



**Gichuru v Package Insurance Brokers Ltd (Petition (Application)
36 of 2019) [2020] KESC 29 (KLR) (4 September 2020) (Ruling)**

Simon Gitau Gichuru v Package Insurance Brokers Ltd [2020] eKLR

Neutral citation: [2020] KESC 29 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 36 OF 2019
DK MARAGA, CJ & P, PM MWILU, DCJ & V-
P, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ
SEPTEMBER 4, 2020**

BETWEEN

SIMON GITAU GICHURU PETITIONER

AND

PACKAGE INSURANCE BROKERS LTD RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Waki, Makhandia and Sichale JJA) delivered on the 19th day of July 2019, in Nairobi Civil Appeal No. 307 of 2018)

A matter in which the Court of Appeal avoided interpreting a constitutional provision interpreted by the trial court can be appealed against at the Supreme Court as a matter involving interpretation and application of the Constitution.

The main issue for determination was whether a matter in which the Court of Appeal avoided interpreting a constitutional provision which had been interpreted by the trial court could be appealed against at the Supreme Court as a matter involving interpretation and application of the Constitution. The Supreme Court held that it could be appealed against at the Supreme Court as a matter involving interpretation and application of the Constitution.

Reported by Kakai Toili

Civil Practice and Procedure – appeals – appeals to the Supreme Court – matters to be appealed against at the Supreme Court – matters involving interpretation and application of the Constitution – where the Court of Appeal avoided interpreting a constitutional provision which had been interpreted by the trial court – whether such a matter could be appealed against at the Supreme Court as a matter involving interpretation and application of the Constitution – Constitution of Kenya, 2010, article 163(4)(a).



Brief facts

The respondent filed the instant application seeking orders of striking out the appeal. The respondent claimed that the petitioner did not have an automatic right of appeal before the court and that the issues in the appeal did not involve interpretation or application of the Constitution. Further, the respondent claimed that the subject matter of the suit revolved around employer and employee relationship, governed by the Employment Act and that the mere allegation of a constitutional violation did not of itself clothe the appeal with the attributes of constitutional interpretation or violation under article 163(4)(a) of the Constitution of Kenya, 2010, (Constitution).

The petitioner invoked article 27 of the Constitution in the claim at the trial court which considered it in its analysis and determination. The Court of Appeal in its analysis, after finding that article 27 had been re-enacted in a legislation specifically to address matters of discrimination of workers in employment in section 5(3)(a) of the Employment Act, used the legislation itself to address the issue at hand than the Constitution, avoiding the constitutional provision altogether. The petitioner averred that the appeal met the threshold set in article 163(4a) of the Constitution and that although the issue in contest was an employment dispute, it took a trajectory of discrimination based on health. Therefore, the petitioner claimed that proceedings and determination in the courts below revolved around article 27.

Issues

Whether a matter in which the Court of Appeal avoided interpreting a constitutional provision which had been interpreted by the trial court could be appealed against at the Supreme Court as a matter involving interpretation and application of the Constitution.

Held

1. Article 163(4)(a) of the Constitution granted parties an automatic right of appeal if an issue touching on application and interpretation of the Constitution was raised and addressed by the superior courts below. It also could arise in cases where there was no specific constitutional issue. In such an instance, a party seeking to rely on article 163(4)(a) should demonstrate a constitutional trajectory in issues addressed.
2. Avoidance of interpretation and application of article 27 of the Constitution by the Court of Appeal did not diminish its presence in the claim. Despite the Court of Appeal dealing with section 5(3)(a) of the Employment Act, that section was a normative derivative of article 27 of the Constitution. It could not thus be said that after enactment of the Act, article 27 died and was buried in a way that it could not be exhumed and revived again at a further appeal before the court to find out whether its death and burial was proper or not by getting subsumed in section 5(3)(a) of the Employment Act.
3. The reliance on article 27 of the Constitution was not a mere reference on generality of a constitutional provision disentitling the petitioner to rely on article 163(4)(a) of the Constitution. Article 27 was applied and interpreted in the superior courts below and before the trial court. Discrimination emerged as one requiring constitutional interpretation and application before the instant court on a further appeal. The appeal involved interpretation and application of the Constitution as required under article 163(4)(a) and rightly before the court.

Application dismissed; costs to be in the cause.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

1. The Respondent filed an application dated 8th November 2019 on 13th November 2019, seeking for the orders of striking out the appeal here in with costs. The application is brought under Articles 163 (4) (a) of the Constitution Section 15(2) of the Supreme Court Act, 2011, Rule 33 of the Supreme Court Rules, 2012. It is supported by the affidavit of Salome Mwangi.
2. Its pleaded that the Petitioner does not have an automatic right of appeal before this Honourable Court; issues in the appeal do not involve interpretation or application of the Constitution; the subject matter of the suit revolved around employer and employee relationship, governed by the Employment Act (the Act) and that the mere allegation of a Constitutional violation does not of itself clothe the appeal with the attributes of Constitutional interpretation or violation under Article 163(4) (a) of the Constitution. It is urged the application be allowed with costs.
3. In response, the Petitioner filed a Replying Affidavit dated 18th December 2019 urging that the application lacks merit. He averred that the issue of jurisdiction can be argued at the main hearing of the appeal and that the appeal meets the threshold set in Article 163(4a) of the Constitution. Although the issue in contest was an employment dispute, it took a trajectory of discrimination based on health. It was subject to proceedings and determination in the courts below revolving around Article 27 of the Constitution.

