REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO 28 OF 2016

IN THE MATTER OF AN APPLICATION FOR REDRESS ON RIGHTS IN THE BILL OF RIGHTS AND CHAPTER FOUR OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 22, 23, 24, 25, 26, 37, 41(2)(D), 43(1)(A), 43(2), 165(3)(B) AND THE RIGHT TO LIFE AND TIMELY QUALITY HEALTHCARE SERVICES

JOSEPH OTIENO ORUOCH.....PETITIONER

VS

KENYA MEDICAL PRACTITIONERS PHARMACISTS & DENTISTS UNION.....1ST RESPONDENT

KENYA NATIONAL UNION OF NURSES.....2ND RESPONDENT

JUDGMENT

Introduction

1. The right to take industrial action versus the right to life and quality health care. This is the subject of this Petition, which was initially filed in Kisumu High Court as *Petition No 17 of 2015*.

2. Because the subject matter of the Petition is labour related, the file was transferred to the Employment and Labour Relations Court in Kisumu and in a ruling delivered on 16th March 2017, **Onyango J** referred the matter to the Hon the Chief Justice to constitute a bench to hear and determine the Petition. The Hon the Chief Justice subsequently gave directions under Article 165(4) of the Constitution that the Petition be heard before us.

The Petition

3. The Petitioner sets out the following facts giving rise to the Petition:

a) The provision of quality healthcare services is deteriorating steadily, following frequent strikes by doctors and nurses, due to various grievances. This has translated to what can be generally described as poor attitude to work among medical health workers and rampant professional negligence, while persons seeking emergency medical treatment have been left to die, sometimes because of unannounced strikes;

b) In the month of August 2015 alone, several people were reported to have died in various hospitals, which was attributed to doctors' and nurses' strikes, for example:

i) On 12th August 2015, *Radio Maisha* reported in the 7.00 pm news bulletin that an 11-year old boy had died in Kilifi Hospital on the 2nd day of a nurses' strike;

ii) On 13th August 2015, *The Standard* reported that at least 12 people had died in different hospitals in Nakuru County, following a nurses' strike;

iii) On 21st August 2015, *The Standard* reported 2 deaths in Siaya County Referral Hospital, following a nurses' strike;

iv) On 21st August 2015, *Radio Ramogi* in their 6 am and 7 am news bulletin reported 1 death in Kapsabet Hospital due to an ongoing nurses' strike.

c) Several reports like the ones above have continued to characterise news in Kenya from time to time since November 2011; several lives have been lost in this manner;

d) It is true that like many workers in Kenya, the Kenya Medical Practitioners, Pharmacists & Dentists Union and Kenya National Union of Nurses, have acted within the Constitution to call and/or go on strike. But there are other provisions in the same Constitution which are obviously infringed; it appears that some inconsistencies in the Constitution are to blame.

4. The Petitioner sets out the following constitutional provisions as the foundation of the Petition:

a) Article 37 which provides that:

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket and present petitions to public authorities.

b) Article 41(2)(d) which states:

Every worker has the right to go on strike.

5. The Petitioner however states that in the exercise and enjoyment of the above rights, the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses, have caused and threaten to cause more unnecessary deaths of Kenyans seeking medical treatment.

6. The Petitioner further states that the foregoing Articles and strike action premised on them violate several provisions in the Constitution under the Bill of Rights. He cites the following in this regard:

a) Article 25(a) which prohibits limitation of the fundamental freedom from torture and cruel, inhuman or degrading treatment.

b) Article 43(1) which provides:

Every person has the right to the highest attainable standard of health, which includes the right to health care services including reproductive health care.

c) Article 43(2) which states:

A person shall not be denied emergency medical treatment.

d) Article 26(1) which provides:

Every person has the right to life.

e) Article 26(3) which states:

A person shall not be deprived of life intentionally except to the extent authorised by this Constitution or other written law.

7. The Petitioner seeks the following remedies:

a) An injunction barring the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses or any of their branches from exercising the rights under Articles 37 and 41(2)(d) of the Constitution;

b) A declaration that the right to life is greater than the right to picket and to go on strike and a finding that these rights are inconsistent with the general intent of the Constitution, when applied to members of the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses;

c) A declaration limiting the rights under Articles 37 and 41(2)(d) for members of the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses, as outlined in Article 24(1).

