



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 28 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH OTIENO ORUOCH.....CLAIMANT

-Versus-

- 1. KENYA MEDICAL PRACTITIONERS, PHARMACISTS & DENTISTS**
- 2. KENYA NATIONAL UNION OF NURSES.....RESPONDENT**

R U L I N G

The Petition herein was filed by JOSEPH OTIENO ORUOCH who describes himself as an adult Kenyan Citizen of sound mind residing in Kisumu and a holder of Kenyan National Identification Card Number 11302177. He has filed the petition under Article 22(1) as a person whose rights and fundamental freedoms in the Bill of Rights have been denied, violated or infringed or is threatened.

Both Respondents, the Kenya Medical Practitioners, Pharmacists and Dentists Union and the Kenya National Union of Nurses, are trade unions registered in Kenya representing workers in the healthcare sector.

The Petitioner states that the quality of health care services is deteriorating steadily following frequent strikes by doctors and nurses due to various grievances and that this has resulted in several deaths attributable to the strikes. He states that although workers in Kenya including Doctors, Dentists, Pharmacists and Nurses represented by the Respondents have a right to call or go on strike under the Constitution, there are other provisions in the same Constitution which are obviously infringed by the strikes.

He states that there appears to be inconsistencies in the Constitution which are to blame, being Article 37 and 41(2) (d) on the one hand and Article 25(a), Article 26(1) and (3) and Article 43(1) (a) and (2).

The said Articles provide as follows -

Assembly, demonstration, picketing and petition.

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

41 (2) Every worker has the right:

(d) to go on strike.

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

Right to life.

26. (1) Every person has the right to life.

.....

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

Economic and social rights.

43. (1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

(2) A person shall not be denied emergency medical treatment.

The Petitioner states that chasing sick people from hospitals and abandoning them to die by the striking workers amounts to inhuman and cruel treatment and violates Article 25(a), 26(1) and 3 and Article 43(1) (a) and (2) and further that Article 25(a) cannot be limited.

The petitioner prays for remedies as set out below -

1. That the court finds my argument coherent and consistent based on the Constitution and laws of Kenya.

2. That the court issues an injunction suspending Articles 37 and 41 (2) (d) with respect to medical health workers to forestall further losses of lives premised on their provisions and grant any relief as provided for in Article 23(3) as the case awaits hearing and determination before the court.

3. That the court declares the right of life greater than the right to picket and strike and find that they are inconsistent with the general intent of the Constitution when applied to medical health workers.

4. That the court gives other direction necessary for the limitation of rights to Article 37 and 41(2) (d) as outlined in Article 24(1) which states:

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 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.

The 1st Respondent, the Kenya Medical Practitioners, Pharmacists and Dentists Union was served but did not file any response to the petition or attend court. The 2nd Respondent, the Kenya National Union of Nurses, filed a notice of Preliminary objection on the following grounds -

1. **THAT**, the Petition is Resjudicata as the subject matter has been addressed in the findings and judgment of this Honourable Court in Petition 70 of 2014 at Nairobi.
2. **THAT**, the Petition offends the fundamental rights of employees enshrined in Article 41(2) (d) of the Constitution.
3. **THAT**, the petition offends the mandatory provisions of Article 50 (1) of the Constitution of Kenya 2010 and Rules of Natural Justice, as it denied parties not brought in court an opportunity to defend themselves against orders which shall affect them.
4. **THAT**, the Honourable Court should strike out the Petition with Costs to the 2nd Respondent.

The 2nd Respondent also filed a statement of Response to the Petition in which it states that the subject matter in the petition is Res Judicata as this court has pronounced itself on the unconstitutionality of section 78 and 81 of the Labour Relations Act in Petition No. 70 of 2014 when the court held as follows -

49. *The limitation under Section 81(3) are specific that;*

"there shall be no strike or lock-out in an essential service."

This limitation is absolute and derogates from the core or essential content of the right to strike. Similarly the limitation under section 78(1) (f) which reads;

"no person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if;

(f) the employer and employees are engaged in an essential service derogates from the core or essential content of the right to strike."

To this extent, Section 81(3) and 78(1) (f) purports to nullify the right to go on strike provided under Article 41 (2) (d) of the Constitution. Article 2(4) of the Constitution provides;

"any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid."

50. *The Court finds that Section 78(1) (f) and 81(3) of the Labour Relations Act, 2007 do not meet the legal standards set under Article 24 (2) (c), as read with Section 41 (2) (d) of the Constitution. The legislature needs to relook these provisions in light of the Constitution of Kenya, 2010.*

The 2nd Respondent further states that the prayers sought in the petition amount to challenging the validity of the Constitution and specifically Articles 41(2) and specifically Articles 41(2) (d) and Article 2(3) which provides that the validity of the Constitution is not subject to challenge by or before any court or other state organ.

The 2nd Respondent further states that the Petition offends the mandatory provisions of Article 50(1) and Rules of Natural Justice as it denies parties not in court the opportunity to defend themselves against orders which shall affect them being the Central Organisation of Trade Unions (COTU) Kenya, the Civil Servants Union, the Trade Union Congress and Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA Workers) whose members also work in essential

services and who are not party to this petition.

The 2nd Respondent further states that the Petitioner has not disclosed his personal interests or the persons whose rights have been infringed or are threatened and that the petition addresses speculative issues. The 2nd Respondent further states that the petition is frivolous, vexatious and an abuse of court process.

The 2nd Petitioner prays that the petition be dismissed and further that the court declares section 78 and 84 of the Labour Relations Act unconstitutional for being in conflict with Article 24 of the Constitution.

On 23rd November, 2016 the 2nd Respondent applied for an order certifying this petition as raising a substantial question of law requiring to be heard by a bench of not less than 3 judges. I directed the 2nd Respondent to file a formal application and serve it upon the Petitioner and 1st Respondent but the 2nd Respondent failed to file the application. On 23rd February, 2017 the Petitioner moved the court for similar orders.

I have carefully considered the prayers in the petition and the issues raised by the 2nd Respondent in both its Notice of Preliminary Objection dated 16th October, 2016 and Statement of Response to the Petition.

The issues raised are-

1. That there is an apparent conflict between Articles 37 and 41(2) (b) on the one hand and Articles 25(a), 26(1) and (3) and Article 43(1) and (2) as read with Article 2(3) of the Constitution on the other hand.
2. That arising from the 2nd Respondent's Statement of Response is whether sections 78 and 81 of the Labour Relations Act are in conflict with the Constitution and should be declared unconstitutional.

I agree with both the Petitioner and the 2nd Respondent that these are weighty constitutional issues that require determination by a bench consisting of not less than three judges. As provided under Article 165 (4) of the Constitution, I certify that this petition raises substantial questions of law under Article 165(3) (b) and (d) of the Constitution requiring to be heard by an uneven number of judges being not less than three. I therefore forward the file to the Chief Justice to constitute a bench to hear and dispose of this petition.

Dated and signed and delivered this 16th day of March, 2017

MAUREEN ONYANGO

JUDGE