



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 2553 of 2012**

**RWAKEN INVESTMENTS LIMITED**

**JEAN BOSCO NDARUGORAGOYE.....CLAIMANT**

**VERSUS**

**THE MINISTRY OF LABOUR**

**THE HONOURABLE ATTORNEY GENERAL**

**THE CHIEF MAGISTRATES COURT, NAIROBI.....RESPONDENTS**

**RULING**

This is an application brought by Notice of Motion brought under Articles 162(2), 163(3) of the Constitution 2010, Section 3 of the Labour Institutions Act, Section 3, 4 of the Industrial Court Act, 2011, Section 87 of the Employment Act and Rule 16 of the Industrial Court (Procedure) Rules, 2010. The applicant seeks to establish whether the Chief Magistrate's Court has jurisdiction to entertain contractual disputes between an employer and employee as criminal proceedings.

The application is based on the grounds and the Affidavit of the applicant director Mr. Jean Bosco Ndarugoragoye that on 12th September 2012 charged by the Labour Officer at the Resident Magistrates Court in criminal labour cases number 1400 and 1411 of 2012 following labour relations conflicts with two employees Julius Waweru Chege and Ndungu Wanyoike Kiemo as his drivers. That the two being employees of the respondent absconded from work in 2011 and later lodged complaints with labour department regarding payments of wages, notice, leave, public holidays and overtime. This prompted the Labour Officer to charge the application director with various criminal offences at the magistrates Court in Nairobi.

The applicant therefore argued that there is a conflict in law regarding the jurisdiction of the Magistrate's Court and the Industrial Court and the Industrial Court. That the Magistrates Court has jurisdiction to entertain criminal labour matters under powers granted vide Chief Justice practice directions granted under gazette Notice No. 9243 as published on 5th August 2011. That on the other hand Article 162 (2) (a), 163 (3) of the Constitution, Section 3 of the Labour Institutions Act, Section 3, 4 and 4(2) of the Industrial Court Act, 2011 and Section 87 (1) and (2) of the Employment Act grants exclusive jurisdiction

to the Industrial Court to entertain all disputes between an employee and an employers.

The application is supported by the Affidavit of the Applicant/Claimant Director, JEAN BOSCO NDARUGORAGOYE. He is also the accused in the lower court.

That by proceedings taking place before the Magistrate Court the Applicant/Claimant herein will suffer double jeopardy. Thus this Court should interpret the matter and give directions.

Article 162 (2) and 163 (3) of the Constitution, 2010 establish the Industrial Court and Superior Courts respectively. Under these powers the Industrial Court has original jurisdiction to hear all labour relations disputes in Kenya. On this basis therefore the Industrial Court being a High Court bears the original jurisdiction to interpret the Constitution and which has an appellate jurisdiction from lower courts that address the basic scenarios of fact that spawn issues of judicial character relating to labour relations in Kenya.

Despite the Industrial Court having original jurisdiction on labour relations matters in Kenya, that jurisdiction can be donated to lower court through practice directions by the Chief Justice in pursuance to Section 27 of the Interpretation and General Provisions Act, chapter 2 of the Laws of Kenya. Such early stage pronouncement on critical issues is best situating in the lower courts for the proper safeguard of jurisdiction of courts below the Industrial Court to determine. Therefore criminal proceedings set out to determine a person's guilt or innocence or to set a convicted person's punishment; a criminal hearing or trial is best conducted at the lowest court. This sets out the primary relevance to such matters before a party can proceed to appeal to the High Court as by law granted this right.

On the other hand the Labour Institutions Act and the Industrial Court Act grant the Industrial Court jurisdiction to entertain all disputes between employees and employers. However, these provisions notwithstanding, Article 161 of the Constitution, which is supreme, grant the Chief Justice powers in the Capacity as the head of the judiciary to make practice directions to facilitate the work of the High Court and indeed of the Industrial Court as constituted the above provisions notwithstanding. Thus by these powers the Chief Justice under provisions outlined in Section 16 of the Labour Institutions Act designated lower Courts presided over by officers of the rank of Senior Resident Magistrate and above as Special Courts to hear labour relations matters specifically on:

1. Work injury related matters;
2. Offences under the Labour Institutions Act, 2007;
3. Offences under the Employment Act, 2007;
4. Offences under the Occupational Safety and Health Act, 2007;
5. Offences under the Labour Relations Act, 2007.