The Response

8. In spite of due service, the 1st Respondent did not respond to the Petition.

9. The 2nd Respondent filed a Statement of Response to the Petition dated 10th October 2016 by which it states that the Petition, as filed, is *res judicata* as the Court has already pronounced itself on the constitutionality of Sections 78 and 81 of the Labour Relations Act, in *Petition No 70 of 2014*.

10. The 2nd Respondent further states that the Petition and the prayers sought therein amount to challenging the validity of Article 41(2) (d) of the Constitution of Kenya, 2010 contrary to Article 2(3) of the said Constitution.

11. The 2nd Respondent adds that the Petition offends the mandatory provisions of Article 50(1) of the Constitution and rules of natural justice as it denies parties not brought to court, an opportunity to defend themselves against orders which shall affect them. The 2nd Respondent cites these parties as the Central Organisation of Trade Unions (COTU), Civil Servants Union, Trade Union Congress and Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers, whose workers also work in essential services and who are not party to this Petition.

12. The 2nd Respondent goes on to state that the Petitioner has not disclosed his personal interest nor whose right has been infringed or threatened with infringement.

13. The 2nd Respondent concludes by asking the Court to declare Sections 78 and 81 of the Labour Relations Act unconstitutional as they infringe on the fundamental rights of workers in essential services contrary to the provisions of Article 24 of the Constitution.

14. Alongside its Response, the 2nd Respondent filed a Notice of Preliminary Objection dated 10th October 2016 citing the following grounds:

a) That the Petition is *res judicata* as the subject matter has been addressed in the findings and judgment of the Court in *Nairobi Petition No 70 of 2014*;

b) That the Petition offends the fundamental rights of employees enshrined in Article 41(2)(d) of the Constitution;

c) That the Petition offends the mandatory provisions of Article 50(1) of the Constitution and rules of natural justice, as it denies parties not brought to court an opportunity to defend themselves against orders which shall affect them.

15. The Respondent filed a further Preliminary Objection dated 12th May 2021 stating:

a) That the Court lacks jurisdiction to entertain these proceedings because by dint of Article 165(3)(d)(i) of the Constitution, it is only the High Court that has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution;

b) That the Court lacks jurisdiction to entertain these proceedings by dint of Article 162(2)(a) of the Constitution, Section 12 of the Employment and Labour Relations Court Act and the Supreme Court decision in ***Republic v Karisa Chengo & 2 others [2017] eKLR***;

c) That the Petitioner has not demonstrated with precision how the fundamental rights and freedoms under the Constitution have been violated or are threatened with violation, contrary to the principles espoused in ***Republic v Anarita Karimi Njeru [1979] KLR 154*** and ***Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR***;

d) That the Petition is *res judicata* as the subject matter has been addressed in the findings and judgment of the Court in ***Petition No 70 of 2014: Okiyah Omtatah Okoiti v Attorney General & 5 others [2015] eKLR***.

16. When the parties appeared before us, it was agreed that the Preliminary Objection be considered alongside the other issues raised in the Petition.

The Preliminary Objection

17. The first preliminary issue raised by the 2nd Respondent has to do with the jurisdiction of the Court to deal with the Petition now before us.

18. In this regard, the 2nd Respondent states that the Employment and Labour Relations Court has no jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution. The 2nd Respondent submits that this is a preserve of the High Court.

19. In advancing this proposition, the 2nd Respondent relies on Article 165(3)(d)(i) of the Constitution which provides that the High Court shall have:

a) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-*

b) *the question whether any law is inconsistent with or in contravention of this Constitution;*

20. The 2nd Respondent argues that this provision locks out both the Employment and Labour Relations Court and the Environment and Land Court from handling matters touching on the interpretation of the Constitution and especially where the constitutionality of a statute is in question.

