



Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others (Petition 4 of 2015) [2017] KESC 11 (KLR) (28 July 2017) (Judgment)

Aviation & Allied Workers Union of Kenya v Kenya Airways Limited & 3 others [2017] eKLR

Neutral citation: [2017] KESC 11 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

PETITION 4 OF 2015

PM MWILU, DCJ & VP, MK IBRAHIM, JB OJWANG, SC WANJALA & I LENAOLA, SCJJ

JULY 28, 2017

BETWEEN

AVIATION & ALLIED WORKERS UNION OF KENYA APPELLANT

AND

KENYA AIRWAYS LIMITED 1ST RESPONDENT

MINISTER FOR TRANSPORT 2ND RESPONDENT

MINISTER FOR LABOUR AND HUMAN RESOURCE

DEVELOPMENT 3RD RESPONDENT

ATTORNEY-GENERAL 4TH RESPONDENT

(Being an Appeal against the Judgment of the Court of Appeal sitting in Nairobi (Gitinji, Maraga and Murgor JJA), delivered on 11th July 2014, in Civil Appeal No. 46 of 2013)

Principles that guide the Supreme Court in exercising its appellate jurisdiction under article 163(4) (a) of the Constitution

Reported by June Jumbari and John Ribia

Jurisdiction – Jurisdiction of the Supreme court – appeals to the Supreme Court – appeals to the Supreme Court from the Court of Appeal – appeals as of right – whether employment matters generally involved matters that involved the interpretation and application of the Constitution by virtue of article 41 of the Constitution that provided for fair labour practices – whether employees’ rights to fair labour practices were directly in issue both at the Industrial Court (as it then was) and the Court of Appeal for the appeal so as to lie in the Supreme Court as of right – Constitution of Kenya articles 41 and 163(4).

Constitutional Law – fundamental rights and freedoms – labour relations – right to fair labour practices – whether employment matters generally fell under the Constitution by virtue of article 41 on fair labour practices – Constitution of Kenya article 41.



Brief facts

The petitioner contended that the instant appeal was before the Supreme Court as of right, as it sought the Supreme Court's interpretation of various provisions of the Constitution, which related to employment law hence certification was not a prerequisite. The petitioner also contended that the decision of the Court of Appeal stood in conflict with fair labour practices, and infringed on the fundamental rights and freedoms of the affected employees and that article 41 of the Constitution, which governed employees' right to fair labour practices was directly in issue both at the Industrial Court (as it then was) and the Court of Appeal, as it formed the basis for determining issues of substantive and procedural fairness in redundancy matters. The petitioner further contended that employment disputes generally touched on fundamental rights and freedoms of the individual, and thus, the redundancy issue was inseparable from norms of fair labour practices under article 41 of the Constitution.

The 1st respondent's case was that the appeal did not coincide with the terms of article 163 (4)(a) of the Constitution and on that account, fell outside the Supreme Court's jurisdiction. The 2nd, 3rd and 4th respondents supported the 1st respondent's case, and submitted that the instant court had no jurisdiction to hear the appeal as there was no constitutional issue that was the subject of interpretation or application at the other Superior Courts; and hence, without certification by the Court of Appeal, the appellant's case lacked a foundation.

Issues

- i. What were the guiding principles that defined the jurisdiction of the Supreme Court as concerned appeals that lay from the Court of Appeal in matters involving the interpretation and application of the Constitution.
- ii. Whether constitutional issues raised in the petition of appeal that had not been raised in the Industrial Court (as it then was) and the Court of Appeal for the matter to be heard in the Supreme Court without certification.
- iii. Whether employment disputes generally touched on fundamental rights and freedoms and as such they conferred upon a litigant the right to stand before the Supreme Court.

Held

1. An appeal to the court ought to originate from a Court of Appeal case where the issues of contestation revolved around the interpretation or application of the Constitution. An appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under the provisions of article 163(4)(a).
2. At no point in either of the superior court's Judgment, did the question of constitutional interpretation or application arise. Although the superior courts might have made reference to certain provisions of the Constitution, it was only in broad terms in the spirit of the new constitutional order, which required that all decisions made by any public organ, officer or person, ought to be in consonance with certain constitutional signals.
3. The appellant's case at the Industrial Court, as well as the 1st respondent's case at the Court of Appeal, squarely entailed the interpretation and application of the terms of the Employment Act and the Labour Relations Act, in so far as their focal point was the issue of redundancy. All references to the terms of the Constitution were guided only by the object of incorporating that charter's spirit, values and principles.
4. Only two grounds in the petition of appeal made reference to certain constitutional provisions; in particular one ground that the Court of Appeal erred in law by evading the question whether the International Labour Organization (ILO) Recommendation No. 166 of the ILO Convention No. 158



- applied to Kenya or not, under, and pursuant to article 2(5) and (6) of the Constitution; and a second ground which stated that the Court of Appeal did not give due consideration to the terms of article 41 of the Constitution. The appellant was inviting the court to delve deeper into such constitutional signals, and to extract issues meriting interpretation.
5. The appeal revolved around the issue of redundancy, and whether or not the 1st respondent's actions were lawful and justified. Consideration of such an issue called for a review of various applicable statutory provisions, which the appellant did not claim to be in conflict with the requirements of fair labour practices under article 41 of the Constitution. No provision of the Constitution was the subject of interpretation in either of the superior courts. It behooved the appellant to indicate with precision any relevant provision of the Constitution that affected its case, and the context in which it became necessary for the court to render interpretation. In such an appeal, the appellant ought to show how the other superior courts incorrectly interpreted, or applied the relevant provision of the Constitution, and how the right interpretation when applied, would impact upon its case. Interpretation or application, in that regard, resided in the assumption of a task that transcended just the reference to the rich generality of a constitutional principle. It was a task that focused upon specific clauses of the Constitution, and called for the attribution of requisite meaning, tenor and effect.
 6. It might have been a valid argument, at a general level, that employment disputes generally touched on fundamental rights and freedoms of the individual, and thus, the redundancy question was inseparable from norms of fair labour practices, under article 41 of the Constitution. However, such a general proposition could not in and of itself, confer upon a litigant standing before the court, as each case bore its unique facts, and ought to be evaluated on its individual merit. The two superior courts had not delved into the arena of constitutional interpretation or application. Furthermore, the Supreme Court, it did not in general, entertain for the first time legal issues that had not been subjected to other superior courts' consideration and analysis. As the court's jurisdiction was substantially donated by the Constitution, the Supreme Court had to limit itself to the intent of the Constitution. The appellant's case did not meet the requisite jurisdictional threshold under article 163(4)(a), and as such, the foundation upon which the petition of appeal would stand, was not sustainable.
 7. The appellant's case did not meet the requisite jurisdictional threshold under article 163(4)(a) which was the basis for delving into a determination of the question whether the Court of Appeal properly arrived at its conclusion in relation to remedies for the appellant and as regarded that court's option of remitting the matter to the first superior court for assessment of damages.

Preliminary objection allowed; petition of appeal struck out; each party was to bear their own costs.

Citations

Cases

Kenya

1. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Explained)
2. *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* Civil Appeal 46 of 2013; [2014] eKLR - (Followed)
3. *Munya, Gatirau Peter v Dickson Mwenda & 2 Others* Application No 5 of 2014; [2014] eKLR - (Followed)
4. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Followed)
5. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] KESC 7 (KLR) - (Followed)
6. *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 2(5); 2(6); 10 ; 41; 47; 163(4)(a); Chapter 4 - (Interpreted)



2. Employment Act (cap 226) sections 2, 40, 40(1); 49(4)- (Interpreted)
3. Industrial Court Act (cap 234B) section 17(2) - (Interpreted)
4. Labour Relations Act (cap 234) section 2 - (Interpreted)

International Instruments

ILO Convention No 158 - Termination of Employment Convention, 1982 paragraph 166 - (Mentioned)

Advocates

1. *Mr. Mwenesi* for the appellant.
2. *Mr. Amoko* for the 1st respondent.
3. *Mr. Onyiso* for the 2nd, 3rd & 4th respondents.

JUDGMENT

A. Introduction

1. The appellant filed its appeal to this court pursuant to article 163(4)(a) of the [*Constitution of Kenya, 2010*](#). The petition, dated May 19, 2015, is an appeal from the Judgment and Orders of the Court of Appeal at Nairobi, dated the July 11, 2014 in Civil Appeal No 46 of 2013.

B. Background

2. In September, 2012, a group of 447 employees of Kenya Airways Limited (KQ) were relieved of their duties, as part of a staff rationalization programme that had been initiated by KQ. The affected employees, through their union, Aviation & Allied Workers Union Kenya (the appellant), filed a suit at the Industrial Court (Industrial Cause No 1616 of 2012), seeking *inter alia*, the following Orders:
 - (a) a declaration that the affected employees have suffered unfair and wrongful redundancy;
 - (b) an Order that the affected employees be reinstated to their former employment and positions without any loss of benefit and/or seniority;
 - (c) in the alternative, the employees be paid actual pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned, housing allowance, and all accruing allowances; and
 - (d) an Order for payment of maximum compensation for loss of employment.
3. By an award delivered on December 3, 2012, the Industrial Court (Rika J) allowed the petition, and gave the following Orders:
 - (a) The restructuring, redundancy and retrenchment processes, carried out by the 1st respondent between 1st August, 2012 and September 4, 2012, were substantively without justification, and procedurally wrong, amounting to unfair termination of employment.
 - (b) All the affected 447 unionisable employees are hereby reinstated to their roles at KQ, held as at August 30, 2012, without loss of seniority, continuity, benefits and privileges.
 - (c) All employees shall be paid their back-salaries and allowances from the month of September, 2012.
 - (d) All the reinstated employees are directed to report to work tomorrow at 8.00 a.m.



4. KQ was dissatisfied with the decision of the Industrial Court, and lodged an appeal at the Court of Appeal in Nairobi, *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others*, Civil Appeal No. 46 of 2013. Upon considering the matter, the Court of Appeal (Githinji, Maraga, Murgor JJ A) allowed the appeal, and set aside the award of the Industrial Court. In doing so, the Appellate Court noted that though termination of employment on account of redundancy was justified, the selection procedure was unfair, and hence the termination was unlawful, save that the Order for re-instatement preferred by the Industrial Court was justified. On that basis, the Court of Appeal awarded the retrenched employees damages equivalent to six months gross salary, in addition to three months' salary in lieu of notice, severance pay of 20 days for every completed year of service, and all other unpaid dues which KQ had agreed to pay.
5. The appellant was dissatisfied with the Judgment and Orders of the Court of Appeal, and filed this appeal which is premised on the following grounds:
 - (a) the Court of Appeal contravened section 17(2) of the *Industrial Court Act* (cap 234B of the Laws of Kenya), by failing to remit the matter back to the Industrial Court [now, Employment and Labour Court] for assessment of damages and compensation payable;
 - (b) the Court of Appeal erred in setting aside the Order for reinstatement issued by the trial Court which Order had been implemented by KQ before it was stayed by the Industrial Court, and then by the Court of Appeal;
 - (c) the Court of Appeal erred in law by restricting the application of article 10 to public and government bodies only;
 - (d) the Court of Appeal erred in law by evading the question as to whether the International Labour Organisation (ILO) recommendation No. 166 of the *ILO Convention No. 158 (Termination of Employment Convention)*, 1982) applies to Kenya, pursuant to article 2(5) and (6) of the *Constitution of Kenya, 2010*;
 - (e) the Court of Appeal erred by failing to take into account the terms of article 41 of the *Constitution*;
 - (f) the Court of Appeal erred in holding the redundancy to be justified, merely because the evidence showed KQ to be in a 'precarious financial position';
 - (g) the Court of Appeal erred in failing to consider the submissions and authorities presented to it, concerning reinstatement, and accrued salaries payable;
 - (h) the Court of Appeal erred in law in failing to pronounce itself on the law applicable to back-pay, and also erred in failing to order reinstatement with back pay, after finding that KQ had not satisfied the conditions under section 40(1) of the *Employment Act*, for termination of employment on account of redundancy; and
 - (i) the Court of Appeal erred in failing to pay any regard to the principle of "Last in, First Out", as a criterion of the law, in redundancy cases.
6. Subsequent to the filing of the petition, the 1st respondent filed a notice of motion application dated August 13, 2015, seeking to strike out the petition of appeal on grounds that ?
 - (a) the appeal seeks to re-open litigation at the Supreme Court, on settled matters of law;
 - (b) the appeal seeks to re-litigate, at the Supreme Court, factual issues that have been extensively dealt with and determined both at the High Court and the Court of Appeal;



- (c) the appellant seeks to litigate for the first time on ancillary constitutional questions that were never pleaded, and/or were not the subject of judicial determination at the Industrial Court or Court of Appeal;
 - (d) the appellant otherwise seeks to correct a perceived miscarriage of justice and/or error in the application of settled law by the Court of Appeal; and
 - (e) the appeal is otherwise frivolous, and an abuse of Court process.
7. Both the petition and the application were heard simultaneously.

C. Submissions of the Parties

a. Appellant

8. Learned counsel, Mr Mwenesi submits that the appeal is before the Supreme Court as of right, as it seeks the court's interpretation of various provisions of the Constitution, which relate to employment law. He disapproves of the 1st respondent's argument that certification is a prerequisite in a case such as this.
9. Counsel contests the Court of Appeal's reasoning, that reinstatement was not a proper remedy, even where it was found that redundancy was not effected in accordance with the law. Accordingly, counsel urged, the decision of the Court of Appeal stands in conflict with fair labour practices, and infringes the fundamental rights and freedoms of the affected employees.
10. Counsel invoked article 41 of the Constitution, which governs employees' right to fair labour practices, and urged that the said provision was directly in issue both at the Industrial Court and the Court of Appeal, as it formed the basis for determining issues of substantive and procedural fairness in redundancy matters. Counsel took the position that all employment matters necessarily touch on fundamental rights and freedoms of individuals. He cited, in this regard, the long title to the Employment Act (No 11 of 2007), in the following terms:
- “An Act of Parliament to ...declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.”
11. It was counsel's contention, therefore, that there is an inextricable correlation between the employment law and Chapter Four of the Constitution, which outlines the fundamental rights and freedoms of all persons. He essentially concurred with the appellate court's observation that the Labour Relations Act, 2007 (Act No 14 of 2007) and the Employment Act, (cap 226, Laws of Kenya), do set the framework for compliance with the guarantees of the Constitution (article 41) for fair labour practices. Learned counsel urged that the question of redundancy was intertwined with the constitutional safeguards for social justice and fairness; and hence it was a matter necessitating constitutional interpretation and application. He submitted that redundancy involves loss of one's employment – which affects the dignity, social security and livelihood of a person, and that such fundamental rights are recognised and safeguarded under the Bill of Rights provisions (Chapter Four) of the Constitution.
12. Learned counsel contests the Court of Appeal decision, for delving into matters of fact, by assessing damages to be awarded to the affected employees; according to him, the matter should have been remitted to the Employment and Labour Court for proper assessment.



b. 1st Respondent

13. The crucial point in the 1st respondent's case, as urged by learned counsel Mr. Amoko, was that the appeal did not coincide with the terms of article 163 (4)(a) of the *Constitution*, and on that account, fell outside the Supreme Court's jurisdiction. Counsel submitted that the proceedings in the first two superior Courts did not involve matters of constitutional interpretation or application. He invoked before this court the statement of claim filed at the Industrial Court, which in his view, had by no means shown any violation of fundamental rights safeguarded under the *Constitution*. Counsel submitted that all the trial judge had done, was to consider articles 10 and 41 in relation to violation of section 40 of the *Employment Act*.
14. Counsel submitted that the petition of appeal, and the record of appeal reveal that the determinations by the other courts, revolved around the issue of procedural fairness in a redundancy matter, within the meaning of section 40 of the *Employment Act*. The 1st respondent's case was also anchored on the provisions on redundancies, as found in employment law. Counsel urged that there was no constitutional issue or remedy sought in the statement of claim, and that the appellant only tangentially relied on articles 10, 41 and 47 of the *Constitution*, in support of the well settled statutory provisions on redundancy.
15. In support of his case, learned counsel invoked this court's decisions in *Lawrence Nduttu & 6,000 Others v. Kenya Breweries Ltd & Another*, SC Petition No. 3 of 2012; [2012] eKLR; *Peter Oduor Ngoge v. The Hon. Francis Ole Kaparo & 5 Others*, SC Petition No. 2 of 2012; and *Gatirau Peter Munya v Dickson Mwenda & 2 Others* SC Application No. 5 of 2014; [2014] eKLR – which define the span of the Supreme Court's jurisdiction under article 163(4)(a) of the *Constitution*.
16. Regarding the merits of the substantive appeal, counsel urged that the appellate court correctly reviewed the evidence on record, so as to ascertain the proper assessment of evidence in arriving at the trial court's decision. He submitted that there was overwhelming evidence on record to show that the unsatisfactory financial situation of KQ justified the redundancies. In this regard, he submitted that though reinstatement is a recognised remedy under the law, it is not an automatic remedy. He urged that in the circumstances of this case, reinstatement was not a proper remedy, as it did not meet the threshold set under section 49(4) of the *Employment Act*, which specifies the factors to be taken into account before recommending a reinstatement.

c. 2nd, 3rd & 4th Respondents

17. The 2nd, 3rd & 4th respondents, represented by learned counsel, Mr. Onyiso, supported the 1st respondent's case, and submitted that this court has no jurisdiction to hear the appeal. Counsel opined that there was no constitutional issue that was the subject of interpretation or application at the other superior courts; and hence, without certification by the Court of Appeal, the appellant's case lacked a foundation. In that regard, he urged the Court to be guided by the dictum in the case of *Owners of the Motor Vessel 'Lillian S' v Caltex Oil(Kenya) Ltd* [1989] KLR 1, wherein the late Justice Nyarangi pronounced himself thus:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings....A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. Learned counsel urged the court to dismiss the appellant's case with costs.



D. Issues for Determination

19. From the parties' respective submissions before us, the following issues arise for consideration:
- (a) whether the appeal meets the jurisdictional threshold under article 163(4)(a) of the Constitution;
 - (b) whether the Court of Appeal properly arrived at its conclusion, with regard to the remedy for the appellant, in the circumstances of the case;
 - (c) whether the Court of Appeal should have remitted the matter to the Employment and Labour Court for assessment of damages; and
 - (d) what remedy is merited?

E. Analysis

(a) Supreme Court: The Question of Jurisdiction

20. The respondents have urged that this court has no jurisdiction to entertain the appellant's claim. We have, at the very outset, to address our minds to this critical question, before considering the merits of the appellant's case. It is the determination of this question, that advances the motion of this court to the next stage.
21. While the appellant has moved this court under article 163(4)(a) of the Constitution, the respondents submit that the appeal does not lie as of right, and that it could only come on certification by this court or the Court of Appeal, by virtue of article 163(4)(b) of the Constitution. Short of this condition, the respondents urge that the appellant has no standing before the Supreme Court. In support of their argument, the respondents contend that the appellant's claim does not involve matters of constitutional interpretation or application, and neither were any such matters canvassed before the other superior courts. The respondents urge that the appellant can only invoke this court's jurisdiction if the appeal raises matters of general public importance, and if a certification has been issued confirming the same. On that basis, the respondents urge that the appeal be struck out.
22. This court has, time and again, defined the contours of its jurisdiction under article 163(4)(a) of the Constitution, and its decisions in that regard still remain valid, and must apply in a case such as this. The established guiding principles were affirmed in the case of Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another Sup Ct Petition No 3 of 2012; [2012] eKLR where a two-Judge Bench of this court (Tunoi and Wanjala SCJJ) remarked that [paragraph 28]:

“The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a).”



23. Further, in the case of *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others*, Sup Ct.Petition No 10 of 2013, this court observed that [paragraph 37]:

“In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the Constitution...” [emphasis supplied].

24. The foregoing principle is developed further, in this court’s decision in *Gatirau Peter Munya v. Dickson Mwenda & 2 Others* SC Application No 5 of 2014; [2014] eKLR [paragraph 69]:

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

25. There are, thus, succinctly stated principles to guide this court on whether it will exercise appellate jurisdiction by virtue of article 163(4)(a) of the *Constitution*. We are properly guided, on that basis, in formulating the relevant questions in this instance:

- (i) What was the question in issue at the Industrial Court (as it then was), and at the Court of Appeal?
- (ii) Did the other superior courts dispose of the matter after interpreting, or applying the *Constitution*?
- (iii) Does the appeal raise a question of constitutional interpretation or application, and has the same been canvassed in the other superior courts, and then progressed through the normal appellate course?
- (iv) Did the other superior courts’ reasoning, and the inferences that led to the determination of the issue, take a trajectory of constitutional interpretation or application?

(b) The Question Before the First Two Superior Courts

26. The appellant filed a statement of claim dated September 12, 2012 at the Industrial Court in Nairobi. The essence of the appellant’s claim was that the 1st respondent had, unlawfully and without notice, or any justifiable cause, effected a staff rationalization exercise in disregard of the law, and declared the appellant’s members redundant, while forcing others into early retirement.

27. The claim was based on certain specific grounds as follows:

- (a) that the unilateral decision of the 1st respondent failed to take into account the psychological and social effects it would have upon the members of the appellant;
- (b) that in terms of section 40 of the *Employment Act*, not less than one month’s notice should be given to the union, and personal notice delivered to the non-unionisable employees, before such action as was taken by the 1st respondent; and the 1st respondent failed to comply with this requirement – and hence its actions were unlawful, inoperative, and void *ab initio*;



- (c) that the 1st respondent failed to consult with the appellant in order to reach consensus on measures aimed at avoiding retrenchment; minimizing the number of dismissals; and mitigating against the adverse effects of dismissal;
 - (d) that the 1st respondent failed to disclose material facts to the appellant; and
 - (e) that the criteria used by the 1st respondent in selecting the affected employees was not objective.
28. The appellant's case at the Industrial Court focussed on the 1st respondent's conduct, and on how it had conducted the entire staff rationalization programme, leading to redundancy. It was urged that the 1st respondent had acted unilaterally, and failed to consult the affected employees – this constituting a blatant breach of section 40 of the *Employment Act*, as well as an unlawful process.
29. At the appellate court, the grounds of appeal by the 1st respondent were as follows: the trial court erroneously assumed jurisdiction to conduct investigations as to the circumstances under which redundancy was declared; the court misconstrued section 40 of the *Employment Act*, in relation to the requirement of notice, consultation, and selection criteria; the court misapprehended the provisions of article 10 of the *Constitution*, as it relates to labour practices, and to the terms of the Employment Act; the trial Judge breached the 1st respondent's right to a hearing, by arriving at a finding on material that was not before the court, and by applying jurisprudence from other jurisdictions without entertaining relevant submissions thereon; the court failed to take into account overwhelming evidence from un-audited and audited accounts showing crippling financial situations affecting the 1st respondent, and that justified redundancies; and the court erred in ordering reinstatement, in view of the alternative reliefs sought.
30. At the Court of Appeal, the 1st respondent contested the trial judge's interpretation and application of those provisions of the *Employment Act* which relate to redundancy, and the appropriate remedy therefor.

(c) The First Two Superior Courts: Was their Task one of Interpreting or Applying the Constitution?

