



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW NO. 5 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th May, 2016)

REPUBLIC.....APPLICANT

VERSUS

DEPUTY COMMISSIONER FOR LABOUR.....1ST RESPONDENT

COMMISSIONER FOR LABOUR.....2ND RESPONDENT

THE RESIDENT MAGISTRATES COURT AT NAIROBI.....3RD RESPONDENT

EX-PARTE

KEVIN ASHLEY

CHRISTINE WANJIRU

NAIROBI JAVA HOUSE LIMITED

RULING

1. This is an Application for Judicial Review via Notice of Motion dated 15th of April 2015, where the Applicants Kevin Ashely, Christine Wanjiru and Nairobi Java House Limited seek the following orders:

1) An order of Certiorari to bring to the Court and quash the decision dated 19th December 2014 made by the Respondent on behalf of the 2nd Respondent purportedly pursuant to Sections 45 and 49 of the Employment Act 2007.

2) An order of Certiorari to bring to the Court and quash the Charge sheet dated 13th March 2015 in the Resident Magistrate's Court at Nairobi Criminal Case No 483 of 2015.

3) An Order of Certiorari to bring to the Court and quash the Summons dated 15th March 2015 issued by the Resident Magistrate's Court at Nairobi in Criminal Case NO 483 of 2015.

4) An Order of prohibition directed at the 1st and 2nd Respondent prohibiting them from prosecuting, continuing with prosecution and/ or instituting criminal prosecution against the Applicants in the Resident Magistrate's Court at Nairobi in Criminal Case No 483 of 2015 in its present form or in any intended variation thereof of the charges thereon or akin to the same.

5) An Order of Prohibition directed at the Resident Magistrate's Court at Nairobi prohibiting him or any other Magistrate's Court at Nairobi from hearing or further hearing, determining or in any manner whatsoever dealing and/ or proceeding with Criminal Case No. 483 of 2015 any variation thereof the charge or charges in substituting thereof or akin to the same in the said criminal case.

6) The costs of the application be provided for.

2. The Application is supported by the verifying affidavit of Kevin Ashely and Christine Wanjiru.

Facts

3. The 1st and 2nd *ex-parte* Applicants are the Chief Executive Officer and Human Resource Manager respectively of Nairobi Java House Limited the 3rd *ex parte* Applicant is a limited liability company duly incorporated under Companies Act Chapter 486 of Laws of Kenya.

4. On the 13th of March 2015 the 2nd Respondent charged the *ex-parte* Applicants with failing to provide an employee to whom Wages Regulation Order applies with a condition of employment contrary to Section 49(1) (c) of the Employment Act 2007 as read together with Section 88 of the said act:

“The particulars of the offence are stated as “Kevin Ashely as the Director Wanjiru as Human Resource Manager and Nairobi Java House as the Company jointly being employers of Charity Mwihaki Thumbi as Senior Human Resource Officer between 4th October 2013 to 19th November 2014 here in Nairobi County, you unlawfully terminated and failed to compensate her in cash amounting to Kshs. 576,000.00.”

5. The said Charity Mwihaki Thumbi was employed by the 3rd Ex-Parte Applicant as a Senior Human Resource Officer vide contract of service dated 4th October 2013 and terminated on the 19th of November 2014, after which she lodged a complaint of unfair termination in terms of Section 47 of the Employment Act 2007.

6. Via letter dated 19th December 2014 the 1st Respondent found that the termination was unfair and recommended that the complainant be paid in addition to the terminal benefits already computed, a further six months' salary as compensation for the unfair termination.

7. The 3rd *ex parte* Applicant disputed and rejected the findings and recommendation on substantial grounds vide letter dated 12th of January 2015 and the complainant wrote a further demand via their Advocates dated 26th January 2015 which the 3rd *ex-parte* Applicant responded and disputed the claim vide letter dated 6th of February 2015.

8. The *ex-parte* Applicants were to appear before the 3rd Respondent, Resident Magistrate's Court at Nairobi to plead to the charges preferred against them by the 2nd Respondent the Deputy Commissioner for Lands.

9. The Applicants submit that the decision to prosecute them is unlawful and an abuse of the process of the Court on the principal ground that the purported offence with which they are charged with does not exist in law. Contravention of Section 49 deals with “remedies for wrongful dismissal and unfair termination” and does not create or prescribe any offence. It only sets out the remedies for wrongful dismissal and unfair termination that Labour Officer may recommend to an employer.

10. The Applicants also submit that Section 88 of the said Act deals with “General Penalty and Offences under other laws” and does not create any offence. Moreover, they submit that Section 88 has no relevance in the matter as the *ex-parte* Applicants have not committed any offence under the Act and have not contravened or failed to comply with any of the provisions of the Act for which no penalties is

specifically provided.

11. They therefore ask the Court to quash the above decision by order of Certiorari as it is unlawful and invalid in law. They submit that the ex parte Applicants are also entitled to an order of prohibition to ensure that the Respondents do not act on the aforesaid unlawful charge.

12. The ex parte Applicants further state that their prosecution on non-existent offences are unconstitutional and a nullity. It is a clear violation of the Constitution of Kenya under Article 10(2) (a) and 159 (2) (e) of the Constitution of Kenya 2010.

13. They rely on the Ruling of Justice Nyamu (as he then was) in **Misc. Civil Application No 491 of 2004; Republic –vs- The Principal Magistrate’s Court at Githunguri Ex- Parte James Kahuha Thuo [2005] eKLR** where he held that:

“It is irresistible for the Court to find that the two applicants have been charged with offences not defined anywhere or with offences not known to law. The Court finds that the very act of charging them with non-existent offences is an unlawful act. It is a cardinal principle of the rule of the law that a person can only be charged with breaches of law in ordinary courts and with nothing else. Any attempt to charge a person otherwise is an infringement of the rule of law and the Constitution specifically prohibits any conviction except in respect of contempt under Section 77(8) and the proviso.”

14. The ex-parte Applicants further submit that the charge sheet does not disclose an offence known to law and is incompetent and fatally defective. They rely on the case of **Barclays Bank of Kenya vs City Council of Nairobi [2006] eklr** where Justice Wendo held:

“the applicant has ably demonstrated that the offence with which the applicant was charged is non –existent and the charge sheet is therefore incompetent and fatally defective... the charge sheet and proceedings in case number 1509 (A)/05 are amenable to being quashed and I hereby order them quashed by Order of Certiorari.”

15. They also rely on the case of **Henry O. Edwin vs Republic [2005] e KLR** where the Court of Appeal stated that:

***“It is trite law that an accused person must be charged with an offence that is known to law. Particularizing the charge enables the accused person know the offence with which he is charged and the likely sentence that he would get should he be convicted. This is information that enables the accused person to adequately prepare his defense. We adopt with approval the sentiments of the High Court in Sigilani –vs Republic [2004] 2 KLR 480 where it was held that: _
“The Principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead specific charge that he can understand. It will also enable the accused to prepare his defense.” We have looked at the Act. Section 5, the section under which the appellant was charged provides for “penalty for other acts connected to narcotic drugs etc.” There is no section 5(b). The appellant was therefore charged under a non-existent provision of law. This renders the charge sheet fatally defective”.***

16. They therefore submit that the decision to charge the ex parte Applicant for non- existent offences amounts to gross abuse of the process of Court and that this Court has jurisdiction to halt the criminal proceedings by way of prerogative orders of Certiorari and prohibition.

17. They further submit that the Court has exclusive original jurisdiction to hear and determine the Notice of Motion in terms of Article 162(2) (a) of the Constitution and Section 12(1) (a) of the Employment and Labour Relations Court Act, Chapter 234 B of the Laws of Kenya because the subject matter relates to a dispute relating to or arising out of employment between an employer and an employee.

18. For the foregoing reasons they pray that the application be granted as prayed with costs to the ex parte Applicants.

19. The Respondents filed a Replying Affidavit dated 8th May 2015 sworn by Robinson Juma Twanga, a Principal Officer Labour Officer in the Ministry of Labour, Social Security and Services, Labour Department.

20. They aver that as Labour officers have powers under Section 49 of the Labour Institutions Act, 2007 to institute proceedings on behalf of and in the name of an employee for recovery of a sum due from an employer by reason of the failure of the employer to provide an employee with the conditions of employment prescribed in a Wages Order.

21. They further state that they do file criminal cases related to labour matters in Chief Magistrate's Court in accordance with Gazette Notice No. 9243 of 27th July 2011 attached and marked RJT issued by Hon. Chief Justice which placed employment and labour related cases under the jurisdiction of Magistrates Court presided by Magistrates of level of Senior Resident Magistrate.

22. The Hon. Chief Justice has powers to direct, allocate appoint Magistrate by way of Gazette Notice to handle labour related cases in accordance with Section 29(3) of the Industrial Court Act which have jurisdiction to handle disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations subject to Article 169 of the Constitution.

23. They rely on the case of **Republic v Douglas Barasa Queens Bookshop [2014] eKLR** where it was stated:

“that said the spirit of the opening words of Section 35 is to empower Labour Officers to monitor and enforce compliance with any labour law. It is in my view that if it was the intention of the Director of Public Prosecution to limit Labor Officer’s power, in respect to prosecution, to only one labour law then the director of Public Prosecutions would have to use unequivocal language. This Court does not find words used in Gazette Notice 9399 to be unequivocal. It is for this reason and others stated above that I hold that the words ‘for the purpose of all cases arising under the Labour Institutions Act, 2007’ used in Gazette No 9399 should be construed to mean all cases arising under any labour law”.

24. For those reasons they pray that the application be dismissed.

25. Having considered the submissions by both parties, this Court sets down issue for determination as follows:

- 1. Whether the charges the Applicants are facing are known in law***
- 2. Whether the 1st and 2nd Respondents have Locus to charge the Applicants.***
- 3. Whether 3rd Respondent has jurisdiction to handle the charge.***
- 4. What remedies to give in the circumstances?***

26. This is a good starting point because under Article 50 2(n) not to be convicted for an act or omission that at the time it was committed or omitted was not:

- “(i) an offence in Kenya; or***
- (ii) a crime under international law”.***

27. The Applicants have submitted before this Court that the offences for which they have been charged

are non-existent.

28. The Applicants were charged under Section 49 (1) (c) of the Employment Act 2007 as read with Section 88 of the said Act. Section 49 of Employment Act deals with remedies for wrongful dismissal and unfair termination. Section 49 (1) (c) of the Employment Act 2007 states as follows:

“---- where in the opinion of a Labour Officer summary dismissal or termination of a contract of an employee is unjustified, the Labour Officer may recommend to the employer to pay to the employee any of the following:

a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service.

b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

29. The above Section therefore does not create any particular offence but gives a raft of remedies available in cases of wrongful dismissal and unfair termination.

30. Section 88 of Employment Act on the other hand provides for a general penalty and offences under other laws. Section 88 provides as follows:

1. A person, other than a child, who commits an offence under this Act, or contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided shall be liable to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding three months or to both.

2. Nothing in this Act shall prevent an employer or employee from being proceeded against according to law for an offence punishable under any other law in force.

3. No employer or employee shall be punished twice for the same offence”.

31. The Section clearly stipulates for the penalty for contravening any part of the Employment Act 2010 for which no penalty is specifically provided for.

32. What Section 88 envisages is a penalty for offences and contraventions under this Act. The question then is whether Section 88 of Employment Act can be used to punish an employer for wrongful termination of an employee?.

33. My answer is No. A punishment cannot be prescribed for a non-existent offence. What Section 49 of Employment Act envisages is a case as provided for under Section 15 of Employment and Labour Relations Court where the Court may refer a dispute to other methods of resolving the same including seeking for an opinion/report from a Labour Officer. It is then that the Labour Officer may recommend remedies set out under Section 49 of Employment Act where there is a case of unfair and wrongful termination.

34. On the issue of Locus to bring charges by 1st and 2nd Respondents, the said Respondents definitely have Locus to act as prosecutors where they have been duly gazetted to do so. They derive their authority from the Labour Institutions Act Part V which deals with Labour Administration and Inspection.

35. Section 35(k) of Labour Institutions Act gives Labour Officers powers:

“Without prejudice to the powers of the Attorney-General, to institute proceedings in respect of any contravention of any provision of this Act or for any offence committed by an employer under this Act or any other Labour law”.

36. On the issue of jurisdiction, this Court has jurisdiction to handle this matter as provided for under Section 12 of employment and Labour Relations Court Act. However, the lower Court cannot have jurisdiction to hear and determine a non-existent offence.

37. Having found as above, this Court finds that the charges preferred against the Applicants herein before the Magistrates Act are non-existent.

38. The Applicants may have contravened some law but the mode of resolving the matter is not by charging them. The Grievants still have avenues to file suits before the Employment and Labour Relations Court if they feel that they were wrongfully or unfairly terminated and the Respondents need not charge the Applicants in that respect.

39. I therefore find that the Application by the Applicants has merit and I allow it. The end result is that I issue orders as follows:

1. An order of Certiorari to bring to the Court and quash the decision dated 19th December 2014 made by the 1st Respondent on behalf of the 2nd Respondent purportedly pursuant to Section 45 and 49 of the Employment Act 2007.

2. An order of Certiorari to bring to the Court and quash the charge sheet dated 13th March 2015 in the Resident Magistrate’s Court at Nairobi Criminal Case No. 483 of 2015.

3. An order of Certiorari to bring to the Court and quash the summons dated 14th March 2015 issued by the Resident Magistrate’s Court at Nairobi in Criminal Case No. 483 of 2015.

4. An order of prohibition directed at the 1st and 2nd Respondents prohibiting them from prosecuting, further prosecuting, continuing with prosecution and or instituting criminal prosecution against the Applicants in the Resident Magistrate’s Court at Nairobi Criminal case No. 483/2015 in its present form unless charges are varied to conform to the law.

5. An order of prohibition directed to the Resident Magistrate’s Court at Nairobi prohibiting the continuation of the current charges in Criminal Case No. 483 of 2015 unless altered or amended to conform with the law.

6. There will be no orders as to costs.

Read in open Court this 12th day of May, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nderitu holding brief for Kipngeno for Applicants

Ondukenya for 1st and 2nd Respondents