



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. E001 OF 2022

DR. MAGARE GIKENYI J. BENJAMIN.....PETITIONER

VERSUS

MINISTRY OF LABOUR (MOL).....1ST RESPONDENT

ATTORNEY GENERAL(AG).....2ND RESPONDENT

AND

FEDERATION OF KENYAN

EMPLOYERS (FKE).....1ST INTERESTED PARTY

CENTRAL ORGANIZATION OF

TRADE UNIONS(COTU).....2ND INTERESTED PARTY

TRADE UNIONS CONGRESS OF

KENYA(TUC-Ke).....3RD INTERESTED PARTY

NATIONAL ASSEMBLY(NA).....4TH INTERESTED PARTY

SENATE.....5TH INTERESTED PARTY

RULING

1. The Applicant has moved this Court vide a Notice of Motion Application dated 1st January, 2022 filed under a Certificate of Urgency. The Motion Application is supported by the Affidavit of the Applicant, Dr. Magare Gikenyi J. Benjamin.

2. The Application which is expressed to be brought under Articles 22(1), 23(a), 159, of the Constitution, as read with Rules 3,5,7(1) and (2) of the Constitution of Kenya Protection of Rights and Fundamental Freedoms, seeks the following orders;

a) Spent

b) **THAT** the court is pleased to constitute a bench of uneven number of judges for as espoused in article 165(4) for hear and determine this petition.

c) **THAT** any other order or modification of petitioner's prayer(s) or expansion of parties (if need be) which this Honourable court (suo moto) may deem fit to give to a achieve objects of justice for majority of Kenyans.

d) Costs in the cause.

3. The Application is premised on a number of grounds including the following:-

i. that Section 29 of Employment Act, 2007 discriminates men against women in awarding of leave caused by birth of the same child (both are parents) contrary Article 27, which prohibits all forms of discrimination.

ii. the differentiation/discrimination of duration of maternal and paternal leaves is NOT fair a differentiation.

iii. the petition raises substantial issues of law as expected in Article 165(4) of the Constitution of which will have a significant bearing on the public interest.

iv. the petition has prayers that if allowed by the court, will have far reaching consequences in the labour market and will change the landscape of the labour market.

v. the matter being determined transcends the circumstances of the particular case as it is not just a mere discrimination of an individual employee, which ordinarily will be resolved by declarations and compensations, but it will be a large scale discrimination which will have impact on number of employees in an organization and has significant bearing on the public interest.

vi. by virtue of section 29 of the Employment Act, the import of which has had far reaching effects, it has set/produced unwanted effects. Through this section 29 of the E.A, women have been directly and indirectly been discriminated in that Kenya being a capitalist state, employers have shied away from employing female employees.

4. The respondents and the interested parties did not respond to the Application.

5. On 27th January, 2022, the Petitioner was granted leave to file and serve his submissions in support of the Application.

6. In his submissions the Applicant urged that the Petition raises substantial questions of law that warrant the empanellment of a bench of an uneven number of judges being not less than three. The Applicant further submits that the Petition raises substantial questions of law that are novel and affect public interest. He invited the Court to consider the findings in the case of **Peter Nganga Muiruri vs Credit Bank Limited & Another Civil Appeal No. 203 of 2006** and **Wycliffe Ambetsa Oparanya & 2 others vs Director of Public Prosecutions & another [2016] eKLR**.

Analysis and Determination

7. I have considered the Application, the grounds in support thereof and the submissions by the Petitioner. The main issue that arises for determination is whether the Petitioner has demonstrated that the petition raises a substantial question of law to allow a referral to the Honourable Chief Justice for purposes of empanelling a bench of uneven number of judges, being not less than three.

8. **The determination of this issue hinges on Article 165(4) of the Constitution** which provides as follows: -

“Any matter certified by the court as raising a substantial question of law under clause 3(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

9. The term “substantial question of law” has not been assigned a definition under the Constitution or by statute. Nonetheless, the issue has been addressed by Courts through case law over time and parameters as to what would a substantial question of law determined. In the case of **Robert N. Gakuru & Another vs the County Government of Kiambu and Another [2013] eKLR**, the court reckoned thus: -

“The test for construing a matter as raising a substantial issue of law is no easy task I would say that it is a matter that has not been previously settled by a court such that it does not have a binding or persuasive precedent. It also would be a matter that is intertwined involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally conversed before the same court, and calling for an alternative view...”

10. In light of the foregoing authority which I wholly adopt, a matter that raises a substantial issue of law, is one that has not been previously settled by court, hence is novel or sui generis in nature. Such a matter is also one that is intertwined and involves diverse areas of the law therefore making the matter relatively complex as compared to other matters normally conversed before the same court, and calling for an alternative view.

11. It is instructive to note that these considerations are not comprehensive enough to merit empanellment. As such, other considerations ought to be taken into account for instance, whether the matter raises weighty issues, the bearing on public interest and its impact on legislation or public policy.

12. As was held by Odunga J, in the case of **Wycliffe Ambetsa Oparanya & 2 others vs Director of Public Prosecutions & another [2016] eKLR**,

“[22]. ...the Court must adopt a holistic approach to the matter at hand. In other words, the mere fact that one factor is found to exist does not automatically qualify the matter for certification under Article 165(4) of the Constitution...Novelty alone with due respect does not qualify the matter as raising a substantial question of law though it is one of the many factors to be considered. In my view the issue is not merely to do with complexity or difficulty of the case in the views of the applicant but ought to be one that turns on cardinal issues of law or of jurisprudential moment. In my view the mere fact that a matter is novel or jurisprudentially challenging does not ipso facto elevate it to a substantial question of law for the purposes of Article 165(4) of the Constitution. With due respect any judge worth his or her salt must be prepared to deal

with and determine novel questions whether complex or otherwise since the Court cannot abdicate its duty of determining disputes to another organ. To me it is a matter of the application of such principles to the matter at hand. Such application, in my view does not constitute a substantial question of law for the purposes of Article 165(4) of the Constitution.”

13. The gist of the instant Petition is the constitutionality of section 29 of the Employment Act. In as much as the Court is yet to determine the said issue, it is notable that the same is not intertwined and does not involve diverse areas of law. I am also not persuaded that the same is complex enough as to require the referral for empanelling of an uneven bench of not less than three judges.

14. Over and above, it is instructive to note that the decision of a single Judge on such an issue is no less than that of a 3 Judge bench. This position is buttressed by the determination of **Majanja J**, in the case of **Harrison Kinyanjui vs Attorney General & Another [2012] eKLR, in which he held as follows: -**

“...It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”

15. Coupled with the foregoing, I am mindful of judicial resource, which must be utilized reasonably. Hence, it will not be prudent to have a matter as this one, that can be disposed off by a single Judge, being placed before three or more Judges, thus requiring more time and more personnel to handle the same.

16. Against this background, I do not find that the instant Petition raises a substantial question of law as to warrant reference to the Hon. Chief Justice as required under Article 165(4) of the Constitution.

17. In the premises, I decline to allow the Application.

18. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 31st day of March, 2022.

STELLA RUTTO

JUDGE

Appearance:

For the Petitioner /Applicant In person

For the Respondents No appearance

For the Interested Parties No appearance

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE