



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; DCJ &VP, Wanjala, Njoki, Lenaola & Ouko SCJJ)*

**PETITION NO. E036 OF 2025**

**-BETWEEN-**

**ELIUD NYAEGA GWARO..... APPELLANT**

**—VERSUS—**

**KENYA REVENUE AUTHORITY .....RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi  
(Gatembu, Ochieng & Muchelule, JJ.A.) dated 20<sup>th</sup> June, 2025 in Civil Appeal No. E257  
of 2023)*

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**Representation:**

Mr. Odhiambo Othim for the Appellant.  
*(Muttisya & Company Advocates)*

Ms. Patricia Leparashao for the Respondent.  
*(Kenya Revenue Authority)*

**RULING OF THE COURT**

**[1] COGNIZANT OF** the Court’s jurisdiction to hear appeals from the Court of Appeal as circumscribed by Article 163(4)(a) of the Constitution, *to wit*, only in matters involving the interpretation or application of the Constitution; mindful that the mere invocation of constitutional provisions in pleadings does not, without more, confer jurisdiction upon the Court; and further aware that, consistent with this Court’s prior dicta and inherent powers, it retains the discretion to determine preliminary objections *in limine* where a petition is wholly defective on the face of it; and

**[2] ACKNOWLEDGING** that this Court has elected to exercise its discretion to address, *in limine*, the Notice of Preliminary Objection dated 10<sup>th</sup> September 2025, filed by the respondent, which challenges the Court's jurisdiction to entertain the Petition of Appeal dated 4<sup>th</sup> August 2025, on the ground that it offends the mandatory provisions of Sections 15 and 15B of the Supreme Court Act, No. 7 of 2011; and

**[3] NOTING THAT** the dispute giving rise to this appeal originates from the summary dismissal of the appellant from his employment with the respondent, the Kenya Revenue Authority, on 31<sup>st</sup> August 2018; that the appellant challenged his termination before the Employment and Labour Relations Court (ELRC) in Cause No. 323 of 2020 (E289 of 2020); that the ELRC (*Mbaru, J.*) dismissed the claim on 29<sup>th</sup> March 2021, finding the termination procedurally fair and substantively justified; that the appellant subsequently filed an application for review of that judgment on 13<sup>th</sup> April, 2021 under Order 45 of the Civil Procedure Rules and Rule 33 of the ELRC (Procedure) Rules, which was dismissed on 31<sup>st</sup> May 2021; and that the Court of Appeal, in a judgment delivered on 20<sup>th</sup> June 2025, dismissed the appellant's appeal from the ruling on the review application, finding it lacking in procedural tenability and substantive merit; and

**[4] TAKING INTO ACCOUNT** the Petition of Appeal dated 4<sup>th</sup> August 2025, wherein the appellant seeks to overturn the judgment of the Court of Appeal on the summarized grounds that the learned Judges of Appeal erred: in dismissing the appellant's appeal contrary to overwhelming evidence that his summary dismissal was extremely harsh in the circumstances and there was need to review the ELRC judgment delivered on 29<sup>th</sup> March 2021; by holding that the appellant did not establish discovery of new and important evidence, yet there existed important evidence which was not within his purview and which was not given to him at the time of the hearing; by failing to find that the trial judge failed to exercise her discretion judiciously in dismissing the review application; and in failing to appreciate the working environment of the appellant; and

**[5] UPON CONSIDERING** the respondent's Notice of Preliminary Objection dated 10<sup>th</sup> September 2025, and the respondent's written submissions dated 12<sup>th</sup>

November 2025 filed in support thereof, wherein it is contended that: this Honourable Court lacks jurisdiction as the Petition does not involve the interpretation or application of the Constitution; the appellant has failed to identify with precision which relevant Articles of the Constitution were the subject of interpretation or application before the courts below; the substratum of the Petition is a challenge to a termination from employment and a decision to decline an application for review, which are purely factual and legal issues under the Employment Act and Civil Procedure Rules, not constitutional principles; the appellant has listed various constitutional rights but has not demonstrated how they are related to his dispute from the ELRC to the Court of Appeal; an employment claim cannot mutate into a constitutional petition where the appellant failed to raise the constitutional issues at the trial court; and that the authorities of *Kamau Vs Karanja & another* [2024] KESC 64 (KLR), *Ngoge Vs Kaparo & 5 others* [2012] KESC 7 (KLR), are squarely applicable; and

**[6] UPON CONSIDERING** the appellant's Submissions dated 3<sup>rd</sup> November 2025 and filed on 4<sup>th</sup> November 2025, in response to the Preliminary Objection, wherein it is contended that: this Court's jurisdiction is properly invoked under Article 163(4)(a) of the Constitution as the Petition raises issues of interpretation of the Constitution, including the right to fair labour practices under Article 41, the right to access to information under Article 35, the right to fair administrative action under Article 47, and the right to a fair trial under Article 50; the Court of Appeal failed to safeguard these constitutional rights; the case of *John Florence Maritime Services Limited & Another Vs Cabinet Secretary Transport & Infrastructure & 3 Others* [2021] KESC 39 (KLR) demonstrates that this Court can intervene where constitutional issues are engaged; and that the appellant does not require leave or certification because the Petition is not a matter of general public importance but one relating to interpretation of the Constitution; and

**[7] UPON REVIEWING** the Record of Appeal and the judgment of the Court of Appeal delivered on 20<sup>th</sup> June 2025, in Civil Appeal No. E257 of 2023, which reveals that the issues for determination before the appellate court were: whether the learned Judge erred in dismissing the appellant's application for review;

whether the appellant had demonstrated the "ingredients for review" under Order 45 of the Civil Procedure Rules and Rule 33 of the ELRC (Procedure) Rules, including the discovery of new and important evidence or an error apparent on the face of the record; whether the trial judge had exercised her discretion judiciously; and whether the appellant's conduct, including the non-disclosure of the review application in a prior application for extension of time, constituted an abuse of the court process; and

**[8] UPON REVIEWING** the Replying Affidavit of Grace Mwangi, sworn on 18<sup>th</sup> September 2025 on behalf of the respondent, wherein she deposes that: the Petition is incompetent as it offends Sections 15 and 15B of the Supreme Court Act; the appellant has listed new constitutional issues which were never part of his appeal at the Court of Appeal or his review application at the ELRC; the substratum of the Petition is a challenge to a termination from employment and a decision to decline a review; the Court of Appeal correctly addressed itself to the ELRC's reasoning and found no error of principle or misdirection of law; the appellant failed to demonstrate that this is a valid petition deserving this Court's jurisdiction after the substantive issues have already been dealt with; and

**[9] FURTHER CONSIDERING** the Further Affidavit of Eliud Nyaega Gwaro, the appellant herein, sworn on 26<sup>th</sup> September 2025 and filed in response to the Replying Affidavit, wherein it is deposed that: the appellant was never negligent of duty and never colluded with any clearing agent; no clearing agent was brought as a witness against the appellant during the disciplinary hearing or at the ELRC; the appellant was discriminated against and the procedure leading to his termination was unfair and unlawful; the appellant was never provided with all documents in relation to his case before the Disciplinary Committee, and his rights during the disciplinary hearing were never explained to him; the respondent had custody of the contested documents; the issues raised in the Petition are constitutional; Sections 15 and 15B of the Supreme Court Act have not been violated as this is a matter relating to interpretation of the Constitution; the appellant does not require leave or certification; the Petition is properly before this Court; and the Court of Appeal failed to properly address itself on the decision of the ELRC, including the

fact that the appellant was never supplied with crucial documents which were in the custody of the respondent; and

**[10] HAVING CONSIDERED** all the foregoing, **WE NOW OPINE** as follows:

- i. The sole and pivotal issue for our determination at this stage is whether this Court possesses the jurisdiction to entertain the instant appeal, which the appellant submits has been filed as of right. It is trite law that jurisdiction is everything, and without it, a court must down its tools. The burden lies upon the appellant to demonstrate that this appeal properly falls within our ambit under Article 163(4)(a) of the Constitution.
- ii. Article 163(4)(a) of the Constitution provides a right of appeal to this Court only in cases “involving the interpretation or application of the Constitution.” This jurisdictional gateway is narrow and specific. It is not an avenue for a second or subsequent appeal on matters of statutory interpretation, procedural rules, or factual disputes, however passionately held. As this Court stated in *Ngoge Vs Kaparo & 5 others* [2012] KESC 7 (KLR):  