These practice directions were issued on 27th July 2011 vide Kenya gazette notice No. 9243. Subsequent to these directions the lower Courts have handled all matters of employee and employer as outlined under the gazette notice.

Is this a conflict in the law? Was the gazette notice repealed by the coming into force of the Industrial Court Act?

The jurisdiction of judges where magistrates or special courts are given powers do not abet until those powers are revoked by issuance of a gazette notice. Even with the coming into force of the industrial Court Act, 2011, the powers granted to the Senior Resident Magistrates to operate with relation to labour relations under the Labour Institutions Act, 2007, Employment Act, 2007, Occupational Safety and Health Act 2007 and Labour Relations Act 2007 have not been revoked and or repealed by the operation of the Industrial Court Act. These powers were specific to the provisions of these cited legislation

regarding employer and employee offences outlined under the stated laws in their entirety.

Thus the special jurisdiction of the lower Court officers under section 16 (2) of the Labour Institutions Act, confer jurisdiction upon these courts to hear or grant orders relating to offences that may have been committed by employers and employees as outlined. These are provisions meant to ensure that the rules of procedure are applied properly towards the attainment of substantive justice under the Constitution, the Labour Institutions Act, the Employment Act, the Occupational health and Safety Act and Labour Relations Act with due cognizance of the provisions of Section 162 (2) of the Constitution that established the Industrial Court.

Therefore by the issuance of the gazette notice under the hand of the Chief justice, the designated officers generally or specifically thereto empowered to so act on matters of employer/employee offences outlined under:

1. Offences under the Labour Institutions Act, 2007;
2. Offences under the Employment Act, 2007;
3. Offences under the Occupational Safety and Health Act, 2007;
4. Offences under the Labour Relations Act, 2007.

These provisions are to be implemented by the designated officers in consultation with the Minister responsible for labour relations and the principal judge of the Industrial Court, and thus by the Labour Officers acting in this case as to charge the applicant/claimant herein is under these powers. The offences and charges as stated before the lower court in relation to offences and work injury related matters are therefore proper for such court to so act unless shown to have extended to other matters outside the granted authority specifically set out under the gazette Notice No. 9243.

Thus any party dissatisfied with the decision of the lower court under the orders referred to under the gazette notice, shall be to a Judge at the Industrial Court. Therefore where a Judge is invited to attend to a matter for which the lower court is empowered to address, it means that the parties are thereby denied an opportunity of appeal to the judge and any appeal can only be to the Court of Appeal where the rules permit. It would not be proper unless it is absolutely necessary for a Court to take deliberate step in denying a party a necessary stage in legal litigation for which a party would have been entitled but for the action of the Court even if the Court has jurisdiction to deal with a matter. There are good policy reasons underpinning the requirement that actions be taken at the lowest tier of the judicial hierarchy so as to afford a party as many opportunities as possible of testing the correctness of a decision.

Therefore this Court is reluctant to entertain matters of work injury, offences under the Labour Institutions Act, 2007; Employment Act, 2007; Occupational Safety and Health Act, 2007; and Labour Relations Act, 2007 unless it is absolutely necessary and in the interest of justice. The provisions of Section 3 and 4 of the Industrial Court Act and Section 3 of the Labour Institutions Act, the Sections only recognize the need to attain the overriding objective in the exercise of the powers conferred on this Court under the Act or any of its provisions. The said provisions do not purport to overrule any of the provisions of both Acts but only provide that in the exercise of the powers under the Act the Court ought to ensure that the overriding objective of the Act is attained. Therefore to argue that the Industrial Court Act repealed part of the Labour Institutions Act is a misconception.

I therefore direct that the proceeding before the Senior Resident Magistrate, Nairobi or a senior officer so designated to proceed in determining charges and offences as outlined under Section 28 (a), 36, 88 of the Employment Act and Sections 48 of the Labour Institutions Act.

These are the directions of this Court.

Delivered in court at Nairobi this 12th day of March, 2013.

**Monica Mbaru**

**JUDGE**