Case Number:	Petition 31 of 2013
Date Delivered:	16 Jul 2015
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Mumbi Ngugi, George Vincent Odunga, Mathews Nderi Nduma
Citation:	Kenya Medical Research Institute v Attorney General & 37 others [2015] eKLR
Advocates:	Mr Wetangula for the Petitioner. Mr Enodo for 1st Interested Party. Mr Achacha for 2nd Interested Party.
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed.
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT NAIROBI

PETITION NO. 31 OF 2013

KENYA MEDICAL RESEARCH INSTITUTE
…….....……PETITIONER

VERSUS

THE HON. THE ATTORNEY
GENERAL…….....…….....1ST
RESPONDENT

INDUSTRIAL COURT OF
KENYA…….....……..…2ND
RESPONDENT

AGNES MUTHONI & 34
OTHERS…….....1ST INTERESTED
PARTY

UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTES STAFF OF KENYA …2ND
INTERESTED PARTY

JUDGMENT

1. The Petitioner, Kenya Medical Research Institute, (also referred to as "the Employer") terminated the employment of its then employees, the 1st Interested Parties (also referred to as "the Employees") under letters of termination dated 17th December 2009. It paid each of the 1st Interested Parties one month's salary in lieu of notice.

2. The Interested Parties, aggrieved by the Petitioner's decision, lodged a claim before the erstwhile Industrial Court (which shall hereafter for convenience be referred to as the "Industrial Court") seeking orders, inter alia, that the letters of termination dated 17th December 2009 be nullified in **Trade Dispute Cause No. 37N of 2010**.

3. The matter came up for hearing on 19th April 2010 and the Award of the Industrial Court was delivered on 13th May, 2010 in which the Court ordered the Employer to unconditionally reinstate all the thirty five (35) employees who lost their jobs unfairly immediately with no loss of their basic pay or seniority, and to re-engage them in the respective positions they were holding prior to the termination on 17th December 2009.

4. Aggrieved by the decision of the Court and as provided under the Labour Institutions Act, No. 12 of 2007 (now repealed), the petitioner gave notice of its intention to appeal against the Award on points of law before the Court of Appeal.

5. **Civil Appeal No 15 of 2011** was lodged before the Court of Appeal but the Appeal was struck out by a ruling dated 10th May 2013 as being incompetent on the grounds that the Court of Appeal did not have jurisdiction to determine the Appeal. It was the decision of the Court of Appeal, in striking out the appeal, that the provisions of **Section 27** of the Labour Institutions Act was contrary to **Section 64** of the Constitution of Kenya, 1969 (repealed) and therefore null and void.

6. In its decision, the Court of Appeal stated that the Petitioner still had a remedy to file an action for judicial review or such other action before a Court with the competent jurisdiction.

7. The Petitioner, still aggrieved by the Award of the Industrial Court dated 13th May 2010, and apprehensive that the Interested Parties might commence the enforcement process of the Award of the Industrial Court, filed the present Petition in the Industrial Court of Kenya (now Employment and Labour Relations Court) (ELRC) as presently established under **Article 162(2)** of The Constitution of Kenya, 2010 as read with **Section 4** of the Employment and Labour Relations Act, 2011. An order for stay of execution of the Award of the Court issued on 13th May 2010 was granted pending the hearing and determination of this Petition.

8. In the Petition dated 5th August 2013 the petitioner seeks the following orders:

i. ***A declaration that the Petitioner's right to a fair hearing and fair trial have been violated by being granted a hollow right with regard to exercise the right of appeal, which right cannot be exercised.***

ii. ***A declaration that the Petitioner's right to the equal protection of law as guaranteed by Section 70 of the Constitution has been contravened by having a right it cannot exercise yet the Interested Parties have the right to enforce the Award of the Industrial Court as then constituted without any hindrance.***

iii. ***A declaration that Petitioner's right to a fair hearing and a fair trial by a court of law for the determination of the existence or extent of a civil right or obligation as established by law has been contravened by the court resorting to a mode of trial unknown in law.***

iv. ***A declaration that the Petitioner's right to a fair hearing and fair trial by a court of law in accordance with the law has been violated by failure of the court to uphold the applicable law and find that the Interested Parties had no locus standi to lodge the claim.***

v. ***A declaration that the Petitioner's right to" contractual obligation with the Interested Parties being contracts of service were converted into contracts of servitude by the compulsion to retain the services of the Interested Parties and in violation of section 73 of the Constitution (Repealed).***

vi. ***A declaration that the Petitioner's right to a fair hearing and trial were violated by the court making a determination on an issue that was not pleaded and which the Petitioner was not granted an opportunity to make representation on thus occasioning a gross miscarriage of justice.***

vii. ***A declaration that the procedure of the Industrial Court (as then constituted) violated the right to a fair trial cross examining Advocates for the parties thus making them part of the dispute, which occasioned a miscarriage of justice.***

viii. ***An order of the Court quashing the Award of the Industrial Court (as then constituted).***