Case History

4. The cause of action is stated to arise from termination of the Petitioner's employment who was retained in permanent and pensionable contract by the Respondent. He was diagnosed with a spinal cord tumor in November 2013; Sought medical treatment in India but upon resuming work on 10th February 2014, his mobility had been impaired. He was directed not to report to work from 14th April 2014 till a time when his condition and mobility improved.
5. The Respondent sought medical appraisal report from the Petitioner's doctor. The doctor's report recommended a further two months' sick leave. From that report, the Petitioner was suspended from employment on 23rd June 2014 and was urged to hand over the Respondent's property in his care and custody. He protested the suspension. On 1st August 2014 he was dismissed summarily for gross misconduct allegations.
6. Aggrieved by the dismissal, the Petitioner filed a suit in the Employment and Labour Relations Court Case No. 1375 of 2014 Seeking for damages for wrongful termination based on discrimination and twelve months' salary in damages and unpaid dues. After hearing, the court found the termination as unlawful and damages were awarded with pending dues as prayed. On appeal to the Court of Appeal, it was held there was no discrimination on the Petitioner. The twelve Months salary award was set aside. Award of one month's salary in lieu of notice was upheld.
7. Dissatisfied with the finding of the Court of Appeal, the Petitioner has appealed to this Court through an Appeal dated 2nd September, 2019 filed on even date. The appeal is brought under Articles Article 163(3)(b) (i), 163 (4) (a) of the Constitution of Kenya, 2010 and Section 15(2) of the Supreme Court Act, 2011, Rule 9 & 33 of the Supreme Court Rules, 2012. The Petitioner relies on provisions of Articles 27, 41, 54 and 259 of the Constitution of Kenya, 2010 and Sections 5 and 46 of the Employment Act.



8. The grounds are that there was an error by the Court of Appeal in failing to analyse the evidence on record before reaching its decision on discrimination; by introducing new and extraneous facts that were not before the trial court in determining the issue of discrimination; in interpretation of Article 27(5) of the Constitution and in interfering with the discretion of the trial judge in respect of the award of twelve months' salary for unlawful termination.
9. The Respondent filed this instant application seeking the striking out of the appeal on grounds that it is not in the categories which an appeal can lie as of right under Article 163(4)(a) of the Constitution. Parties were directed to file and exchange submissions for determination by the Court.

Parties Written Submissions

A. Respondent's written submissions

10. The submissions are dated 19th December 2019 and filed on 20th December 2019. The Petition was filed as of right under article 163(4)(a). It is urged that there was nothing in the case concerning interpretation and application of the Constitution in the superior courts below. The suit revolved around interpretation and application of various sections of the Employment Act, and specifically Section 5 thereof which safeguards against discrimination based on disability and health at the work place. Reliefs for compensation against discrimination sought are provided for under the Act.
11. Although several Constitutional provisions including Article 27 are cited as relied on, the Petitioner has not explained how they were interpreted or applied by the courts below. He urged the application to be allowed. Reliance was placed on the cases of Lawrence Nduttu & 6000 Others vs Kenya Breweries Ltd & Another SC Pet 3 of 2012, (2012) eKLR, Ali Hassan Njoho & Another vs Suleiman Said Shahbah & 2 Others, SC Pet No.10 of 2013, (2013) eKLR and Okiya Omtata Okoiti vs The Central Bank of Kenya & Others Application No. 32 of 2018.

B. Petitioner's written submissions

12. In opposition to the application for striking out the appeal, the Petitioner on 20th December 2019 filed his written submissions dated 19th December 2019. He submits that the issue before the courts below was whether he was subjected to discrimination in course of employment. The Court of Appeal narrowly interpreted circumstances in not giving full meaning of discrimination. Right to non-discrimination is a fundamental right under Article 27 of the Constitution safeguarding against all forms of discrimination. This Court's jurisdiction is properly invoked. He relied on the cases of Hassan Joho, Lawrence Nduttu (Supra) and Gatirau Peter Munya vs Dickson Mwenda & 2 Others SC Applic. No. 5 of 2014.

Analysis and Determination

13. We have considered the parties' pleadings and submissions in the application. The issue for determination is;

Whether the appeal can be struck out under Article 163(4a) of the Constitution.

14. In order to ascertain whether the prayers sought in the application by the Respondent can issue, we have to examine the proceedings before courts below in light of Article 163(4a) invoked by the Petitioner as the supporting provision to find out whether the appeal is properly brought before this Court under Article 163(4)(a) of the Constitution.



