REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

PETITION 341 OF 2011

SAMUEL G. MOMANYI……..PETITIONER

VERSUS

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

SDV TRANSAMI KENYA LTD……..……..2ND RESPONDENT

J U D G M E N T

Background

1. The Petitioner, Samuel Momanyi, by his Petition dated 1st December 2011 states that he was employed by the 2nd Respondent on 16th January 2009 as a Project Manager and after a three month probation period, he was confirmed in his employment. It was his case that he had left his employment with Interfreight East Africa Limited, upon the *"enticement"* of the 2nd Respondent, and he served with dedication and diligence until 27th February 2010 when his services were terminated before he was heard and without lawful reasons being given for that action.

2. The Petitioner admits that his employment contract provided that any dispute between the parties would be referred to arbitration but that he filed a claim before the Industrial Court which claim was struck off under **Section 45(3)** of the **Employment Act, 2007** as he had not completed thirteen (13) months' employment with the 2nd Respondent. That the Court ruled that he had no lawful basis for claiming that he had been unfairly terminated. It is his argument that inspite of that Ruling, he is entitled to remedies under the Constitution because his rights and freedoms have been violated by the 2nd Respondent's actions.

3. He now prays for the following Orders;

"(a) A declaration that the Petitioner's right to fair labour practices enshrined in Article 41(1) of the Constitution has been infringed and or violated by the 2nd Respondent by virtue of the fact that the Petitioner was not accorded a fair opportunity to be heard on the allegations resulting in the termination of his employment on 27th February, 2010 nor were the said allegations substantiated which further contravenes Article 35 of the Constitution.

(b) A declaration that Section 45(3) of the Employment Act 2007 is inconsistent with the provisions

of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said section purports to deny the Petitioner the rights and freedoms enshrined in the said Articles of the Constitution.

(c) Consequently, an order do issue declaring Section 45(3) of the Employment Act 2007 invalid by reason of its violation of the rights and fundamental freedoms in the Bill of Rights of the Petitioner rights and fundamental freedoms and the said Ruling be reviewed and set aside.

(d) A declaration that the Petitioner has a right to be fairly heard on his claim against 2nd Respondent on unfair termination and further a declaration that the Ruling delivered by the Industrial Court on 10th December, 2010 in Cause No.358 of 2010 violated the Petitioner's rights and fundamental freedoms and the said Ruling be reviewed and set aside.

(e) An order for reasonable compensation be made to the Petitioner to be paid by the Respondents to for an amount to be determined by this honourable Court for violation of the petitioner's rights and fundamental freedoms.

(f) An order that the costs consequent upon this Petition be borne by the Respondents in any event.

(g) All and any such order as this honourable Court shall deem just."

Response by the 2nd Respondent

4. The 1st Respondent inspite of service has failed to file any answer to the Petition but the 2nd Respondent did so through a Replying Affidavit sworn on 28th February 2012 by one, Warui Mwangi, Legal Manager of the 2nd Respondent.

5. It is deponed thereby that save for the fact that the Petitioner was employed as a Project Manager, and that his services were terminated as claimed, the 2nd Respondent denies that the Petitioner was diligent in his duties and that the termination of his employment was lawful and warranted.

6. Further, that the Petitioner was given an opportunity to explain his lackluster performance prior to the termination and after a meeting on 10th February 2010, which he attended, it was decided that he lacked the capability to perform the functions entrusted to him and he was given reasons why his continued employment was no longer tenable.

7. That the Petitioner, without referring the matter to arbitration, filed a claim before the Industrial Court and thence to this court, and yet none of the complaints raised in both Courts are lawfully sustainable.

8. It is the 2nd Respondent's plea that since the Petition raises issues that were dealt with by the Industrial Court, then the matter is settled and the Petition ought to be dismissed.

Opinion

9. I should begin by stating that since the facts are not in contest at all, the first question to address is whether the termination of the Petitioner's employment was in breach of **Article 41(1)** of the **Constitution**. That Article provides as follows;

"(1)Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining".