10**.** The petition is based on the following grounds:

i. ***The Petitioner's right to lodge an appeal on points of law to challenge the Award of the Industrial Court (as then constituted) is a hollow right depriving the Petitioner of its fundamental right to a fair trial and equal protection of the law which entails the right to exhaust legal avenues available and provided in law to resolve disputes to all parties equally.***

ii. ***The Petitioner's right to a fair trial was violated by the Industrial Court (as then constituted) adopting a procedure of trial that is unknown and alien in law without the consent of the Parties and /or directions from the Court to the detriment of the Petitioner inter alia.***

iii. ***The Petitioner's rights were violated by the Industrial Court (as then constituted) when it held that the reasons given by the Petitioner for termination of the Interested Parties employment were not valid and the Court did not give cogent reasons as to why they were not valid.***

iv. ***By ordering reinstatement of the Interested Parties the Industrial Court (as then constituted) converted the contracts of service between the Petitioner and the Interested Parties into contracts of servitude by imposing employees on an employer in violation of Section 73 of the Constitution.***

v. ***The Petitioner's fundamental rights as set out in the Constitution have been infringed and***

the Industrial Court established under Article 162(2)(a) of the Constitution of Kenya, 2010 has power to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the grant of such remedy as stipulated under Section 84 of the Constitution of Kenya, 1969. (now repealed)

Submissions by the Petitioner

11. In its submissions, the petitioner argued that the Industrial Court violated its constitutional rights in several respects. It was its contention, first, that the Court entertained the suit without jurisdiction in that the Interested Parties, who had only served the Petitioner for 10 months, were barred from instituting a dispute for unfair dismissal in the Court by virtue of section 45(3) of the Employment Act. (now repealed).

12. The petitioner argued, further, that the Court adopted a mode of trial unknown in law by excluding oral evidence without consent of the parties.

13. It was also its submission that the Industrial Court made a determination on an issue that was not pleaded, and which the Petitioner was not granted an opportunity to make representations on, thus occasioning a gross miscarriage of justice.

14. The Petitioner was also aggrieved by the conduct of the judge who heard the matter, complaining that he cross examined Advocates for the parties thus making them part of the dispute, which action occasioned a miscarriage of justice.

15. Finally, it was the Petitioner’s contention that by reinstating the Interested Parties to their employment with the petitioner, the Court converted contracts of employment into contracts of servitude.

16. It was its case therefore that its right to a fair hearing and to equal protection of the law was violated by the Industrial Court, and it prays for the reliefs sought in the petition.

The Response

Submissions by the Respondents

17. The 1st and 2nd Respondents opposed the petition vide grounds of opposition filed by the Attorney General on 8th September, 2013. The Respondents submitted that the petition is unmerited and an afterthought in that the Petitioner was lawfully sued in a court of law and as such cannot turn around and claim its rights were violated.

18. It was also their submission that the right of judicial review was available to the Petitioner, but it chose not to exercise it. In their view, the Petitioner's claims of breach of constitutional rights are unfounded.

19. The Respondents further submitted that **section 70** of the former constitution guaranteed to all protection of the law and as such it cannot be said that the Petitioner was never given a chance to defend itself.

Submissions by the Interested Parties

20. The Interested Parties relied on the Replying Affidavit of Agnes Muthoni filed on 30th January, 2014 and submissions dated 12th February, 2014. It was submitted on their behalf that as was evident from the record of proceedings before the Industrial Court, the parties had agreed on the manner of proceedings, and had also consented to consolidate all applications and be heard on 19th April, 2010.

21. The Interested Parties submitted further that on 19th April, 2010, parties made oral submissions on the documentation filed. It was their case that no objection was raised during the trial on the mode of the proceedings; and further, that the **Industrial Court (Procedure) Rules, 2010**, which were gazetted on 4th May, 2010, were not in place when the dispute was heard. The Interested Parties submitted that the previous rules provided that the Court may direct parties to proceed by way of written submissions and

dispense with oral evidence, and that the Petitioner did not raise any objection to the procedure adopted by the Court.

22. With regard to the Petitioner's contention that its right to a fair hearing was violated, the Interested Parties submitted that the issue of fair hearing does not arise at all because the Court afforded the parties ample opportunity to make their representations, and lack of oral evidence does not imply unfair hearing. The Interested Parties further submitted that whether or not the Interested Parties were properly employed is *res judicata* having been determined by the Industrial Court, which submission applied to all evidential issues raised by the Petitioner which the Interested Parties submitted had been dealt with by the Court and a determination made.

23. The Interested Parties contended that, in any event, the remedy of reinstatement is provided for under **Section 49 (3)(a)** as read with **Section 50** of the Employment Act, 2007 and the Court had discretion whether to reinstate the Interested Parties or not. It was their case therefore that the issue of subjecting the parties to a contract of servitude does not arise in the circumstances of the case.

24. The Interested Parties further argued that this Petition was an appeal through the back door, the Petitioner having failed to exercise its right of review to the same Judge who had made the decision it was aggrieved by, or to make a judicial review application to the High Court timeously. They observed that the Petitioner had initially filed **Petition No 201 of 2010** and then withdrawn it; that this matter is a repeat of the same petition in a different court; and it therefore constitutes an abuse of the court process and should be dismissed with costs.

Issues for Determination

25. Having considered the respective pleadings and submissions of the parties in this matter, we take the view that the following issues arise for determination:

i. ***Whether this petition is competent;***

ii. ***Whether the Industrial Court had jurisdiction in light of section 45(3) of the Employment Act;***

iii. ***Whether the Petitioner's failure to avail itself the right of Judicial Review in the High Court put paid to the allegation that its right under section 70 of the former constitution was violated;***

iv. ***Whether there is any merit to the Petition and if so, what remedies, if any, are available to the Petitioner.***

Whether the Petition is Competent.

26. Learned Counsel for the Interested Parties raised a myriad of procedural issues. It was contended that the Petitioner, being a body corporate, had no right to institute these proceedings under the old Constitution as the same could only be instituted by individuals. On this contention, we only need to refer to Shah Vershi Devji & Co. Ltd Vs. The Transport Licencing Board **[1971] EA 289; [1970] EA 631** in order to expose the fallacy in this position. In the said case, it was held:

"Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word "person" is defined in section 123 as including "any body of persons corporate or unincorporated. Thus, a company is a "person" within the meaning of Chapter V of the constitution which is headed "Protection of Fundamental Rights and Freedoms of the Individual" and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying. The word "individual" can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it although it is included in the list of rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word "individual". "Individual" seems to be any legal person who is not the general public."

27. It was also contended that the Petitioner had filed an earlier petition which was withdrawn. As the said petition was never heard on its merits, the mere fact that it was filed does not preclude the Petitioner from instituting fresh proceedings. *Res judicata*, we must point out, applies only where the earlier matter has been determined on merits and does not apply where the same was withdrawn or struck out on a technical point of law or for want of jurisdiction. With respect to the alleged defects in the affidavit which the Interested Parties argue is defective, it is our view that the same, even if true, are curable under Article 159(2)(d) of the Constitution. In any case we would not be expected to determine in this petition whether the deponent of the affidavit in question was not authorized to execute the same by virtue of his tenure having expired.

Whether the Industrial Court had Jurisdiction in light of section 45(3) of the Employment Act.

28. Section 45(3) aforesaid provides:

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

29. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation on jurisdiction may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction. It is our view that where the Tribunal has made a factual finding either expressly or by necessary implication as to the existence of antecedent, it is not for this Court in a constitutional petition to reverse such a finding of fact since that is a decision which goes to the merit of the decision. To do otherwise would amount to this Court acting as an appellate court rather than a Constitutional Court. In this case, the issue whether or not the Interested Parties had been in employment for 13 months was clearly a factual issue. We decline to find that by virtue of that factual finding, the Court had no jurisdiction.

30. In any case since it was conceded that this section was declared unconstitutional, nothing turns on this issue.

Whether the Petitioner's failure to avail itself the right of Judicial Review in the High Court put paid to the allegation that its right under section 70 of the former constitution was violated.

31. The Industrial Court (as then constituted) was established under **Section 11(1)** of the Labour Institutions Act No. 12 of 2007 thus;

"there is established an Industrial Court with all the powers and rights set out in this Act or any other law, for the furtherance, securing and maintenance of good Industrial or labour relations and employment in Kenya."

32. Under **sub-section 11(2)**, the Court comprised of a principal Judge and as many Judges as the President acting on advice of the Judicial Service Commission, may consider necessary. The Court sat with members nominated by employers and trade unions.

33. The Jurisdiction of the Court was set out under **Section 12** of the Labour Institutions Act thus;

"12(1) The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court. Or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer's organization and a trade union or between a trade union, an employer's organization, a federation and a member thereof." (emphasis ours)

34. As a matter of fact, the then Industrial Court did not have exclusive jurisdiction over matters stated above but had concurrent jurisdiction in that the High Court as established then under The Constitution of Kenya 1969 had unlimited jurisdiction over all criminal and civil matters. Employment and Labour disputes are mostly civil and at times criminal in nature.Therefore, the High Court had concurrent jurisdiction with the Industrial Court over these matters.

35. In **High Court Petition No. 33 of 2011-Brookside Dairy Ltd. vs The A.G. and 2 Others).** Hon. D. S. Majanja, J. upon reviewing the case of **Mecol Limited vs. The Attorney General and Others, Nairobi HC Misc. App. 1784 of 2004 (unreported) and Kenya Guards and Allied Workers Union Vs. Security Guards Services and 38 others, Nairobi HC Misc. 1159of 2003** (unreported) held;

"I take the position that the Industrial Court, as a creature of statute, is a Court subordinate to the

High Court. Parliament did not have the Constitutional authority under the former Constitution to create a Court of equivalent status with the High Court."

36. This is the view that was adopted by the Court of Appeal in this matter when it found that **Section 27(1)** of the Labour Institutions Act, (now repealed) which provided that any party to any proceedings before the Industrial Court may appeal to the Court of Appeal against any final judgment, award or any order of the Industrial Court, was unconstitutional.

37. The Court of Appeal upheld the position that the erstwhile Industrial Court was a subordinate Court and therefore its decisions could not be appealed directly to the Court of Appeal.

38. What options, did the Petitioner have, having been aggrieved by the judgment of the then Industrial Court in **Cause No. 37N of 2010** delivered on 13th May 2010"

39. In **High Court JR Case No. 218 of 2010 Kenya Medical Research Institute vs. The Industrial Court and The Hon. The Attorney General and 3 Others,** the Court dealt with the question whether the High Court had supervisory jurisdiction over the Industrial Court.

40. Hon. W. K. Korir J, in a judgment delivered on 21st February 2012 reviewed several previous decisions of the High Court including **Kenya Airways Ltd. vs. Kenya Airline Pilots Association NRB HCC Misc. Appl. No. 254 of 2001,** in which Alnashir Visram J. (as he then was), held that the High Court had supervisory jurisdiction over the Industrial Court; **Mecol Ltd. vs. A.G. & 7 Others [2000] eKLR** in which K.H. Rawal, O. Mutungi, (Rtd) and M. Kasango JJ held that;

"During the hearing much was said of the High Court's supervisory power over the subordinate Courts, which the Applicant said extended to supervisory power over the Industrial Court. That supervisory power is donated by Section 65(2) of the Constitution. The High Court is conferred with supervisory powers over the civil or criminal proceedings of the subordinate Courts. We are of the undoubted view, as discussed in this ruling herein before, that as regards judicial review the High Court indeed has the supervisory role over subordinate courts which include the Industrial Court."

41. Justice Korir upheld this view and stated:

"That this is the position I have always held as regards the old Industrial Court. The former Industrial Court was a subordinate Court amenable to the supervisory jurisdiction of this Court. I therefore entirely agree with the position found in Kenya Airline Pilots Association and Mecol Limited vs. Attorney General and 7 others as regards the place of the then Industrial Court vis a vis this Court."

42. This decision by Korir J. is particularly important because the Applicant was Kenya Medical Research Institute, the Petitioner in *casu*.

43. **JR Misc. Application No. 2187 2010** was filed on 13th July 2010. It is therefore very clear that the Petitioner herein was not unaware that Judicial Review as a remedy was available to a Party aggrieved by a decision of the Industrial Court (as then constituted).

44. In fact, Hon. Korir J. found in favour of the Applicant (Kenya Medical Research Institute), that the Industrial Court as then constituted had no jurisdiction to entertain the dispute because it was not founded on an employee and employer relationship as provided under **Section 11** of the Labour Institutions Act, 2007 (now repealed).

45. At the time the decision of the then Industrial Court was delivered on 13th May 2010, the Constitution of Kenya, 2010, was not yet in place and therefore the remedy of judicial review was available to the Petitioner at the High Court. However, once the 2010 Constitution was promulgated and the present Employment and Labour Relations Court was established under **Article 162(2)** as read with **Sections 4 and 12** of the Employment and Labour Relations Act 2011 (as amended in 2014), the High Court was entitled to transfer the matter to the Employment and Labour Relations Court which Court has now the jurisdiction to entertain all matters arising from an employer and employee relationship. In the **Brookside Dairy Ltd.** case **(supra)** D. S. Majanja J. held;

"Article 162(2) of The Constitution contemplates the establishment by the Legislature, of a Court of the status of the High Court to hear disputes concerning employment and labour relations. Such a court was duly established by Legislature by enactment of the Industrial Court Act (Act

No. 20 of 2011) whose date of commencement was 30th August 2011."

46. The **Brookside Dairy Ltd**. case is on all fours with the present matter except that in the Brookside Dairy Ltd. case, the Hon. Judge was dealing with a judicial review application, whereas this is a constitutional petition.

47. This petition was, however, instituted after the promulgation of the Constitution of Kenya, 2010 under which Article 23 thereof permits the Court, in dealing with proceedings for enforcement of the Bill of Rights under Article 22, to grant appropriate relief including an order of judicial review. In applying a provision of the Bill of Rights, Article 20(3) of the Constitution enjoins this Court to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

48. It is therefore our view that whereas the petitioner ought to have challenged the then Industrial Court's decision by way of judicial review under the old constitution, since this Petition was filed after the promulgation of the current Constitution, the same applied with respect to the reliefs available to the Petitioner. While we deprecate the conduct of the Petitioner in not resorting to the remedies which were available to it then, we are reluctant to disallow this Petition solely on that basis.

Whether There is Any Merit to the Petition

49. The Court has carefully perused the averments in the petition and noted that the matters raised therein relate to the procedure the Judge in the Industrial Court followed in the hearing and determination of the suit. The petition also contains an objection to the decision of the court to reinstate the Interested Parties to their previous employment.

50. The Petitioner specifically complains of violation of its constitutional rights protected under **section 64, 70** and **73** of the former constitution**. Section 70** guaranteed to all persons equal protection of the law whereas **Section 73** protected individuals against being subjected to servitude. The appeal by the Petitioner was struck out by the Court of Appeal on the basis that **Section 27** of the Labour Institutions Act violated **Section 64** of the former constitution.

51. The Petitioner has outlined mistakes made by the Judge of the Industrial Court which it argues amounted to violation of its constitutional rights. In the Petitioner's view, the Court ought to have conducted a hearing by way of oral evidence. However, in **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of Appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.

52. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

53. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

54. In addition, as was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the

context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

55. The Interested Parties responded to the petitioner's submissions with regard to the right to a fair hearing this submission by retorting that from the record, the parties agreed on the manner of proceedings and consented to consolidate all applications. On the hearing date, the parties made oral submissions on the documentation filed and no objection was raised during the trial on the mode of the proceedings. It was contended that the Industrial Court (Procedure) Rules, 2010 which were Gazetted on 4th May, 2010 were not in place when the dispute was heard. To the contrary, the applicable rules of procedure at the time of the hearing empowered the Court to direct parties to proceed by way of written submissions and dispense with oral evidence and that the Petitioner did not raise any objection to the procedure adopted by the Court.

56. Section 23 of the repealed Industrial Relations Act provided as follows:

In any proceedings before the Industrial Court, a party to the proceedings may act in person or be represented by a legal practitioner, an office bearer or official of that party's trade union or employers' organisation and, if the party is a juristic person, by a director or an employee.

57. From the manner in which the proceedings were conducted, it would seem that the parties chose to be represented by their legal representatives during the hearing, and not to tender oral evidence.

58. Whereas section 24(1) shielded the Court from being bound by rules of evidence, section 24(2) of the said Act provided that:

If a witness objects to answering any question or to producing any relevant document on the ground that it will incriminate him, or on any ground on which the witness could lawfully object if the objection was made in civil or criminal proceedings in the High Court, the witness shall not—

(a) be required to answer the question or to produce the document; and

(b) be liable to any penalties for refusing to do so.

59. Our understanding is that the Petitioner's advocate could have objected to answering questions put to him in cross-examination. He however chose not to do so. It is our considered view that it is too

late in the day for the Petitioner to turn around and complain that it was not afforded a fair hearing when it participated fully in the said proceedings and had the advantage of being represented by legal counsel. It chose not to invoke its rights conferred upon it by legislation. Rule 21 of the **Industrial Court (Procedure) Rules, 2010,** which was relied upon by the Petitioner, assuming the Rules were applicable to the hearing before the Court, provides:

The Court may, subject to an agreement by all parties, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.

60. While we appreciate that the said provision was subject to agreement of the parties, no objection was raised as to the mode of proceeding adopted by the Court. Whereas in the ordinary courts of law that procedure may be frowned upon, we are of the view that considering the nature of the proceedings in question, the Petitioner's complaint is unsustainable.

61. The Petitioner further contended that the Court made a decision based on an unpleaded issue. The law, as we understand it, is not that the Court is barred from deciding a matter on an unpleaded issue. Whether the Court would do so depends on the circumstances of the case and the manner in which the proceedings have been conducted before the Court. The law is that a Court may base its decision on an issue, where it appears from the course followed at the trial, that the issue has been left to the Court for decision. See **Odd Jobs vs. Mubia [1974] EA 476; Abdi S Rahman Shire vs. Thabiti Finance Co. Ltd. [2002] 1 EA 279** and **Marco Munuve Kieti vs. Official Receiver and Interim Liquidator Rural Urban Credit Finance & Another Civil Appeal No. 164 of 2002**. It was the Respondent's case that the alleged unpleaded issue, probationary contract, was in fact submitted on by the parties. If that was the position, and the same was not denied, then the Court was bound to address its mind to the same.

62. Moreover, we are of the view that a wrong action or decision of a public body does not necessarily elevate a matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a constitutional petition. As was appreciated in **Pattni & Another vs. Republic [2001] KLR 264** in which **Harrikisoon vs. Attorney General of Trinidad and Tobago [1980] AC 265** was cited with approval:

"The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious....the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the

jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."

63. In that decision it was held that:

"No human right or fundamental freedom recognised in the Constitution is contravened by a judgement or order that is wrong and is liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. And where there are no higher courts to appeal to, then, no one can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair and it is only errors of procedure that are capable of constituting infringement to the rights protection by section 1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction. The error must amount to failure to observe one of the fundamental rules of natural justice."

64. The Petitioner has not pleaded with specificity in the body of the petition how the Petitioner's rights were violated under **Sections 70** and **73** of the Constitution. The general complaints about the procedure followed by the Judge in the Industrial Court and the alleged consequences of the award of reinstatement do not disclose violation of constitutional rights of the Petitioner. Furthermore, the Petitioner knew or ought to have known that the remedy of judicial review was available to it if it was aggrieved by the decision of the Industrial Court.

65. Parties who intend to commence legal proceedings by way of a constitutional petition ought to take note of the sentiments of the Court in **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193,** where the Court expressed itself as follows:

"We find that the making of an allegation of contravention of Chapter 5 provisions per se, without particulars of the contravention and how that contravention was perpetrated would not justify the court's intervention by way of an inquiry where the particulars of contravention and how the contravention took place are plainly lacking in the pleadings....Any such inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious, constitutional references which would in turn triviliase the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...."

66. In view of the analysis and findings set out above, it is the Court's considered view that the Petitioner wishes to have a second bite at the cherry since the employment dispute between the parties was fully heard and determined by the Industrial Court.

67. This Court finds that the 2nd Respondent did not violate any constitutional rights of the Petitioner as set out in the Petition or at all. The Petition lacks merit and it is hereby dismissed with costs in respect of all proceedings that have taken place in this Court and the former Industrial Court.

Dated and Signed at Nairobi this 16th day of July, 2015.

NDERI NDUMA MUMBI NGUGI G V ODUNGA

JUDGE JUDGE JUDGE

Dated, Delivered and Signed at Nairobi this 16th day of July, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Delivered in the presence of:

ADVOCATE FOR THE PETITIONER Mr. Wetangula

ADVOCATE FOR THE 1ST RESPONDENT ……

ADVOCATE FOR THE 2ND RESPONDENT ……

1ST INTERESTED PARTY Mr. Enodo

2ND INTERESTED PARTY Mr. Achacha