31. In arriving at its decision, the Industrial Court (Rika J) summarised the appellant's case under three rubrics, namely: whether the retrenchment exercise initiated by the 1st respondent on August 1, 2012 and scheduled for completion on September 4, 2012 was justified, and based on valid grounds; whether the process was carried out fairly and in accordance with the law governing the relationship between the parties; and, to what extent the court could intervene, as regards the redundancy exercise. Within that framework of issues, the Industrial Court substantively examined the questions of redundancy, retrenchment and restructuring, in the context of the Employment Act. The court observed that the 1st respondent must be guided by the values and principles under article 10 of the *Constitution*, when applying or interpreting the governing labour laws. The Court also recognised that security of employment has now been anchored in the *Constitution* (article 41), under the theme of fair labour practices.
32. At the appellate court, Githinji JA observed that the question in issue was the legality of the termination of contract of service, on the basis of redundancy, and the procedure to be followed in such a case. The learned judge noted that the law in Kenya is mainly governed by the *Employment Act*, the *Industrial Relations Act*, the terms of individual contracts of service, and the Collective Bargaining Agreement



where applicable. On that basis he held, after considering sections 43 and 45 of the *Employment Act*, that ?

“Redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.”

33. On his part, Maraga JA (as he then was) framed three broad issues for determination: whether or not redundancy was justified; whether or not it was legally and fairly carried out; and if redundancy was not necessary or if it was illegally effected, whether or not the trial Judge was justified in ordering reinstatement of the affected employees. After considering the meaning of the term ‘redundancy’, as provided for under section 2 of the *Employment Act* and the *Labour Relations Act*, the learned judge, in the light of the relevant facts, held that the 1st respondent was justified in declaring redundancy. He found, however, that the redundancy was not declared in accordance to the law, in view of section 40 of the *Employment Act*, which imposes a duty on the employer to give notice to the employees signifying an imminent redundancy. The learned judge on this basis, held that [paragraph 62]:

“My view that no notice was given to the labour officer and no proper notice was given to the affected employees or their trade union, that no meaningful consultations were possible or held, and that the criteria followed to select the affected employees was flawed... [leads me to the conclusion that] the appellant’s retrenchment of 447 employees amounted to unfair termination of employment.”

34. Before the two superior courts, it is clear that the material question for determination was: whether the redundancy scheme initiated by the 1st respondent was justified; and what were the appropriate remedies, in a proper case. In arriving at their decisions, the appellate court judges carefully analysed the *Employment Act* and the *Labour Relations Act*, seeking to attach proper meaning to the term ‘redundancy’. At no point in either of the superior court’s judgment, did the question of constitutional interpretation or application arise. Although the superior courts may have made reference to certain provisions of the *Constitution*, it was only in broad terms in the spirit of the new constitutional order, which requires that all decisions made by any public organ, officer or person, must lie in consonance with certain constitutional signals. In that regard, the *Constitution* is a living charter which governs our daily lives. Hence the pertinence of the Industrial Court’s finding that the 1st respondent, in making its decisions, is to be guided by the values and principles enshrined in article 10 of the *Constitution*. To answer the question, therefore, whether article 10 of the *Constitution* was the subject of the court’s interpretation, we find that the appellant’s case at the Industrial Court, as well as the 1st respondent’s case at the Court of Appeal, squarely entailed the interpretation and application of the terms of the *Employment Act* and the *Labour Relations Act*, insofar as their focal point was the issue of redundancy. All references to the terms of the *Constitution* were guided only by the object of incorporating this charter’s spirit, values and principles.

(d) Constitutional Interpretation/Application: Canvassing in Appellate Process

35. Having found that no question of constitutional interpretation or application formed the gist of the superior courts’ reasoning, the remaining issue is, whether the appeal raises questions of constitutional interpretation or application. We outline the grounds of appeal, as enumerated in the Petition of Appeal dated May 19, 2015, as follows:
- (a) that the Court of Appeal exceeded its mandate, by its conclusions of fact, thus contravening section 17(2) of the *Industrial Court Act* (cap 234B of the Laws of Kenya);