10. The Petitioner has picked on the subject of unfair labour practices to anchor his claim. One of the claims that can be made under that heading is that of *"unfair dismissal"*. I am aware that in its ruling delivered on 10th December 2010, Justice Rika of the Industrial Court noted that the Petitioner had not satisfied the rquirements of **Section 45(3)** because he had worked for eleven (11) months and twenty seven (27) days. The Judge went further to distinguish a claim based on *"wrongful dismissal"* and *"unfair termination"* and concluded that a claim under **Section 45(3)** aforesaid must relate to *"unfair termination"* only. In the case of the Petitioner, the judge then held that part of his claim was without merit and dismissd it but advised him to pursue any claim flowing from his employment contract independently of the *"unfair termination claim"*. He concluded by stating as follows;

"The claimant to proceed with its claim (sic) on notice pay, service or severance pay, and relocation allowance".

11. From Submissions by the parties, it is obvious that there is still pending before the Industrial Court part of the dispute regarding the petitioner's employment and for obvious reasons, I will say no more on that matter save to state that no appeal has been filed regarding either the dismissed part of the claim or the Court's interpretation of **Section 45(3)** of the **Employment Act.**

12. **In any event, is the above <u>Section</u> in conflict with <u>Article 41</u> of the <u>Constitution</u> and is this Court properly seized of the question?** This Court is a creature of **Article 165(3)** of the **Constitution** which provides as follows;

"***(1) …***
(2) …

(3) "Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to

consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation."

(4) ...

(5) ...

(6) ...

(7) ..."

13. **Article 165(5)** then ousts certain questions from the jurisdiction of this Court because it provides as follows;

"***(1) …***
(2) …
(3) ...
(4) ...

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) ...
(7) ..."

14. **Article 162(2)(a)** creates a Court with the status of the High Court to determine disputes relating to employment and labour relations and by **Sub-Article 3,** the **Industrial Court Act No.20** of **2011** was enacted. Of interest is **Section 12** thereof which provides as follows;

"*Jurisdiction of the Court.*

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;
(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just".

15. From a casual reading of the above provisions, only this Court *(the High Court of Kenya)* can determine whether any statute or parts of it are in conflict with the Constitution and that being the case, it

is properly seized of the questions posed above.

16. It has been argued by the Petitioner that **Section 45(3)** is in conflict with **Articles 48** and **50(1)** of the Constitution which guarantee the rights to access to justice and the right to a fair hearing. It is his further argument that it is discriminatory of certain kinds of employees that only those who have served for over thirteen (13) months can file a claim for unfair termination of their services and yet there is no magic about the thirteen (13) months.

17. It is instructive that the Attorney General failed to respond to the Petition and yet this particular issue would have required his answer because it is weighty and serious. He has not and the implications will shortly become obvious.

18. The 2nd Respondent in answer has merely stated that the Petitioner has *"not stated his complains (sic) against **Section 45(3)** of the **Employment Act, 2007** and the manner the said **Section** infringes upon the Petitioner's rights"*. It adds that the standards for proof of a claim of this kind *"is very high"* and that the Petitioner has failed that test.

19. In my view, there is clear merit in the arguments by the Petitioner. I say so because when the **Employment Act** was enacted in **2007**, the Constitution 2010 had not been promulgated and there was necessarily a need to align the provisions of all statutes enacted prior to it, with the said Constitution. This is what happened for example in South African where upon the post-apartheid Constitution being enacted, the **Basic conditions** of **Employment Act, 2007** was subsequently passed and its objects were to;

"… give effect to the right to fair labour practices referred to in Section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of eh International Labour organization …"

Chapter 5 of that **Act** is headed ***"Termination of Employment"*** and it has provisions for;

(i) Notice of Termination of Employment.

(ii) Payment instead of Notice.

(iii) Employees in accommodation provided by employers.

(iv) payments on termination.
(v) Severance pay and
(vi) Certificate of Service.

Of interest is **Section 36** which provides as follows;

"this Chapter does not apply to an employee who works less than 24 hours in a month for an employer."

20. In the **Employment Act, 2007**, Part VI is headed **"Termination and Dismissals"** and I have elsewhere above referred to **Article 41** of the Constitution and **Section 45** of the **Act** which is titled **"Unfair Termination". Section 46** is titled **"Reasons for Termination or Discipline"** and they provide as follows;

"Section 45;

(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 employees 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.

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

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(f) the existence of any pervious warning letters issued to the employee."

"Section 46;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty —

(a) a female employee's pregnancy, or any reason connected with her pregnancy;

(b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;

(c) an employee's membership or proposed membership of a trade union;

(d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;

(e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;

(f) an employee's refusal or proposed refusal to join or withdrawal from a trade union;

(g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or

(e) an employee's participation in a lawful strike".

21. Reading the two Sections together with **Articles 27** and **48** of the **Constitution**, there is obvious discrimination and the Applicant and those in his situation have been denied equal protection and equal benefit of the Law and they have also been denied ***"the full and equal employment of all rights and fundamental freedoms"*** to the extent expected by the Constitution. They have also been denied ***"access to justice."***

22. I have held as above because I am in agreement with the Petitioner that there is no explanation offered by either the 2nd Respondent and the Attorney General why a person who has worked for one (1) year and one (1) month is the only one who can claim that his employment has been unfairly terminated and that one who has worked for less than that period cannot have the benefit of that claim. I have attempted on my own and without assistance from counsel to get the justification for such a provision but my efforts have come to naught. I have elsewhere above reproduced **Section 36** of the **South African Act** and it is easy to see that a person who works for less than 24 hours a month may genuinely have no claim for unfair termination but how can one explain that a person who has worked for a full year and more can be unfairly terminated and have no recourse to the protection of the Law? **Why discriminate in such a blatant manner and why close the doors of justice to an otherwise deserving litigant on account of period served which is not legitimately too short to have any lawful meaning?**

23. Discrimination has been defined as a *"distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group [which] has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of Society"* Wilson J. in Andrews vs. Law Society of British Columbia (1989) I SCR 321. I wholly agree with the learned judge.

24. In Cradle vs. the Attorney General [2006] eKLR, it was stated that when considering whether a Section of the Law is discriminatory, *"the Court must take into account the history, and Social Economic context of the Legislation, in other words, the environment in which the Legislature enacted the Statute."* I agree and in this case, I have said that when the **Employment Act, 2007** was enacted, the Constitution 2010 was not in place and it is agreed that the Repealed Constitution did not have as much a robust Bill of Rights as the Constitution 2010 and there would certainly be need for all Laws to conform with it as it is the express provision of **Article 2(4)** of the **Constitution.** In its preamble, the **Employment Act, 2007** provides that it is an **Act** of Parliament designed *inter-alia* to *"declare and define the fundamental rights of employees, to provide basic conditions of employment of children, and to provided for matters connected with the foregoing."* It is obvious to me that the objects above cannot be met when **Section 45(3)** as presently existing is left to stand in our statute books.

25. **In what circumstances can a Court declare a Law to be unconstitutional?** There is a whole raft of Legal authorities on this subject but I am persuaded by the reasoning in Hamdardda Wakhama vs. Union of India AIR 1960 at 554 where the Court stated *inter-alia* as follows;

"…when an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at"

26. I wholly agree and as I have shown above, **Section 45(3)** is unreasonable and has the opposite of what the object of the **Employment Act** was intended to be. In his Ruling, Rika J. *(above)* labored to show that the Applicant would otherwise have been heard on his claim against the 2nd Respondent but for the barrier created by **Section 45(3).** The learned judge then severed the Petitioner's claims and struck out what he thought fell under **Section 45** but retained for hearing what fell outside it. Clearly, the Law was oppressive but the judge's hands were tied.