***“in the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”***
- iii. The appellant’s core complaint, distilled from his pleadings and submissions, is that the Court of Appeal erred in dismissing his appeal against the ruling declining his review application. He contends that his summary dismissal was extremely harsh, that the procedure was unfair, that crucial documents were withheld, and that the Court of Appeal failed to appreciate his working environment. While these grievances are framed with reference to Articles 35, 41, 47, and 50 of the Constitution, a holistic examination of the proceedings reveals that the substantive contest

between the parties has always been a quintessential employment dispute, centering on the procedural fairness and substantive justification for a summary dismissal under the Employment Act, 2007 the basis upon which the judgment was entered by the ELRC.

- iv. Specifically, the appellant having opted to review the decision of the ELRC, the subsequent appeal to the Court of Appeal and to this Court can only be in the narrow prism of the disallowed review application.
- v. From the above context, references to constitutional Articles in the appellant's grounds of appeal against the decision of the Court of Appeal are incidental to the core employment and procedural dispute. The Court of Appeal's judgment was primarily on the application of the principles under Section 41 and 44 of the Employment Act, Order 45 of the Civil Procedure Rules, and Rule 33 of the ELRC (Procedure) Rules. The Court of Appeal analyzed whether the "ingredients for review" were met, whether there was discovery of new and important evidence, and whether the trial judge exercised her discretion judiciously.
- vi. Thus, the focus of the present appeal ought to revolve around whether the conditions for review under Order 45 of the Civil Procedure Rules and Rule 33 of the ELRC (Procedure) Rules had been met. This, in our view, does not raise constitutional questions but rather the routine application of statutory and procedural law.
- vii. Further, the constitutional issues raised in an appeal as of right must have been the subject of litigation and determination in the courts below. The appellant did not raise constitutional questions before the ELRC in his original claim, nor in his review application, and the Court of Appeal was not called upon to interpret or apply any specific constitutional provision as a primary issue for determination. From the three issues for determination framed in the petition of appeal, two of which relate to evidence and the third of which is on exercise of judicial discretion by the trial judge, no issues of constitutional contestation arise for the court's determination.
- viii. Similarly, other than seeking reliefs for damages for discrimination at work and general damages for violation of the appellant's fundamental rights, no constitutional argument by way of an appeal against the decision of the

Court of Appeal warranting our intervention under Article 163 (4)(a) has been demonstrated in the petition of appeal, appreciating that we exercise appellate jurisdiction. The appellant has, therefore, failed to demonstrate that the superior courts below, in their reasoning embarked on a substantive trajectory of constitutional interpretation and/or application.

- ix. We reiterate the Court's holding in ***Lawrence Nduttu & 6000 others Vs Kenya Breweries Limited & Another*** [2012] eKLR, that “*the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application*” is insufficient to confer jurisdiction, as sought by the appellant. The appellant's reliance on ***John Florence Maritime Services Limited & Another Vs Cabinet Secretary Transport & Infrastructure & 3 Others*** [2021] KESC 39 (KLR) misses the real finding in that case and which is distinguishable from the appellant's case. In that case, the Court was seized of a matter involving the interpretation of a bilateral international agreement and its interplay with constitutional principles of state authority and taxation. The alleged constitutional violations in that case were central and unavoidable. In the present case, the alleged procedural unfairness—the failure to supply documents during the disciplinary hearing and the dismissal of the review application—is a function of the application of the Employment Act and the Civil Procedure Rules. It does not, in our view, rise to the level of a fundamental breach of fair trial rights that would trigger this Court's jurisdiction under Article 163(4)(a) of the Constitution.
- x. Consequently, and for the above reasons, we find that the appeal is, in essence, an impermissible second appeal against the concurrent findings of two lower courts on matters of fact and statutory law, dressed in constitutional garb. The Preliminary Objection is therefore merited.
- xi. As costs follow the event, we see no reason to depart from the general principle.

**[11] CONSEQUENTLY**, for reasons aforesaid, we make the following orders:

- (i) *The Notice of Preliminary Objection dated 10<sup>th</sup> September 2025 filed by the respondent is upheld.*

