



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NUMBER 81 OF 2019**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES [KNUN].....PETITIONER**

**VERSUS**

- 1. DIRECTOR OF PUBLIC PROSECUTIONS**
- 2. THE CHIEF MAGISTRATE, MILIMANI LAW COURTS**
- 3. THE HON. ATTORNEY- GENERAL**
- 4. KENYATTA NATIONAL HOSPITAL BOARD.....RESPONDENTS**

**AND**

- 1. SETH AMBUSINI PANYAKO**
- 2. JOSEPH WANYOIKE WANYAMBURA**
- 3. EVANS MWENDWA MWALUKO**
- 4. BONIFACE MUSYOKA NTHENGE**
- 5. IVKY NDALEVA**
- 6. JEREMIAH AYIRO**
- 7. GLADYS KWAMBOKA**
- 8. ROSE WANJIRU MUTHII**
- 9. DOROTHY ANYANGO AYIEKO**
- 10. JENIFFER KAGWIRIA MUNGANI**
- 11. DAMARIS MUKIRI.....INTERESTED PARTIES**

**RULING**

1. The Interested Parties are, Officials and Members of the Petitioner Trade Union.
2. They were engaged in industrial action between 29<sup>th</sup> October 2018 and 31<sup>st</sup> October 2018. They were pressing the authorities for grant of certain rights to the nurses working at Kenyatta National Hospital, as well as for recognition of the Petitioner within the Hospital.
3. They were promptly arrested, and charged at Milimani Chief Magistrate's Court Criminal Case Numbers 2055 and 2065 both of 2018, with the offences of creating disturbance in a manner likely to cause a breach of the peace, contrary to section 95[1] of the Penal Code;

taking part in an unlawful assembly, contrary to section 79 of the Penal Code; and resisting lawful arrest of Police Officers, contrary to section 253[b] of the Penal Code.

4. They presented this Petition on 14<sup>th</sup> May 2019. They argue that they were exercising their fundamental rights and freedoms under the Constitution, by participating in the industrial action. The Respondents were wrong in lodging complaint, arresting, charging and prosecuting the Interested Parties, as theirs is purely a labour dispute. They state that their industrial action should not be criminalized. They invoke the Constitution of Kenya, and section 22 [a] of the Labour Relations Act.

5. They seek orders to prohibit the Respondents from prosecuting and trying them in the criminal proceedings. They seek also, an order against the 4<sup>th</sup> Respondent, barring the 4<sup>th</sup> Respondent from terminating their respective contracts of employment based on the industrial action.

6. They filed an Application dated 14<sup>th</sup> May 2019 seeking protective measures in the nature of stay of the criminal proceedings, pending hearing of the Petition filed herein.

7. The 1<sup>st</sup> Respondent has filed a Notice of Preliminary Objection, which is supported by the Co- Respondents. At heart of the objection is jurisdiction.

8. It is submitted that the E&LRC lacks jurisdiction to entertain the Petition and grant the orders sought. The Respondents rely on the well-known Article 162 [2] [a] of the Constitution; Section 12 of the E&LRC Act; and Supreme Court of Kenya decision, **Republic v. Karisa Chengo & 2 others [2017] e-KLR**.

9. Parties agreed to have the objection considered and determined on the strength of their respective submissions.

***The Court Finds: -***

10. The Court is persuaded on the strength of **Republic v. Karisa Chengo** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others [2012] e-KLR**, that it does not have jurisdiction to deal with all the prayers sought in the Petition.

11. The Interested Parties are facing criminal charges under the penal code, in the Chief Magistrate's Court. Those are not proceedings between an Employer and an Employee. The criminal proceedings are brought by in the name of the Republic against individuals who are identified. At issue is not a dispute between an Employer and an Employee. The matters involve the Republic against named Accused Persons. The Petitioners and the Interested Parties are stretching the jurisdiction of the E&LRC too far, by thinking that the E&LRC can supervise a Subordinate Court, exercising what is purely a criminal jurisdiction.

12. The only prayer open to the adjudication of the E&LRC, is the prayer against the 4<sup>th</sup> Respondent, which seeks to restrain the 4<sup>th</sup> Respondent from terminating the contracts of the Interested Parties. The prayers seeking termination of the criminal cases, are best articulated at the correct constitutional forum, which the Court thinks, is the High Court of Kenya.

13. Whereas the E&LRC may have supervisory jurisdiction in matters under the prosecution of Labour Officers, in Criminal Courts, relating to offences under Labour Laws, such as Wage Offences, the Court does not have jurisdiction to stop prosecution of Employees, over offences of a general nature, such as resisting arrest, disturbing peace, or unlawful assembly, over which the Interested Parties are charged. The Interested Parties are not charged before the Chief Magistrate's Court under any Labour Law. Had they been, perhaps it would be arguable, that the E&LRC, has supervisory jurisdiction, as the criminal proceedings would be in the nature of administration of Labour Law. The jurisdiction of the E&LRC has been misunderstood and extended, to corners of the legal space, where it was never intended to reach by the Constitution and the E&LRC Act. At one time, Judges of this Court were made to sit on appeal in robbery with violence cases. On other occasions they were taken for judicial training on election laws, in anticipation of hearing of electoral disputes. The **Karisa Chengo** decision clarified the jurisdiction of Specialized Courts. Parties ought to observe the clear principles of delimitation of jurisdiction, drawn by the Court of Appeal and the Supreme Court, in **Karisa Chengo**.

14. The Court therefore agrees with the Respondent that it does not have jurisdiction to prohibit the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, from taking the action they have taken, against the Interested Parties.

15. It is noted that Prosecution, in Criminal Case Number 2055 of 2018, closed its case, on 12<sup>th</sup> March 2019, with the full participation of 3 Interested Parties, involved in the Petition herein. They have not submitted before the Hon. Trial Magistrate, that theirs is a labour dispute which has been criminalized. They still have the opportunity to make this submission, before the closure of their case.

***IT IS ORDERED: -***

***a. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are discharged from the Petition herein.***

***b. All prayers in the Petition, except prayer A, E, H and I, restricted to the 4<sup>th</sup> Respondent, are struck off.***

***c. No order on the costs.***

***d. The Petitioner, Interested Parties, and the 4<sup>th</sup> Respondent shall set down the remainder of the Petition for hearing.***

**DATED AND SIGNED AT CHAKA, NYERI COUNTY, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 9TH DAY OF APRIL 2021.**

**James Rika**

**Judge**