to contracts of employment. Finally, counsel submitted, that this was an ordinary claim that should have come to court by way of a plaint and or statement of claim as opposed to a Constitutional Petition.

To our mind, the issue here is simple and straightforward. The trial court having found that the termination of the appellants in the public interest was in breach of the respondents' Regulations and the rules of natural justice, could it withhold a remedy on the premises that the appellants approached the court through a wrong procedure?

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of **Harrikissoon v Attorney General [1980] AC 265**, the Privy Council held that:-

> **"….The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for**

redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action….."

Again in the case of Re Application by **Bahadur [1986] LRC (Const) 297**, a case also from **Trinidad & Tobago**, the above Court held emphatically that:-

"……The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution."

In the South African case of **SA Naptosa & Others v Minister of Education Western Cape & others [2001] BLLR 338 at 395**, the Western Cape High Court observed:-

"…If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right…"

Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In the case of **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR**, this Court observed:-

"……**Citing the case of** Alphonse Mwangemi Munga & Others vs African Safari Club Ltd [2008] eKLR, **the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference.**

Having heard counsel submit on this issue of jurisdiction and also having gone over the nature of the pleadings as placed before the High Court as well as the manner in which that court found and determined the reference, we do not discern any fault on the part of the learned judge. We say so because the drafting, tenor and substance of the reference before her was essentially on breach of terms of employment. All this shines through the quotations (above) from the petition as regards the orders, and prayers stated. The appellant was hired by the 1st respondent as Deputy Vice Chancellor according to the Kenyatta University Act. In alleged breach of that employment contract, the 1st respondent allegedly sent him on compulsory leave, suspended him from duty and stopped his emoluments before finally firing him. So the appellant had gone before the High Court for declarations/orders that the compulsory leave was void, terminating his employment should be halted and he should be paid compensation. To my mind, this petition was essentially an employment claim that should have gone to the Industrial Court in accordance with Article 162 (2) (a) **above, and the learned judge rightly declined jurisdiction over it**….'

Then there is the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, where this Court again emphasized:-

"…In our view, there is considerable merit in the submission that where there is a clear

procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.…"

Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014,** the Supreme Court delivered itself thus on the issue:-

"[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**. In South Africa, in** S v. Mhlungu, 1995 (3) SA 867 (CC) **the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:**

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (**Ashwander v. Tennessee Valley Authority**, 297 U.S. 288, 347 (1936))."

On this score again, the trial court was right in its holding. In this country, we have all along had legislation governing employment, the latest being the Employment Act, 2007. When the appellants filed their Petitions, the pre-2007 Employment Act, was in force. It is on this Act that the appellants should have anchored their claim. At the time however, the dominant view and which held sway was that the rules of natural justice and indeed **Section 77** of the repealed Constitution could not be read in contracts of employment. These arguments however no longer hold sway in the light of the labour and employment reforms in Kenya with the advent of the Employment Act, 2007 and the current Constitution. Rules of natural justice are statutorily underpinned by **Sections 41, 43** and **45** of the Employment Act. The duty of the employers to act fairly is now recognized in the Act as well as the Constitution. The court is mandated further by the Constitution and the Act to resolve all employment disputes expeditiously and its procedures have been rendered less technical. We are saying all these in answer to the appellants' submissions on the twin question of the applicability of the rules of natural justice and the Constitution to the dispute. This was purely a labour dispute that could have been resolved by the application of the Employment Act as well as the Regulations. In fact it is the Regulation that governed the relationship between the appellants and the respondents. The appellants were subject to the Regulations by virtue of **Section A.2 (a)** and their letters of appointment.

However, and as correctly submitted by the respondents, the trial court could not apply the current laws and the jurisprudence developed after the enactment of the Employment Act, 2007 and the current Constitution to the Petitions as they were filed before those laws came into existence. To do so would have denied the respondents the defences available to them then. The flawed procedure in which the appellants were retired was not subject to the Constitution of Kenya, 2010 or the Employment Act, 2007, as both had not been enacted in 2005 when the appellants were retired in public interest. Thus, the cases of **Gladys Boss Shollei** and **Philip K. Tunoi** relied on heavily by the appellants are inapplicable. The general rule is that statutes other than those which are merely declaratory or which relate only to matters

of procedure or evidence, are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implications, it appears that this was the intention of the legislature. Further a Constitution is not necessarily subject to strictures of retroactivity as ordinary statute. A Constitution may embody retrospective provision though. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the Constitution. As stated by the Supreme Court in **Samuel Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**:-

> **"….If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution…."**

Such was the situation that the respondents found themselves. A consideration of the Articles of the Constitution dealing with labour relations reflect no retrospectivity. The same goes for the Employment Act. Accordingly, the appellants' claims were bound by the old Constitution and the Employment Act then in force when they were lodged. They contained no provisions with regard to the application of the rules of natural justice and bill of rights in employment contracts.

The appellants have relied heavily on **Section 77** of the repealed Constitution to advance their case on natural justice, bias and fair hearing in employment disputes. However, this Court in the case of **Kenya Revenue Authority** (*supra*) stated:-

> **"…. The requirements of a fair hearing or the right of hearing under** *section 77* **of the Constitution and the rules of natural justice were two ideas which formed part of the respondent counsel's submissions and which the superior court accepted hook, line and sinker, and unilaterally incorporated them into the Code of Conduct. With respect, this was a serious misdirection or misapprehension of the applicable law and of the factual position on the part of the Court. Firstly, as regards the terms of a contract of service or any other contract it is not the business or function of a court of law to rewrite a contract for the parties by prescribing how the organs entrusted with disciplinary matters in a contract must operate or to introduce terms and conditions extraneous to the contract. Secondly, it is for the parties to provide in the contract how such organs should operate and how the hearings, if any, are to be conducted. A court of law cannot in our view, import into a written contract of service rules of natural justice and the Constitutional provisions relating to the right of hearing….."**
>
> *"Section 77(9)* **of the Constitution is inapplicable to the organs of discipline or tribunals which have been specifically provided for in a contract of service by the parties**. *Section 77(9)* even on its own wording clearly applies where a court or other adjudicating authority has been established by a law. The section applies only where a law has prescribed the manner of determination of the existence of a civil right or obligation and does not apply to contractual tribunals**……With respect, the superior court's importation and application of the concept of fair hearing as defined in the context of the Constitution was a clear misapprehension of the law.** The section does not and was not intended to apply to contracting parties at all or for that matter to a contract of service unless the parties themselves have specifically stated so in their contract. In the matter before us, neither the Staff Committee nor the Board of Kenya Revenue Authority constituted a court of law or an adjudicating authority as defined in *Section 77* of the Constitution**.**"

The trial court was therefore right in holding that this was a simple employment matter that should have been handled as such by ELRC by way of a simple plaint or claim rather than by way of constitutional interpretation and or reference. The fact that the Petitions had been transferred from the High Court to ELRC was of no moment. However, the court erred when it applied the rules of natural justice to the dispute. However, since there is no cross-appeal, we shall leave it at that.

In saying all these, we are not oblivious to the fact that a party is entitled to sue under the Constitution even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.

Lastly, to do justice to the parties, could the trial court having found that the appellants' termination of employment ran foul of the regulations, have converted the Petitions into a plaint and or statement of claim? Of course, such approach was available to the trial court. However, the prayers sought in the Petitions militated against such move.

On the last ground of appeal, we take the view that considering that the hearing of the Petitions proceeded on the basis of the pleadings and written submissions of the parties only, the complaint by the appellants that the trial court erred in fact in arriving at a decision that was wholly against the weight of the evidence, law and justice is not merited at all if the record is anything to go by. We think that on the contrary and on the material before it, the trial court did a splendid job. It considered all the matters placed before it and arrived at a just decision.

The appeal therefore fails and is dismissed. This being an employment dispute, parties shall bear their own costs.

Dated and delivered at Malindi this 1st day of July, 2016.

ASIKE- MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR