KENYA LAW REPORTS
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KLR 2012
These Law Report contains precedent setting judicial opinions delivered in the Year 2012 by the Supreme Court, Court of Appeal, High Court, Environment and Land Court and the Employment and Labour Relations Court.

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Tel: +254 (020) 2712767, 2011614, 2719231 Mobile: +254 710 799 464, 736 863 309

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National Council for Law Reporting (Kenya Law) - A service state corporation in the Judiciary
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Editor/CEO’s Note

Integrity, as one of Kenya Law’s values, requires us to conduct our operations honestly, objectively and impartially, and with discipline and commitment in service to the people while adhering to high ethical principles and professional standards. Professionalism on the other hand demands that we apply highest levels of knowledge, skills, competencies and ethical values in the execution of our mandate. Our other related values are transparency and accountability, reliability, innovation and citizen focus.

As we close the year 2016, I would like to use this final note to thank all Kenya Law staff and stakeholders who enable us to achieve these and all our other commitments. We achieve everything we do because of you. Allow me to share with you a number of awards that we have won this year as the evidence that we remain true to our commitments.

First, out of 399 entries, Kenya Law received two awards at the prestigious Financial Reporting (FiRE) Awards. We emerged First Runners Up in the Best Public Finance Management category. That segment of the award evaluates all aspects of resource mobilization and expenditure management in government. The second award was Second Runners Up in the IPSAS Accrual category, which is an assessment of compliance with the financial reporting standard for state corporations.

Our vision of accessible public legal information towards an enlightened society demands that we make use of Information and Communication Technology (ICT) to enhance access to legal information. We must therefore remain at the forefront of innovative and creative use of technology in making Kenya Law the place where legal information is public knowledge. As a result of this and more, in 2016 we won two awards each in the CIO Awards and the Kenya Open Data Awards. The CIO Award recognizes 100 East African Organizations that use ICT to achieve their goals. We were awarded a Gold Mark in recognition of our Enterprise Information Technology Adoption as well as an Award for Deployment of Technological Solutions in the Public Sector. On its part, the Kenya Open Data Awards, hosted by Kenya Open Data and the ICT Authority, recognizes innovations open data actors who make open data easy to use. Kenya Law earned the Public Institution Award in recognition of its high publishing standards (Law Reports) and use of challenging data (online content). We also earned the Innovation Award in recognition of Kenya Law’s use of open data as a tool for innovation - through the user-friendly revamped case law database.

We recognize that our mandate is our solemn duty and as we begin a new year be rest assured that Kenya Law shall continue on the path of integrity, professionalism, innovation and creativity.

We wish you a prosperous year 2017.

Long’et Terer
CJ’s Message

Speech delivered by the Hon. Chief Justice, Mr. Justice David K. Maraga on the occasion of his swearing in at State House Nairobi. On 19th October 2016.

Your Excellency, President Uhuru Muigai Kenyatta;
Your Excellency, the Deputy President William Ruto;
Hon. Speaker of the National Assembly;
Members of the Judicial Service Commission; Judges and Magistrates; Institutional Heads here present;

Chief Registrar of the Judiciary;
Faith leaders;
All protocols observed;

Ladies and Gentlemen.

Allow me to thank the president for hosting this event, and to appreciate all of us who have honored the invitation to attend this swearing in ceremony. We, also, collectively thank God for an occasion such as this.

The broad representation here today is a testimony of Kenya at its best -a people always able and willing to pull together, united by a purpose which reflects our culture, national character and a belief in constitutionalism.

It is tempting to take an event such as the one we are having here today as ordinary and routine. Taking the oath of office as the 15th Chief Justice of the Republic of Kenya may not, in and of itself, be an event of monumental novelty.

But we must not lose the significance of this historic day. This day affirms the country’s recognition and acceptance to be governed as a constitutional democracy. The transition from one Chief Justice to another, conducted through an open, competitive recruitment process – a constitutional device the rest of the world holds in remarkable awe – is not only a testament to our strong democratic traditions but also a vindication of the independence of our institutions such as the Judicial Service Commission.

Today shows that when we allow institutions to thrive, and when those institutions are populated with men and women who put the country first, they will always do what is right. Throughout the process of choosing the holder of the Office of the Chief Justice, the JSC manifested both independence and accountability – conducting a process that is open, transparent and responsive to the concerns of the Kenyan people. I am proud to be a product of that process and I am committed to protecting and enhancing the Constitutional ideals of judicial independence and accountability. Given the high caliber of other Kenyans who applied for the job of Chief Justice, the burden for delivery of the essentials of this office is certainly high for me. I salute my worthy competitors. I am confident that with the support of all the justice sector stakeholders I will succeed.
Your Excellency, Ladies and gentlemen,

This is, also, an important day for the Judiciary. The Judiciary was the first arm of government to transit from the independence Constitution to the 2010 constitution when it recruited the first Chief Justice under the new Constitution. This exercise was achieved five years ago with widespread national and international acclaim. Today, the Judiciary, again, is the first arm of government to oversee the first peaceful transition and transfer of power under the 2010 Constitution. This is a remarkable feat and the Judiciary and the JSC, are very proud that we are setting the pace for the rest of the country. We hope that other arms of government will follow suit in this now well beaten path of proper conduct in the management of leadership succession at the top echelons of government.

But our pacesetting has not just been in transitions. It has also been on reforms both in terms of constitutional implementation and institutional transformation. For the last five years, the Judiciary, under the leadership of my predecessor, Hon. Dr. Willy Mutunga, has been implementing an ambitious and successfully transformation agenda, which has been a benchmark for other public sector institutions.

We have been resetting the button for the kind of Judiciary that Kenyans want and need. A Judiciary that is people-centered and a fair and firm defender of their rights. A Judiciary that is independent, and one that robustly upholds the Constitution. A Judiciary that gallantly fights corruption within its ranks, and one that is transparently managed. A Judiciary that is financially strong yet accountable. A Judiciary that is open and friendly to the public, and one that has now finally embraced performance contracting. I want to thank Hon. Dr. Willy Mutunga for his leadership and for laying the strong foundations of transformation on which I will build.

As I assume office, I promise to focus on a number of fundamental undertakings: I will endeavor to turn the Judiciary into a world-class justice institution. My overarching interest will be on improvement of service delivery in the justice sector to the Kenyan people. I will seek to eliminate corruption from amongst our ranks, reduce the backlog of cases and automate court proceedings. I will aspire to enhance access to justice for all and improve performance and accountability within the Judiciary. The Judiciary must be accountable on its finances and on its jurisprudence, both in quantitative and qualitative terms. I can assure the country that the judicial work ethic is going to change – for the better.

Your Excellency, Ladies and gentlemen

The core function of the judiciary is to ensure that citizen’s rights are protected, that all are equal before the law and that the rule of law is observed. While cultivating a collaborative and mutually supportive relationship with all arms of Government, we will continue to discharge our constitutional mandate fairly, impartially but firmly. We shall respect the constitutional independence of other arms of government and expect that they, too, shall similarly respect the independence of the judiciary. The principle of separation of powers is central to our constitutional architecture.

Your Excellency, Ladies and Gentlemen, Leadership is about service and team work. I intend to build a positive culture amongst the staff, an attitude of service, and collegiality. In the same vein, I will strive to ensure that the Judiciary delivers value for money to the Kenyan public. Our service is justice. Kenyans must feel the quality and speed of our service and be satisfied with it. This
requires continuous improvement and accountability.

Although more than three quarters of our Judges, Magistrates and Judicial Staff are honest and hardworking people, corruption continues to be a dark blot on the Judiciary as an institution. Whereas considerable progress has been made in the fight against this vice, I must admit that the information I have indicates that it is on the rise. I promise to deal with this problem in a direct and frontal manner. I will strengthen the Office of the Judiciary Ombudsperson, reinforce the disciplinary processes in JSC, and bolster the Directorate of Internal Risk and Audit among many other recommendations that will result from the on-going Anti-Corruption Mapping exercise being led by Transparency International. I will institutionalize the war against corruption so that it is not a periodic event but part and parcel of our culture and management systems and processes. I recognize that the steady and consistent support of the Executive and the Legislature as well as that of other institutions is crucial in the fight against Corruption. I plead for maximum support in this regard.

I am aware that the legal profession is linked to the Judiciary in a special way. I will endeavor to extend and fortify this relationship. But as the Judiciary reflects on improving on judicial performance, we must expect the same of the bar. I will seek to engage both with the leadership and membership of the Law Society of Kenya to play their part in improving service delivery, clearing case backlog, enhancing integrity in court processes and improving the quality of legal training and legal services provided by both the bar and bench.

Lastly, let me turn my attention to the role of the Judiciary in the next elections.

Elections and Election Dispute Resolution is a key priority for me. I have been the Chairman of the Judiciary Committee on Elections and I have confidence in the preparations that we have and are putting in place. But we are just one actor in the chain. We require all agencies, other actors, the political class and the Kenyan citizenry to play their part in ensuring that the next elections are undertaken in accordance with the set Constitutional standards. I want to assure the nation that the Judiciary is ready to satisfactorily determine any disputes that may arise from the electioneering process. The Judiciary is ready to hear and resolve any election disputes that may arise in a fair and timely manner. We shall continue to invest in cultivating the trust and confidence of the Kenyan people in our arbitral role in electoral disputes. I am determined to do what it takes, to engage as widely as is necessary and as is permitted under the Constitution, to achieve this objective and to ensure that justice prevails and peace abounds amongst the Kenyan people.

HON. MR. JUSTICE DAVID K. MARAGA

CHIEF JUSTICE & PRESIDENT, SUPREME COURT OF KENYA
The matter in dispute revolved around the move to demarcate the boundaries with intent to preserve the territorial integrity of Turkana County. The Petitioners’ grievance was that, the territorial integrity of Turkana County had been subjected to violation by both state and non-state actors. These allegations were triggered by two events; firstly the creation of administrative units within Turkana County belonging to or considered to be part of neighbouring counties; secondly alleged unlawful transfer of resources that belonged to Turkana County Government to neighbouring counties and by the entry of non-state actors into Turkana County who conducted raids causing death and destruction of property. As a result, the security of the people of Turkana County was apparently threatened.

In countering the Petitioners’ allegations, the Respondents relied on articles 5 and 6 of the Constitution of Kenya, 2010 (the Constitution) arguing that said articles did not introduce the concept of territorial integrity as to involve independent States. The Petitioners were also faulted for not following the available dispute resolution mechanisms within Turkana County Government to neighbouring counties and by the entry of non-state actors into Turkana County who conducted raids causing death and destruction of property. As a result, the security of the people of Turkana County was apparently threatened.

In response to the question of jurisdiction, the Court held that; Jurisdiction flows from the law, and the recipient-Court was to apply the same, with any limitations embodied. Such a Court would not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation was clear and there was no ambiguity. The High Court had very wide jurisdictional reach spanning from the ordinary criminal and civil matters, to those of a constitutional nature. However, there were certain matters that had been specifically excluded from the Court’s jurisdiction, either by legislation or the Constitution.

The Court further found that, article 88 of the Constitution established the Independent Electoral and Boundaries Commission (IEBC) that could alter and delimit County boundaries and that an aggrieved party could only seek a review of the IEBC’s decision. As a result of the tussle, four issues were canvassed before the Court which included: first, the question of jurisdiction of the Court; whether invoking the High Courts’ jurisdiction without exhausting the established dispute resolution mechanisms with regard to alteration and delimitation of County boundaries was an abuse of the court process; second, whether Counties as established under the Constitution of Kenya, 2010, possessed territorial integrity of states; Third, whether the State had abdicated its constitutionally mandated duty by failing to provide security to the Petitioners and Fourth, whether the Petitioners were entitled to damages.

In response to the question of jurisdiction, the Court held that; Jurisdiction flows from the law, and the recipient-Court was to apply the same, with any limitations embodied. Such a Court would not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation was clear and there was no ambiguity. The High Court had very wide jurisdictional reach spanning from the ordinary criminal and civil matters, to those of a constitutional nature. However, there were certain matters that had been specifically excluded from the Court’s jurisdiction, either by legislation or the Constitution.
responsibility for the delimitation of constituencies and wards. The High Court only had review powers of a decision of the IEBC in terms of article 89(10) of the Constitution. In addition, article 89(11) of the Constitution had set out the procedure for reviewing of a decision of the IEBC.

It further stated that the Constitution spelt out the procedure for the alteration of County boundaries which was a function squarely within the competence of the Executive and not the Judiciary. Where there was clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure ought to have been strictly followed. It went ahead to clarify that mere allegation that a human right had been or was likely to be contravened was not itself sufficient to entitle an Applicant to invoke the jurisdiction of the Court if it was apparent that the allegation was frivolous, vexatious or an abuse of the Court process, being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involved no contravention of any human right or fundamental freedom.

Still on the question of jurisdiction, the Court held that, where there was a parallel remedy, constitutional relief ought not to have been sought unless the circumstances of which the complaint was made included some feature which made it appropriate to take that course. As a general rule, the Court stated, there had to be some feature, which, at least arguably, indicated that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse or abuse of the Court’s process.

A court of law has to first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If a court were to act in haste, it would be presuming bad faith or inability by that body to act. Where there existed sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the Court would not be invoked until such mechanisms had been exhausted. Both the delimitation and alteration of electoral and geographical boundaries did not fall within the Court’s jurisdiction, and thus the Court could not entertain or grant any relief sought in the Petitioners prayers relating to the same.

With regards to the second issue, as to whether Counties established under the Constitution of Kenya, 2010 possessed territorial integrity of states, the Court held that; article 6(1) of the Constitution divided the territory of Kenya into 47 Counties that were listed in the First Schedule. Within the Kenyan territory, the Constitution established two distinct spheres of Government: National and County governments. Article 6(2) made it clear that those two levels of Government, although distinct, were inter-dependent and would conduct their mutual relations on the basis of consultation and co-operation. It was through that provision that the intention of the Constitution on the idea of a distinct but co-operative Government emerged. Additionally, article 174 of the Constitution provided more content as it set out the objects of devolution. Although the Constitution had divided Kenya into Counties, primarily for purposes related to better governance, Kenya remained one sovereign Republic. In addition, every territory and territorial waters that was deemed to be a part of Kenya fell under her sovereignty. That was apparent from articles 4, 5 and 6 of the Constitution read in tandem.

The Court stated that, the concept of territorial integrity featured only twice in Kenya’s Constitution. Firstly, it was found under article 238(1) of the Constitution which provided for principles of national security and Secondly, under article 241 of the Constitution titled the establishment of defence forces and defence council. In both articles the Court stated that this had been used simultaneously with the word sovereignty and in the context of provision of security for Kenya, as a Country. No reference had been made to Counties in either article.

The true position was that, the principle of territorial integrity was a principle under international law applicable to Nation States or Countries as provided under article 2(4) of the United Nations Charter.

According to the Court, only States or Countries enjoyed territorial integrity and not Counties. That was further reinforced by the definition of State under article 1 of the Montevideo Convention on the Rights and Duties of States which provided that the State as a person of international law would possess the four fundamental qualifications: a permanent population; a defined territory; government and; capacity to enter into relations with other states.

Based on the said qualifications, it was apparent that Counties did not satisfy the requirements of the definition. As such, the claim that the County enjoyed territorial integrity and that the same had
been violated could not be sustained.

With regards to the third issue as to whether the State had abdicated its constitutionally mandated duty by failing to provide security to the Petitioners, the court held that, the provision of security was within the competence of the National Government by virtue of article 238(1) of the Constitution and exercised that function through the three organs of national security listed in article 239(1) of the Constitution, namely: the Kenya Defence Forces; the National Intelligence Service; and the National Police Service.

Article 26 of the Constitution protected the right to life while article 40 protected the right to property. Those rights, it was expressed under article 19(3)(a) of the Constitution, belonged to each individual and were not granted by the State. The State does not grant rights and fundamental freedoms to any person because human rights are generally inherent, universal and inalienable rights of human beings. A Constitution simply recognizes the natural and original human rights of mankind which any and every human being ought to have in order to lead a dignified life till his or her natural death.

Article 21 of the Constitution enjoined the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. The State protects its citizens through the police service. The police service is the organ responsible for maintaining law and order, preservation of peace, protection of life and property as well as prevention and detection of crime including the apprehension of offenders. Under the provisions of the Constitution, the police still has that obligation. Article 245(8) of the Constitution empowered Parliament to enact legislation giving effect to that provision. Consequently, Parliament enacted the National Police Service Act under which the functions of the police were found at section 24 of the Act.

The court further held that, it was within the obligation of the State to protect its citizens and it could not ensconce itself by stating that other people were suffering the same fate as the Petitioners or that the Petitioners had been in that state since time immemorial. With advanced technology in the security sector, the Court stated that, it was inexcusable that there were cross-County raids amongst communities neighbouring each other. Such inaction on the part of the State amounted to abdication of its constitutional mandate of protecting the lives and properties of its citizens. Thus, the Court found the State to have abdicated its constitutional duty.

Article 23(1) of the Constitution made it unequivocally clear that the Court had jurisdiction on matters related to alleged violations of human rights and freedoms to grant appropriate relief. The Petitioners’ claim had been supported by the supporting affidavits of the 2nd to 21st Petitioners’ annexed to the Petition which had set out in detail their losses and the physical and emotional injuries that they had suffered on account of the assailants. However, the Petitioners had not specified with sufficient particularity the individuals responsible for those atrocities neither had they provided material evidence for their claims.

As to whether the Petitioners were entitled to damages, the Court held that, it is a well-established principle that constitutional petitions have to be pleaded with reasonable precision. Thus, the Court was unable make a determination on the quantum of damages suffered by the Petitioners.

Petition dismissed; No order as to costs.
“There are circumstances under which a court may decline to follow a decision which would otherwise be binding on it and those were (a) Where there were conflicting previous decisions of the Court; or (b) Where the previous decision was inconsistent with a decision of another Court whose decision was binding on the court which was considering the issue; or (c) Where the previous decision was given per incuriam.”

Justice J.M. Mativo, in Micheal Waweru Ndegwa v Republic

“The Court could not feign ignorance to the political and power dynamics which usually ran behind the scenes of prominent public appointments. On occasion, the appointments had been used for political gerrymandering or reward for loyalty. That was unconstitutional and the Court had to, where it was proved that a person had been prejudiced and excluded from appointment on such considerations, assert itself and invalidate such appointment.”

Justice A J Nelson in Okiya Omtatah Okotit v Head of The Public Service Cabinet Secretary & 3 others, Petition 114 of 2016

“The law on the topic of compulsory blood or DNA testing in paternity disputes, which was also partly an issue in the Petition, was yet to be completely and satisfactorily developed locally. There was no express legislative framework, which specifically regulated the position in civil cases. The few judicial pronouncements on the topic did not appear unanimous in approach or principle. Whereas in relation to children, the courts had occasionally been quick to act in the child’s best interest and ordered DNA testing, with regard to non-consenting adults, the jurisdiction had been left hazy.’

Justice JL Onguto in D N M v J K, Petition No 133 of 2015

“While the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions. The EACC in the circumstances of the case had no powers in the absence of the commissioners to initiate investigations of its own motion or any other person’s motion, save any directions by the Director of Public Prosecutions.”

Justice JL Onguto in Busia County Government v Ethics and Anti-Corruption Commission, Petition 382 of 2015
“Territorial integrity was a principle under international law applicable to Nation States/Countries as provided under article 2(4) of the United Nations Charter. Only States/Countries enjoyed territorial integrity and not Counties. That was further reinforced by the definition of State under article 1 of the Montevideo Convention on the Rights and Duties of States which provided that the State as a person of international law would possess the following qualifications: a) a permanent population; b) a defined territory; c) government and; d) capacity to enter into relations with other states. It was apparent that Counties did not satisfy the requirements of the definition. As such, the claim that the County enjoyed territorial integrity and that the same had been violated could not be sustained.”

“The duty of an expert witness was to provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within their expertise. That was a duty that was owed to the Court and overrode any obligation to the party from whom the expert was receiving instructions.”

“The holding of two public offices simpliciter did not result in a violation of articles 10 or 73 or 232 of the Constitution, 2010. Each case had to be viewed on the basis of its own unique facts. It was possible for a public officer to hold two or even more offices where a statute expressly allowed and roles clearly defined or where there was a clear co-relation between the two offices and no possibility of conflict of interest arose or was foreseeable.”

“The word ‘unlawful’ did not constitute a key ingredient to an offence under section 11 (1) of the Sexual Offences Act. What was key in that section was that the particulars had to reveal that the act complained of was intentional and indecent in nature. The particulars of the count clearly revealed that the act that the Appellant was being accused of was intentional and indecent. The word unlawful was relevant in the repealed section of the Penal Code (section 139) that placed importance to lack of consent as a key component in a charge of rape.”
Kenya Law Wins Awards

CIO 100 Awards

The CIO 100 Symposium seeks to identify and recognize 100 organizations in East Africa that have used I.C.T to impact their organizations goals. Kenya Law scooped two (2) awards:
1. Achievement of a Gold Mark in recognition of excellence in Enterprise Information Technology Adoption
2. Award for deployment of technological solutions in the Public Sector

Out of the 600 organizations from across East Africa that participated in this year's CIO 100 awards, Kenya Law came second overall!

Fire Awards

1st Runners Up - Best Public Finance Management category evaluating organizations looking at all aspects of resource mobilization and expenditure management in government.

2nd Runners up - IPSAS Accrual category (International Public Sector Accounting Standard which is the financial reporting standard for State)

Kenya Open Data Awards

These awards are hosted by Kenya Open Data and the I.C.T Authority, and are geared towards rewarding stakeholders in the open data space who have created innovations that make it easier for users to access and use open data. Kenya Law scooped two (2) awards which are;
1. The Public Institution Award for Celebrating high publishing standards and use of challenging data. This was in recognition of the high publishing standards of the Kenya Law Reports and the online content
2. Innovation Award - This was to Celebrate open data used as a tool for innovation and in this case, Kenya Law’s new and revamped case law database was lauded by the judges of the awards.

Free Access to Law Awards

Winner;

Kenya Law won the inaugural Free Access to Law Award held in SA for being the leading publisher of public legal information in the continent.
Court of Appeal Cases

Circumstances under which a Court may decline to follow a decision which would be binding on it

Micheal Waweru Ndewga v Republic
Criminal Appeal 290 of 2010
High court of Kenya at Nyeri

J.M. Mativo, J
September 14, 2016
Reported by Teddy Musiga & Mercy Cherotich

Statutes – interpretation of statutes – interpretation of Section 35 of the Anti-Corruption and Economic Crimes Act - whether Section 35 of the Anti-Corruption and Economic Crimes Act was complied with before commencing the prosecution – Anti-Corruption and Economic Crimes Act, section 35

Criminal procedure – evidence -mode of taking and recording evidence in trials – right to hear or recall evidence - where evidence is partly recorded by one magistrate and partly by another – where the convicting magistrate does not inform the accused on his right to recall or re-hear the evidence - whether the proceedings by the trial court were fatally defective for failure of the convicting magistrate to inform the accused on his right to recall or re-hear the evidence – Criminal Procedure Code, section 200 (3).

Criminal law – offences – offence of soliciting a benefit – elements of the offence of soliciting a benefit – whether the essential ingredients of the offence of soliciting a benefit were proved by the prosecution - Anti-Corruption and Economic Crimes Act, sections 39 (3) (a) and 48 (1).

Brief facts

The Appellant was charged with soliciting a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti-Corruption and Economic Crimes Act. The initial magistrate only heard the evidence of PW1 in chief. Cross-examination of PW1 and other 8 witnesses were heard by the succeeding magistrate. The Appellant appealed on grounds that the convicting magistrate failed to inform him on his right to recall or re-hear any witness pursuant to section 200 (3) of the Criminal Procedure Code.

The Appellant further contended that he was charged without the requisite recommendation for such prosecution by the then Kenya Anti-Corruption Commission (KACC) to the Attorney General who only could give his consent to prosecute after considering the investigation report by the KACC. Under section 35(1) and (2) of the Anti-Corruption and Economic Crimes Act, 2003, Kenya Anti-Corruption Commission was mandatorily required to make and submit a report of its investigations to the Attorney General with a recommendation to prosecute or not to prosecute the appellant of corruption offences or an economic crime. The Appellant contended that without the report, the purported prosecution by KACC through the Police was null and void. The appellant heavily relied on the Court of Appeal decision in, Nicholas Muriuki Kangangi vs The Hon. Attorney General, where the court terminated proceedings that had been instituted without complying with the provisions of section 35 (1) and (2) of the Act which made it mandatory for the KACC to make and submit a report to the Hon. Attorney General.

Issues

i. Whether the proceedings in the trial court were fatally defective for failure to comply with the provisions of section 200 (3) of the Criminal Procedure Code, which required the convicting magistrate to inform the accused on his right to recall or re-hear the evidence.

ii. Whether there were circumstances under which a Court could decline to follow a decision from a superior court.

iii. Whether Section 35 of the Anti-Corruption and Economic Crimes Act, where the Kenya Anti-Corruption Commission was mandatorily required to make and submit a report of its investigations to the Attorney General with a recommendation to prosecute or not to prosecute was complied with before commencing the prosecution.
iv. Whether the essential ingredients of the offence of soliciting a benefit were proved by the prosecution.

Held

1. For the High Court to set aside the conviction under section 200 (3) of the Criminal Procedure Code (CPC) it had to form the opinion that the accused person was materially prejudiced. It was necessary to appreciate the meaning of the above sections and in particular the phrase materially prejudiced.

2. Canons of construction were no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute, a court could always turn first to one cardinal canon before all others. Courts have to presume that a legislature said in a statute, what it meant and meant in a statute what it said there. When the words of a statute are unambiguous, then, the first canon is also the last. Judicial inquiry is complete.

3. A basic principle of statutory interpretation is that courts give effect, if possible, to every clause and word of a statute, avoiding any construction which implies that the legislature is ignorant of the meaning of the language it employed. The modern variant is that statutes have to be construed so as to avoid rendering superfluous any statutory language. A statute has to be construed so that effect is given to all its provisions and no part will be inoperative or superfluous, void or insignificant.

4. Even though the provisions of section 200 (3) of the CPC were couched in mandatory terms, it was important to examine the circumstances of each case, whether or not the Accused was materially prejudiced and how far the proceedings had proceeded and whether or not the circumstances of the case would warrant a retrial or an absolute acquittal, and utilization of judicial time. Whereas, it was totally improper for the magistrate to fail to inform the appellant about rights under Section 200 of the CPC, the circumstances of the case were such that it could not be said that the Appellant was materially prejudiced.

5. The provision of section 200 of the CPC had to be used very sparingly. Only in cases where the exigencies of the circumstances were not only likely but would defeat the ends of justice if a succeeding magistrate was not allowed to adopt or continue a criminal trial started by a predecessor.

6. The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice. It provides a degree of certainty as to what is the law of the country and is a basis on which individuals could regulate their behavior and transactions as between themselves and also with the State.

7. The principle of judicial precedent has to be strictly adhered to by the High Courts of each of the States and those courts have to regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts were bound by the decisions of the House of Lords, and of course. Similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to those decisions also to the decisions of the High Court in the particular State.

8. Adherence to precedent has to be the rule and not the exception. The labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.

9. There are circumstances under which a court could decline to follow a decision which would otherwise be binding on it and these are

(a) Where there are conflicting previous decisions of the Court; or

(b) Where the previous decision is inconsistent with a decision of another Court whose decision is binding on the court which is considering the issue; or

(c) Where the previous decision is given per incuriam.
10. As a general rule though not exhaustive the only cases in which decisions have to be held to have been given *per incuriam* are those decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the Court concerned. In such cases some part of the decision or some step in the reasoning on which it was based is found, on that account, to be demonstrably wrong.

11. The Attorney General's power under Section 12 of the Prevention of Corruption Act, appeared to have been retained when the Anti-Corruption and Economic Crimes Act was enacted. The power of KACC to prosecute any person or group of persons was subject to the direction of the Attorney-General, hence the requirement under Section 35 of that Act, that a report of any investigation be made to the Attorney General with certain recommendations.

12. A prosecution for an offence under Prevention of Corruption Act, could not be instituted except by or with the written consent of the Attorney General: Provided that a person charged with such an offence could be arrested, or a warrant for his arrest could be issued and executed, and he could be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence had not been obtained, but no further or other proceedings could be taken until that consent had been obtained.

13. The legislature was categorical that a prosecution under the Prevention of Corruption Act had to be preceded by a written consent from the Attorney General. Its intention was very clear from the outset and there was no doubt that any prosecution without a written consent would have been fatal.

14. There was no provision requiring a written consent in the Anti-Corruption Act. Section 35 of the Act which the Court of Appeal compared with Section 12 of the Prevention of Corruption Act had nothing to do with the consent to prosecute any offence under the Anti-Corruption & Economic Crimes Act, 2003 but only dealt with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. The reports had to include information on the outcome of the investigations and any action taken upon it, which included but not limited to arresting and charging suspects pursuant to Section 32 of the Anti-Corruption Act.

15. There was no provision in the Prevention of Corruption Act similar to section 32 of the Anti-Corruption & Economic Crimes Act, 2003 and the existence of that provision in the current anti-corruption legislation was an additional reason against any attempted analogy between Section 12 of the Prevention of Corruption Act, and Section 35 of the Anti-Corruption Act. In the context of the current anti-corruption legal regime there was no comparison between the two either in form, substance or in effect.

16. The Court of Appeal never made any reference at all to section 32 of the Anti-Corruption Act; neither was there any discussion of the constitutional provisions of articles 157(6)(b) and 157(12) on the exercise of powers to prosecute by the other persons or authorities such as the Anti-Corruption Commission. It could be that those provisions were not brought to the attention of the Court. Had those provisions been urged, the Court would not have interpreted section 35(1) of the Anti-Corruption & Economic Crimes Act in isolation and would have probably come to a different conclusion.

17. The Court would not have declared that the powers of the Attorney General in Section 12 of the repealed Prevention of Corruption Act were retained in Section 35 of the Anti-Corruption & Economic Crimes Act, 2003 law. Such a declaration would be inconsistent with the provisions of section 32 of the Anti-Corruption & Economic Crimes Act, 2003 which clothed the Director and investigators of the Commission with powers not only to investigate and arrest but also to charge.

18. The provisions such as articles 157(6)(b), 157(12) of the Constitution and section 32 of the Anti-Corruption Act had deliberately been included in the current legal regime because prosecution, for instance of offences related to corruption was not and had not been an alien concept to any anti-corruption authority. Considering the cancerous effect...
corruption had to the wellbeing of any country and in particular to its economy and considering how much could be achieved as a nation without corruption, a body established and appropriately equipped to eradicate the vice had powers to prosecute those who found this vice palatable.

19. The doctrine of *stare decisis* was one long recognized as a principle of Kenyan law. The decisions of an ordinary superior court, are binding on all courts of inferior rank within the same jurisdiction. Though not absolutely binding on courts of co-ordinate authority nor on the Court itself, would be followed in the absence of strong reason to the contrary.

20. Strong reason to the contrary did not mean a strong argumentative reason appealing to the particular judge, but something that should indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. Strong reason to the contrary was not to be construed according to the flexibility of the mind of the particular judge. There was a possibility that the decision cited by counsel for the appellant was rendered without consideration to the above provisions.

21. Being a first appeal, it was incumbent upon the court to re-analyse and re-evaluate the evidence adduced before the trial court and come up its own conclusions while at the same time bearing in mind that the court did not have the advantage of seeing the witnesses testify. It was necessary to examine the ingredients of the offence. The legal burden of proof in criminal cases never left the prosecution’s backyard.

22. To constitute the crime of solicitation of a bribe, it was not necessary that the act be actually consummated or that the defendant profit by it. It was sufficient if a bribe was actually solicited. The main ingredients of the offence were that the accused had to be acting in any capacity, whether in public or private sector, or employed by or acts on behalf of another person. He had to be shown to have obtained or attempted to obtain from any person gratification other than legal remuneration and the gratification should be as a motive or reward for doing or forbearing to do, in the exercise of his official function, favour or disfavour to any person.

23. The gravamen of the offence was acceptance of or the obtaining or even the attempt to obtain illegal gratification as a motive or reward for inducing a public servant for corrupt or illegal means. The receipt of gratification as a motive or reward would complete the offence.

24. In order to constitute an offence of soliciting a benefit the following are essential ingredients;

   a) There has to be solicitation or offer or receipt of a gratification. Such gratification must have been asked for, offered or paid as a motive or reward for inducing by corrupt or illegal means,

   b) That someone has to be acting in the public or private or employed or acts for and on behalf of another person, or confer a favour or ask for a favour to render some service.

25. The term soliciting implies that the accused took the initiative to ask for the bribe and that he actively allowed himself to be corrupted. The crime was consummated by the mere fact of soliciting a bribe. It was enough that there was soliciting. Even if the person solicited a bribe then changed his mind and decided to do his duty without taking a bribe, the crime was nevertheless consummated though the change of heart might mitigate his punishment.

26. The benefit solicited had to be any gift, loan, fee, reward, appointment, service, favour, forbearance, promise, or other consideration or advantage. It was implicated in the wording of the section that the promise, gift or present had to be something that was not legally due. It should be remembered that the crime was committed by the mere fact that any of the foregoing was solicited. The prosecution had to show the purpose for which the item, favour or promise was solicited.

27. The gist of the offence is that it is corruption to ask for any benefit not legally due in order to do one’s appointed duty. It’s always against the public interest to secure a benefit by corruption. The public servant is paid a salary to perform his appointed duties. He is therefore bound by law to discharge those duties without seeking further or other
emoluments.

28. The essential ingredients of the offence of soliciting a benefit are that the accused has to have received a benefit that it had to have been received corruptly as an inducement to bring about some given results in a particular matter, that the benefit had not been legally due or payable. The above quotation expressed the correct legal position on the necessary ingredients and counts two and four were proved to the required standard.

29. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal-

a) Has to be guided by the principle that punishment was pre-eminently a matter for the discretion of the trial court.

b) Has to be careful not to erode such discretion: hence the further principle that the sentence could only be altered if the discretion had not been judiciously and properly exercised.

The test for (b) was whether the sentence was vitiated by irregularity or misdirection or was disturbingly inappropriate.

Appeal dismissed. Conviction and sentence upheld
Appointee of persons, who have attained age of retirement, on agreement terms, is lawful

Okiya Omtatah Okoiti v Head of The Public Service Cabinet Secretary & 3 others Petition 114 of 2016
Employment and Labour Relations Court
At Nairobi
A J Nelson, J
September 2, 2016

Reported by Emma Kinya Mwobobia & Ian Kiptoo

Constitutional law - public officers - appointment of public officers - appointment of persons past the retirement age - whether the appointment of the 2nd and 3rd Interested Party was unlawful and unconstitutional as they had passed the age of retirement

Brief facts

The Petitioner had been granted temporary orders suspending the Implementation of the Respondents’ decision to extend the tenures of the 2nd and 3rd Interested Parties as officers of the 1st Interested Party (Kenya Prison Service). Pending determination of the Petition, the Court heard the parties to decide whether the interim orders could or could not remain in force and whether the said orders adversely affected the effective execution of the functions set out in section 5 and 6 of the Prisons Act to warrant their discharge and as corollary whether any prejudice would be occasioned to the Petitioner and the constituency he represented if the said orders were set aside, discharged or varied.

Issue

i. Whether the appointment of the 2nd and 3rd Interested Party was unlawful and unconstitutional as they had passed the age of retirement.

Relevant Provisions of the Law

Constitution of Kenya, 2010

Article 23

23(3) in any proceedings brought under article 22, a Court may grant appropriate relief, including

a. a declaration of rights

b. an injunction

c. a conservatory order

d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or a fundamental freedom in the Bill of Rights and is not justified under article 24

e. an order for compensation

Prisons Act

Section 6

1. The Deputy Commissioner may exercise any of the powers or perform any of the duties vested in or assigned to the commissioner by or under this Act or any rules made thereunder or by or under any other written law.

2. The Commissioner may delegate any of the powers vested in him by this Act or any rules made thereunder or save where contrary intention appears therein, by any other written law, to an assistant Commissioner.

Paragraph E.19 (1) of the Public Service Code of Regulations

Where vacancies cannot be filled on pensionable terms because of non-availability of suitable persons or where vacancies exist in the non-pensionable establishment such as in development projects, candidate recruited to fill such vacancy should be appointed on Agreement Terms if the period is justified.

Held

1. Public interest litigation was a new and developing concept especially under the Constitution of Kenya, 2010 (Constitution). It was a useful concept since it allowed any person to petition the Court whenever there was a violation or a threat of violation of any right or fundamental freedom enshrined in the Constitution. It was no longer necessary for a person to show any personal harm or violation before an action could be
2. The Public Service Code of Regulations under clause E 19(1) seemed to have permitted appointments on agreement terms. However, the application of the stipulation in the Public Service Commission Code of Regulation was not absolute. The appointment had to be made only where it had been demonstrated that there was non-availability of a suitable person to take up the position on pensionable terms.

3. No question had been raised nor was evidence tabled challenging the competence or integrity of the 2nd and 3rd Interested Party to warrant their interdiction from continuing to discharge their duties and functions albeit under the local agreement terms already issued to them. The Court therefore varied its earlier order to the extent that the 2nd and 3rd Interested Party would continue to serve in their respective capacities as so appointed by the local agreement pending the hearing and determination of the Petition.

4. Taking into account article 23(3) of the Constitution, if the Court ultimately made a finding that the appointment of the 2nd and 3rd Interested Party was a violation of the Petitioner's and the constituency he represented rights, the Court would so declare and invalidate the law which permitted the appointment of persons who had attained the mandatory retirement age on local agreements to continue discharging their duties and functions past retirement age.

5. The Court could not feign ignorance to the political and power dynamics which usually ran behind the scenes of prominent public appointments. On occasion, the appointments had been used for political gerrymandering or reward for loyalty. That was unconstitutional and the Court had to, where it was proved that a person had been prejudiced and excluded from appointment on such considerations, assert itself and invalidate such appointment.

6. Article 27 of the Constitution bound state organs, officers and public officers to observe national values when making decisions. Those national values, and of relevance to the case were equity, equality and good governance. Furthermore, article 232 of the Constitution provided that the values and principles of public service included fair competition and merit as the basis of appointment and promotions.

7. The Court would have time to consider the complaints and concerns of the Petitioner on merit when the Petition was ultimately heard. However, at the interlocutory stage, the balance of convenience lay in varying the prior orders made to the extent that the 2nd and 3rd Interested Party would continue to serve in their respective capacities pending the hearing and determination of the Petition.

Application dismissed. Costs in the cause

Nexus of a biological relationship has to be established to warrant an order for Deoxyribonucleic Acid (DNA) Test

D N M v J K
Petition No 133 of 2015
High Court of Kenya at Nairobi
Constitutional & Human Rights Division
JL Onguto, J
September 7, 2016
Reported by Teddy Musiga and Mercy Cherotich

Constitutional Law - fundamental rights and freedoms - right to dignity - family - claim that the respondents failure to recognize the petitioner as his daughter violated her constitutional right to family and right to dignity - whether the Respondent failed to recognize the Petitioner as her daughter - The Constitution of Kenya, 2010 articles 45 and 28.
**Brief Facts**

The Petitioner sought an interlocutory order directing the Respondent to submit and subject himself to a Deoxyribonucleic Acid (DNA) test for the purposes of determining whether the Respondent was the Petitioner’s biological father. The Petitioner alleged that in 1980, the Respondent had an intimate relationship with the Petitioner’s mother and as a result, the Petitioner was born. The Petitioner stated that she was informed that the Respondent was her father and that he had over the years assisted her financially including partly meeting her expensive medical treatment for breast cancer.

In the main Petition, the Petitioner claimed that her rights were being violated as the Respondent had continued to treat the Petitioner in a discriminatory manner on grounds of birth contrary to article 27(4) and (5) of the Constitution. The Petitioner also alleged that her rights to dignity under article 28 and to a family under article 45 of the Constitution had also been violated by the Respondent in so far as the Respondent had made it difficult and impossible for the Petitioner to relate and identify with the Respondent as her biological father.

The Respondent filed a Replying Affidavit where he denied that there had been any relationship between himself and the Petitioner’s mother or ever supporting the Petitioner financially or otherwise. Additionally, the Respondent denied being the biological father of the Petitioner.

**Issues**

I. Whether it was mandatory to establish a nexus of a biological relationship to warrant the order of a DNA test at the interlocutory stage.

II. Whether the Petitioner’s rights to dignity under article 28 and to a family under article 45 of the Constitution of Kenya, 2010 had been violated by the Respondent by making it difficult and impossible for the Petitioner to relate and identify with the Respondent as her father.

III. Whether an order for DNA testing would equate an intrusion into the Respondent’s right to privacy.

IV. Whether there was a legislative framework with regard to DNA testing in non-consenting adults.

V. Whether there were circumstances that could warrant the Court to order for DNA testing at an interlocutory stage.

**Held**

1. The Court ought not to issue such mandatory orders at an interlocutory stage of the proceedings especially where the same or similar orders were sought in the main Petition. The Court had, under article 23 of the Constitution of Kenya 2010 an almost unlimited power to fashion orders or relief as may be appropriate. The jurisdiction was unlimited as to what and when orders could be issued.

2. The Court had to exercise caution especially when the orders sought were mandatory in nature and where they could also end up being an intrusion of another individual’s constitutionally guaranteed rights or freedoms. The approach by the court when faced with an application for a mandatory interlocutory order should be, prior to granting such an order, satisfied that there were special circumstances, which warranted such an order being issued.

3. The court had to be satisfied that the case was a clear and straightforward one, which ought to be dealt with at once, and that at trial the court would be vindicated for having issued the order in the first place. Where there was any slight doubt, then such an order could not be issued. The standard would therefore certainly not be the equivalent of a *prima facie* case being established. The rationale ought to be that acts performed pursuant to mandatory orders may not be easily remedied if the claimant’s case was ultimately a flop at trial. Mandatory orders may be issued by the court at an interlocutory stage even where it appeared to fragment the Petition and dealt with or granted only one or some of the reliefs sought in the main Petition.

4. The law on the topic of compulsory blood or DNA testing in paternity disputes, which was also partly an issue in the Petition, was yet to be completely and satisfactorily developed locally. There was no express legislative framework, which specifically regulated the position in civil cases. The few judicial pronouncements on the topic did not appear unanimous in approach or principle. Whereas in relation to children, the courts had occasionally been quick to
act in the child’s best interest and ordered DNA testing, with regard to non-consenting adults, the jurisdiction had been left hazy.

5. For a DNA testing order to issue, an applicant had to establish that some right recognized by the Constitution had been violated or infringed. The applicant had to have also established the biological relations with the respondent. While one set of case law suggested that the burden was to be discharged on a *prima facie* basis, the other suggested that the burden was to be discharged through the ordinary standard of civil litigation, that of a balance of probabilities.

6. The Court had an inherent jurisdiction to order or not to order DNA testing both where a child was involved and where there was no child but only a non-consenting adult. The court ought to be mindful to protect bodily security and integrity as well as the privacy of individuals to be subjected to such tests. The essence was that the court ought to be ready to assert its role of resolving disputes fairly and one way of doing so was by discovering the truth, even through compulsion.

7. Paternity tests were known to have a high degree of accuracy. Statistics showed that though not absolute, the percentage of accuracy to the family tree was a staggering 99.9%. They revealed the truth and generally courts had accepted their overall accuracy and value.

8. Even though the court’s core role was to determine disputes, the courts often deployed methods of compulsion not necessarily to get to the truth but to help determine disputes fairly. It is thus common to see witnesses being summoned and also being compelled at the risk of jail, to answer questions. In all instances, the party which sought the court’s assistance ought to lay a firm legal and factual foundation for his case. It is not different where DNA testing is sought.

9. In the case of DNA testing, the basis ought to be laid even where a child is involved, as ordering DNA testing is not a mere procedural matter but is substantive enough given that an individual’s constitutional rights may have been limited through such testing.

10. The evidential basis of the Petitioner’s case was the affidavit sworn in support of the application. The Respondent largely denied the affidavit evidence. When facts averred in an affidavit have not been admitted, they can not be taken on their face value to be creditworthy and tenable. Without disregarding them, such facts ought to be subjected to challenge and in light of the circumstances of the case.

11. The Respondent had himself sworn a detailed affidavit in response to both the Petition as well as the instant interlocutory application. The only admission to any of the Petitioner’s averments was that the Respondent once helped the Petitioner by settling part of the Petitioner’s medical bill. The help was stated to have been out of humanitarian grounds. The admission was not made under oath. The admission was also not made directly by the Respondent. It was made by the Respondent’s counsel. Its probative value could consequently be subjected to question.

12. Besides the alleged admission, there was no other nexus biologically connecting, even by the slightest imagination, the Petitioner and the Respondent or the Petitioner’s mother and the Respondent. The Petitioner was also not a child to warrant any special circumstances being invited. The Petitioner sought to know the truth through a scientific determination of paternity. The Petitioner also sought to establish the violation of her constitutional rights.

13. A determination of paternity (or more correctly, non-paternity) put to rest nagging questions or doubts. A basis however needed to be set for such a test. Such a basis could be set in the preliminary stages of the suit where there was clear and irrefutable conduct pointing towards paternity. Such a basis could be found to have been established after trial.

14. The matrix of the competing interests which involved the Petitioner’s right to have the dispute adjudicated fairly and the Respondent’s interests to have his constitutional rights to bodily integrity and privacy protected, would dictate that the level of certainty to be achieved was not simplified. Rather the court had to be satisfied that an appropriate basis had been
laid out.

15. The Petitioner’s affidavit evidence had to be subjected to appropriate challenge and testing through cross-examination prior to any final orders being issued because an order for DNA testing made at an interlocutory was basically final. Once undertaken, it could not be undone though it could be ignored.

16. Where paternity was in dispute, then within reasonable limits and in appropriate cases DNA testing of non-consenting adults could be ordered even at an interlocutory stage. The bid to establish the truth through scientific proof should not be generalized and should never so lightly prevail over the right to bodily integrity and right to privacy until it was clear that such rights ought to be limited. The clarity was only established where an undoubted nexus was shown as well as a specified quest to protect or enforce specific rights. Untested and controverted affidavit evidence may not suffice.

17. The Court could not make the orders sought at that stage of the proceedings, as the Petitioner on the basis of the untested affidavit evidence had failed to do enough to establish the requisite nexus.

Application dismissed with no orders as to costs.

The right to fair administrative action extends to juristic persons
Busia County Government v Ethics and Anti-Corruption Commission
Petition 382 of 2015
High Court at Nairobi
J L Onguto, J
September 7, 2016
Reported by Nelson Tunoi & Silas Kandie

Constitutional Law - constitutional commissions - establishment of a Commission and the manner in which a Commission would cease to exist - effect of resignation by Commissioners at the Ethics and Anti-Corruption Commission – where the EACC had obtained the search warrants and subsequently raided the Petitioner’s premises - whether the EACC exceeded its investigatory powers and fettered the functions and operations of the Petitioner - Constitution of Kenya 2010, articles 79, 249, 250 & 255; Ethics and Anti-Corruption Commission Act, No 22 of 2011, section 4.

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms – right to fair administrative action– whether the EACC violated the Petitioner’s rights enshrined under article 47 of the Constitution – where the EACC moved the court ex parte without notice to obtain warrants - Constitution of Kenya 2010, article 47.

Brief facts:
On September 4, 2015, officers of the Ethics and Anti-Corruption Commission (EACC) in the company of security personnel raided the offices of the Petitioner (County Government of Busia) and without explaining the purpose proceeded to cart away documents and equipment. The EACC was executing search warrants earlier obtained by the EACC before the Chief Magistrates Court at Busia. The raid allegedly led to a dysfunction of the Petitioner as most of its operations were halted with the seizure and detention of crucial documents and equipment including computers.

The warrants had been obtained without notice on September 3, 2015 after the EACC received intelligence reports that the Governor of the Petitioner, one Sospeter O. Odeke, had allegedly colluded with senior officials of the Petitioner to defraud the Petitioner. He had been named as the Respondent in the proceedings before the Chief Magistrate. He was however never served with the court process either before or even after the warrants were issued. The warrants were however directed at the Governor and were to be executed at his office, residence or business premises. The Petitioner’s premises happened to also house the official offices of the Governor in his capacity as the governor of the county.

Issues:

i. Whether the EACC at the time it obtained the search warrants and subsequently raided the Petitioner’s premises was lawfully and constitutionally constituted so as not to render its actions void.

ii. Whether the EACC violated the Petitioner’s rights enshrined under article 47 of the
iii. Whether the EACC exceeded its investigatory powers and fettered the functions and operations of the Petitioner.

**Held:**

1. Upon establishment by an Act of Parliament the EACC acquired the status of an independent commission settled to protect the sovereignty of the people. Further, the secretary to the commission as well as the investigators were all appointed and were not members of the commission. They were appointed like all other staff by the commissioners under section 18 of the EACC Act. The secretariat (secretary and staff) could only act effectively and perform the commissioners’ functions when the commissioners were in office. In the absence of the commissioners, the secretariat on its own motion could not purport to execute and perform the core functions of the EACC. It was contrary to law. Such core functions included investigating and recommending the prosecution of offenders.

2. It could not be argued that in the circumstances, there was a *lacuna* in the fight against corruption. The Director of Public Prosecutions (DPP) was properly enjoined under article 157(4) of the Constitution to direct the investigation of any criminal conduct and crimes under the Anti-Corruption and Economic Crimes Act (ACECA) or EACC Act or under any other law enacted pursuant to Chapter 6 of the Constitution. Nothing stopped the DPP from investigating and pursuing such suspects or offenders.

3. Section 5(2) of the Office of the Director of Public Prosecutions Act, No. 2 of 2014, empowered the DPP to direct investigations to be conducted by an investigative agency or assign his officers to assist in the investigation. Nothing under the law restrained the Director of Public Prosecutions from directing or assisting the EACC in undertaking its investigatory role in the absence of commissioners of the EACC. Additionally, article 157 of the Constitution did not make any distinction as to the crimes the Director of Public Prosecutions could urge or direct the national police service to investigate. The essence was to ensure that the independence of the EACC survived past the vacation of office by commissioners or in the absence of any commissioners, just the same way the EACC survived as an entity under article 253(a) of the Constitution.

4. While the absence of the commissioners did not render the EACC extinct by virtue of its juristic corporate features, in so far as its core functions of investigating economic crimes and recommending the prosecution of offenders was concerned, it had to be dormant until properly reconstituted or assisted through the Director of Public Prosecutions. The EACC in the circumstances of the case had no powers in the absence of the commissioners to initiate investigations of its own motion or any other person’s motion, save any directions by the Director of Public Prosecutions.

5. Regarding whether the EACC had exceeded its investigatory powers in the absence of commissioners, from the record it was evident that the powers were not exceeded. The EACC was enjoined under section 11(1) (d) of the Ethics and Anti-Corruption Act to conduct investigations and make appropriate recommendations to the Director of Public Prosecutions for consideration. The EACC could, by applying the provisions of both the ACECA and the Criminal Procedure Code, push further any investigations it had started by seeking the court’s help. The EACC could move the court through the use of legislation, which clearly defined the power to search and seize with a view to achieving the compelling public objective of ensuring that crime was investigated. Pursuant to section 29 ACECA as read together with section 23(4) of the ACECA, the EACC prompted the court under section 118 of the Criminal Procedure Code for a search and seizure warrants.

6. The interference with the privacy and property of the Petitioner was authorized by an independent party in the Chief Magistrates’ court that approved and granted the warrants. The court considered it right that the rights of the individual governor and the Petitioner had to give way to those of the EACC as an investigating arm. As the courts deemed it that there were reasonable grounds to allow the search and seizure for...
purposes of preparatory investigations, it authorized it and granted the search and seizure warrants. The Petitioner did not fault the issuance of the warrants, hence the warrants were deemed to have stood in good stead.

7. The extent of the warrants was clearly defined. The warrants authorized the search of the governor’s office and residential premises, which were housed within the Petitioner’s premises. Additionally, the warrants conferred authority upon the EACC officers to seize documents and items. The EACC could not be faulted for executing the warrants the way it did.

8. The EACC was exercising a statutory mandate. It moved the court under section 118 of the Criminal Procedure Code. An investigator could move the court without notice under section 118 of the Criminal Procedure Code so long as the investigator had solid and reasonable grounds to stand on. The investigator moved the court ex parte.

9. Article 47 of the Constitution was not absolute. The statutory framework of the Criminal Procedure Code limited the provisions of article 47 and justifiably so with clear criteria that the court must be satisfied on oath that there were reasonable and solid grounds for the warrants to be issued. The preparatory investigations being undertaken in the circumstances of the case were not judicial or quasi-judicial in nature to warrant the application of article 47 of the Constitution. Thus, the Petitioners rights under article 47 of the Constitution were violated.

10. Investigations occasionally inconvenienced the party being investigated. It did not however mean that an investigation must be faulted and vacated on that basis unless it was shown to the court that the investigators were simply unreasonable especially where they had to seize items or documents. Public policy would favour inconvenience being occasioned if it was with a view to fighting off crime. However, the circumstances of each case ought to be viewed sui generis. In the instant case, the investigators were neither unreasonable to deserve condemnation nor the actions of the EACC fettered the Petitioner’s operations.

11. The EACC at the time of this decision was properly constituted. Nothing would stop the EACC from commencing the investigation a fresh. The previous investigations could not however bind the Director of Public Prosecutions. All the items seized and demanded back had already been returned. There would consequently be no need for any mandatory restorative orders.

Petition allowed with costs to the petitioner; a declaration issued that the seizure of the information, documents and equipment from the Petitioner’s offices on or about September 2, 2015 was unconstitutional and illegal in so far as the same was undertaken by a body then lacking the constitutional capacity to undertake such investigation.

Courts of equal status as the High Court have jurisdiction to determine claims of a dispute before them that would have otherwise been determined by the High Court

George Joshua Okungu v Kenya Pipeline Company Ltd & 3 others
Cause Number 154 of 2015
Employment & Labour Relations Court at Nairobi

J Abuodha J
September 2, 2016
Reported by Phoebe Ida Ayaya

**Jurisdiction** – jurisdiction of courts – judicial hierarchy – the nature of the jurisdiction of the High Court, Environment & Land Court and the Employment & Labour Relations Court - whether the Employment and Labour Relations Court had jurisdiction to determine the matter where there was a claim of no employer – employee relationship that arose between the Claimant and the Respondents

**Brief facts**

The application was premised on the grounds
among others that since there was no employer-employee relationship between the Claimant and the Respondent, the claims against the 4th Respondent could not be tried by the Court. That was to say the claims for malicious prosecution; defamation and discrimination against the 4th Respondent were triable by the High Court since there was no employer employee relationship between the Claimant and the 4th Respondent. The 4th Respondent submitted that the 4th Respondent was not disputing the Claimant’s claim but that the pleadings were in the wrong Court.

The 4th Respondent was therefore challenging the jurisdiction of the Court to determine the issues listed by the Claimant.

**Issues**

i. Whether the Employment and Labour Relations Court had jurisdiction to determine the matter where there was a claim of no employer – employee relationship that arose between the Claimant and the Respondents

ii. Whether a Judge once appointed as either a High Court, Employment and Labour Relations Court or Environment and Land Court could hear and determine matters reserved for any of those courts

**Held**

1. The creation of specialized Courts with status of the High Court under article 162(2) of the Constitution of Kenya, 2010 had somewhat created uncertainty among lawyers on the scope and extent of the jurisdiction of the specialized Courts vis-a-vis the High Court and vice versa. Any Judge needed not resolve that uncertainty. In fact no parameters needed to be set since every case was to be decided by its own circumstances.

2. No litigation presented itself as a single-issue dispute. There were usually a potpourri of crosscutting and conflicting issues that could span across the three equal status Courts namely High Court, Environment and Land Courts and Employment and Labour Relations Court.

3. The Constitution, of Kenya, 2010, and Employment and Labour Relations Act granted the Court jurisdiction over employment and labour relations and connected purposes and not employer-employee disputes only.

4. The jurisdiction of the Court was attracted by the reason of the fact that the factual background of the claims presented by the claimant arose out of his contract of employment with the 1st Respondent and once the Court was clothed with the jurisdiction to determine that aspect, it had full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction.

5. It could not only create duplicity in evidence but also uneconomical use of judicial time to split claims with similar factual background and evidence among the equal status Courts. That was to say, Courts of equal status as the High Court, at the risk of sounding tautologious, were themselves High Court and were properly clothed with jurisdiction to determine consequential or accrued aspects of a dispute before them that would have otherwise been determined by the High Court. The same principle applied to the High Court finding itself in similar circumstances.

*Objection overruled and application dated May 12, 2015 dismissed with costs.*
Actual possession of property must be demonstrated for a claim of forcible detainer to be proved

John Mutua Kyengo v Republic
Criminal Appeal 105 of 2015
High Court at Machakos

E Ogola, J
September 7, 2016
Reported by Nelson Tunoi & Silas Kandie

**Criminal Law - forcible detainer- need for the complainant in a charge for forcible detainer to be the lawful owner of the land in dispute- Penal Code, section 91.**

**Brief facts**

The Appellant was charged, convicted and sentenced to serve 18 months’ imprisonment for the offence of forcible detainer contrary to section 91 of the Penal Code. The Appellant appealed against that conviction and sentencing. The charge in the lower court alleged that on November 5, 2013 at Kivaku village, Kyamuoso Location in Kilungu Sub County within Makueni County being in actual possession of Plot No 1611 in Kyamuoso Adjudication section without colour of right the Appellant held possession of the same in breach of peace against the person entitled by law to the said plot.

**Issues**

I. Whether the ingredients of the offence of forcible detainer were proved.

II. Whether the sentence of 18 months imprisonment for the charge of forcible detainer was reasonable where the Code had not stated the term.

**Held**

1. The Court had no duty to go behind the title and purport to establish the true owner when the documents, which were not disputed, showed clearly who the true owner of the plot was. The trial court did not have to visit the site.

2. The trial Court observed that the defence witnesses were truthful though they seemed not well versed with the nature of the offence before the court and of the facts therein. The observation could not be faulted. It was important for the witnesses to understand the nature of the case and the section of the law relied on so that the evidence they gave might be relevant.

3. The Appellant should have been aware that a plea of ignorance was no defence in criminal proceedings. Indeed all the prosecution needed to do, and which they did, was to establish the ingredients of the offence of forcible detainer under section 91 of the Penal code as follows:-

   a) the Accused was in actual possession of the parcel of land which he had no right to hold possession of; and

   b) the Accused had to be in occupation of the parcel of land in a manner that was likely to cause, or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land.

That was proved by the evidence of prosecution witness who confirmed that the Appellant chased him away from the land where he was the caretaker employed by the Complainant.

4. The prosecution established all the ingredients of the charge of forcible detainer. It established that the Complainant was the legal owner of the suit parcel of land; that the Appellant was in unlawful possession and occupation of the same and that the Appellant had resisted the Complainant’s attempt to take possession of the suit parcel of land in a manner that was likely to cause breach of peace.

5. The criminal court had jurisdiction to try any offence which was provided for in law, it was in the case. Since there was the criminal jurisdiction to try the offence, the submissions by the Appellant that the matter be referred to village elders was not sustainable and was dismiss.

6. The sentence period of 18 months fell within the law and was reasonable and required no interference with by the Court.

*Appeal dismissed; conviction and sentence upheld.*
Constitutional Law - leadership and integrity-responsibilities of leadership- authority assigned to state officers-public trust to be exercised with the purposes and objects of the Constitution-where a public officer holds two positions in public service- whether the appointment of the 4th Respondent as chairman of the CUE and therefore a public officer offended articles 73 and 249 of the Constitution of Kenya, 2010 as the 4th Respondent was already in public service - Constitution of Kenya, 2010, articles 10, 73 and 249

Constitutional Law - public service- commission and independent offices-values and principles of public service-circumstances of conflict of interest- where a public officer holds two positions in public service - where there was a likely improper and substantial conflict of interest- where the commission appointed someone already holding position in a correlated office- whether the 4th Respondent was specifically in a position of conflict of interest or potential conflict of interest by holding on to the two positions- whether the Respondents failed in their duty of upholding the independence of the commission by appointing the 4th Respondent contrary to article 249 of the Constitution- Constitution of Kenya, 2010, articles 10, 73 and 249

Brief facts

The Petition involved the appointment and continued occupation by the 4th Respondent as the Chairman of the Commission for University Education (the CUE) and Director of Kenyatta University Consultancy Service Unit (KUSCU).

In July 2015, the 3rd Respondent through a circular letter laid down the state policy which prohibited serving and active public officers from serving as independent board members or directors of parastatals, state corporations and public institutions. A second circular letter issued by the 3rd Respondent on January 5, 2016 reiterated the policy and urged for its enforcement by the 1st Respondent and all Cabinet Secretaries.

At the time of his appointment as chair of the CUE, the 4th Respondent was midway through his faculty contract with Kenyatta University. The contract was later to be renewed for another two years in 2015. The 4th Respondent continued to be a director of KUSCU. He also continued as the chairman of the CUE, prompting the Petitioner to rush to court. The Petitioner’s case was that the 4th Respondent failed to declare his conflict of interest in holding the two positions of director/ faculty at Kenyatta University of the one hand and chairperson the CUE.

The Petitioner contended that in the eyes of the public the 4th Respondent would be seen to favour his original employer- Kenyatta University. According to the Petitioner the provisions of article 73 of the Constitution of Kenya, 2010 had not been followed. The Respondents had also failed in their duty of upholding the independence of the commission contrary to article 249 of the Constitution.

Issues

I. Whether the appointment of the 4th Respondent as chairman of the CUE and therefore a public officer offended articles 73 and 249 of the Constitution of Kenya, 2010 as the 4th Respondent was already in public service.

II. Whether the Respondents failed in their duty of upholding the independence of the commission by appointing the 4th Respondent contrary to article 249 of the Constitution of Kenya, 2010

III. Whether the Petition met the competency threshold of reasonable precision.

IV. Whether the appointment of the 4th Respondent was in violation of any state policy contained in any circular letter(s).

V. Whether the 4th Respondent was specifically in a position of conflict of interest or potential conflict of interest by holding on to the two positions.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 260

Defines a public officer as:
Article 232

232. (1) The values and principles of public service include—

(a) High standards of professional ethics;
(b) Efficient, effective and economic use of resources;
(c) Responsive, prompt, effective, impartial and equitable provision of services;
(d) Involvement of the people in the process of policy making;
(e) Accountability for administrative acts;
(f) Transparency and provision to the public of timely, accurate information;
(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
(h) Representation of Kenya’s diverse communities; and
(i) Affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) Men and women;
(ii) The members of all ethnic groups; and
(iii) Persons with disabilities.

(2) The values and principles of public service apply to public service in—

(a) All State organs in both levels of government; and
(b) All State corporations.

(3) Parliament shall enact legislation to give full effect to this Article.”

The Universities Act

Section 5

A quick review of the functions of the CUE would reveal that:

a. Promotes the objectives of university education
b. Advises the Cabinet secretary on policies relating to university education
c. Promotes, advances, publicises and sets standards relevant in the quality of university education, including the promotion and support of internationally recognised standard
d. Monitors and evaluates the state of university education systems in relation to the national development goals
e. Licenses any student recruitment agencies operating in
Kenya and any activities by foreign institutions

f. Develops policy for criteria and requirements for admission to universities

g. Recognises and equates degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the CUE from time to time

h. Undertakes or causes to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of the Universities Act or any regulations made under the Act

i. Inspect universities in Kenya on regular basis

j. Accredit universities in Kenya

k. Regulate university education in Kenya

l. Accredit and inspect university programmes in Kenya

m. Promote quality research and innovation

Held

1. Constitutional petitions ought to be crafted with reasonable precision. The reasonable precision was intended to ensure the Respondent as well as the Court understood the Petitioner’s case with ease. The instant Petition was reasonably precise. The Court as well as the Respondent could, and indeed did, appreciate and understand the exact nature of the Petitioner’s case of public officers holding two public service jobs.

2. The proper meaning of public officer was embodied in article 260 of the Constitution of Kenya, 2010. The different definitions in other statutory provisions ought not to take precedence over the said constitutional provisions.

3. Articles 73 and 232 of the Constitution, 2010 ought to be read together for a more holistic appreciation of the values and principles of public service expected of State and public officers.

4. Public officers were expected to ensure that confidence is maintained in the public service generally and in the integrity of their respective offices individually. Public officers have to also exercise objectivity and impartiality in decision-making and ensure that their decisions are not influenced by favoritism or other improper motives. Their personal interest has to also not conflict with their public duties.

5. The national values and principles of governance enshrined under article 10 of the Constitution, 2010 ought to guide the public officer all the times. These include accountability, transparency, integrity, equality and equity. The same principles were partly reiterated under article 232 of the Constitution, 2010 and additionally expounded by the Public Service (Values and Principles) Act

6. The holding of two public offices *simpliciter* did not result in a violation of articles 10 or 73 or 232 of the Constitution, 2010. Each case had to be viewed on the basis of its own unique facts. It was possible for a public officer to hold two or even more offices where a statute expressly allowed and roles clearly defined or where there was a clear co-relation between the two offices and no possibility of conflict of interest arose or was foreseeable.

7. From 1874, the law or rule founded on the highest and truest principles of morality had been that a person in whom trust or responsibility had been placed had to never act so as to have his interest in the fore of others: That principle had survived the test of times and still held well nearly a century and a half later. Undoubtedly, situations of conflict of interest could only lower public interest and public confidence in systems as well as institutions.

8. Certain of the functions of the Commission for University Education (CUE) would entail the making of decisions directly affecting the 4th Respondent’s employer Kenyatta University. In particular those itemized under section 5(1) (h), (i), (j), (k) and (l) of the Universities Act were of relevance. Those would rank as functions and decisions, which would have to be university-specific rather than general decisions of all universities. The possibility and potential of conflict of interest would in such a case be real and not merely apparent. Where the decision was to apply generally to all universities, it should be argued that the conflict might be nominal if not nonexistence, even where the concerned regulatory individual was an employee of a university institution.
9. The Constitution, 2010 dictated and demanded objectivity from public officers under article 73(2) (b). It also demanded that public officers be not influenced by favoritism or other improper motives in their decision-making. The Constitution also demanded impartiality of public officers under article 232(1) (c). Where there were a real possibility of conflict of interest or of the potential of conflict of interest, then the very principles enshrined under articles 10, 73 and 232 of the Constitution, 2010 were unlikely to be met. Public officers, whose duties invited the potential of conflict of interest, were unlikely to inspire public confidence in their offices or the services they offered.

10. There appeared to exist a likely improper and substantial conflict of interest by the 4th Respondent being in substantial association with Kenyatta University, the same institution that was supposed to be regulated and substantially superintended by CUE, which was headed by the 4th Respondent as the chairperson. Some of the programmes the 4th Respondent undertook or tutored at Kenyatta University might very well come before him for review as he chaired the CUE. It mattered little that the 4th Respondent contended that the decision making at CUE was by a whole majority board. It was not lost to the Court that the 4th Respondent depended on any confirmed quorum of the CUE and held a decisive or casting vote.

11. The 4th Respondent’s dual role placed him in a conflicted position and that might not help promote or advance the constitutional design as detailed under Chapter 6 and promoted by among other statutes the Public Service (Values and Principles) Act. An employee or officer of a regulator should ordinarily also not be an employee or officer of the regulated.

12. The 3rd Respondent either through an edict or circular letters could actually override express constitutional provisions that preached against partiality, favoritism and non-objectivity. These were all negative values likely to exist where it was shown that the potential of conflict of interest was real.

13. It was possible for a public officer to hold two public offices, where the law allowed or where the two offices correlated. In the circumstances of the instant case the 4th Respondent could not continue to be an employee of Kenyatta University and also be the chair of the CUE. He was likely to be perceived as non-impartial and partisan by most stakeholders in the higher education sector as well as by the public generally. The likelihood that where the CUE in the performance of its duties engaged Kenyatta University, the 4th Respondent could look the other way was real.

14. The 4th Respondent should not be holding two public offices, which did not co-relate. There was little clarity on how the 4th Respondent was appointed almost simultaneously to both positions. That was a case of wilful blindness or that 2nd Respondent deliberately overlooked the possibility of conflict of interest. The renewal of the 4th Respondent’s contract as a lecturer in 2015 on the other hand only helped to heighten the conflict. The 4th Respondent should not be serving in the two positions, not because he was not qualified to serve in either but simply due to the fact that he was conflicted and that was not in the spirit of the Constitution let alone values of public service.

15. The objective decision had been made. A subjective decision had to be made by the 4th Respondent. He was qualified to serve in both positions but had to, due to constitutional and statutory compulsions, only serve in one. He had to make the choice. Failure to do so would force the Court to make the choice. It would be appropriate to fashion appropriate reliefs.

Petition allowed. Each party to bear its costs since its one of the many public interest litigation cases

a. The 4th Respondent should within ten (10) days of the date of that order being served upon him or upon the Commission for University Education formally tender his resignation from either the position of lecturer and employee of Kenyatta University and any of its units including the Kenyatta University Consultancy Services Unit OR as chairperson of the Commission for University Education.

b. The letter of resignation should be
The word 'Unlawful' does not constitute a key ingredient to an offence under section 11 (1) of the Sexual Offences Act.

Williamson Karimi Njogu v Republic
Criminal Appeal No 31 of 2015
High Court of Kenya at Kerugoya
R.K. Limo, J
October 25, 2016
Reported by Phoebe Ida Ayaya & Nowamani Sandrah

Criminal Procedure- charges-defective charge sheet-where section 2 (1) of Sexual Offences Act creating the offence was not cited - whether faulting in the drafting of the Charge Sheet pointing out that section 2 (1) of Sexual Offences Act creating the offence was not cited rendered the charge fatally defective- Sexual Offences Act, section 2(1) ; Criminal Procedure Code (cap 75) section 382

Criminal Law- defilement- elements of defilement-whether touching on the thighs of a child deliberately and indecently constituted an indecent act in the spirit of law - whether touching on the thighs of a child deliberately and indecently constituted an indecent act-Sexual Offences Act sections 2(1)

Evidence Law - child evidence –child of tender years –where the only evidence was that of a child of tender years, who was the alleged victim –duty of the Court to conduct a voire dire examination on a child of tender years-whether the evidence of the child was corroborated by someone else- how a trial court should receive such evidence – Evidence Act (cap 80) section 125 ;Oaths and Statutory Declarations Act (cap 15) section 19; Criminal Procedure Code (cap 75) sections 208, 302

Statutes- interpretation of statutes- Interpretations of the Sexual Offences Act- whether the Court could interpret the words 'unlawful' and 'and' under sections 11 (1) and 2 the Sexual Offences Act respectively-validity and effects of the interpretations- Sexual Offences Act sections 2 and 11(1)

Brief facts
The Appellant was charged with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The Appellant denied both counts and the case proceeded for hearing upon which the Appellant was acquitted of the principal charge but found guilty of the alternative charge and convicted to serve 10 years imprisonment. The trial court on the basis of the evidence tendered found that there was no evidence to support the main charge of defilement and gave him the benefit of doubt. While dismissing the defence of alibi by the Appellant, the trial court found that the Appellant had both time and opportunity to commit the crime.

I. Whether the word ‘unlawful’ constituted a key ingredient of an offence under the Sexual Offences Act in section 11(1).

II. Whether omitting a section creating the offence in the charge sheet rendered the charge fatally defective.

III. Whether in making the observation about the credibility of the witness belatedly at the stage of judgment was an error.

IV. Whether in contending that the demeanor of the witness should have been recorded in the body of the proceedings was an error.

V. Whether touching on the thighs of a child deliberately and indecently constituted an indecent act.

VI. Whether the Court could interpret the meaning of the words ‘and’ and ‘unlawful’ under sections 2 and 11(1) of the Sexual Offenses Act respectively
**Relevant provisions of the law**

**Sexual offences Act**

**Section 2 (1)**

Defines an “indecent act” as “unlawful intentional act which causes (of relevance to this appeal)

Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.

**Held**

1. The word ‘unlawful’ did not constitute a key ingredient to an offence under section 11 (1) of the Sexual Offences Act. What was key in that section was that the particulars had to reveal that the act complained of was intentional and indecent in nature. The particulars of the count clearly revealed that the act that the Appellant was being accused of was intentional and indecent. The word unlawful was relevant in the repealed section of the Penal Code (section 139) that placed importance to lack of consent as a key component in a charge of rape.

2. Technically the charge and the particulars of the offence facing the Appellant as framed were sound in law and clearly revealed that an offence had been committed and the Appellant clearly knew what charges faced him at the trial. There was no prejudice suffered in that regard. But as to whether the charge and the particulars of the charge was supported sufficiently by the evidence tendered to justify the finding made by the trial magistrate was an issue that called for a separate consideration and determination.

3. The section cited by the charge facing the accused was the punitive part and it was necessary for the state to cite section 2 (1) of the Act, which created the offence upon which the Appellant was charged with. However, the omission to cite the section that created the offence was not fatal to the prosecution case. The defect was one of those defects that were curable under section 382 of the Criminal Procedure Code as the same did not prejudice the Appellant or occasioned a failure of justice. The Appellant was also ably represented by counsel at the trial and was in a position to raise an objection about the same if he felt that he was prejudiced by the omission by the prosecution to cite the section creating the offence. The Appellant was well informed of the charge facing him and was not prejudiced in defending himself.

4. The charge against the Appellant should have contained both sections 11(1) and 2 (1) of the Sexual Offences Act. The omission of section 2 (1) was not fatal. The cited section in the charge was sufficient to reveal the nature of the charge facing the Appellant and the omission was minor and curable under section 382 of the Criminal Procedure Code.

5. The doctor at the trial did not positively state that there was no penetration. His evidence taken, as a whole was that he could not conclusively conclude that there was penetration. That was where the trial magistrate missed the boat. The doctor did not say that the minor was not penetrated. What he said was that based on his findings he could not say for certain that penetration occurred. It was clear therefore that the testimony of the doctor was indecisive and that was where the trial magistrate should have evaluated the exhibits tendered and the doctor’s own testimony to arrive at his own conclusion, which should have led him to conclude that penetration, had been established.

6. The conclusion of the doctor that the issue of penetration was not conclusive was in conflict with the other evidence tendered including the medical findings recorded on the 1st page of the treatment chit (Exhibit 1). The doctor examined the complainant a few hours after the incident and examined her pants, which the witness had confirmed in her evidence that it was the same pants she wore before and after the incident. According to the said doctor the pants had no bloodstains other than whitish discharge. According to the complainant in her own words ‘the Appellant took off his trouser, he took off her pants then raped me’.

7. The trial court in its judgment observed that the minor appeared truthful and found her credible. That observation was key in light of the provisions of section 124 of the Evidence Act that provided that, a court could find a conviction based on evidence of the complainant only if that was the only evidence available and if the victim was found
to be truthful based on reasons to be recorded. The trial magistrate found the minor truthful because he found her credible, consistent and not shaken at all on cross-examination. On the basis of that, and the fact that the doctor’s inconclusiveness was in conflict with the other cited evidence tendered before the trial court, the trial magistrate ought to have discounted the doctor’s evidence and concluded that penetration had been proved beyond reasonable doubt notwithstanding the inconclusive opinion of the said doctor.

8. There were many schools of thought on where a trial court should record the demeanor of a witness. There was a school of thought that the demeanor of a witness, how he/she behaved while testifying should be recorded in the body of the proceedings but in brackets to show that it was an observation by a trial court. Another school of thought had it that the demeanor should not be part of the proceedings and should not therefore be in the body of proceedings but off the marginal lines to show that it was an observation made by the trial court besides what the witness was actually stating. The other school of thought was that the demeanor if it was important to the findings of the trial court should be recorded elsewhere on a separate sheet that would only help the trial court to remember the demeanor once it retired to write the judgment. There was no hard and fast rule on that.

9. Recording the demeanour of a witness in the judgment was not belated or improper. What was important was that a court on a demeanor of a witness made the observation but where it was made or recorded was immaterial.

10. Having considered the evidence tendered by P.W. 2 (E W G) the village in charge who took up the report of defilement when it was made known to her and the evidence of P.W. 3 (J W N), the evidence tendered by the two witnesses corroborated the evidence of the complainant.

11. The Appellant had not alluded to being framed up by either the complainant or the other witnesses. The witness had no reason to testify falsely against him. That fact could only point to one direction, which was the fact that the evidence tendered by the prosecution strongly, supported the main charge of defilement facing the Appellant.

12. The trial magistrate appeared to have misdirected himself on a point of law by failing to properly evaluate the evidence tendered by the doctor because had he done so he would have found out that the conclusion made by the doctor that penetration was not conclusive, was as pointed out above questionable in view of the findings made on the treatment chit as a result of the medical examination conducted on the minor.

13. Contrary to the contention by the Appellant, touching on the thighs of a girl or a woman deliberately and indecently constituted an indecent act. That was the spirit of law in section 2 (1) of the Sexual Offences Act. What the section precluded was an action that caused penetration. The trial magistrate was in error to find that the Appellant was guilty of indecent act when the evidence tendered showed that the act complained of caused penetration.

14. In section 2 (1) of Sexual Offences Act, indecent act did not include an act that caused penetration. The evidence tendered by the prosecution indicated that there was penetration. The absence of spermatozoa or bloodstains could not negate the fact that penetration had been established. Penetration as defined under section 2 (1) meant either partial or complete insertion of the genital organ of a person into a genital organ of another person. The complainant at the trial did testify that the Appellant inserted part of his penis into her vagina and that constituted penetration in view of the other evidence pointed out.

15. The sentence meted out against the Appellant though lawful was on the basis of a conviction, which was wanting on the aspects highlighted. The framing of the particulars of the charge in the 2nd count particularly the use of the conjunctive word ‘and’ made it necessary for the prosecution to prove that the Appellant had touched all the 3 parts pointed out in the particulars of the charge with his organ before a conviction could be found. However, that point was now academic.

16. The trial magistrate erred in making a finding
Cases

on the alternative count or charge when the evidence tendered by the prosecution at the trial was as pointed established beyond reasonable doubt that the complainant had been defiled as indicated in the main charge. The trial court ought to have properly directed itself on the evidence tendered and had it done so, it could have found the Appellant guilty of the main charge of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006. In that regard there would have been no need or legal basis to make a finding on the alternative charge.

Persons who make false representations to get employed cannot be entitled to remedies for unfair termination

John Kisaka Masoni vs. Nzoia Sugar co. Limited

Cause 148 OF 2015

(Formerly Bungoma CMCC.332/2013)

Employment and Labour Relations Court at Kisumu

M Onyango, j

September 8, 2016

Reported by Emma Kinya Mwobobia & Ian Kiptoo

Labour Law—employment-termination and dismissal—summary dismissal of an employee-procedural fairness—where a claimant was dismissed without being subjected to a disciplinary hearing—whether the dismissal of the Claimant without being subjected to a disciplinary hearing was procedurally unfair—Employment Act, section 41.

Labour Law—employment-termination and dismissal—summary dismissal of an employee-proof of reasons for termination and summary dismissal—where an employee presented false academic papers—whether the Respondent could take disciplinary action against the Claimant for presenting falsified academic papers during recruitment—Employment Act, section 43.

Labour Law—employment-termination and dismissal—summary dismissal of an employee-remedy for wrongful dismissal and unfair termination—whether a Claimant who had made false representations to get employed was entitled to damages for unfair termination.

Civil Practice and Procedure—remedies-prayers—where a party did not plead remedies in a plaint but pleaded them at time of hearing—whether the Court could award damages not pleaded in a Plaint

Brief Facts

The matter before the Court related to the summary dismissal of the Claimant who was employed by the Respondent as a shift clerk Grade UG. 02 in Sales and Marketing Department. The Respondent, being a state corporation, was required to undertake the authentication of academic and professional certificates for all officers in the Public Service, including state corporations. Following the authentication process, the Claimant was among those whose certificates were found to be unauthentic by the Kenya National Examinations Council (KNEC) and was thereafter suspended and later summarily dismissed.

The Claimant stated that the certificates in his file were not the ones he had presented when applying for employment and he believed that his file had been manipulated. Furthermore, the Claimant stated that he had not been paid his dismissal dues by the Respondent.

The Respondents on the other hand contended that it used the certificates that were submitted by employees on initial recruitment from the Respondent’s records for authentication. Furthermore, that the Claimant requested for and was given 9 days to clear with KNEC but failed to do so and as a result he was dismissed from service.

In addition, The Respondent stated that the Claimant was paid Kshs 48,722 for days worked up to May 10, 2013 and his provident fund contributions excluding the company’s contributions. He was also

Appeal dismissed

I. The conviction of the Appellant and the sentence meted out on the alternative count of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act quashed.

II. The sentence of 10 years imprisonment set aside.

III. Appellant convicted under section 8(1) (4) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 15 years imprisonment as provided by law.
paid pro rata leave.

Issues

i. Whether the Respondent could take disciplinary action against the Claimant for presenting falsified academic papers during recruitment.

ii. Whether the dismissal of the Claimant without being subjected to a disciplinary hearing was procedurally unfair.

iii. Whether the Court could award damages not pleaded in a Plaint.

iv. Whether a Claimant who had made false representations to get employed was entitled to damages for unfair termination.

Relevant Provisions of the Law

The Employment Act 2007

Section 41

Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Section 43

Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45

Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Held

1. Section 41 of the Employment Act provided for fair procedure in respect of notification and hearing before termination on grounds of misconduct whereas section 43 provided for proof of reason for termination. In addition, section 45(1) and (2) prohibited against unfair termination of employment.

2. There were two sets of certificates on record. Those attached to the Claimant’s application for employment as shift clerk showing a results slip for KCSE for 1998 giving a mean grade of B- and a KCPE certificate showing that the Claimant sat for his exams in 1993. While filing the Plaint, the Claimant attached a copy of his national identity card stating that he was born on September 14, 1988 and a KCPE Certificate for 1998. The two sets of documents did not add up. The year of birth, the dates the Claimant sat for the exams and the grades attained were all different.

3. The Claimant admitted in cross-examination that his proper form 4 grade was D+. The advertisement for the job in which he was employed required a minimum grade of C-(Minus). Thus, His explanation that someone had manipulated his personal file in the Respondent’s records was not convincing as he was not qualified for the job according to what he alleged were his correct certificates. The only explanation for the apparent mix up of documents then was that at the time of recruitment, the Claimant’s certificates were falsified to show
that the Claimant was qualified for the job as advertised.

4. Furthermore, the Claimant was evasive while responding to questions put to him during cross-examination and had to be cautioned by the Court to respond to questions as asked. The Claimant was uncomfortable with questions relating to his qualifications for the job. From the foregoing, the Respondent had valid and sufficient grounds to take disciplinary action against the Claimant.

5. It was evident that the Claimant was never subjected to a disciplinary hearing as provided in section 41 of the Employment Act. The Respondent had attached excerpts of the Collective Bargaining Agreement but appeared to have either deliberately or inadvertently omitted to attach the pages that contained the disciplinary process. Only the last portion of clause 8 which provided for suspension was included being on the same page with clause 9 that provided for termination notice which the Respondent wished to rely on.

6. Apart from the audience given to the Claimant immediately after the report on authentication was received on April 2, 2013 and again on April 3, 2013 when he was discussing the results of the report, no hearing was given to the Claimant. Consequently, he was suspended from employment on April 17, 2013 and dismissed on May 10, 2013 without being subjected to a disciplinary hearing. Therefore, the dismissal of the Claimant was procedurally unfair for failure to subject him to a disciplinary hearing as provided under section 41 of the Employment Act.

7. All the cases relied upon by the Respondent related to the measure of damages for unlawful or unfair termination/dismissal. The cases were all decided based on common law which was that the measure of damages was limited to the period of notice that the employee would have been entitled to had he been terminated according to the provisions of his contract of employment. The cases were all determined before the enactment of the Employment Act, 2007 which introduced new provisions on termination and/or dismissal as well as on terminal benefits and compensation. The cases were therefore not applicable to the case.

8. The Claimant had prayed for several remedies during the hearing including some that were not pleaded in the plaint. Obviously those prayers that were not contained in the Plaht could not be considered by the Court. The only prayers in the Plaht which the Court had considered were for general damages for unlawful dismissal, costs and interest.

9. Having found that the summary dismissal was procedurally unfair, the summary dismissal of the Claimant was reduced to normal termination of employment so that the Claimant would be entitled to payment of one month’s salary in lieu of notice. That had already been admitted and offered by the Respondent through its witness. In addition, the Claimant was entitled to pay in lieu of leave which had already been paid. Therefore, the Court awarded the Claimant one month’s gross salary in lieu of notice in the sum of Kshs 26,730 or whatever gross salary he was earning at the time of dismissal.

10. The grounds for dismissal were so grave that it would be a travesty to justice to award the Claimant damages for unfair termination. The Claimant was not qualified for the job and falsified his certificates in order to get employment with the Respondent. He was not entitled to any compensation. The Claimant was however entitled to a certificate of service.

Claim dismissed; each party to bear its own costs.
Consent orders can only be challenged through a review as opposed to an appeal
Nicholas Kigo Wambugu vs. Miriam Nyawira Mwaniki
ELCA 4 of 2016
In the Environment and land Court
L N Waithaka, J
October 5, 2016
Reported by Emma Kinya Mwobobia & Ian Kiptoo

Civil Practice and Procedure—stay of execution—circumstances in which a court could issue orders for stay of execution—where leave to appeal was granted—where an applicant sought stay of consent orders—whether the Applicant was entitled to stay of execution against consent orders issued by the Business Premises Rent Tribunal (BPRT)—Civil Procedure Rules, order 42 rule 6(2).

Civil Practice and Procedure—consent orders—setting aside of consent orders—where an applicant sought stay of consent orders issued—whether an appeal was the proper forum to challenge a consent order issued by a court—Civil Procedure Act—section 67(2).

Brief Facts
The Application before the Court related to a stay of execution of orders issued in the Business Premises Rent Tribunal (BPRT) Meru pending hearing and determination of the appeal. The Respondent contended that orders sought to be stayed were consent orders and therefore the application and the appeal on which it was hinged were an afterthought, vexatious, frivolous, lacking merits and an abuse of the Court process. In addition, the Respondents contended that the application was fatally defective for being brought under wrong provisions of the law and because it sought to stay a consent order. The Petitioners on the other hand contended that the memorandum of appeal raises valid issues concerning the consent and that defect in the application stated by the Respondent was curable under article 159 of the Constitution of Kenya, 2010. The Respondent further urged the Court to allow the application to avoid rendering the appeal nugatory.

Issues
i. Whether the Applicant was entitled to stay of execution against consent orders issued by the Business Premises Rent Tribunal (BPRT).

Relevant Provisions of the Law
Civil Procedure Act
Section 67(2)
“67(2) No appeal shall lie from a decree passed by court with the consent of the parties.”

Civil Procedure Rules, 2010
Order 42 Rule 6(2)
“(2) No order for stay of execution shall be made under subrule (1) unless—

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Held
1. It was not in dispute that on May 13, 2015 the parties to the dispute recorded consent. Being an application for stay pending appeal, the law applicable to the application was found in order 42 rule 6(2) of the Civil Procedure Rules.

2. To justify a grant of stay, an applicant had to show or establish facts to satisfy the Court that if execution was allowed to proceed, it would result in a state of affairs that would substantially affect or negate the very essential core of the Applicant’s case as the successful party in the appeal. An applicant ought to have placed before the Court facts to show to the satisfaction of the Court that if no stay was granted, he would suffer a loss that was substantial. Under order 42, the Court was not required to inquire into the merits of the intended appeal as that was a question that could only be determined by the Court of Appeal.

3. For the Court to exercise the discretion vested on it in favour of the Applicant, the
Cases

Applicant had to satisfy the conditions set in order 42 Rule 6(2) of the Civil Procedure Rules. More importantly, the Applicant had to, by way of evidence; demonstrate that unless stay pending appeal was granted, he would suffer substantial loss. In addition, the Applicant had to also furnish security for due performance of such decree or order as might have been ultimately binding on him. Thus, the Applicant had not made up a case for being granted an order for stay pending appeal.

4. On the basis of the provisions of section 67(2) of the Civil Procedure Act, the best way of challenging a consent order was by an application for review or setting aside of the consent order before the Court which made the orders because, it was such a court which was better placed to determine whether or not there existed a ground or grounds for reviewing or setting aside the orders in question.

5. Under section 67(2) of the Civil Procedure Act, once parties had entered into a judgment by consent, the same was not appellable and could only be set aside on grounds which would necessitate setting aside a contract for example fraud, collusion or any other reason which would enable a court to set aside an agreement. In certain circumstances, an aggrieved party could apply for review of a court order under order 44 of the Civil Procedure Rules.

Application dismissed; Costs to the Respondent

Section 30a of the copyright act declared unconstitutional for limiting artists’ rights and freedom of association

Mercy Munee Kingoo & another vs. Safaricom Limited and 3 Others

Constitutional Petition 5 of 2016

High Court at Malindi

S J Chitembwe, J

November 3, 2016

Reported by Emma Kinya Mwobobia & Ian Kiptoo

Constitutional Law - national principles and values-public participation in the law making process-where a statute law Miscellaneous Act introduced substantial issues-whether section 30A to the Copyright Act, as amended by the Statute Law (Miscellaneous Amendment) Act 2012, was unconstitutional for not being subjected to public participation-Constitution of Kenya, 2010, articles 10 and 188.

Constitutional Law -legality of statutes-legality of a statute in the Copyright Act requiring artists to belong to a Collective Management Organisation CMO to receive their remuneration-whether section 30 of the Copyright Act was unlawful for requiring that artists had to belong to a CMO for them to receive their remuneration-Copyright Act, section 30A.

Statutes-interpretation of statutes-constitutionality of section 30A of the Copyright Act-where the statute purported to limit artists’ rights and freedom of association-Constitutionality of section 30A of the Copyright Act as it limited the Petitioners right to association-Constitution of Kenya, 2010, articles 36; Copyright Act CAP 130, section 30A.

Civil Practice and Procedure-res judicata-where a matter had already been heard and determined-whether the matter in regards to constitutionality of section 30A had been heard and determined-whether the matter before the Court in regards to the constitutionality of section 30A of the Copyright Act was res judicata having been heard and determined in Petition 317 of 2015.

Brief Facts

The Petitioners were composers, producers and performing artists of musical and audio-visual works who had contracted Premium Rate Service Providers (PRSPs) to digitize their musical work and downloads in the 1st Respondent’s Skiza Tunes Portal. In December, 2012 parliament passed the Statute Law (Miscellaneous Amendments) Act which introduced section 30A into the Copyright Act.

The Petitioners stated that they were not members of the Collective Management Organizations (CMOs) and did not intend to join any one of them and that the 1st Respondent’s act of entering into an agreement with third parties was forcing the artists to become members of the CMOs and was a violation of their rights provided under article 36 of the Constitution of Kenya, 2010 (Constitution). In addition, the Petitioners stated
that the said amendment was not subjected to public participation in total contravention of article 118 of the Constitution.

On the other hand, the Respondents contended that section 30 was mandatory and all payments had to be made to the CMOs and no one else. Furthermore, the Respondents contended that the Petition was res judicata as the issues being raised were determined in Nairobi High Court Constitutional Petition 317 of 2015 in which the Court held that:

a) Section 30A of the Copyright Act did not violate the Petitioners' freedom of association. That was in light of the fact that there was no requirement for any artist to become a member of a CMO in order to receive remuneration for the use of copyrighted works; and

b) Section 30A of the Copyright Act did not violate the intellectual property rights of petitioners. Its only requirement was that there would be collective management organizations which collected royalties for use of copyrighted works and distribute such royalties to the copyright holders.

Issues

i. Whether the matter before the Court in regards to the constitutionality of section 30A of the Copyright Act was res judicata having been heard and determined in Petition 317 of 2015.

ii. Whether section 30A to the Copyright Act, as amended by the Statute Law (Miscellaneous Amendment) Act 2012, was unconstitutional for not being subjected to public participation.

iii. Whether the Petitioners had to be members of a CMO for them to receive their remuneration.

iv. Whether section 30A of the Copyright Act was unconstitutional as it limited the Petitioners freedom of association under article 36 of the Constitution.

Relevant Provisions of the Law

Constitution of Kenya, 2010

Article 36

Freedom of association

(1) Every person has the right to freedom of association,
an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act.

2. Section 7 of the Civil Procedure Act prohibited courts from hearing disputes which had already been determined by other courts. Once a pronouncement had been made on an issue, then the same ought not to have been the subject of litigation before another court and between the same parties. The final determination in Petition 317 of 2015 did not make any pronouncement on the constitutionality of section 30A of the Copyright Act. The Court had held that section 30A of the Copyright Act did not violate the Petitioners’ rights. It could well have been concluded that it was determined that section 30A was not unconstitutional. However, that determination was in relation to the parties to that petition as well as the core issue as to whether the section violated freedom of association under article 36 of the constitution. That issue was determined in Petition 317 of 2015.

3. Estoppel by res judicata, or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing a stable basis for future conduct.

4. The Latin word res judicata simply means a thing judicially determined. They may apply to the claim as a whole (usually referred to as cause of action estoppel), or may refer to one or more specific issues which the Court was required to decide in the course of reaching its decision on the matter before it (what is generally referred to as issue estoppel).

5. Where a dispute involved interpretation of a statutory provision which was alleged to be in contravention of the Constitution, similar cases could be brought to court but based on a different dimension. A petitioner could say that a certain provision of a statute was unconstitutional as it violated a certain article of the Constitution. That dispute could be determined but another party was not barred from asking the same court to declare the same statutory provisions as unconstitutional as it was passed without public participation or that it violated another article of the Constitution.

6. Res judicata could not be applied generally in relation to interpretation of the Constitution or a statute. There was also the simple fact that one judge could declare a certain statutory provision as unconstitutional while another judge declared the same provision as constitutional. In such a case, res judicata could not apply.

7. The Petitioners were not parties to Petition 317 of 2015. The contention that they were represented by their PRSP – Liberty Africa Technologies Ltd – could not stand. That party litigated on the position of a Premium Rate Service Provider while the Petitioners were artists. The freedom of association of the PRSPs was different from that of the artists. Therefore, the Petition was not res judicata. The Petitioners could challenge the provisions of section 30A on the grounds that it was passed without public participation or that it violated their constitutional rights. They could also challenge the section on the ground that its implementation was leading to infringement of their constitutional rights.

8. Section 30A was brought in through the Statute Law (Miscellaneous Amendments) Act, 2012. The Act covered several other statutes and its preamble indicated that it was an act of parliament to make minor amendments to statute law. The amendments on the Copyright Act related to section 15 that was deleted, section 30 had some amendments, section 30A was introduced, and sections 36 and 42 were also amended.

9. Ordinarily, a Statute Law (Miscellaneous Amendments) Act only dealt with minor amendments to certain statutes. Such amendments involved rectification of drafting mistakes or deleting provisions which had been affected by other new legislation among others. Therefore there would be no need for extensive public participation if
the intention was to do minor amendments as the same Act suggested. However, where the new introductions altered the original Act to a great extent and introduced new substantive provisions that were not in place before, then such amendments ought to have been subjected to public participation.

10. Parliament had made drastic amendments to old statutes through the avenue of Statute Law (Miscellaneous Amendments) Act. A case in point was the amendment of the Judicial Service Act and introduction of a requirement that three names for the position of the Chief Justice and Deputy Chief Justice be forwarded to the president for him to appoint one nominee for each respective position in place of the original position which required that only one name be forwarded by the Judicial Service Commission. The amendments were done through the Statute Law (Miscellaneous Amendments) Act, 2015. The same Act introduced drastic changes to the Employment and Labour Relations Act, the Environment and Land Court Act, the High Court (Organization and Management) Act and the Magistrates’ Court Act. There could have been some form of public participation while passing the Statute Law (Miscellaneous Amendments) Acts, but a great deal of consultation was required.

11. The issue of public participation had been litigated upon in several forums. Unfortunately for the case, the report of the relevant parliamentary committee was not brought to the attention of the Court for it to know what transpired when the bill was referred to the committee. The Court could make a presumption that the committee called for memorandums and comments in relation to the proposed amendments on all the affected statutes. Article 10(2) (a) on National Values and Principles of Governance called for participation of Kenyans in all spheres of life. Similarly, article 118 called for parliament to conduct its business and the business of its committees in an open manner and facilitate public participation.

12. It was not expected that all Kenyans would participate in the enactment of legislation. Indeed, Kenya’s representative democracy whereby each constituency elected a member of parliament each election year to represent the residents of a particular constituency implied that Kenyans were fully represented in the legislative process. However, by enacting the 2010 Constitution, Kenyans still felt that they ought to have been engaged once again when parliament was conducting its affairs. That was why article 118 was placed in the Constitution.

13. Article 118 called for engagement with the stakeholders of each particular sector affected by a specific legislation whenever such legislation was amended or where a new legislation was enacted. The stakeholders affected by the Copyright Act included all Kenyans generally and in particular the producers, performers, artists, mobile phone operators, broadcasting corporations among others. There was no evidence that the stakeholders were engaged before the introduction of section 30A of the Copyright Act. The section was not a minor Amendment. On the timelines taken to pass the bill, it would be noted that there was no time for public participation. The committee only had three days from December 19, 2012 to December 21, 2012 to present the bill back to parliament. That period was not sufficient to engage the stakeholders.

14. The position prior to the enactment of section 30A seemed to be that each artist was represented by a PSRP. Those providers were not licensed as CMOs. Section 5 of the Copyright Act provided for functions of the Kenya Copyright Board, KCOBO. One of its functions under section 6(b) was to license and supervise the activities of Collective Management Societies as provided for under the Act.

15. Section 46(5) of the Act was clear that only one collecting society could be licensed in respect of the same class of rights or category of works. Section 30(3) recognized a performer’s right to enter into a binding authorization and appoint a representative. Section 30A called for payment to producers and performers of the single equitable remuneration through the respective CMOs and the remuneration would be paid by the user to the CMO. In addition, the remuneration would be shared equally between the producer of the sound recording and the performer.
16. On the issue of public participation before the introduction of section 30A, there was no public participation. The stakeholders were not engaged. The section did not introduce minor amendments to the Act and ought to have been subjected to public participation. The assumption was that the amendments on the affected statutes were minor. However, drastic changes were made to the Copyright Act.

17. According to the Petitioners, they were not involved in the change of paying point from the PRSPs to the CMOs. There was no requirement for any artist to become a member of a CMO in order to receive remuneration for the use of copyright works. Section 30A did not make it mandatory for the 1st Respondent to channel the royalties only through the CMOs. Thus, the argument that it would be difficult to deal with each individual artist was not tenable as the 1st Respondent had been paying dividends to its shareholders through their mobile phones.

18. The 1st Respondent had over twenty million subscribers and was able to manage all their affairs which were not limited to phone calls but included m-pesa transactions (mobile money transfer), purchase of bundles, accumulation of points through the use of phones, use of internet and crediting airtime. The 1st Respondent’s technology was quite advanced and had been of great service to Kenya. Between 2013 and 2015, the 1st Respondent had been paying the royalties through the PRSPs and had not been charged in curt for violating the law.

19. The 1st Respondent was a party in Nairobi Petition Number 317 of 2015. The court held that it was not mandatory for the artists and producers to be members of the CMOs for them to receive their remuneration for the use of their copyright works. The effect of that was that the CMOs could only pay those registered with them. Since the PRSPs were also legally licensed, they could still continue to receive the royalties of those artists who were contracted with them. PRSPs were not amorphous or illegal organizations.

20. Section 30A of the Copyright Act did not illegalize payment of royalties to any person other than CMOs. If that was the case, then the section would be violating the Petitioners’ right of freedom of association as well as freedom not to be compelled to join any kind of association. If all royalties were to be paid through CMOs, the effect would be that an artist could not receive his/her royalties until he/she joined one of the three CMOs. The dispute was about payment point and each artist ought to have been at liberty to be paid through the point of his choice. Receiving royalties for an artist who is not your member is unconstitutional. The manner in which section 30A of the Copyright Act was implemented was unconstitutional.

21. Artists who already had existing contracts with their PRSPs were being called upon to abandon those agreements and join any one of the three CMOs. The right to choose where one’s royalties were to be paid was being infringed.

22. From the stand taken by the 1st Respondent that the Petitioners would not get their royalties until the same was paid through the CMOs. It was not clear whether any fees or charges were levied by the CMOs. Although they were described as non-profit making organizations, that did not mean that they were charitable institutions. They were private bodies. Therefore, there would be no need of them receiving the royalties and thereafter passing the payment over to the artists without any fee. If that was the case, which was not, then the royalties ought to have been paid directly to the artists without any involvement of the CMOs.

23. The Petitioners had established a prima facie case. They were not consulted when section 30A of the Copyright Act was passed. Their pre-existing contracts were being trampled upon. It was evident that the 1st Respondent was not the only user of the Petitioners’ works. There were other mobile phone operators. There were also television and radio stations that could have been using the Petitioners’ works. Some of the users might not have been using the digitized ring tones but by the end of the day royalties had to be paid. Those royalties were not paid through the three CMOs.

24. The Petitioners were involved in an industry which involved the youth as well as well established artists. It took time, money and hard work to produce the artistic works. The
law ought not to have way-layed the artists at the very end of the process and order them to receive their royalties through three Collective Management Organizations. Such an arrangement was tantamount to obstructing an employee or anyone not to get his salary or payment through any other bank other than the one preferred by the employer or paying body. That was unconstitutional.

25. The Kenyan Constitution had pumped fresh air and freedom into the Kenyan society. No Kenyan ought to have his options of how he would like his payments to be made after his/her hard work limited to a specific paying point. That amounted to tethering one’s freedom of association and right to choose where to be paid and limiting such fundamental rights and freedoms to only three CMOs was unconstitutional. That could not be allowed in a democracy like Kenya’s based on equality, human dignity and the rule of law.

26. The extent that section 30A of the Copyright Act limited the artists’ right to choose how their royalties were to be paid was unconstitutional as its effect was to limit the Petitioners’ freedom of association. Furthermore, taking into account the fact that section 30A of the Copyright Act was enacted without public participation and its effect was to be applied retrospectively without regard to existing arrangements between artists and their contracted PRSPs, that section was unconstitutional.

Petition allowed: Each party to bear its own costs

a) A permanent injunction restraining the 1st Respondent from remitting artists’ royalties from the Skiza Tunes Portal to CMOs;

b) Section 30A of the Copyright Act was unconstitutional.

c) A declaration that the august 2015 agreement between the 1st Respondent and the CMOs was irregular, unlawful and infringed on the Petitioners’ constitutional rights

Publication by a bank of a customers’ failed transaction results that are false, to a third party, amounts to breach of contract and libel

Equity Bank Limited and Another vs Robert Chesang

Civil Appeal 571 of 2012

High Court at Nairobi

R E ABURILI, J

September 21, 2016

Tort Law-defamation-libel-elements of libel-whether the print out transaction indicating that an account was nonexistent was defamatory of the Respondent.

Banking Law-bank-customer relationship-duty of a bank towards its customer-where a bank failed to honour a customer’s transaction-whether the allegation by the 1st Appellant that the Respondent had a nonexistent account was breach of bank-customer contractual relationship-whether the 1st Appellant was negligent in carrying out its obligations and contractual duty of care it owed to the Respondent.

Civil Practice and Procedure-appeal-right of appeal-leave to institute an appeal-whether the Appellants required leave to institute an appeal against a judgement passed exparte-Civil Procedure Act, sections 65 and 67

Civil Practice and Procedure-damages-remedy of award of damages-consideration for award of damages-whether the Respondent was entitled to damages awarded in the Trial Court

Brief Facts

The appeal arose from the judgement and decree in which the Plaintiff had sued the Appellants claiming damages for the tort of libel and for breach of contract. According to the Respondent, on February 22, 2010 he went to Nakumatt Supermarket to shop. He used his ATM card with Equity Bank to pay for the goods. Regrettably, the transaction failed with results transaction declined account as account being nonexistent in which the supermarket thought that the Respondent was trying to defraud the supermarket using an ATM card and caused him to be arrested and temporarily detained by anti-fraud banking unit. Consequently, the Trial Court awarded damages for Kshs 1 million general damages for libel and breach of contract and Kshs 1.5 aggravated damages.
It was the Appellants submission that the damages awarded were inordinately high and that general damages for breach of contract should not have been awarded. Furthermore, it was submitted that reliance on the Nicholas R.O. Ombija Vs KCB case by the Trial Magistrate was erroneous as the reach of the said defamatory statements was markedly different.

The Respondent contended that the appeal was incompetent as order 6 of the Civil procedure Rules, 2010 provided that if one did not file a defence then they had to seek leave to appeal. In addition, the Respondent contended that the Trial Court applied all relevant principles and made no error in awarding damages.

Issues

i. Whether the Appellants required leave to institute an appeal against a judgement passed ex parte.

ii. Whether the print-out transaction that failed indicating that the account was nonexistent was defamatory of the Respondent.

iii. Whether the allegation by the 1st Appellant that the Respondent had a nonexistent account was breach of bank-customer contractual relationship.

iv. Whether the Respondent was entitled to damages awarded in the Trial Court

Relevant Provisions of the Law

Civil Procedure Act

Section 65

Appeal from other courts

(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

(a) Deleted by Act No. 10 of 1969, Sch.;

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact;

(c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

Section 67

Appeal from original decree

(1) An appeal may lie from an original decree passed ex parte.

(2) No appeal shall lie from a decree passed by the court with the consent of parties

Held

1. Being a first appeal, the Court was obliged to abide by the provisions of section 78 of the Civil Procedure Act to reevaluate and re-examine the Lower Court’s record and the evidence before it and arrive at its own independent conclusion, having regard to the fact that it neither saw nor heard the witnesses as they testified.

2. It is well settled that the Court will not interfere with the exercise of discretion by the inferior Court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.

3. It was undisputed that the Appellants neither entered an appearance nor filed a defence in the Lower Court as a result of which interlocutory ex parte judgment was entered against them and the Respondent proceeded to formally prove his case.

4. Section 65 of the Civil Procedure Act was clear that an appeal would lie to the High Court from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of a third class, on a question of law or fact. Furthermore, section 67 of the Civil Procedure Act enacted that an appeal could lie from an original decree passed ex parte.

5. The Respondents had obtained an interlocutory judgment against the Appellants and their efforts to set aside that judgment in order to defend the suit was unsuccessful. They were nonetheless allowed to cross examine witnesses and to file submissions. The decree in the Lower Court was therefore passed ex parte as there was no defence on record. That decree was appealable as of right. Thus, no leave was required to file an appeal.

6. With respect to the decision in KCB Ltd V Honourable Nicholas Ombijah CA 231/2009, the Court of Appeal, in allowing the appeal
found that as a matter of fact, there was no denial by Honourable Ombija, J that he had a debit balance in the card account hence he had an overdrawn account. Furthermore, the Court of Appeal found that there was no unequivocal admission of the Plaintiff’s claim by the Defendant through the letter dated May 14, 2008 which profusely apologized for the delay in uplifting the temporary suspension of the Plaintiff’s account after the cheque deposited.

7. It had not been shown in the instant case that the circumstances under which the appeal in CA 231/2009 was allowed were the same prevailing circumstances in the case, noting that the said appeal was against a ruling on an application which sought to have the defence struck out and judgment entered in favour of the Respondent. Furthermore, the Court of Appeal did order for restoration of the defence on the record with the result that that suit was not yet determined and therefore it would have to be heard on the merits. In addition, it had not been shown that the Respondent had overdrawn his accounts whose existence with the 1st Appellant was undisputed by the evidence adduced in the Lower Court. There was also no evidence that the Respondent was relying on an alleged admission of his claim by the Appellant.

8. The Court of Appeal in the Ombija case (supra) did not overturn the finding that in claims of the nature before the Court, contract and libel formed one transaction, which was a relevant factor in determining liability and damages for injury to one’s credit where there was evidence of bank-customer contractual relationship. There was uncontroverted evidence adduced by the Respondent that he held 8 accounts with the 1st Appellant which accounts had sufficient funds to pay for the items at the supermarket which did not cost more than Kshs 15,000.

9. The relationship between a bank and its customer is that of principal and agent. Consequently, the bank being the holder of customer’s money is under a duty to pay a customer’s order where there are sufficient funds to his credit and where there is such failure, a cause of action will accrue. Where a bank declines to honour a customer’s order for the money held in account, without any sufficient explanation, that refusal or failure constitutes a breach of contract for which the banker is liable in damages. In addition, the principles applicable to dishonour of cheques presented for payment are the same as those applicable for the dishonour of the order for payment using a credit card as well as a debit card.

10. The print out by the supermarket teller was information which the bank configured in its system and therefore the fact of rejection of the transaction for nonexistent account was uttered by the bank to the supermarket teller who was a third party for purposes of publication of defamatory matter. The Court was satisfied on the evidence adduced in the Lower Court that the allegation that the Plaintiff had no account was false, derogatory and unjustified and in breach of bank-customer contractual relationship.

11. In Halsbury’s Laws of England, 4th Edition, Volume 3 at paragraph 125 on banker-customer relationship and obligations thereto, it was stated that the characteristic usually found in bankers are:

a) That they accept money from and collected cheques for their customers and place them to their credit;

b) That they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and

c) That they kept current accounts in their books in which the credits and debits are entered.

If without justification, a banker dishonored his customer’s cheque, he is liable to the customer in damages for injury of credit. Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer or for personal customers. The answer on a cheque dishonored on presentation by a third person might have constituted libel, but such cases are rare; in such cases general damages might be awarded.

12. There being evidence that the Plaintiff had 4 accounts all connected to the ATM card that was used for the failed transaction on account of nonexistent account, and which had sufficient funds for purposes
The accounts in issue existed, from which the ATM card was connected; the funds were sufficiently available in those accounts in excess of Kshs 200,000; the ATM card was current and not expired; the accounts were active or expected to be active as there was no reason why a bank would issue an ATM card on dormant accounts and not recall it; there was no evidence of default by the Respondent; there was no evidence of fraud or suspected fraud for the accounts in issue to be frozen; there was no evidence of any unusual activity or heavy withdrawal from the accounts raising suspicion or red flag of fraud; there was no evidence that the ATM card was blocked; neither was there evidence that the ATM card was being used at an unusual location to indicate some fraud in which case the issuer of the card would be made aware.

The Appellant’s own brochure on cash back encouraging account customers to shop, pay and withdraw cash conveniently was clear that a customer with an ATM as that held by the Respondent could shop for goods and services at their preferred outlet, pay using any of their equity cards and withdraw cash at their preferred outlets. That never was to be as the Respondent could not access his money which was in his accounts connected to the ATM. Furthermore, when the Respondent went to make inquiries from his bank, the bank claimed that his accounts at Fourways Towers and at Haille Sellasie Avenue were nonexistent.

The claim by the Appellant that the account was incomplete was insincere since the Appellant did not provide any details of what was lacking when the account was opened and whether the Appellant was asked to furnish some further particulars before his account as opened could be activated. Even assuming that the particular account’s opening process was incomplete, there was no justification for the Appellant’s system refusing to allow the Respondent to transact on his co-joined accounts which were active and which had sufficient funds. Therefore, the Trial Magistrate was not in error when he found and held that the Appellants were liable for breach of contract and libel. Every breach of contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the Claimant had suffered through that breach. A claimant who had not, in fact, suffered any loss by reason of the breach, was nevertheless entitled to a verdict but the damages recoverable would be purely nominal.

The reason given for dishonor of the ATM debit card, transaction declined account as being nonexistent, was wholly untrue and unnecessarily strong. That reason as given by the bank for the failed transaction in the supermarket depicted the Plaintiff in bad light, that he must have been a fraudster. In addition, the arrogance of the Defendant’s manager who was the 2nd Appellant, when confronted with the complaint by the Plaintiff to explain the problem, though not proven to be defamatory, was a demonstration of spite and malice against the Plaintiff.

Furthermore, the Defendant never showed any remorse for the humiliation shown to the Plaintiff when the ATM card would not be used to pay for goods worth in the supermarket. The dishonor compelled the Respondent to close all his 8 accounts with the Appellant who even refused to release the monies available in those accounts to the Respondent until he had to obtain a mandatory compelling injunction including commencement of contempt of court proceedings before his money was released to him while the case was pending. Such conduct on the part of the 1st Appellant bank had to be checked with sanctions of an award of aggravated damages.

The power to award exemplary damages does not affect the power of the Court when making an award of general damages to take into account the conduct of a Defendant as an aggravating factor. It might have also been argued that aggravated damages would have been more appropriate than exemplary.
The distinction is not always easy to see and it is to some extent an unreal one.

19. It is well established that when damages are at large and the Court is making a general award, it may take into account factors such as malice or arrogance on the part a defendant and this is regarded as increasing the injury suffered by a plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.

20. No apology was tendered to the Plaintiff for the unfortunate action of the bank which was not well intentioned. That was highly spiteful of the Respondent who need not prove that he was an advocate at the time for him to deserve damages since the accounts were not in the names of his law firm. He was nonetheless the bank’s customer. Whether or not he was an advocate with a practicing certificate was not relevant since it was persons who practiced law and not all legal practitioners, depending on their area of practice that required a practicing certificate. The Respondent was an advocate and he had admitted that he was at the material time working for private companies.

21. The Appellant could not hide under the Respondent’s failure to hold a practicing certificate to escape damages for breach of contract or for libeling its customer. As regards trading customers, the law presumes injury without proof of actual damage. The Appellant’s conduct aggravated the Plaintiff’s misery and distress in the eyes of the supermarket teller who had to call in security to arrest, detain and interrogate the Respondent. An apology would have mitigated the Respondent’s loss.

22. A customer had to be taken to know the state of each of his accounts. If the balance on the whole was against him, he had no right to expect cheques he drew would be cashed. Further, money was not available immediately it was paid into an account even if payment was by cash as the bank had to be allowed sufficient time to carry out book keeping operations before crediting the account.

23. There was evidence that the Respondent had active accounts with the Appellant, three of which were linked to the ATM card which the Respondent presented for swiping at the supermarket. Furthermore, there was no evidence that he had just credited the said accounts with money and was seeking to access the same without according the Appellants sufficient time to carry out book keeping operations before making the said monies available to the Respondent.

24. On quantum interference of damages, the principle is that an appellate court will not ordinarily interfere with the findings of a trial court on an award of damages merely because the Appellate Court may take the view that had it tried the case, it would have awarded a higher award or lower damages different from the award of the Trial Court. To so interfere, the Court must be persuaded that the Trial Court acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damage to which the Plaintiff was entitled.

25. Failure by the Appellant to activate the Respondent’s accounts to enable him access money through the use of ATM card was gross recklessness which constituted willful blindness which amounted to knowledge and justified the Court to find malice in view of the subsequent conduct of the 1st Appellant’s managers who attended to the Respondents inquiries. A bank had a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extended over the whole range of banking business within the contract with the customer. Thus, the duty applied to interpreting, ascertaining and acting in accordance with the instructions of the customer.

26. The Appellant had no justification or excusable reasons for dishonoring the credit of its customer, the Respondent. The act of declining to allow the Respondent to transact his business with ease using the ATM card was an act of carelessness which was not going to the benefit of any party of the law except injuring the customer’s credit and for which liability had to attach and damages
awarded not only for breach of contract but also for libeling the customer's credit.

27. The Appellants had, in the appeal by way of submissions, tended to challenge the factual evidence which was adduced in the Lower Court yet they never had any defence to any of those factual matters. Submissions are not evidence and have never been substituted to evidence. The suit in the Trial Court proceeded as a formal proof and on the evidence adduced, the Respondent proved his claim against the Appellant on a balance of probabilities to warrant a judgment both on liability and an award of damages.

28. The Appellant was in breach of the contract it had with its customer, the Respondent, to honour the use of ATM card which was a contractual relationship informed by a fiduciary nature of customer/bank relationship where the bank would not expose the customer to injury that was foreseeable. The bank-customer relationship was based on the utmost good faith. The bank was also under a contractual duty to diligently handle accounts of a customer, to ensure that funds-deposited on account were available when required by a customer. Any deviation from that understanding without justifiable reasons which ought to have been communicated to the customer well in advance or immediately, the bank was in breach of a contract with the customer and was liable in damages.

29. The Trial Magistrate correctly exercised his discretion in awarding to the Respondent Kshs 1 million general damages for libel and breach of contract and Kshs 1.5 aggravated damages in view of the humiliating, embarrassing and contemptuous manner in which the Appellants treated the Respondent and made no apologies about it.

Thus, the Court upheld the awards both on special damages, general damages and aggravated damages as awarded as being reasonable in the circumstances of the case.

Appeal dismissed; Costs to the Respondent

So long as a man rides his hobbyhorse peaceably and quietly along the King's highway, and neither compels you or me to get up behind him - pray, Sir, what have either you or I to do with it? — Laurence Stern
A protected strike can not be converted into an unprotected strike by the addition of impermissible demands

Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 others v Unitrans Fuel and Chemical (Pty) Limited
Constitutional Court of South Africa
Case CCT 131/15
September 1, 2016
Reported by Linda Awuor & Kakai Toili

Labour law – employment law – employment disputes – methods of resolving employment disputes – industrial actions – strikes – protected strikes – essential elements for a protected strike - whether a protected strike could be converted into an unprotected one as a result of the addition of impermissible demands to a permissible demand - Constitution of the Republic of South Africa, 1996, sections 23(2)(c), 36 & 213; Labour Relations Act(South Africa) section 64, section 67, section 68(5)

Labour law – employment law – termination and dismissals of employees – factors to consider in termination and dismissal of employees – strikes – protected strikes - whether the dismissals for participating in a protected strike were substantively and procedurally fair - Constitution of the Republic of South Africa, 1996, section 23(2)(c); Labour Relations Act(South Africa) sections 64, 67, 68(5), 193 & 194; Code of Good Practice(South Africa) Schedule 8 Item 6

Brief Facts:
The Respondent entered into contracts with clients in terms of which it transported its clients' dangerous goods, such as petroleum products, oxygen and liquefied petroleum gas (LPG). The Respondent remunerated its heavy-duty truck drivers who transported its clients' products commensurately in accordance with how lucrative the contracts they serviced were. The Respondent had a lucrative contract with the Shell Company of South Africa. After the contract terminated, the Respondent transferred its drivers who had been attached to the Shell contract to various other contracts it had with other clients. It then required them to sign new contracts of employment in terms of which their wage rates were reduced. The majority of the drivers signed the new contracts but seven (Shell 7) refused to do so. The Respondent reduced the Shell 7's wage rates without their consent. That and other complaints led Transport and Allied Workers Union of South Africa (TAWUSA) to make four demands to the Respondents.

One of the demands was that the Respondent restores the Shell 7's wage rates without their consent. That and other complaints led Transport and Allied Workers Union of South Africa (TAWUSA) to make four demands to the Respondents.

The Applicants followed the dispute resolution procedures of the South African Labour Relations Act (LRA) and in due course issued a strike notice. The Labour Appeal Court held that the Applicants could only have struck in respect of the wage cut demand and the wage discrepancy demand, but not in respect of the other two demands (LAC judgment). More than 200 employees went on strike on October 28, 2010. The strike continued until November 1, 2010. The Respondent regarded the strike as unprotected for exceeding the scope of the LAC judgment. The Applicants regarded the strike as protected as to them the demands fell within the ambit of the LAC judgment. After issuing a number of ultimata
calling upon the workers to return to work, the Respondent issued a final ultimatum at 1400 hours on November 1, 2010. The Respondent said that, as a gesture of its goodwill and in order to end the strike, it would restore the Shell 7 to their agreed wage rates and pay them the back-pay. It refused to do anything about the wage discrepancy demand. It called upon the Applicants to return to work at 0600 hours on November 2, 2010 failing which they would be summarily dismissed. The Applicants did not return to work and were dismissed.

In subsequent litigation, the Labour Court held that the strike had been unprotected and dismissed the Applicant’s unfair dismissal claim. The Applicants appealed to the Labour Appeal Court and their appeal failed and thus sought leave to appeal against the second LAC judgment.

Issues:

(i) Whether a protected strike could be converted into an unprotected one as a result of the addition of impermissible demands.

(ii) Whether the dismissals for participating in a protected strike were substantively and procedurally fair.

Held by Mhlantla J, Moseneke DCJ, Cameron J, Froneman J and Nkabinde J:

1. The matter affected the livelihood of 94 individuals and their families. It involved the interpretation of the constitutionally entrenched right to strike and the dismissal of workers whilst exercising their right to strike. The Court had jurisdiction on the basis that the matter triggered a constitutional issue. Jurisdiction was established in terms of section 167(3)(b)(ii) of the South African Constitution on the constitutional court as the case raised an arguable point of law of general public importance which ought to have been considered.

2. Determining whether the dismissals related to misconduct would have depended on the interpretation of the ambit within which the workers could have withheld their labour. The two demands which related to the wage discrepancies and the wage cuts were authorised by the first Labour Appeal Court (LAC) judgment. The judgment was binding on the parties as there was no appeal against it and its interpretation of the two demands.

3. The wage discrepancies demand was impermissible from the strike’s commencement as it fell outside the defined ambit of the first LAC judgment. That ensured that substantive wage issues were negotiated at Bargaining Council level and accordingly barred from a negotiation at the plant level. What remained was a consideration of the wage cut demand of the Shell Seven workers that the first LAC judgment authorised.

4. The wage cut demand could not have been described as an increase in wages as there was no cost implication to the employer. The restoration of the terms and conditions of employment would have meant that the Respondent should have paid the Shell Seven workers their back pay from the time that the Respondent commenced paying them at reduced rates. That, however, could not have been regarded as a wage increase or cost implication to the Respondent, as it had unilaterally reduced those wages and over a period enjoyed a saving at the expense of the workers who had to endure hardships. It would have had to pay what it should have paid had it not changed the terms and conditions of employment. All that was required from the employer was for it to have restored the status quo ante. That demand was permissible only to the extent that the wage cut demand related to the Shell Seven workers.

5. The inclusion of impermissible demands could not have extinguished the Shell Seven workers’ wage cut demand which remained lawful and permissible. Since the Shell Seven workers’ demand was lawful and severable from the other demands, the addition of an impermissible demand could not have rendered the Shell Seven workers’ demand unlawful.

6. The right to strike in pursuit of a permissible demand did not evaporate upon the addition of impermissible demands. It was permissible for workers, not directly affected by the demands of a certain group of workers directly affected to have participated in the strike in support of the demands as long as the strike was protected in respect of the workers who were directly affected by the dispute. When the permissible demand was extinguished following the employer’s acceptance of such demand the collective refusal to have worked became unprotected. Similarly, when workers collectively struck in support of a permissible demand, the strike remained protected even though the workers included impermissible demands.

7. The addition of impermissible demands did
not dissolve the lawfulness of the strike based on a permissible demand was subject to one condition, the strike notice notifying the permissible demand to the employer had to set out the issue over which the workers would have gone on strike with reasonable clarity.

8. The objective of a clear demand was to give the employer proper warning of the strike and an opportunity to take necessary steps to protect the business. It could not have been emphasised enough that the practice of concealing the core nature of a permissible demand could not and should not have been condoned.

9. A strike is a high-stake exercise that is fraught with difficulty. It was undesirable for both employer and workers that strike action was unnecessarily protracted. A strike was a measure of last resort born of the collective desperation of workers to give their demands force. Negotiations between employers and workers through a trade union or otherwise should have been facilitated as opposed to hindered and should have been approached in good faith by both parties.

10. The introduction of the impermissible wage cut demand in respect of the other workers did not extinguish the permissible wage cut demand relating to the Shell Seven workers because the permissible issue was set out with reasonable clarity in the various strike notices. The strike remained protected by virtue of and within the ambit of the Shell Seven workers’ wage cut demand.

11. The strike was protected from October 28, 2010 until November 1, 2010 when the employer capitulated to the Shell Seven workers’ wage cut demand. From that moment, the workers could not have persisted in their conduct of withholding their labour as the other demands were impermissible demands and no longer enjoyed the protection provided by the Shell Seven workers’ wage cut demand. Their actions in participating in an unprotected strike from November 1, 2010 amounted to misconduct.

12. Whether the Respondent fulfilled the demand had to be determined objectively. The subjective motive for fulfilment of the demand could not have undone the fact that the demand was fulfilled.

13. Schedule 8 of the South African Code of Good Practice provided that a dismissal was unfair if it was not effected for a fair reason and in accordance with a fair procedure. Whether a dismissal was for a fair reason was determined by the facts of the case and the appropriateness of dismissal as a penalty. That was the substantive fairness enquiry.

14. Item 6(1) of the South African Code of Good Practice on dismissals and industrial action provided that while participation in an unprotected strike amounted to misconduct, that did not automatically render dismissals substantively fair. The substantive fairness of the dismissals had to be measured against inter alia the seriousness of the contravention of the South African Labour Relations Act, the attempts made to comply with the Labour Relations Act and whether or not the strike was in response to unjustified conduct by the employer. Where striking workers engaged in unprotected strike action, the onus rested on the workers to tender an explanation for their unlawful conduct, failing which their dismissal would have been regarded as substantively fair, provided dismissal was an appropriate sanction.

15. The workers’ unprotected strike following the Respondent’s capitulation in its final ultimatum was impermissible not only for failing to have complied with the provisions of the South African Labour Relations Act, but for failure to have complied with the orders of both the Labour Court and Labour Appeal Court. Strike action in defiance of a court order was a serious contravention of both the court order and the provisions of the LRA. It could not have been condoned barring the existence of exceptional circumstances in favour of the striking workers.

16. There were no exceptional circumstances that could have remedied the striking workers’ failure to have complied with the applicable court orders to the extent that dismissal would not have warranted an appropriate sanction. It was apparent that the striking workers’ demands other than those relating to the Shell Seven workers, exceeded the scope of the first LAC judgment. They fell outside of the ambit of the Collective Agreement. Despite the employer capitulating in respect of the Shell Seven workers, the striking workers continued to pursue demands that fell outside of the ambit authorised by the LAC and the Labour Court. That was a serious contravention of the LRA that could not have been condoned. In response to it,
the employer’s decision to issue an unequivocal ultimatum was justified.

17. The employer’s decision to unilaterally reduce the wages of the Shell Seven workers could not have borne relevance to the substantive fairness or lack thereof of the dismissals effected after the demand was capitulated to by the employer. Strike action in relation to the employer’s conduct was permissible only to the extent that that action was contemplated by the first LAC judgment. In the absence of the Shell Seven workers’ demand, the remaining demands could not have been said to be in response to the employer’s unjustified conduct. That was because they went further than the framework contemplated in the first LAC judgment, and therefore the Collective Agreement.

18. In determining the appropriateness of a dismissal as a sanction for the striking workers’ conduct, consideration had to be given to whether a less severe form of discipline would have been more appropriate, as dismissal was the most severe sanction available. An illegal strike constituted serious and unacceptable misconduct by a worker. Where an employer had issued an unequivocal ultimatum informing workers engaged in an impermissible strike that their misconduct would result in dismissal, subsequent dismissal had been found to be an appropriate sanction for non-compliance. The dismissals effected in response to the unprotected strike action were substantively fair.

19. The South African Code of Good practice provided that whether or not a dismissal was procedurally fair would have been determined by referring to the guidelines set out in the Code. The procedural fairness of a dismissal effected in terms of item 6 of the Code of Good Practice on dismissals and industrial action was determined in light of item 6(2) of the Code. Item 6(2) provided that when effecting a dismissal within its ambit, the employer had to first contact the strikers’ union at the earliest possible opportunity to discuss the course of action it intended to adopt, if that step produced no result the employer might have issued an ultimatum. Item 6(2) could therefore have been sub-divided into two requirements: first, that the employer should have contacted the strikers’ union and second, that the employer had to issue an ultimatum prior to effecting the dismissals.

20. The first purpose of item 6(2) of the South African Code of Good Practice on dismissals and industrial action was that at the very earliest opportunity a union official should have been allowed to make representations on behalf of striking workers who were not given an opportunity to make representations individually. Item 6(2) embraced the audi alteram partem principle in the context of a strike dismissal under the provisions of the LRA compelling an employer to engage with the workers’ union. Only once it became clear that the union’s attempts would have proved fruitless or merely sought to extend the strike, the employer might have issued an ultimatum.

21. When assessing the fairness of an ultimatum, the factors to have been considered were the background facts that gave rise to the ultimatum, the terms thereof and the time allowed for compliance. The Respondent’s first three ultimatums were tendered during the protected strike period and therefore they could not have been given legally binding force, to do so would have allowed employers to flout the protective measures afforded to workers should their strike action have been protected by virtue of compliance with the legislative requirements.

22. Item 6(2) of the Code of Good Practice on dismissals and industrial action was clear. It demanded compliance prior to dismissal, presuming that an employer had already established that the workers’ misconduct deserved dismissal. That was the substantive fairness enquiry in item 6(1) on dismissals and industrial action. An employer had to first establish, in accordance with item 6(1), that the workers’ conduct was deserving of dismissal. Only after an employer had done so, might have turned to item 6(2), which prescribed how the dismissal was to be effected in a procedurally fair manner. The contention that an employer could have presumed eventual non-compliance with item 6(1) and sought to bolster its compliance with item 6(2) by issuing an ultimatum during protected strike action was unsustainable.

23. An ultimatum tendered during protected strike action was not legally binding on striking workers, as their dismissal at that point would have amounted to a serious contravention of the LRA. The first three ultimatums could not have been considered in determining whether the
Respondent acted in a procedurally fair manner.

24. Item 6(2) of the Code of Good Practice on dismissals and industrial specifically required that an employer should issue an ultimatum in clear and unambiguous terms that should have stated what was required of the workers and what sanction would have been imposed if they did not comply with the ultimatum. The ultimatum clearly informed striking workers that their failure to resume their normal duties at the specified time would have resulted in summary dismissal, barring the making of representations, of which there were none. To prevent uncertainty in the minds of the workers regarding the finality of the ultimatum, which may have been created as a result of the Respondent having tendered three ultimatums during the period in which the strike action was permissible, the Respondent emphasised the finality of the ultimatum. The terms of the ultimatum reflected those terms specified in item 6(2). Accordingly, the procedural fairness of the dismissals had to turn on the period of time afforded to the striking workers by the Respondent.

25. It had been held to be unreasonable to have expected strikers to resume work in too short a time. A reasonable time ultimately would have depended on the circumstances, but an ultimatum should have afforded the strikers a proper opportunity for obtaining advice and taking a rational decision as to what course of action to have followed.

26. It was apparent that the period of time conferred by the ultimatum had to be viewed in light of the conditions prevailing at the time it was issued. The time period conferred by an ultimatum had to be viewed in the context of whether the ultimatum provided an adequate opportunity for the workers involved to have engaged with its contents and respond accordingly. That was in line with item 6(2) on dismissals and industrial action of the Code encompassing the audi alteram partem principle, which extended into the terrain of unprotected strike action. The importance of conferring an adequate period of time for both parties to the dispute to have cooled-off had to be emphasised. An adequate cooling-off period ensured that an employer did not act in anger or with undue haste and that in turn the striking workers acted rationally having been given the opportunity to have reflected.

27. The only legal ultimatum was the one that was issued on November 1, 2010. That was because the other three had been issued whilst the strike was protected and at that stage the workers were entitled to have ignored them. The strike became unprotected at 1405h on November 1, 2010, that was, upon the Respondent capitulating to the Shell Seven workers’ demand. The ultimatum continued to provide unequivocally that the striking workers should have returned to work and resumed their normal duties by 0600h on November 2, 2010. Failure to have done so, the ultimatum continued and would have resulted in the workers being summarily dismissed unless the Appellants provided the Respondent in writing with reasons before expiry of the ultimatum showing that their strike action was lawful and why they should have not been dismissed.

28. The Appellants effectively had three working hours to have considered the ultimatum, reflected on the situation and responded. The time provided by the Respondent was insufficient to have enabled them to have done that. The ultimatum failed to have afforded the workers an adequate period of time to have considered its contents and respond accordingly, which the audi alteram partem principle demanded. Given the complexity of the matter, the fact that the strike action had been protected and that the employer only capitulated in respect of the Shell Seven workers’ demand in the same ultimatum, a period of just under 16 hours (effectively three working hours) could not have been regarded as sufficient to have justified the Respondent’ actions in dismissing the Appellants. It followed that the dismissal of the workers was procedurally unfair.

29. In terms of section 193(2) of the South African Labour Relations Act on remedies for unfair dismissal the Labour Court had to order that unfairly dismissed workers be reinstated or re-employed, barring where the conditions in subsections (a)-(d) were fulfilled. Should any of the conditions have been fulfilled, then the Labour Court was not obliged to have ordered that the workers be reinstated or re-employed, but might have ordered any form of relief specified in section 193(1) on remedies for unfair dismissal, which in addition to reinstatement and re-employment, contemplated the payment of compensation to the workers by the employer.
30. The dismissals were unfair on grounds of procedural fairness which sections 193(2) (d) on remedies for unfair dismissal and unfair labour practice and section 194(1) on limits on compensation specifically contemplated. It was inappropriate that an order of reinstatement or re-employment be given pursuant to section 193(2). A remedy had to be fashioned in terms of section 193(1) read with section 194(1) should an award of compensation be made.

31. The issue of remedy had to be determined by the Labour Court, which would have regard to all the relevant issues which might have included the question relating to the interests of justice, delay in proceeding with the appeal in the LAC and re-employment or otherwise of the workers. The Court was not adequately placed to have considered the issues, even more so with a remedy having to be fashioned in terms of sections 193(1) on remedies for unfair dismissal and unfair labour practice and section 194(1) on limits on compensation, the latter requiring that any award of compensation made be just and equitable in all the circumstances. It was more appropriate that the matter be considered by a specialist court which would have been able to have investigated and interrogated the circumstances of each worker and determine an appropriate remedy. It was therefore in the interests of justice that the matter be remitted to the Labour Court to fashion an appropriate remedy in terms of sections 193(1) and 194(1).

Zondo J, Mogoeng CJ, Bosielo AJ, Khampepe J and Madlanga J concurring (Jafta J only concurring in the order)

32. The Court had jurisdiction and leave to appeal should have been granted. It should have been taken into account that both the Applicants and the Respondent wanted the appeal to be disposed of on the merits. Indeed, the LAC might have taken it into account but did not grant condonation and the reinstatement of the appeal because it took the view that the appeal had no prospects of success.

33. Had the Labour Appeal Court taken the view that there were reasonable prospects of success for the appeal, it would probably have granted condonation and reinstated the appeal. That had to be so because it did consider part of the merits of the appeal.

34. The Labour Appeal Court failed to consider that even if it was held that the Applicants’ strike was unprotected, their dismissal was both substantively and procedurally unfair. That was a serious misdirection that weighed heavily in favour of granting the Applicants’ leave to appeal, that was because that meant that there was an important part of their appeal which had been left undecided. That part of the appeal would have remained undecided if leave to appeal was refused.

35. There were reasonable prospects of success for the Applicants’ appeal not only in relation to showing that their dismissal was unfair but also in showing that the dismissal was automatically unfair. That would be by reason of the dismissal having been a dismissal for participation in a protected strike. The Labour Appeal Court may have overlooked its own previous decisions relevant to the legal status of the strike in coming to the conclusion that the strike was unprotected and that, if effect was given to those decisions, the conclusion might have been reached that the strike was either largely or wholly protected. The appeal had reasonable prospects of success.

36. The strike was protected throughout and the individual Applicants and the other workers were dismissed for participation in a protected strike. Even if the strike could have been said to have become unprotected at about 1600h or so on November 1, 2010 and the individual Applicants could have been said to have participated in an unprotected strike between 1600h on November 1, 2010 and 0600h on November 2, 2010, the reason for the dismissal would still have been predominantly for participation in a protected strike and would still have been predominantly automatically unfair. The remedy itself should have been granted and that remedy was reinstatement.

37. Section 23(2)(c) of the South African Constitution on labour relations entrenched every worker’s right to strike. The South African Labour Relations Act (LRA) gave effect to that and other rights. Section 64 of the LRA on the right to strike and recourse to lock out conferred upon every employee the right to strike if certain conditions or requirements set out in that provision had been satisfied. The term issue in dispute referred to in section 64(1)(a) was defined in relation to a strike or lock-out as meaning the demand, the grievance or the dispute that formed the subject matter of the strike or lock-out. The
word dispute was defined as including an alleged dispute. There was only one requirement which the parties were not agreed had been satisfied in order to have rendered the strike protected.

38. Section 213 of the South African Labour Relations Act on definitions, defined a strike as the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who were or had been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to work in the definition included overtime work whether it was voluntary or compulsory.

39. There were four elements or components that made up a strike under the South African Labour Relations Act. In parlance people called every collective stay-away from work or work-stoppage a strike. Under the LRA a strike had to have the four elements. These were:

(a) a partial or complete concerted refusal to work or retardation or obstruction of work,

(b) by persons who were or had been employed by the same employer or by different employers,

(c) for the purpose of remedying a grievance or resolving a dispute,

(d) in respect of a matter of mutual interest between employer and employee.

40. One should not have talked about a strike in support of a certain demand because, in terms of the definition of the word strike, a strike already included a demand. One should have spoken of a collective refusal to work in support of a certain demand or in pursuit of a certain demand.

41. In Afrox Ltd v SA Chemical Workers Union and Others (1) (1997) 18 ILJ 399 the Labour Court enunciated a principle that if a group of workers had a dispute with their employer that directly affected them and they had complied with the statutory requirements that had to be satisfied in order for them to have been entitled to strike, not only would they have been entitled to strike but also their colleagues who were not directly affected by the dispute would have been entitled to withhold their labour in support of the demands of the group that was directly affected by the dispute. The principle would have been referred to as the worker solidarity principle because the workers who were not directly affected by the dispute but were, nevertheless entitled to have withheld their labour did so in solidarity with their colleagues who were directly affected by the dispute. The worker solidarity principle was crucial to the determination of the question whether the individual Applicants were entitled to take part in the strike in this case.

42. The wage cut demand permitted by the first LAC judgment was limited to the Shell 7. However, the fact that the Applicants expanded the wage cut demand to include other workers in addition to the Shell 7 did not mean that the correct wage cut demand was no longer on the table. It remained part of the expanded wage cut demand. The Respondent was entitled at any stage to take the position that it would have complied only with the wage cut demand relating to the Shell 7. The demand that the Shell 7 be restored to their agreed wage rates and that their full backpay for the period starting from February or March 2009 be paid was never abandoned. As long as the wage cut demand in relation to the Shell 7 had not been abandoned and had not been complied with, the Shell 7 were entitled to have withheld their labour from the Respondent. As long as the Shell 7 were entitled to withhold their labour in support of the wage cut demand, in terms of the worker solidarity principle the rest of the workers, including the individual Applicants were entitled to have withheld their labour from the Respondent in solidarity with the Shell 7.

43. As at October 28, 2010 the issue in dispute in the form of the wage cut demand had been referred to the conciliation process that had failed to produce an agreement between the parties and a certificate of outcome had been issued. A strike notice had been given to the Respondent and the prescribed 48 hours written notice had expired by 1430h. The Shell 7 were entitled as at that time to have collectively withheld their labour in pursuit of the wage cut demand. The fact that the Shell 7 were entitled to have withheld their labour meant that on the basis of the worker solidarity principle, the rest of the workers including the individual Applicants were entitled to have withheld their labour in pursuit of the wage cut demand in respect of the Shell 7. Therefore, the strike that commenced at 1430h on October 28, 2010 was a protected strike. The strike continued on October 29, 30, and 31.
and on November 1. The strike was protected from beginning to end and its legal status never changed.

44. Where concerted refusal to work was resorted to in support of a demand made by a trade union or workers to an employer, the employer would have needed to comply fully and unconditionally with the demand in order for a protected strike to have turned into an unprotected strike. Once the employer had remedied the grievance or complied with the demand or once the dispute had been resolved, the workers might not have continued with their concerted refusal to work because the purpose for which they would have been entitled to withhold their labour would have been achieved. Any continued refusal to work would lack an authorised purpose and therefore the strike would have been unprotected.

45. Another way in which a protected strike would have ceased to be protected would have been if the union or employees abandoned the authorised purpose of the concerted refusal to work and sought to achieve a different purpose that was not authorised. Another way would have been if the employer and the union or workers were to reach an agreement that settled the dispute even if the employer had not complied fully and unconditionally with the original demand of the union and the workers. Absent any of those methods of turning a protected strike into an unprotected strike, a protected strike remained protected.

46. The Respondent made a promise or undertaking to restore the Shell 7 to their agreed wage rates, including increases and to pay their backpay since their transfer from the Shell contract. However, it made that promise or undertaking as a gesture of goodwill and in order to end the strike. That meant that the Respondent made the promise not because it accepted that it had unilaterally changed a term or condition of employment of the Shell 7 or that from February or March 2009 when the Shell 7 were transferred from the Shell contract, it had been in breach of their contracts of employment and was obliged to have restored the Shell 7 to their agreed wage rates and to have paid them their backpay. It did not accept liability to have restored the Shell 7 to their contractually agreed wage rates and to have paid them the back pay that it was legally obliged to pay them.

47. The phrase as a gesture of goodwill had the same legal status as the phrase *ex gratia* as in an *ex gratia* payment. A person who made an *ex gratia* payment to someone else did not accept liability to make that payment but made it as a favour. The South African Concise Oxford Dictionary explained the term *ex gratia* with reference to payment as something done from a sense of moral obligation rather than because of any legal requirement.

48. The Applicants never asked the Respondent to meet their demands as a friendly gesture or out of its goodwill. In effect the Respondent was making an offer of settlement to the Applicants and it was not obliged to have accepted. The Respondent was not acceding to the Applicants demands as it stood. It sought to make an offer as a gesture of goodwill and in order to end the unlawful strike action.

49. If the Applicants had accepted that promise and the basis on which it was made, namely, as a gesture of goodwill and not as an acceptance of legal liability that would have been prejudicial to their rights. Once the Applicants had accepted that offer, the Respondent could then have called upon the workers to return to work and they would have been obliged to return to work. Before they had accepted the offer made on the basis of a gesture of goodwill the Respondent had no right to have called upon the workers to return to work or to resume their duties and they were not obliged to have returned to work. The promise made by the Respondent as a gesture of goodwill and in order to end the strike did not in law have the effect of changing the status of the strike. The strike remained protected.

50. The Respondent promised the Applicants that they would be put on the initial wage rates as a gesture of its goodwill and in order to end the strike. That meant that, whereas, prior to that promise, the Shell 7 had a contractual right to be on those wage rates, if they accepted the Respondent’s promise, the basis for their continued presence on those wage rates would no longer have been their contractual rights but it would have been the Respondent’s goodwill.

51. Whereas the Applicants embarked upon a collective refusal to work in order to put pressure on the Respondent to honour its contractual obligations that were enforceable in a court of law, the Respondent promised them a benefit that was not based on an enforceable right in law but something based on its goodwill that could not
have been enforced in law. If the Applicants had accepted the Respondent’s promise, they would not have got what they had demanded but would have been short-changed. Therefore, the basis upon which the Respondent made its promise showed that it was not giving the workers what they were demanding.

52. If the Applicants had accepted the Respondent’s promise and the Shell 7 were then placed on the agreed wage rates but no longer because they were contractually entitled to be on those wage rates but because of the Respondent’ goodwill, they would have lost a justiciable contractual right to be on those wage rates and accepted a regime to be there at the pleasure of the Respondent. The basis upon which the Respondent made its promise was enough to have justified the conclusion that the promise could not have and did not change the protected strike into an unprotected strike.

53. It was uncertain whether the Respondent’s statement that it would have reinstated the wage rates of the Shell 7 had the effect of restoring the Shell 7 to the wage rates they enjoyed prior to their transfer from the Shell contract. The uncertainty arose from the fact that it was not known whether at a practical level there were any specific measures or steps that the Respondent was required to have taken in order to have effected their restoration for purposes of future payments. What was certain was that the Respondent’s promise or undertaking to pay the Shell 7 the backpay did not constitute compliance with that part of the wage cut demand that required the Respondent to have paid the backpay. That part of the wage cut demand required the Respondent to actually pay the backpay and not to have promised to pay or to have made a promise to pay it at some stage in the future.

54. A promise to have paid the backpay did not equate to the payment of the backpay. There was no full compliance with the wage cut demand. If a court ordered an employer to reinstate an employee to his position and pay him his backpay and the employer reinstated him but did not pay him his backpay but promised that he or she would pay it in due course, there was no full compliance with the order of the court. There would only have been full compliance when the employee had actually been paid his or her backpay as well.

55. The Respondent appeared to have been in too much of a hurry to get the workers back at work with the result that it failed to comply with the wage cut demand in full. Full compliance meant the restoration of the Shell 7 to their wage rates and the actual payment of their backpay. If the Respondent had done that, it would have complied with the wage cut demand and, assuming that the workers could not have continued withholding their labour in pursuit of the wage discrepancy demand, the strike would have ceased to be protected and the Respondent would have been entitled to call upon the individual Applicants and other workers to have returned to work and performed their normal duties.

56. Until the Respondent had restored the Shell 7 to their agreed wage rates and actually paid them their overdue backpay, it had no right to call upon them and the other workers to return to work and they were not under any obligation to have heeded any such call. That was because where a collective refusal to work was resorted to in support of a certain demand upon an employer, the workers were entitled to have continued to withhold their labour as long as the employer had not complied with that demand. It was only when the employer had complied with the demand or the demand had been abandoned or a settlement agreement had been concluded that the workers’ right to have withheld their labour ceased to exist. Partial compliance with the demand was not good enough. What was required was full and unconditional compliance with the demand.

57. The onus was upon the Respondent to show that it met or complied with the wage cut demand in full. The result was, therefore, that what the Respondent did in making the promise to have restored the wage rate of the Shell 7 and the promise to pay them their backpay sometime in the future did not interrupt or terminate the protected status of the strike. The strike continued to be protected. The Respondent had no right in law to have issued the final ultimatum to the Applicants and to have called upon the workers to return to work. The Respondent did not dismiss the individual Applicants and the other workers for participating in an unprotected strike but dismissed them for participating in a protected strike, that meant that it dismissed them for exercising their right to strike. That rendered the dismissal automatically unfair.
58. The Respondent had been in breach of the contracts of employment between itself and each one of the Shell 7 employees and its performance of its obligation was long overdue as the Shell 7 had performed their part of the bargain all along. An employee’s obligation to work and the employer’s obligation to pay the employee the agreed wage are reciprocal obligations. Once an employee had performed the work, the employer was obliged to pay the employee the agreed wage. As long as the employer owed the employee his or her wages or part of his or her wages, the employee was entitled to refuse to work and the employer was not entitled to the services of the employee and had no right in law to have called upon the employee to perform. The Respondent was not entitled to have called upon the Shell 7 in its final ultimatum to perform their obligations until it had performed its long overdue obligations. As long as the Shell 7 were entitled to have withheld their services, the rest of the workers were entitled to have collectively refused to work in support of the demand of the Shell 7. On that basis the dismissal would be automatically unfair.

59. The Applicants were entitled to have withheld their labour in support of the wage discrepancy demand permitted by the Labour Appeal Court, note had to be taken of the fact that there were different versions of the wage discrepancy demand. The Applicants were not entitled to have withheld their labour because there was no evidence that they were obliged to have worked between 1600h on November 1 and 0800h on November 2 when they were dismissed.

60. The first LAC judgment did not permit a version of the wage discrepancy demand that entailed an increase in the wages of the workers. It only permitted a version that did not entail an increase in wages of any of the workers. The Applicants’ demand articulated as the wage discrepancy demand was not permitted by the first LAC judgment. Accordingly, the workers, including the individual Applicants, were not entitled to pursue it by way of a collective refusal to work.

61. Where the employer relied on misconduct on the part of employees to justify their dismissal, the employer bore the onus to have proved the misconduct and to show that dismissal was the appropriate sanction. Section 192(2) of the South African Labour Relations Act on the onus in dismissal disputes provided that if the existence of the dismissal was established, the employer had to prove that the dismissal was fair.

62. In labour law parlance the term misconduct referred to conduct on the part of an employee that constituted either a breach of the contract of employment or a breach of a workplace rule. Participation in an unprotected strike constituted a breach of the contract of employment of the employees and was therefore misconduct. However, before one could have talked about whether employees took part in an unprotected strike, it had to first be shown that the conduct of the employees constituted a strike.

63. The definition of the word strike in the South African Labour Relations Act included the phrase concerted refusal to work. That part of the definition as opposed to the reference to the retardation or obstruction of work was the part applicable to a case such as the present where the workers completely refused to work.

64. It was a basic principle of the law that for employees to have been said to be on strike, they had to have been collectively refusing to work at a time when, in terms of their contracts of employment, they were obliged to be working. If the time when the workers were not working was a time when they were not obliged to be working, they could not have been said to have been on strike except when their conduct constituted an overtime ban. That was why, if workers who took their lunch break from 1300h to 1400h collectively stopped working at 1300h on a particular day and spend their lunch break singing, toy-toying and carrying placards outside of or by the gate of the employer demanding a wage increase, they were not in law engaged in a strike. However, once they did that at a time when they were obliged to work, they would be on strike and if the prescribed statutory procedures had not been followed the strike would have been an unprotected strike.

65. Other factors that supported the view that the dismissal would still have been predominantly automatically unfair or substantively unfair even if the individual Applicants had been obliged to work between 1600h on November 1 and 0600h on November 2, 2010 and could therefore have been said to have participated in an unprotected strike between 1600h or 1700h on November 1
and about 0600h on November 2, 2010 were the following:

(a) For the best part of its duration, the strike was protected
(b) The strike was peaceful
(c) The unprotected strike would have been of short duration
(d) The strike would have been caused by The Respondent's unlawful conduct in acting in breach of the contracts of employment between itself and each one of the Shell 7
(e) Whatever financial loss the Respondent might have suffered could not have been taken into account because it largely flowed from the protected part of the strike
(f) The workers had complied fully with the statutory procedures required to be followed to have rendered strikes protected and it was only the Respondent's promise that might have changed the strike from a protected strike to an unprotected strike
(g) The Respondent had not yet paid the Shell 7 the backpay which it owed them which was a major cause of the strike
(h) The workers had no bad disciplinary record
(i) There was no indication that in the past the individual Applicants had ever been involved in any unprotected strike
(j) In effect the Respondent subsequently condoned participation in the strike by the workers whom it re-employed without giving them even a disciplinary warning
(k) The Applicants co-operated fully with the Respondent and suspended the commencement of the strike on three occasions:
   i. When the Respondent sought to obtain an interdict from the Labour Court
   ii. When it sought to pursue an appeal to the Labour Appeal Court and
   iii. When Mr Badenhorst was not available and was travelling and the Applicants bona fide believed that the strike was protected.

66. A strong factor that showed that dismissal was not a fair sanction in the case and would not have been a fair sanction even if the strike had been unprotected was that a few days after the dismissal of the workers the Respondent re-employed every dismissed employee who applied for re-employment but employed them at a lower wage rate than their previous rates. There was no suggestion that upon re-employment the employees were given a disciplinary warning of any kind.

67. Dismissal as a sanction for misconduct was a sanction of last resort. It had sometimes been referred to as the death penalty. That was said in the light of the harsh consequences it might have had on an employee who was dismissed. For that reason dismissal was only appropriate as a sanction for dismissal in those cases where the misconduct of which the employee was guilty was one that at least the employer considered to render a continued employment relationship intolerable or unacceptable.

68. A court could not have concluded that workers were participating in a strike unless it first inquired into whether or not they were obliged to work. The first judgment ought to have inquired into the issue. If it had, it would have concluded that the Respondent did not produce any evidence that indicated that the individual Applicants were on the shift that was required to work between 1405h on November 1 and 0600h on November 2. Without that evidence, the conclusion that the individual Applicants were participating in a strike during those hours was legally unsustainable. In fact it was not known whether the individual Applicants were on a shift that was required to work between 0600h and 1405h on November 1 when the final ultimatum was issued. It might have been that the workers who were supposed to have been working on those shifts were not among the individual Applicants but were some of those who were re-employed after the dismissal.

69. The dismissal of employees taking part in a protected strike for the operational reasons of a business faced with an ongoing protected strike may have been permissible but in such a case the employer was required to have met a very stringent test. That was so because the law had to protect the workers' right to have taken part in a protected strike without fear of dismissal for participation in a protected strike disguised as a dismissal for operational reasons.

70. The Respondent would have had to have followed the statutory consultation process applicable to dismissal for operational requirements if it relied upon operational requirements. Even if the
Respondent sought to have justified dismissing the workers on operational requirements, it would have failed and the dismissal would still have been substantively unfair.

71. The conclusion reached that the dismissal was automatically unfair made it unnecessary to have inquired into whether the dismissal was also procedurally unfair. The position would have been the same even if the conclusion reached was that the dismissal was substantively unfair. That was because, if a dismissal was automatically unfair or substantively unfair, a finding that it was procedurally unfair did not at a practical level grant the employee any additional remedy in addition to the remedy that arose out of the finding that the dismissal was automatically or substantively unfair.

72. The Labour Court would have granted reinstatement with retrospective effect to the date of dismissal.

JAFTA J concurring:

73. Leave to appeal should have been granted, the appeal upheld, orders of the Labour Court and the Labour Appeal Court set aside and the individual Applicants should have been reinstated. To have held otherwise would have suggested that the contractual term that linked the payable wage-rate to the Shell contract had no force and effect. It appeared that the conclusion that the Shell-7 employees had a contractual right to have been paid at the wage-rate that applied to the Shell contract would have made theirs not a dispute in respect of a matter of mutual interest which was the kind of dispute over which the South African Labour Relations Act permitted workers to strike.

74. Borrowing from other jurisdictions whose constitutions entrenched fundamental rights, it was declared that constitutional rights conferred without express limitation should not have been cut down by reading implicit restrictions into them. That ought not to have been done so as to have brought those rights in line with either unwritten customary law and the common law or written law like statutes. That was so because the South African Constitution was the supreme law from which all laws derived their validity.

75. It was the South African Constitution itself that ordained the limitation of rights enshrined in the Bill of Rights by other laws, including statutes if certain conditions prescribed by it were met. It was in that context that without a challenge to the limitations imposed by the South African Labour Relations Act that its limitations were justified, despite the punitive outcomes they introduced for exercising a guaranteed right.

76. The right to strike was conferred without any limitation and that legislation like the South African Labour Relations Act that limited it had to be construed in a manner least intrusive of the right if the text was reasonably capable of bearing that meaning. What that meant was that in determining whether the strike that started as protected in the contemplation of the South African Labour Relations Act became unprotected at some point, the relevant provisions of the Labour Relations Act, in a manner least intrusive of the right to strike, had to be interpreted.

77. A good point at which the interpretation process should have started was section 64(1) of the South African Labour Relations Act on the right to strike and recourse to lock out, which prescribed conditions for exercising the right to strike. Apart from recognising that every employee had a constitutional right to strike, the section stipulated conditions which had to be met before the right might have been exercised. First, it obliged the employees to refer the issue in dispute to conciliation under the auspices of the Commission for Conciliation, Mediation and Arbitration (the Commission), established in terms of the Labour Relations Act. The section precluded such employees from going on strike until the Commission had issued a certificate to the effect that the dispute remained unresolved or a period of 30 days had elapsed if the parties did not agree on an extension. Once those conditions were met and the employees had elected to strike, they were required to have given the employer a written notice at least 48 hours before the strike commenced. All those conditions were satisfied hence it was common cause that the strike was protected when it commenced.

78. The crucial issue for determination was whether at some point the strike became unprotected and as a result the affected employees lost the protections in section 67 of the South African Labour Relations Act on strike or lock-out in compliance with the Act and became vulnerable to dismissal for exercising their constitutional right. Allied to that was the difficult question
whether the mere loss of those protections meant that employees should have lost their jobs for exercising a constitutionally guaranteed right. There was no provision in the Labour Relations Act which authorised the abnormality apart from section 68(5) on strike or lock-out not in compliance with the Act. A dismissal like the one imposed constituted punishment. The employees were punished for being on strike. It was not so clear whether the punishment was authorised by the Labour Relations Act and if so whether it amounted to a limitation envisaged in section 36 of the South African Constitution on limitation of rights. For the section permitted limitations of guaranteed rights but not punishment for exercising those rights.

79. The concept of a protected strike was introduced by section 67 of the South African Labour Relations Act on strike or lock-out in compliance with the Act. That section afforded striking employees protection if their strike complied with Chapter IV of the Labour Relations Act on strikes and lock outs and as a result it was a protected strike. Participation in such a strike did not amount to a delict or breach of contract and civil proceedings might not have been instituted against a person for participating in a protected strike. An employer might not have dismissed employees for participating in a protected strike, even though the employer was not obliged to have remunerated them. Dismissing an employee for taking part in a protected strike constituted an automatically unfair dismissal, for which reinstatement was the appropriate remedy.

80. What emerged from the text of section 68(5) of the South African Labour Relations Act on strike or lock-out not in compliance with the Act was that the Labour Relations Act did not directly authorise dismissal of employees who were involved in an unprotected strike but did so impliedly. The implication arose from the provision's recognition that participation in an unprotected strike might have, in appropriate circumstances, constituted a fair reason for dismissal. That suggested that such a dismissal might have been taken to have been substantively fair because it was based on a valid reason.

81. Since it could not have been gainsaid that section 68(5) of the South African Labour Relations Act on strike or lock-out not in compliance with the Act introduced into the right to strike, the Court was duty-bound to have interpreted it in a manner least restrictive of that right if its language was reasonably capable of bearing that construction. In doing so close attention had to be paid to the language. It had to proceed from the premise that the protections in section 67 on strike or lock-out in compliance with the Act were not available to cases where section 68(5) on strike or lock-out not in compliance with the Act applied. Therefore employees to whom the provision applied were not insulated against dismissal for participating in a strike. That was because those protections were afforded only to the employees who took part in a protected strike.

82. It did not appear that the language of section 68(5) of the South African Labour Relations Act on strike or lock-out not in compliance with the Act was reasonably capable of a meaning that least intruded into the right to strike. Where it applied, it justified a dismissal for exercising a constitutionally guaranteed right. The punishment of dismissal it permitted had as its consequence, the outcome of disabling a worker from exercising the right to strike because that right might have been enjoyed by only those who were fortunate enough to have been in employment. If one was unemployed, she could not have withheld her labour for the purpose of putting pressure on an employer to have resolved a grievance or a matter of mutual interest.

83. If the Respondent wanted to render the strike unprotected, it should have tendered to meet both demands. In respect of the second demand, the Respondent was required to eliminate disparities in wages by discontinuing its policy of paying higher wages in lucrative contracts and ensuring that there was parity in wages. The choice was that of the Respondent to have determined the method to be followed to realise parity. It depended on the Respondent to have achieved this goal by either cutting down the wages of employees in lucrative contracts or increasing the wages of the lower earning employees.

84. Notice was issued so as to have met requirements of section 64(1) of the South African Labour Relations Act on the right to strike and recourse to lock out which imposed pre-conditions for exercising the right to strike. All those conditions were satisfied before the strike commenced on October 28, 2010. Section 64 did not regulate
negotiations between the striking workers and their employer during the strike. Nor did the Labour Relations Act prescribe the issues to be covered in such negotiations. It was open to negotiating parties to have raised whatever issues they wished to have placed on the agenda. At those negotiations workers might have even expanded the dispute in respect of which the strike was undertaken. It would have been up to the employer to have rejected the expansion of the demand.

85. The fact that the dispute was expanded at the negotiations during a strike did not detract from the fact that the strike was pursued in order to have resolved a particular and defined dispute. It was not open to the employer to simply regard the strike as unprotected because the dispute was expanded. What the employer needed to have done to end the strike was to have met the demand encapsulating the dispute that was unsuccessfully conciliated and led to strike. In doing so the employer might have rejected the expanded part of the dispute and confined itself to the part in respect of which the workers were entitled to strike.

86. The Respondent needed to have met not only the wage-cut demand but also the wage-discrepancy demand. If at the meetings the parties had attempted to expand or alter that demand, the Respondent was entitled to have rejected the attempt. But such attempt did not relieve the Respondent from the obligation to have met the wage-discrepancy demand as defined if it wished to end the protected strike.

87. The Respondent’s failure to have met the wage-discrepancy demand did not change what was a protected strike into an unprotected one. To have said that the Applicants pursued under the demand something other than what was endorsed was to have overlooked the notice of October 27, 2010. That was the notice that activated the strike and it stated expressly that the Applicants would go on strike in respect of specific demands: the wage-discrepancy demand and the wage-cut demand. There was simply no legal basis for disregarding the contents of the notice. Without it the strike could not have been protected.

88. If the Applicants had failed to issue the notice and had relied on statements alluded to it at the various meetings, the strike could have been unprotected. There was no basis for regarding what was said at negotiations as having altered the nature of the strike from being protected to an unprotected strike. There were no grounds also for holding that what rendered the strike protected was wage-cut demand only.

89. Determining the demands in respect of which the Applicants went on strike with reference only to what it said at negotiations and not the notice of October 27, 2010 lost sight of reality. That reality was that in negotiations parties started by advancing their highest demands and as negotiations proceeded, compromises were made at the end of negotiations each party might have obtained less than what it sought to have achieved. These negotiations like any other negotiations were not regulated by any statutes and no issue was excluded from the agenda.

90. When the Applicants issued the notice on October 27, 2010 it was exercising a statutory power. The relevant provision authorised employees or their union to have issued notice before commencing a strike action. There was nothing in the provision which suggested, even remotely, that a union which had issued the notice had the power to have varied, amended or altered such notice and least of all done so orally at a negotiation in the meetings. Had the Applicants purported to have altered the notice by advancing a new demand, it would have acted without power. What the Respondent was obliged to do to end the protected strike was to meet both demands on the notice.

Leave to appeal granted, appeal upheld.

I. Orders of the Labour Appeal Court and the Labour Court set aside and that of the Labour Court replaced with the following:
(a) Dismissal of the individual Applicants by the Respondent on November 2, 2010 was automatically unfair.
(b) Respondent ordered to reinstate each one of the individual Applicants in its employ on terms and conditions of employment not less favourable to him or her than the terms and conditions that governed his or her employment when the individual Applicants were dismissed on November 2, 2010.
(c) Order of reinstatement to operate with retrospective effect to November 2, 2010.

II. Respondent to pay the Applicants’ costs both in the Court and in the Labour Appeal Court.

Relevance to the Kenyan Situation:
The Constitution of Kenya, 2010 under article 41(1) provides that every person has the right to fair labour practices. It goes further under sub-article 2 to provide that every worker has the right to fair remuneration, to reasonable working conditions, to form, join or participate in the activities and programmes of a trade union and to go on strike. Sub-article 3 provides that every employer has the right to form and join an employer’s organisation and to participate in the activities and programmes of an employer’s organisation.

The Labour Relations Act, 2007 under section 76 provides that a person may participate in a strike or lock-out if the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment. Other issues under the said section that entitle one to participate in a strike or lock-out include: the recognition of a trade union, the trade dispute is unresolved after conciliation under the Act or as specified in a registered collective agreement that provides for the private conciliation of disputes and seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of the trade union.

Section 79 (2) of the Labour Relations Act, 2007 provides that a person does not commit a breach of contract or a tort by taking part in a protected strike or a protected lock-out or any lawful conduct in contemplation or furtherance of a protected strike or a protected lock-out. Section 79 (3) proceeds on to state that an employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.

Section 79 (4) provides that civil proceedings may not be instituted against any person for participating in a protected strike or a protected lock-out or any conduct in furtherance of a protected strike or protected lock-out. Section 79 (6) provides that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lock-out.

Kenyan courts have handled various cases touching on protected strikes, for instance in Teachers Service Commission Vs Kenya National Union of Teachers (Knut) & Another Cause 1539 of 2012 the Industrial Court held that It was clear from the text of the notices that the Respondents did not comply with the provisions of section 76 (b) and(c) and section 78 (1) (e) of the Labour Relations Act and that the parties did not go for conciliation either as provided in section 62 of the Labour Relations Act or in their own internal machinery under the recognition agreements. The Court further held that both notices were therefore not in compliance with the law as there were no conciliations that had failed to warrant the issuance of the strike notices. The Court finally held that the strikes were therefore not protected under section 79 of the Labour Relations Act.

This case will go a long way in assisting Kenyan Courts to handle similar issues as the one that faced the South African Constitutional Court more effectively.

Children have rights which are distinct from other people’s rights

Makhlouf v Secretary of State for the Home Department
Supreme Court of the United Kingdom
[2016] UKSC 59 on appeal from [2014] NICA 86
November 16, 2016
Reported by Linda Awuor & Kakai Toili

Family law – children - rights and welfare of children – right to parental care – parental responsibility –best interests of children - whether it was in the best interests for children to have their father who had been convicted of various criminal offences to be deported - Borders, Citizenship and Immigration Act 2009 (United Kingdom), section 55, Human Rights Act 1998 (United Kingdom) section 6, United Nations Convention on the Rights of the Child, article 3 (1)

Brief Facts:
The Appellant was born in Tunisia. In 1996 he married a United Kingdom citizen and they had a daughter, born in Northern Ireland, in 1997. Shortly after the birth, the Appellant joined them in Northern Ireland on a spousal visa. A year later he was granted indefinite leave to remain. He separated from his wife in 1999. In 2006 he had a son with a new partner but the relationship broke down shortly after the birth of the son. In 2008 the Family Court
ordered that he could only have indirect contact with his daughter and that he had to obtain the leave of the Court before making any further applications for contact. The Appellant had not had any contact with his son since 2010.

In 2005 the Appellant was convicted of two counts of assault occasioning grievous bodily harm, for which he received concurrent sentences of 39 months and nine months imprisonment. Between 2008 and 2010 he was convicted and sentenced for a series of further offences including breach of a non-molestation order, disorderly behavior and assaulting a police officer. Following a further incident in 2011 he was convicted of disorderly behavior, attempted criminal damage and resisting a police officer for which he received three concurrent sentences of five months imprisonment.

In 2012 the Home Secretary sought the Appellant’s deportation on account of his convictions. Following inquiries regarding the Appellant’s family circumstances, a deportation order was issued. The Appellant appealed claiming that his deportation would breach his and his children’s right to respect for private and family life under article 8 of the European Convention on Human Rights and that the Secretary of State had failed to take sufficient account of the best interests of his children. His appeals to the First-tier Tribunal, Upper Tribunal and Court of Appeal were dismissed thus the Appellant filed an appeal to the Court.

**Issue:**

(i) Whether it was in the best interests of children under section 55 of the Borders, Citizenship and Immigration Act, 2009 (United Kingdom) on the duty regarding the welfare of children to have their formerly convicted father deported.

**Held by majority:**

1. Where a decision was taken out on the deportation of a foreign criminal who had children residing in the United Kingdom, separate consideration of their best interests was obviously required especially if they did not converge with those of the parent to be deported. In the case of a child with a dual ethnic background, that factor required to be closely examined. The child's interests had to rank as a primary consideration.

2. All the evidence provided led unmistakably to the conclusion that the Appellant did not enjoy any relationship with either of his children and that they had led lives which were wholly untouched by the circumstance that he was their father. The possibility of such a relationship to have developed was a factor to be considered.

3. The question of the risk of the Appellant’s re-offending was one of the factors to be considered but his criminal behavior after the offences in 2005 did not augur well in that assessment, these were associated with disputes about contact with his children but, at the least, they spoke to his propensity to indulge in offending behavior if he failed to get his way.

4. The Secretary of State was not obliged to have made further inquiries in relation to the Appellant and his children beyond those which had already taken place. The children did not require the disruption of further investigation in circumstances where a court with appropriate jurisdiction had made important decisions in relation to their welfare.

**Lady Hale concurring:**

5. Where children would be affected by a deportation or removal decision, their best interests had to be treated as a primary consideration, and considered separately from those of the adults involved and from the public interest.

6. The duty to treat the children’s best interests as a primary consideration stemmed from two sources in domestic law. First, section 55 of the Borders, Citizenship and Immigration Act 2009 on the duty regarding the welfare of children required the Secretary of State to make arrangements for ensuring that her own functions in relation to immigration, asylum and nationality, and those of her immigration officers, were discharged having had regard to the need to have safeguarded and promoted the welfare of children who were in the United Kingdom. The aim was to reflect in United Kingdom law the effect of article 3 (1) of the United Nations Convention on the rights of the child, which required that in all actions concerning children, including those by administrative bodies, the best interests of the child should have been a primary consideration.

7. There was a second source of the obligation, in section 6(1) of the Human Rights Act 1998 on acts of public authorities, which required public authorities to have acted compatibly with the rights contained in the European Convention
on Human Rights, including the right to respect for family life contained in article 8 which had been interpreted by the European Court of Human Rights to include the duty in article 3(1) of the United Nations Convention on the rights of the child. Children had to be recognised as rights-holders in their own right and not just as adjuncts to other people’s rights. But that did not mean that their rights were inevitably a passport to another person’s rights.

8. The Appellant was treating the children as a passport to his own rights, rather than as rights-holders in their own right. His daughter was nearly 15 when the deportation order was made and was then nearly 19. Her parents separated before she was two years old. Her contact with him ended when she was five. Legal proceedings when she was ten ended in an order for indirect contact only and a further order that her father should not have been able to make further applications about her upbringing without the permission of the Court. It could be assumed, therefore, that there were good reasons for not requiring the mother to have allowed direct contact between father and daughter.

9. Without a very good reason to the contrary, the Secretary of State was entitled to treat the orders of the family courts as reflecting what was indeed in the best interests of the children concerned. After all, a family court deciding the future of a child had to make the welfare of the child, not only a primary consideration, but its paramount consideration.

10. Family courts were supposed to have known about the best interests of children and they had appropriate investigative resources to have made their own independent enquiries should they have needed to do so. The idea that the Secretary of State should have made her own investigation of matters which had already been investigated by the family courts was not only completely unrealistic, it was contrary to the understanding that the uncertainty and anxiety generated by repeated investigations and disputes about their future was usually bad for children. It was good for children, especially children of mixed ethnicity, to have had a relationship with both their parents.

11. It was good for the children to have peace and stability. If the Appellant’s daughter wished to establish a closer relationship with her father, she would have been able to do that for herself, and it would have made little difference to their indirect contact whether he was in the United Kingdom or in Tunisia.

12. The Secretary of State’s officials deserved credit for the patience and perseverance with which they conducted their inquiries into the Appellant’s family circumstances. There was nothing which should have prompted them to make further enquiries as to the best interests of the children. There was nothing at all to suggest that the best interests of the children required that their father should have remained in the United Kingdom. Of course there could be cases where fuller inquiries were warranted or where the best interests of children did outweigh the public interest in deportation or removal. That was emphatically not one of them.

Appeal dismissed.

Relevance to the Kenyan Position

The Constitution of Kenya, 2010 under article 45 (1) provides that the family is the natural and fundamental unit of the society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.

Article 53 (1) (e) of the Constitution provides that every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not. Article 53 (2) goes on to state that a child’s best interests are of paramount importance in every matter concerning the child.

The Children Act Cap 141 Laws of Kenya under section 4 (2) provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Section 4 (3) of the said Act goes on to state that all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by the Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to: safeguard and promote the rights and welfare of the child, conserve and promote the welfare of the child, secure for the child such guidance and correction as is necessary for the
The 2nd Petitioner who was facing deportation for having been in Kenya illegally argued that the order for his deportation was contrary to article 45 of the Constitution of Kenya as it would break a family unit and also that the Petitioners children would suffer neglect as his children’s constitutional right to parental care, love and protection would be violated contrary to article 53 of the Constitution. While dismissing the Petition the Court stated that the Petitioners’ family had not been denied the necessary recognition and protection envisaged under Article 45 (1) of the Constitution and that the Court was unable to discern how the children would not have been provided for if the 2nd Petitioner was deported. The Court further held that general statements to the effect that rights have been violated were not enough and that there was need for a more cogent substantiation.

This case will be of great help to Kenyan Courts faced with a similar challenge to handle it more effectively and to expand the jurisprudence on this area of law.
Kenya Law staff benefits from a crucial team building session

By Erick Odworo

The Kenya Law’s annual staff team building was held between 21st to 24th September, 2016 in Mombasa.

The session, which was facilitated by Antihill Champions Team Building Consultants, started by members being taken through personality profiling – self-awareness sessions and identification of individual and teams’ blind spots that have been reducing cohesion.

This was made possible through such mentally engaging activities like the red and green, bucket ball, amoeba strategy and KSS model among other activities. The team identified areas of improvement in communication styles, perception, decision making, team spirit, personality conflicts, professionalism, interpersonal relations and departmental synergy among others.

At the end of the second day, all the issues and action points were harmonised and discussed by the consultant and the entire team led by the Chief Executive Officer Long’et Terer, who assured the team that will continue to implementing them to enhance cohesion and synergy.

With a more energised and motivated team, Kenya Law can only serve the public better.
Kenya Law joined other exhibitors at the 14th Annual Nairobi Trade Fair (NITF) show held at Jamuhuri Park from 3rd-9th October 2016.

The 2016 NITF was themed “Enhancing Technology in Agriculture and Industry for Food Security and National Growth” and was officially opened by his Excellency President Uhuru Kenyatta on 5th October 2016.

The 2016 NITF attracted more than 90 foreign exhibitors, more than 400 local exhibitors and more than 600,000 visitors and offered an opportunity to regional, continental and global exhibitors to show case and demonstrate their products and services. It also offered visitors an opportunity to interact with different people from diverse backgrounds in business hence creating a platform for exchanging ideas and experiences.

Kenya Law representatives also educated various people visiting the stand on how to navigate through the Kenya Law website; which includes case search, Laws of Kenya, recent amended acts, election petitions among others.

Copies of the pocket size Constitutions and other Kenya Law magazines were distributed to very delighted visitors.

1. Nairobi County Governor Dr. Evans Kidero takes a glimpse of cases compiled in the Supreme Court case digests volume 1. He was among the hundreds of visitors who visited the Kenya Law at the 2016 Nairobi International trade Fair.

2. Ms. Carolyne Wairimu (right) educates the public on how to use the Kenya law website.

3. Kenya law staff James Onguso (right) and Musembi Kasavuli (left) attend to visitors at the Kenya Law exhibition tent during the Nairobi International Trade Fair held at the Jamhuri park grounds from 3rd-9th October 2016.
Public legal information is part of the common heritage of humanity and maximizing access to this information promotes Justice and the Rule of Law. It is for this reason that Kenya Law Participated in the 2016 LSK Legal Awareness week held from 26th September to 30th September at the Milimani Commercial Court.

The objective of the Legal Awareness Week is to promote the mandate of the Law Society of Kenya by extending legal literacy and awareness to members of the public through provision of free legal advice. The theme for the event this year was, "Improving Access to Justice through Alternative Dispute Resolution".

The event was officially launched by the acting President of the Supreme Court, Justice Mohammed Ibrahim who hailed exhibitors for providing the weeklong free services to members of the public. The advocates appreciated the service Kenya law offers to them and making the cases and statutes easily available to them as well as the Kenya Law weekly updates which they receive through the newsletter.

The event promoted better public understanding of the mandate of Kenya Law and its bid to Provide Universal Access to Kenya’s Public Legal Information for the Promotion of the Rule of Law.
This is a synopsis of legislation in the form of Bills and Acts of Parliament that have been enacted in the period between October-December 2016. This synopsis provides for legislation enacted in both houses, Senate and National Assembly.

BILLS

A. SENATE BILLS

1. **Constitution of Kenya (Amendment) (No. 2) Bill, 2016**
   
   Dated: 2nd November, 2016
   
   **Sponsor:** Kembi Gitura, Senator
   
   **Objective** - This Bill seeks to amend the Constitution so as to reduce the number of counties to forty-six, by excluding Nairobi from the ambit of county governments and placing it under the leadership of the National Government. It seeks to establish Nairobi as the National Capital City and empowers the President to nominate a Cabinet Secretary to head the City.

2. **The Care and Protection of Child and Parents Bill, 2016**
   
   Dated: 2nd November, 2016
   
   **Sponsor** - Masha Elizabeth Ongoro, Senator
   
   **Objective** - This Bill is for an Act of Parliament to provide a framework for the care and protection of child parents within the Counties. It also seeks to provide a framework through which an expectant girl child or a child parent may actualise their right to basic education and at the same time ensure the care of their children.

   It provides a framework for the provision of care centres which would provide facilities for the care of children born to child parents and who would wish to resume with their studies but have no person to take care of their child. The Bill imposes an obligation on the county governments to establish care centres for this purpose and sets out the standards that a county government or any other person who intends to establish a care centres is required to meet. The Bill leaves it to the county governments to provide a framework for the registration and licensing of the centres and the manner in which they are to be monitored and inspections carried out in relation to the centres.

3. **Public Participation Bill, 2016**
   
   Dated - 8th November, 2016
   
   **Sponsor** - Amos Wako, Senator and Chairperson, Standing Committee on Legal Affairs and Human Rights.
   
   **Objective** - The principal object of the Bill is to provide a framework for effective public participation and to give effect to the constitutional principles of democracy and participation of the people under Articles 1, 10, 35, 69, 118, 174 and 184, 196, 201 and 232 of the Constitution. This Bill proposes to provide a national framework for public participation and a mechanism to facilitate effective and coordinated public participation.

4. **County Boundaries Bill, 2016**
   
   Dated- 8th November, 2016
   
   **Sponsor** - Mutula Kilonzo Jnr, Member, Committee on Justice and Legal Affairs
   
   **Objective** - The Bill mainly seeks to provide for county boundaries and for a mechanism for the resolution of county boundary disputes through the establishment of a county boundaries mediation committee; It also gives effect to Article 188 of the Constitution on the alteration of county boundaries.

5. **Coconut Industry Development Bill, 2016**
   
   Dated - 9th November, 2016
   
   **Sponsor** - Masha Elizabeth Ongoro, Senator
   
   **Objective** - The highlight of this Bill is the revamping of coconut farming in order to make it a profitable, sustainable and development-oriented activity. It proposes to provide an avenue for appreciating the medicinal, aesthetic, touristic and artistic value of coconut by encouraging value addition in the processing of coconut and its products. The Bill therefore
establishes the Coconut Industry Development Board to regulate all matters relating to the Coconut industry.

B. NATIONAL ASSEMBLY BILLS

   Dated-16th November, 2016
   Sponsor - Abdinoor Mohamed Ali, Member of Parliament
   Objective-The principal object of this Bill is to streamline the marketing of livestock and livestock products in Kenya. This is to be achieved through the establishment of the Livestock and Livestock Products Development and Marketing Board which is to be the main body dealing with the concerns of the marketing of livestock and livestock products in the country.

   Dated-16th November, 2016
   Sponsor - Aden Duale, Leader of Majority Party.
   Objective-The purpose of this Bill is to facilitate the use of movable property as collateral for credit facilities, to establish the Office of the Registrar of security rights, to promote consistency and certainty in secured financing relating to movable assets. It also seeks to enhance the ability of individuals and entities to access credit using movable assets and to establish a Registry to facilitate the registration of notices relating to security rights in movable assets.

C. ACTS

1. Controller of Budget Act, No. 26 of 2016
   Commencement date-21st September, 2016
   OBJECTIVE- This is an Act of Parliament enacted to give effect to the provisions of Articles 225, 228 and 252 of the Constitution regarding the functions of the Office of the Controller of Budget. The functions of Controller of budget are enumerated under section 5 of the Act. Section 9 of the Act mandates the Controller of Budget in accordance to Article 228(6) of the Constitution to submit to Parliament quarterly budget implementation reports for the national and county governments within thirty days after the end of each quarter. Controller of Budget is also required to submit special reports as provided for under Articles 225(7), 252(1)(a) and 254(2) of the Constitution. This Act repeals Independent Offices (Appointment) Act (No. 8 of 2011).

2. Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016
   Commencement date-21st September, 2016
   Objective-This is an Act of Parliament to provide a framework for the protection and promotion of traditional knowledge and cultural expressions. It also gives effect to Articles 11, 40 and 69(1) (c) of the Constitution. In Article 11, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Article 40 provides for the protection of the right to property while Article 69 (1)(c) makes provision for the obligations in respect of the environment.

3. Natural Resources (Classes Of Transactions Subject To Ratification) Act, No. 41 of 2016
   Commencement date-4th October, 2016
   Objective- This is an Act of Parliament to give effect to Article 71 of the Constitution of Kenya, 2010 which provides for the agreements relating to natural resource. The application of the Act is provided under section 3 which provides that the Act applies to any transaction entered into on
or after the effective date, which under Article 71 of the Constitution, is subject to ratification by Parliament. The effective date here being the date in which the Constitution came into force. The classes of transactions are set out in the schedule of the Act, subject to ratification by Parliament. Submission of agreement by a beneficiary to Cabinet Secretary shall be done not later than fourteen days after entering into a transaction.

**Water Act, No. 43 of 2016**

**Commencement date—By Notice**

**Objective**—An Act of Parliament to provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water; to provide for the regulation and management of water supply and sewerage services; to repeal the Water Act (Cap. 372) and certain provisions of the Local Government Act. The Act provides for the establishment the Water Resources Management Authority and outlines its powers and functions. This Act repeals the Water Act, No. 8 of 2002.

4. **Contempt of Court Act, No. 46 of 2016**

**Date of Commencement: 13th January, 2017**

This Act defines and limits the powers of courts in punishing for contempt of court. The objectives of this Act are to uphold the dignity and authority of the court, ensure compliance with the directions of court, ensure the observance and respect of due process of law. The Act also seeks to preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice as administered by court.

5. **Bribery Act, No. 47 of 2016**

**Commencement date: 13th January, 2017**

This Act provides for the prevention, investigation and punishment of bribery. It provides for its application to be to the public, public officers and private entities.

*Note: To read more on these pieces of legislation, visit, www.kenyalaw.org.*
Kenya Law Reports 2014 Volume 1

KLR 2014
This Law Report contains precedent setting judicial opinions delivered in the Year 2014 by the Supreme Court, Court of Appeal, High Court, Environment and Land Court and the Employment and Labour Relations Court.

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ACK Garden Annex, 5th Floor, 1st Ngong Avenue, Ngong Road, Upper Hill     P.O Box 10443 - 00100, Nairobi - Kenya
Tel: +254 (020) 27 12767, 20 11614, 2719231 Mob: +254 718 799 464, 730 063 309

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