27. I have said enough to show that the **Constitution** must be upheld and **Section 45(3)** declared invalid to the extent of its inconsistency.

28. One other issue has to be addressed and this is with regard to the claim that the Petitioner was not heard by the 2nd Respondent prior to his dismissal. Much as I am tempted to address that issue, in view of what I will shortly say, it is best that I leave the matter for another forum.

29. Lastly, the Petitioner has asked this Court to declare the Ruling dated 10th December 2010 to be in breach of the Petitioner's rights under the Constitution. The matter is moot because once I have declared that **Section 45(3)** is unconstitutional, certain consequential orders have to be made with regard to the proceedings before the Industrial Court. But the more fundamental question is whether this court can direct the Industrial Court as presently constituted.

30. I am aware as I have said elsewhere above that a Court established under **Article 162** of the **Constitution** has the same status as the High Court but I have also stated that only the High Court can interpret the constitutionality or otherwise of any statute or its provisions.

31. Further, the Industrial Court as presently constituted is not such a Court as envisaged by **Article 162(2)** and I agree with Majanja J. in Brookside Dairy Ltd. Vs. Attorney General, Petition No.33 of 2011 when he stated as follows;

"The status of the Industrial Court in relation to the High Court has been somewhat controversial in view of conflicting decisions of the High Court. In the case of Mecol Limited vs. the Attorney General and Others Nairobi HC Misc. Appl. No.1784 if 2004 (unreported) the High Court declared that the Industrial Court was a Subordinate Court for the purposes of the exercise of the supervisory jurisdiction of the High Court under Section 65 of the former Constitution. In Kenya Guards and Allied Workers Union vs. Security Guards Services and 38 Others Nairobi HC Misc. No.1159 of 2003 (unreported) the Court expressed a contrary view on the basis of legislative policy favouring finality of labour disputes.

I take the position that the Industrial Court, as a creature of statute, is a court subordinate to the High Court. Parliament did not have the constitutional authority under the former Constitution to create a Court of equivalent status with the High Court."

I am wholly in agreement with the learned judge and;

32. Regarding compensation for alleged violation of his constitutional rights, I find it difficult to make any award for reasons that neither the 2nd Respondent, nor indeed the Attorney General, can be found to have deliberately acted to create the impugned **Section 45(3).** The Legislature in its wisdom thought it fit to insert it in 2007 long before **Articles 27** and **48** were enacted. To penalize either of them would be unfair.

33. That being the case, this Court can properly issue orders directed at the Industrial Court as presently constituted without breaching **Article 165(6)** of the **Constitution** because such a Court *(the present Industrial Court)* is not a superior Court as defined by **Article 162(1)** of the **Constitution.**

Conclusion

34. Having held as above, it is clear to me that Prayers (a), (d) and (e) of the Petition cannot be granted. Instead I will grant the following Prayers only;

"***(b) It is hereby declared that Section 45(3) of the Employment Act 2007 is inconsistent with the provisions of the Constitution of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said section purports to deny the Petitioner the rights and freedoms enshrined in the said Articles of the Constitution.***

(c) Consequently, an order is hereby issued declaring Section 45(3) of the Employment Act 2007 invalid by reason of its violation of the rights and fundamental freedoms in the Bill of Rights of the Petitioner rights and fundamental freedoms."

35. Regarding costs, I see no reason to burden either of the Respondents as proceedings will continue in the Industrial Court and costs will abide those proceedings.

36. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2012

ISAAC LENAOLA
JUDGE

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In the presence of:

LENAOLA – JUDGE
Irene – court clerk
Mr. Chege for 2nd Respondent
Applicant present
No Appearance for 1st Respondent

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Order
Judgment duly read.

Further order

Copies of the judgment to be supplied to parties.

ISAAC LENAOLA
JUDGE