- (b) that the Court of Appeal erred in setting aside the Order of reinstatement to employment, which had been issued by the trial Court;
 - (c) that the Court of Appeal erred in assessing damages;
 - (d) that the Court of Appeal erred in law by evading the question whether the International Labour Organisation (ILO) Recommendation No. 166 of the [ILO Convention No. 158](#) applies to Kenya or not, under, and pursuant to article 2(5) and (6) of the [Constitution](#);
 - (e) that the Court of Appeal erred in restricting the application of article 10 of the [Constitution](#) to public or government bodies only;
 - (f) that the Court of Appeal did not give due consideration to the terms of article 41 of the [Constitution](#);
 - (g) the Court of Appeal erred in finding that the redundancy in this case was justified, purely on account of the fact that the evidence showed the 1st respondent to be in a ‘precarious financial position’;
 - (h) that the Court of Appeal erred in interfering with the trial Judge’s exercise of discretion to order reinstatement, after it was found that there was no lawful basis for the redundancy;
 - (i) that the Court of Appeal failed to determine that the principle of “Last-in, First-Out”, as a criterion dictated by law, and concerned with ‘seniority’, is a principle to which employers in Kenya must have due regard, in addition to other criteria mentioned in section 40(1)(c) of the [Employment Act](#).
36. What questions of constitutional interpretation or application fall for consideration before this court? We find that only grounds (d) and (f) above, make reference to certain constitutional provisions. It is clear to us that the appellant is inviting the court to delve deeper into such constitutional signals, and to extract issues meriting interpretation. For example, the appellant avers that the Court of Appeal did not give any meaningful consideration to article 41 of the [Constitution](#). As already remarked above, the appeal revolved around the issue of redundancy, and whether or not the 1st respondent’s actions were lawful and justified. Consideration of such an issue calls for a review of various applicable statutory provisions, which the appellant does not claim to be in conflict with the requirements of fair labour practices under article 41 of the [Constitution](#). Indeed, no provision of the [Constitution](#) was the subject of interpretation in either of the superior courts. It behoves the appellant to indicate with precision any relevant provision of the [Constitution](#) that affects its case, and the context in which it becomes necessary for the court to render interpretation. In an appeal such as this, the appellant ought to show how the other superior courts incorrectly interpreted, or applied the relevant provision of the [Constitution](#), and how the right interpretation when applied, would impact upon its case. And “interpretation” or “application”, in this regard, resides in the assumption of a task that transcends just the reference to the rich generality of constitutional principle; it is a task that focusses upon specific clauses of the [Constitution](#), and calls for the attribution of requisite meaning, tenor and effect.

(e) Employment Rights, and the Law: Is there a “trajectory of Constitutional Interpretation?”

37. Endeavouring to persuade the court that this matter falls within its jurisdiction, counsel for the appellant urged that employment disputes generally touch on fundamental rights and freedoms of the individual, and thus, the redundancy question is inseparable from norms of fair labour practices, under article 41 of the [Constitution](#). That may well be a valid argument, at a general level. However, such a general proposition cannot in and of itself, confer upon a litigant standing before this court, as each



case bears its unique facts, and must be evaluated on its individual merit. In this case, after attentively examining both the Industrial Court's and the Court of Appeal's decisions, it is clear to us that the two superior courts had not delved into the arena of constitutional interpretation or application. Furthermore, this being an apex court, it does not in general, entertain for the first time legal issues that have not been subjected to other superior courts' consideration and analysis. As a court the jurisdiction of which is substantially donated by the Constitution, we have to limit ourselves to the intent of the Constitution. And on this vital criterion, it is clear to us that the appellant's case does not meet the requisite jurisdictional threshold under article 163(4)(a), and as such, the foundation upon which the petition of appeal would stand, is not sustainable.

F. Orders

38. The reasoning in the foregoing paragraph disposes of any basis for delving into a determination of the question whether the Court of Appeal properly arrived at its conclusion, in relation to remedies for the appellant, and as regards that court's option of remitting the matter to the first superior court for assessment of damages.
39. Flowing from the above determination, we make the following Orders:
 - (a) The preliminary objection, as to the jurisdiction of this court to determine the notice of motion application dated August 13, 2015 is hereby upheld.
 - (b) The petition of appeal dated May 19, 2015 is hereby struck out.
 - (c) Each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2017.

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PHILOMENA MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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I LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,



SUPREME COURT

