



**Gitahi & 4 others v Kenya Revenue Authority (Petition
43 of 2019) [2020] KESC 46 (KLR) (30 April 2020) (Ruling)**

Reuwel Waithaka Gitahi & 2 others v Kenya Revenue Authority [2020] eKLR

Neutral citation: [2020] KESC 46 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 43 OF 2019

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

APRIL 30, 2020

BETWEEN

REUWEL WAITHAKA GITAHU 1ST APPELLANT

FERICHINA GATHONI WAWERU 2ND APPELLANT

GEDION KATHILA MUTUKU & 2 OTHERS 3RD APPELLANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

*(Being an appeal from the Judgment and Order of the Court of Appeal
at Nairobi (Waki, Warsame and Sichale, JJA) dated 11th October, 2019)*

RULING

A. Introduction

1. On 30th May 2016, the Employment and Labour Relations Court (ELRC per Mbaru, J.) declared that the termination of employment of the three Appellants was unfair and ordered their reinstatement. They were all former employees of the Kenya Revenue Authority, the Respondent, which then filed an appeal to the Court of Appeal against the said decision.
2. On 11th October 2019, the appeal was partly allowed with the Appellate Court finding that the termination aforesaid “was not wrongful” but because the “process of termination was flawed ...,” then the declaration to be given was that “the termination shall be a normal one”. The Appellants are now before this Court challenging the said findings.
3. Before the appeal could be heard on its merits however, the Respondent filed a Motion dated 6th February 2020 seeking orders to strike out the entire appeal under Article 163(4) and (6) of the



Constitution, Sections 2(a), 15, and 16(1) of the Supreme Court Act as well as Rules 15(2)(f) and 24(1) of the Supreme Court Rules, 2011.

B. The Application

4. The Motion is supported by the Affidavit of Grace Mwangi sworn on 6th February 2020 as well as the grounds in the body thereof. It is her deposition that this Court lacks jurisdiction to hear and determine the Appeal under Article 163(4)(a) as neither the trial Court, the Court of Appeal nor this Court were or are now being called upon to interpret or apply any part of the Constitution so as to entitle the Appellants, audience, as a matter of right before this Court.
5. In submissions filed on 24th February 2020, the Respondent has further urged that the interpretation of Section 49(1) of the Employment Act was centrally in issue in the determination of the dispute between the parties and since no constitutional provision required any such interpretation or application, then the whole Appeal was improperly before this Court and ought to be struck out. Reliance thereof was placed on this Court's decisions in *S. K. Macharia and Anor v KCB Ltd & 2 Others* [2012] eKLR; *In the matter of the Interim Independent Electoral and Boundaries Commission [2011]* eKLR; *Lawrence Nduitu & 6000 Others v KBL & Anor*; *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR as well as *Peter Odiwuor Ngoge v Francis Ole Kaparo & 5 Others, SC Petition No.2 of 2012*.

C. The Response

6. The Appellants filed grounds of opposition dated 2nd March 2020 as well as submissions dated 14th January 2020. The submissions, while largely in support of the Petition of Appeal also address the question of jurisdiction and in their grounds of opposition, the Appellants have specifically stated that they rely on the said submissions in response to the Motion.
7. It is the Appellants' case in the above context that the Appeal was properly brought under Article 163(4)(a) of the Constitution and that the dispute between the parties was one in which "public interest elements apply as acknowledged by the Court of Appeal". Further, that "the question of trust between an employer and an employee definitely has wider public interests (sic) than merely those of parties to an employment contract between the parties before the Court", and therefore the Petition of Appeal ought not to be struck off as prayed by the Respondent.

D. Analysis And Determination

8. We must from the outset state that the response to the Motion before us was most baffling. We say so, with respect, because the Appellants have taken the view that where public interest is involved, without more, the jurisdiction under Article 163(4)(a) of the Constitution is automatically triggered. Nothing can be further from the truth if one were to read Article 163(4)(a) of the Constitution contextually.
9. We say so because time and time again, we have explained that the jurisdiction under Article 163(4)(a) is two fold: one, as a matter of right where interpretation and application of the Constitution is sought and which matter has risen up the hierarchy of the superior Courts and two, where the dispute raises a matter of great public importance. In the latter case, certification that the matter is indeed one of great public importance is required which is not the case presently.
10. Furthermore, in *Aviation and Allied Workers Union v Kenya Airways Ltd & 3 Others* [2015] eKLR, we stated that what amounts to interpretation and application of the Constitution is;



(36) ... the assumption of a task that transcends not just the reference to the rich generality of constitutional principle, it is a task that [must] focus upon specific clauses of the Constitution, and calls for the attribution of requisite meaning, tenor and effect.”

This finding had followed a long string of authorities on the issue, specifically Gatirau Peter Munya (*supra*) where we stated thus;

(69) The import of the Court’s statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an Appellant should demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”

11. In applying the above test to the dispute between us, it is obvious that a concise reading of the Judgment of the ELRC (Mbaru, J.) and the Court of Appeal, would show that, what was before the two Courts was the simple question whether the employment of the Appellants was lawfully terminated or not. The question whether the Appellants, as individuals, acted with utmost trust and integrity in the performance of their duties within a public body such as the Respondent, was a peripheral issue as was the decision of the Court of Appeal to the effect that the remedy that commended itself to that Court was that the Appellants’ termination of employment was sustained in “consideration of public interest”.
12. None of the above issues required nor now require the interpretation or application of the Constitution and the mere reference to the public interest by the Court of Appeal would not necessitate such an action contrary to the assertion by the Appellants. It is not even enough to invoke Article 41 of the *Constitution* which protects the rights to fair labour practices as that Article was not subjected to any interpretation or application by either of the superior Courts.
13. In a nutshell, it is our finding that the Motion seeking the striking out of the Petition of Appeal herein is merited and is allowed. As costs follow the event, the Respondent shall have the costs hereof.

E. Disposition

14. From our findings above, the final orders to be issued are the following:
 - i) The Notice of Motion dated 6th February 2020 is granted as prayed.
 - ii) Consequently, the Petition of Appeal dated 15th November 2019 is hereby struck off for want of jurisdiction under Article 163(4)(a) of the *Constitution*.
 - iii) The Respondent shall have the costs hereof.
15. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2020.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT



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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