15. The claim filed before the trial court was brought under provisions of various Sections the Employment Act, Industrial Court Act and Industrial Court Rules. In paragraph 29 and 30 of the claim, it was averred that the Respondent's actions contravened various Sections of the Employment Act and violated his fundamental rights provided for under Articles 27, 28, 41, 43, 47, 50 and 54 of the Constitution. This was through discrimination perpetrated against him through unlawful and unfair termination of employment.
16. Both the trial court and the Court of Appeal framed 3 issues for determination. One of the issues in both courts as framed was whether the Petitioner's right under Article 27 of the Constitution was violated by the Respondent. The trial court opined that the Respondent was at pains to delink the Petitioner's dismissal from his illness in view of the letter dated 14th April 2014 advising the Petitioner not to go to work while sick. It viewed the letter to mean as long as the Petitioner was unwell and immobile, he could not go to work. It held there was discrimination of the Petitioner based on his health status contrary to Article 27 of the Constitution.
17. The Court of Appeal on the other hand in addressing discrimination, cited Article 27 (4) of the Constitution and Section 5 (3)(a) of the Act in verbatim. It held that section 5(3)(a) was the one meant to give full realization of Article 27 of the Constitution as regards employment. Article 27(4) in respect of the Petitioner's claim of discrimination provides for non-discrimination on grounds of health status and disability, while Section 5 (3)(a) of the Act provides for non-discrimination on grounds of disability and HIV status.
18. After evaluating Section 5(3)(a) in light of the circumstances of the case, the Court of Appeal held that discrimination did not arise as it was only the Petitioner who was sick and his dismissal could not be weighed against other employees who were performing while he himself was unable to deliver. The illness affected Petitioner's performance. There was no differential treatment of the Petitioner against the other employees.
19. Article 163(4)(a) of the Constitution grants parties automatic right of appeal if an issue touching on application and interpretation of the Constitution was raised and addressed by the Superior courts below. It also can arise in cases where there was no specific Constitutional issue. In such an instance, a party seeking to rely on this provision should demonstrate a Constitutional trajectory in issues addressed as was held in the case of *Gatirau Peter Munya vs Dickson Mwenda & 2 Others SC Applic. No. 5 of 2014* and *Cordisons International (K) Limited v Chairman National Land Commission & 43 others [2020] eKLR, SC Petition No. 14 OF 2019*
20. We have considered several of our decisions on this provision. In the present case we note that the Petitioner invoked Article 27 of the Constitution in the Claim. The trial court considered the same in analysis and determination. Article 27 was thus present since the inception of the suit as we held in the case of *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others [2019] eKLR, SC Application No. 22 OF 2019*.
21. The Court of Appeal in its analysis, after finding that Article 27 of the Constitution had been re-enacted in a legislation specifically to address matters of discrimination of workers in employment in Section 5(3)(a) of the Employment Act, used the legislation itself to address the issue at hand than the Constitution, avoiding the Constitutional provision altogether.
22. In *Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2020] eKLR, SC Petition No. 21 of 2019*, We considered instances where a contested constitutional provision was introduced in the Court of Appeal, and that the court in addressing the provision in passing, we held did not amounting to interpretation and application of the Constitution under Article 163(4)(a). On the contrary in this



case the Constitutional provision was lost in the Court of Appeal and addressed through the Act of parliament enacted in furtherance of the Constitutional provision.

23. In *Gatirau Munya* (Supra) we considered instances when jurisdiction arises under Article 163 (4) (a) when a provision of an Act of parliament is a normative derivative of a constitutional provision. Avoidance of interpretation and application of Article 27 of the Constitution by the Court of Appeal did not diminish its presence in the claim, since even though it dealt with Section 5(3)(a) of the Employment Act, this section was a normative derivative of Article 27 of the Constitution. It cannot thus be said that after enactment of the Act, Article 27 of the Constitution died and was buried in a way that it cannot be exhumed and revived again at a further appeal before this Court to find out whether its death and burial was proper or not by getting subsumed in section 5(3)(a) of the Employment Act.
24. Further Contrary to the Respondent's allegations, the reliance on Article 27 was not a mere reference on generality of a Constitutional provision disentitling the Petitioner to rely on Article 163(4)(a) of the Constitution as we held in *Aviation and Allied Workers Union of Kenya v. Kenya Airway Ltd & 3 Others* [2017] eKLR. We are also guided by our finding in the case of *Okiya Omtata Okoiti vs The Central Bank of Kenya & others* Applic. No 32 of 2018 that Article 27 of the Constitution was applied and interpreted in the superior courts below, and that before the trial court, discrimination emerged as one requiring Constitutional interpretation and application before this court on a further appeal. We find the appeal involves interpretation and application of the Constitution as required under Article 163(4)(a) of the Constitution and rightly before this Court.
25. In light of the foregoing we make the following orders;
 - (a) The Respondent's application for striking out the appeal dated 8th November 2019 is hereby dismissed.
 - (b) Costs be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF SEPTEMBER, 2020

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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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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I. LENAOLA

JUSTICE OF THE SUPREME COURT



I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