21. In its written submissions dated 12th May 2021, the 2nd Respondent makes reference to a *'constitutional court'* as the one clothed with jurisdiction to deal with issues of violation of constitutional rights. An examination of our constitutional architecture does not reveal the existence of any specific court which may be referred to as *'the constitutional court.'*

22. As regards the jurisdiction of the Employment and Labour Relations Court, it is important to go back to the creation of this Court and the place to begin is Article 162(2) and (3) of the Constitution which provides:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

23. In obedience to Article 162(2)(a) of the Constitution, Parliament enacted Section 12 of the Employment and Labour Relations Court Act, setting out the jurisdiction of this Court in the following terms:

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employer's organisation and a trade union's organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employer's organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

24. Section 77 of the Labour Relations Act grants the Employment and Labour Relations Court the power to prohibit strikes and lockouts. This provision further grants the Court power to direct parties in a dispute to engage in conciliation discussions towards resolving the dispute.

25. By its objection, the 2nd Respondent seeks to introduce a further limitation to the jurisdiction of this Court that is not contemplated either by the Constitution or the enabling statute. Mercifully, the Constitution itself embodies its own principles of interpretation.

26. In this regard, Article 259 (1) states:

259.(1) This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law;

(d) contributes to good governance.

27. Article 259(3) goes on to state:

> *3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking……*

28. With these principles in view and pursuing a purposive interpretation of the Constitution, we find and hold that the phrase *'High Court'* appearing in Article 165(3)(d)(i) of the Constitution must be read and interpreted to include the two courts of equal status being the Employment and Labour Relations Court and the Environment and Land Court; the only limitation being the subject matter of the case before each court.

29. Further still, and in line with the principle that the Constitution must be read as a whole, Article 162(2) of the Constitution specifically ousts jurisdiction from the High Court as far as employment and labour relations and environment and land matters are concerned.

30. This issue has been litigated upon severally and the legal position has been settled with clarity. ***Spedag Interfreight Kenya Limited v Labour & Social Relations & 2 others [2019] eKLR*** was filed before the High Court in Mombasa, seeking determination of a dispute on deduction of agency fees pursuant to section 49 of the Labour Relations Act. The Court held that first, the High Court and the Employment and Labour Relations Court were at par and could award the same reliefs within their specific jurisdictions, second, that matters revolving around employment should be filed and determined at the Employment and Labour Relations Court, and lastly, that the Employment and Labour Relations Court could determine matters on violation of constitutional rights but only in relation to employment and labour relations matters.

31. Earlier on in ***United States International University (USIU) v Attorney General and 2 Others [2012] eKLR*** the High Court in Nairobi had held that:

> *a) Labour and employment rights are part of the Bill of Rights in the Constitution and are protected under Article 41;*
>
> *b) Labour and employment rights violations would only arise from specific relationships created within the employment sphere; relationships that had been specified under section 12 of the then Industrial Court Act (now under section 12 of the Employment and Labour Relations Court Act);*
>
> *c) As per Article 162 of the Constitution jurisdiction to determine employment and labour relations matters is vested only in the Employment and Labour Relations Court;*
>
> *d) If all constitutional violations were handled by the High Court despite being employment matters, parallel jurisdiction would be established between the High Court and the Employment and Labour Relations Court which would lead to confusion and would be counter-productive to the spirit of the constitution;*
>
> *e) The Employment and Labour Relations Court is of equal status to the High Court and is also a superior court as per the Constitution.*

32. The High Court in the ***USIU Case*** (supra) concluded that the Employment and Labour Relations Court is an independent court of equal status with the High Court and that it has the jurisdiction to interpret the Constitution and enforce matters relating not only to Article 41 but all fundamental rights ancillary and incidental to employment and labour relations.

33. ***Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR*** had been filed at the High Court in Nairobi, seeking relief for violation of constitutional rights arising from an employment relationship. The High Court held that it did not have jurisdiction to hear and determine the matter since the cause of action had arisen from an employment relationship.

34. The matter went on appeal to the Court of Appeal, where it was confirmed that the cause of action was related to employment and the dispute should therefore have been filed before the Employment and Labour Relations Court, in accordance with Article 162 (2) (a) of the Constitution.

