



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 26 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER SECTION 70(a), 72(3), 74(1) AND SECTIONS 77 OF THE CONSTITUTION OF
KENYA 1969**

AND

IN THE MATTER OF ARMED FORCES ACT (CHAPTER 199 OF THE LAWS OF KENYA)

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
HIGH COURT PRACTICE & PROCEDURE RULES 2013**

BETWEEN

BENJAMIN KIPYEGON MUTAI	1ST PETITIONER
EDWARD KILI KUTO	2ND PETITIONER
BENJAMIN KIPKOECH CHEPSIROR	3RD PETITIONER
ELIUD KIPKORIR SANG	4TH PETITIONER
MATHEW KIPNGENO KORIR	5TH PETITIONER
CHARLES KIPKEMBOI BII	6TH PETITIONER
FRANCIS KIPCHICHIR BETT	7TH PETITIONER
SOLOMON KIPRUTO MANYARKIY	8TH PETITIONER
DAVID KIPSANG BIY	9TH PETITIONER

v

THE ATTORNEY GENERAL

RESPONDENT

RULING

1. The Petitioners who were serving in the Kenya Airforce at all material times moved the Court on 26 July 2016 alleging violation of their constitutional rights through illegal detention at Kamiti Maximum Prison, torture, inhumane and degrading treatment, sexual assault, loss of properties and legal representation.
2. The alleged violations arose from the 1982 coup attempt.
3. The Petition was accompanied with a motion under certificate of urgency seeking the addition of several named applicants as Petitioners.
4. The Court dismissed the motion on 2 March 2017 because the Petitioners did not attend Court to prosecute it.
5. On 21 September 2017, the Respondent filed a Notice of Preliminary Objection in the following terms

TAKE NOTICE THAT THE HON. ATTORNEY GENERAL shall at the hearing of the aforementioned suit raise and argue a preliminary objection based on the following points of law:

1. That the claim as drafted and filed contravenes article 162(2) of the constitution. 2. That the claim as drafted offends section 12(1) of the Industrial court act.
6. On 24 October 2017 the Court directed that the preliminary objection be taken on 9 November 2017.
 7. Despite service, the Petitioners did not file any response or grounds of opposition but their advocate made oral submissions.

Respondent's submissions

8. According to the Respondent, the alleged violations of the Petitioners rights and freedoms did not occur within the context of an employment relationship and therefore in terms of section 12(1) of the Employment and Labour Relations Court Act as read with Article 162(2) of the Constitution, this Court lacked the requisite jurisdiction.

Petitioners' submissions

9. The Petitioners urged that the preliminary objection raised by the Respondent did not meet the threshold as set out in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd* (1969) EA 696.
10. It was also urged that the Petitioners were governed by the terms of the Armed Forces Act (now repealed) and being employees who have a dispute with their then employer, Kenya Air Force (now the Kenya Defence Forces), it is this Court which has jurisdiction.
11. When asked by the Court to explain the identity of the persons who allegedly violated the Petitioners rights and freedoms, Mr. Agina stated that the violations were perpetrated by members of the Armed Forces who arrested and interrogated the Petitioners.
12. According to Mr. Agina, the Prisons and Police only played a peripheral role by providing detention facilities.
13. As what should be the consequence of the Court upholding the preliminary objection, Mr. Agina urged the Court to transfer the Petition to the competent Court instead of dismissing it.
14. Mr. Agina also cited a few decided cases but he did not provide any copies to the Court or the

Respondent (Court has established the said decisions as *Peter Ngari Kagume & 7 Others v Attorney General* (2009) eKLR and *Samuel Chege Gitau & 283 Others v Attorney General* (2016) eKLR.

15. The Petitioners also filed authorities on 10 November 2017 after the submissions, and therefore the Respondent did not have the benefit of responding to the same.

Evaluation

16. The Court has looked at the *Peter Ngari Kagume* case and established that the dismissal of the Petitioners was directly in issue neither was the jurisdictional question now posed by the Respondent addressed in it.

17. In the *Samuel Chege Gitau* case, the principal question before the Court was the dismissal of the Claimants from employment/service in violation of the Armed Forces Act.

18. The two decisions are therefore of no relevance to the jurisdictional question.

19. The Court has keenly perused the Petition. It is inelegantly drafted but the gravamen of the Petitioners cause of action does not appear to be violation of their rights *qua* employees despite the brief and broad allegation in paragraph 9. There are no allegations of breach of contract or employee rights and freedoms flowing from the Constitution.

20. Equally, there is no relief sought which would arise expressly or implicitly from violation of their rights as employees.

21. This Court is also aware that the High Court has in several cases brought by former colleagues of the Petitioners dealt with similar allegations of violations of constitutional rights and granted appropriate relief.

22. Considering the foregoing and the Court of Appeal decision in *Daniel N Mugendi v Kenyatta University & 3 Ors* (2013) eKLR, the Court orders that this Petition be transferred to the High Court sitting in Nakuru for hearing and determination.

23. Costs in the Cause.

Delivered, dated and signed in Nakuru on this 17th day of November 2017.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Agina instructed by Agina & Associates, Advocates

For Respondent Mr. Kirui, Senior Litigation Counsel, Office of the Attorney General

Court Assistant Nixon