



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**  
**APPEAL NO. 1 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> September, 2014)

LABOUR OFFICER VIHIGA.....APPELLANT

-VERSUS-

HILEM SHAH.....RESPONDENT

**RULING**

The application before court is the Notice of Motion filed in court on 13.2.204 by the applicants herein. The application is brought to court by the applicants who seek orders that:-

1. **That the Hon. Court be pleased to strike out the respondent's appeal herein for being filed out of time without leave of court.**
2. **That the Hon. Court be pleased to strike out the respondent's appeal herein for being filed in the wrong court.**
3. **That the costs of the application be in favour of the applicant.**

The application is based on the annexed affidavit of the applicant herein Hilem Shah and on the grounds that:-

(a) That the appeal is yet to be admitted for hearing.

(b) That the respondent filed criminal case No.960 of 2012 at SPM's Court Vihiga against the applicant and judgment was delivered against the respondent.

(c) That being dissatisfied with the said judgment, the respondent lodged an appeal at the Industrial Court of Kenya at Kisumu which court has no jurisdiction to hear and determine the matter as criminal appeals emanating from Vihiga Court ought to be filed at the High Court Kakamega.

(d) That the said appeal was filed on 19.11.2013 yet the judgment was delivered on 27.9.2013 without leave of the court, which act is unprocedural and/or irregular.

(e) That it is in the interest of justice that the applicant seeks the said orders and that the respondent shall not be prejudiced.

The respondent affidavits filed their replying affidavit on 30th July 2014. The affidavit was sworn by one Pascal Opondo, the County Labour Officer Bungoma and the prosecutor in this matter. It is the respondent's contention that they are properly in court and should be allowed to proceed. They contend that they filed their appeal late after receiving typed proceedings of the criminal case on 4.11.2013.

upon hearing the averments of the parties, the issues for determination are two-fold:-

1. **Whether the appeal is before the right court and whether the court has jurisdiction to entertain the same.**
2. **Whether the appeal is rightly filed before this court.**

On issue of jurisdiction, it is true that jurisdiction is everything and without jurisdiction, this court cannot proceed further. The jurisdiction of this court is conferred by Article 162(2) of the Constitution and S. 12 of the Industrial Court Act 2011.

Under Article 162(2) of the Constitution, 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) ----”**

Under Article 165(5) of the Constitution:-

**“The High Court shall not have jurisdiction in respect of matters;**

**(a) ---**

**(b) Falling within the jurisdiction of courts contemplated in Article 162(2)”**

Pursuant to the provision of Article 162(2) of the Constitution, Parliament enacted the Industrial Court Act 2011 which at S. 12 sets out the jurisdiction of the Industrial Court and thus states as follows:-

**“12(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 Court and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including ---”**

On the court's appellate jurisdiction, S. 18 of the Industrial Court Act states that:-

**“The court shall have appellate jurisdiction to hear and determine appeals from;**

**(a) decisions of the Registrar of Trade Union and**

**(b) any other court, local tribunal or commission as prescribed under any written law.”**

Since the issue before court is an appeal from the decision of the Hon. Magistrate's court relating to a labour matter, the appeal rightly lies with the Industrial Court. To state that the right court is the High court Kakamega is to miss the point as Article 165(5) of the Constitution ousts the High Court's jurisdiction from determining this matter. It is therefore the finding of this court that this is the right court to file this appeal and this court is properly seized with jurisdiction to hear and determine this appeal.

The next issue is whether the appeal is properly before court. The appellants submitted that the appeal has been filed late and without court's authority and should therefore be struck out. The appeal being preferred is in respect of Vihiga Criminal Case No. 960/2012 where judgment was delivered on 27.9.2013. It is basically in relation to a charge of failing to produce employment records under S. 74(2)

of the Employment Act 2007. By virtue of it being employment related, it falls under the Industrial Court but for charges contemplated under Criminal Procedure Rules.

Under S. 349 of the CPC:-

**“An appeal shall be entered within 14 days of the date of the order or sentence appealed against provided that the court to which the appeal is made may for good cause admit the appeal if it is satisfied that the failure to enter the appeal within the period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against and a copy of the record within a reasonable time of applying to the court therefore.”**

The time for which an appeal should be admitted is 14 days except, if the court allows for the reason given under S. 249 of CPC. The issue of admitting or rejecting it lies on the court where it is shown that the record of appeal was not obtained in good time. The appellants want this court to admit their appeal out of time for the reasons that they applied for proceedings but were made available on 4.11.2013. They then moved and filed their appeal on 19.11.2013. It is the finding of this court that though the appeal was filed late, the appellants had a good reason for coming to court late having received the proceedings late.

In order for ends of justice to be done and for the parties not to be condemned unheard and in line with Article 159(5) of the Constitution, I will admit the appeal and allow the parties to argue the appeal so that it can be decided on merit. Costs in the cause.

**HELLEN S. WASILWA**

**JUDGE**

**18/9/2014**

**Appearances:-**

Labour Officer present

Respondent absent

CC. Wamache