35. More recently in ***Attorney General & 2 others v Okiya Omtatah & 14 others [2020] eKLR*** the Court of Appeal stated the following:

> ***"We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the Constitution as held by the High Court in United States International University (USIU) v The Attorney General & 2 others [2012] eKLR and this Court in Daniel N. Mugendi v Kenyatta University & 3 others [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the Constitution is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters. In Daniel Maingi Muchiri v Jubilee Insurance Co. Ltd, CA No 138 of 2016, this Court expressed the position as follows:***
>
> ***"The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction." (Emphasis added)"***

36. We could have decided this issue in one swoop. However, because it is a matter that keeps cropping up, we have devoted a lot of time to it in the hope that it will now rest. The final conclusion is that the jurisdictional limitation placed on this Court is only with regard to the

subject matter of the case; it has nothing to do with the question whether application or interpretation of the Constitution is involved. To use the phrase *'constitutional court'* coined by the 2nd Respondent, one could safely say that the High Court, the Employment and Labour Relations Court and the Environment and Land Court are all *'constitutional courts'* within their specific areas of jurisdiction.

37. As regards ***Karisa Chengo*** (supra), the only thing we will say is that this decision was specifically on the jurisdiction of Judges appointed to serve in the two specialised courts to hear and determine criminal appeals. It had nothing to do with jurisdiction to interpret the Constitution in relevant matters, which is the subject of the 2nd Respondent's objection. That is all we will say on that case.

38. On this limb of the 2nd Respondent's Preliminary Objection, the inescapable finding is that the objection is without basis and is overruled.

39. The second limb of the 2nd Respondent's Preliminary Objection is that the issues raised in the Petition are *res judicata*. We were referred to Section 7 of the Civil Procedure Act which provides:

> ***7. Res Judicata***
>
> *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

40. In ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR*** the Court of Appeal restated the *res judicata* principle as follows:

> ***"Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;***
>
> ***a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b) The former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c) Those parties were litigating under the same title.***
>
> ***d) The issue was heard and finally determined in the former suit.***
>
> ***e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised."***

41. The 2nd Respondent submits that the issue of limitation of the right to go on strike as enshrined in Article 37 of the Constitution was directly and substantially in issue in ***Petition No 70 of 2014: OKiya Omtatah Okoiti v Attorney General & 5 others [2015] eKLR*** which matter was heard and finally determined by our brother, **Nduma J**. The 2nd Respondent therefore posits that this Court is *functus officio* as regards the issues raised by the Petitioner.

42. We have had occasion to look at the judgment in *Petition No 70 of 2014*, which was filed on the throes of an impending strike by members of the Kenya National Union of Nurses, the 2nd Respondent in this Petition.

43. In *Petition No 70 of 2014*, the Petitioner sought the following reliefs:

> a) A declaration that the impending strike by members of the Kenya National Union of Nurses was illegal;
>
> b) A declaration that there is need for the State to enact a legal and policy framework to secure the rights of workers in essential services, and to ensure the amicable resolution of disputes without disrupting service delivery;
>
> c) An order directing the 1st, 2nd, 3rd, 4th and 5th Respondents to enact a comprehensive legal and policy framework resolving labour disputes in essential services without disrupting service delivery.

44. The issues for determination in *Petition No 70 of 2014* as captured in the judgment by **Nduma J** were the following:

> a) Whether the Court had jurisdiction to hear and determine the Petition;
>
> b) Whether the Petitioner had clearly brought out the constitutional violations by the 1st to 5th Respondents;
>
> c) Whether Section 81(3) of the Labour Relations Act, which prohibits strikes and lockouts in essential services is sufficient for purposes of limiting the enjoyment of rights as provided in Article 24(1-3) of the Constitution;

d) Whether a declaration should be issued that there is need for a comprehensive policy and legal framework for the amicable resolution of labour disputes in essential services, including in health;

e) Whether refusal to sign the concluded Collective Bargaining Agreement by the 3rd and 5th Respondents was constitutional and lawful;

f) Whether the 3rd and 5th Respondents should be compelled to absorb the Economic Stimulus Programme (ESP) Health Workers into permanent and pensionable terms of employment;

g) Whether the Salaries and Remuneration Commission has capacity to set the salaries of unionisable employees.

45. In the present Petition, the Petitioner seeks the following remedies:

a) An injunction barring the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses or any of their branches from exercising rights under Articles 37 and 41(2)(d) of the Constitution;

b) A declaration that the right to life is greater than the right to picket and go on strike and a finding that these rights are inconsistent with the general intent of the Constitution, when applied to members of the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses;

c) A declaration limiting the rights under Articles 37 and 41(2)(d) for members of the Kenya Medical Practitioners, Pharmacists & Dentists Union and the Kenya National Union of Nurses, as outlined in Article 24(1).

46. Once we have dealt with the preliminary issues raised by the 2nd Respondent, the substantive issues before us are two:

a) Balancing the right to life and the right to industrial action for workers in the health sector;

b) Limitation of the right to industrial action for health workers.

47. Even on a *prima facie* basis, there is nothing to suggest that these issues were before the Court in *Petition No 70 of 2014*. The preliminary issue on *res judicata* is therefore also overruled.

48. The final issue of a preliminary nature raised by the 2nd Respondent is that the Petitioner has not demonstrated with precision how the fundamental rights and freedoms under the Constitution have been violated or are threatened with violation.

49. In advancing this point the 2nd Respondent relied on the well-known decision in ***Republic v Anarita Karimi Njeru [1979] KLR 154*** where the Court of Appeal held that constitutional petitions must be pleaded with reasonable precision. The 2nd Respondent also relied on ***Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR.***

50. We have looked at the Petitioner's pleadings, which set out the violations complained of, together with the relevant constitutional provisions. From these, we have drawn specific issues for determination, touching on specific rights. We are therefore satisfied that the *'precision principle'* has been satisfied.

51. On the whole, we find that the Respondent's Preliminary Objection is not well taken and proceed to overrule it in its entirety. We will now address the Petition on merit.

Balancing and Limitation of Rights

52. The Petitioner's case is that the right to life as guaranteed in Article 26(1) of the Constitution is superior to the right to participate in industrial action as provided under Articles 37 and 41(2)(d). The Petitioner states that health workers, being in the category of essential service providers, should be prohibited from taking industrial action as it has led to loss of life, which is irreversible.

53. Section 81 of the Labour Relations Act defines an essential service as a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population. Under the Fourth Schedule to the Act, hospital services have been listed as an essential service.

54. It is not in contest that the right to industrial action is not absolute and is therefore subject to limitation within the parameters of Article 24(1) of the Constitution which provides:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors including: -

a) The nature of the right or fundamental freedom;

b) The importance of the purpose of the limitation

c) The nature and extent of the limitation;

d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;

e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

55. The Employment and Labour Relations Court (variously constituted) has broached the issue of limitation of the right to industrial action.

56. In ***Okiya Omtatah Okoiti v The Attorney General & 5 others [2015] eKLR*** **Nduma J** held that Sections 78 and 81 of the Labour Relations Act, whose effect is to prohibit workers employed in essential services from going on strike derogate from the core content of the right to strike as provided under Article 41(2)(d).

57. In ***County Government of Kakamega and another v Kenya National Union of Nurses and another [2017] eKLR*** **Onyango J** took a contrary view stating:

> ***"It is my opinion that the limitations under Section 81 of the Labour Relations Act meet the tests set under Article 24(1). Withdrawal of Hospital Services derogate on the right to life under Article 26, the right to the highest attainable standard of health under Article 43(1) and the right to emergency medical treatment under Article 43(2). I think it is not a disputed fact that the withdrawal of medical services is very likely to, and in fact does, lead to loss of life to people who need medical services. The right to life is in a wider sense part of the right to human dignity under Article 28. The withdrawal of health services may therefore lead to cruel, inhuman or degrading treatment of patients*** **and** ***their relatives who do not have the resources to get treatment at private medical facilities and who have to suffer death or watch their loved ones die without medical attention. Freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 and cannot be limited or derogated."***

58. What then is the correct position on this issue? In reaching our decision, we made reference to international law and foreign decisions of persuasive force.

59. The position of the International Labour Organisation (ILO) as contained in the *Digest of Decisions of the Freedom of Association Committee of the Governing Body* is that the right to go on strike may be restricted or prohibited:

a) In the public service only for public servants exercising authority in the name of the State; or

b) In essential service in the strict sense of the term meaning, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.

60. The *European Social Charter* permits restriction of the right to go on strike only in cases of protection of public interest, the rights and freedoms of others, national security, public morality and health.

61. In the South African case of ***Eskom Holdings Ltd v National Union of Mineworkers and Others (840/2010) [2011] ZASCA 229; 2012 (2) SA 197 (SCA); [2012] 1 All SA 278 (SCA); [2012] 3 BLLR 254 (SCA); (2011) 32 ILJ 2904 (SCA)*** it was held that not all the workers employed in an industry declared to be an essential service need to be precluded from participating in a strike for that service to continue to operate at an acceptable level.

62. The concept of *'minimum service'* is intended to allow certain workers in an industry designated as an essential service to go on strike while at the same time maintaining a level of service at which the life, personal safety or health of the whole or part of the population will not be endangered. In arriving at what constitutes *'minimum service'* a detailed inquiry must be made in order to determine the category and number of employees needed to provide a *'minimum service'* at an acceptable level, in the interest of other fundamental rights.

63. In ***National Union of Mineworkers v Essential Services Committee and Others (JR 1147/16) [2019] ZALCJHB 82*** the court defined *'minimum service'* as one that is sufficient to ensure that during the strike no person's life, personal safety or health is endangered. The court further held that there must be a balance to protect all fundamental rights and set the test for determining *'minimum service'* as:

a) Taking into account employees' constitutional right to participate in industrial action, which ought to be balanced against the general public interest;

b) An examination of specific critical or necessary services required within an essential services designation, that must be maintained at acceptable levels during the course of industrial action, to ensure that life, personal safety or health of the whole or part of the population is not endangered;

c) An assessment of whether a service is superfluous or critical to the overall objective of minimum service through an examination of whether the core business of the entity/service consists of components which are/are not intertwined or interdependent;

d) If the business components of an entity are interdependent, an assessment is to be made as to whether a determination of minimum service will achieve its objectives by attaching significance to any individual business component to the exclusion of any relationship with other components, or whether a composite assessment of the components would be necessary in order to achieve those objectives.

64. In Canada, the principle of *'minimum service'* is maintained. The case of ***Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4 (CanLII), [2015] 1 SCR 245*** dealt with the *Public Service Essential Services Act* enacted to limit the right to go on strike for public sector employees engaged in essential services.

65. Under the *Public Sector Essential Services Act*, a public employer is given the authority to determine the classification of employees who must continue to work during work stoppage, the number and names of employees within each classification and the essential services that are to be maintained.

Conclusion and Disposition

66. Looking at the right to go on strike against the right to life and applying the principles of Article 24 of the Constitution, we are persuaded that an outright prohibition of the right to go on strike for members of the 1st and 2nd Respondents would derogate from the core of that right, which in our view, is not what the Constitution contemplates.

67. We are however convinced that the right to go on strike for these workers is qualified and is therefore contingent upon retention of *'minimum service'* at the affected facilities to ensure that there is no danger to life or health of members of the public.

68. In light of this, we make the following orders.

a) Industrial action by health workers is not permitted unless there is a known and acceptable formula of *'minimum service'* retention at every affected health facility. This limitation is in addition to those imposed by the conciliation procedures set by the Labour Relations Act;

b) The Cabinet Secretaries in charge of Health and Labour, in conjunction with all major stakeholders within the health sector, shall within the next 12 months from the date of this judgment, develop and publish guidelines to give effect to order (a) above;

c) The Registrar of the Employment and Labour Relations Court is directed to serve this judgment upon the Attorney General as well as the Cabinet Secretaries in Charge of Health and Labour.

69. As this is a public interest litigation, we direct that each party will bear their own costs.

70. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021

……..

MONICA MBARU

JUDGE

……

JORUM ABUODHA

JUDGE

…….

LINNET NDOLO

JUDGE

Appearance:

Joseph Otieno Oruoch (the Petitioner in person)

No appearance for the 1st Respondent

Ms Adede h/b Mr. Omulama for the 2nd Respondent