IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 110 OF 2014

BETWEEN

THE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND………......APPELLANT

AND

JORIM WAHORE MARENYA ……………..…..RESPONDENT

(Being an appeal from the Judgment of the Industrial Court of Kenya at Nairobi (Madzayo, J.) dated 13th July, 2012

in

Industrial Cause No. 408 of 2010)

****

JUDGMENT OF THE COURT

The Board of Trustees National Social Security Fund (the appellant), is a body corporate established under **Section 4** of the **National Social Security Fund Act**, (**Cap 258** of the **Laws of Kenya**). For purposes of this appeal, it was the employer of Jokim Wahore Marenya (the respondent), having employed him as an Enforcement Officer III on 10th April, 1991. He rose through the ranks to Enforcement Officer II, and was the Ag Branch Manager, Thika Branch as at the time he was interdicted on 7th December, 2005 and summarily dismissed a fortnight later, through a letter dated 19th December, 2005.

The reasons for the termination and subsequent summary dismissal was the arrest and arraignment of the respondent before the Anti-Corruption Court on Corruption related charges. The respondent pleaded not guilty to the charges and the matter proceeded to hearing. After close of the prosecution case, the magistrate acquitted the respondent under **section 210** of the Criminal Procedure Code on the grounds *inter alia* that the charges as framed were defective, and also for reasons that "***the evidence relied on is shaky, insufficient, unreliable and riddled with untruths."***

This acquittal came four years and a few months after the dismissal of the respondent. He moved to the then Industrial Court (now the Employment and Labour Relations Court) and filed the memorandum of

claim dated 15th April, 2010. In the claim, the respondent sought several reliefs which included a declaration that the appellant herein acted illegally and in bad faith in dismissing the respondent; unconditional reinstatement without loss of benefit; and payment of all his salaries and dues from the date of his dismissal to the time of his reinstatement. He also claimed damages under different heads.

In response to the claim, the appellant filed its memorandum of defence dated 13th September, 2010 in which it defended its action to summarily dismiss the respondent. According to the appellant, the respondent had accepted gifts and/or rewards in the course of his duty and that was in direct contravention of the appellant's Code of Regulations, and more particularly Clause 1:16. It was the respondent's firm proposition that accepting money ostensibly as a token of appreciation, an act which, according to the appellant, the respondent admitted vide statements dated 6th and 13th December, 2005, amounted to gross misconduct which called for summary dismissal.

In the appellant's view, the fact that the respondent was acquitted on the criminal charges did not absolve him from being liable for breach of the appellant's Code of Conduct, and the punishment attendant to it. The appellant maintained that due process was followed; that the respondent was given an opportunity to be heard, and his claim was for dismissal. Submissions were filed by both parties before the Industrial Court and *viva voce* evidence taken. After considering the matter, the learned Judge (Madzayo, J. (as he then was) in his Award rendered on 13th July, 2013 found in favour of the respondent and granted him orders as follows:-

> **"1. That the dismissal be and is hereby declared unfair, unlawful and illegal.**
>
> **2. That the claimant be unconditionally reinstated without loss of benefits and payment of all his salaries and dues from the date of his dismissal to the time of his retirement.**
>
> **3. That the claimant is ordered to report to the Respondent's Managing Trustee for direction or report to his place of work within the next 7 days from the date of this Award.**
>
> **4. …."**

This is the award that prompted this appeal in which the respondent has proffered eleven grounds of appeal. We can compress these grounds into three board grounds which in our view cover all the pertinent issues raised in this appeal. The first ground is on the legality and efficacy of the order of reinstatement which was made almost seven years after the cause of action arose.

Second, is the question as to whether the respondent was given a fair hearing or not before he was dismissed; and lastly whether the acquittal of the respondent entitled him to automatic reinstatement, or other alternative redress from his employer.

The other two issues as to who delivered the judgment (Award); and as to whether the appeal was served on the respondent or not are in our view peripheral and inconsequential. We say so because, for instance on the issue of service of the record of appeal, there are clear and elaborate Rules and Procedures that should be invoked by an aggrieved party where service has not been effected. That is not an issue that can be raised belatedly, in the submissions. The respondent should have moved the Court for striking out of the appeal within the timelines provided for under the relevant Court of Appeal Rules. This not having been done, he cannot raise it this late in the day.

On the issue as to the Award being read by a person who was not a Judge of the Employment Court, this was also an issue that was only floated in the submissions of counsel. The same was neither raised as a ground of appeal, and nor was evidence availed to this Court in support of that submission. We now advert to the three broad areas we mentioned earlier. The issue of the illegality and inefficacy of the reinstatement order is conceded by learned counsel for the respondent and we do not therefore need to delve into it. It is common ground that when the cause of action arose, the operative law was the repealed Employment Act (**Cap 226** Laws of Kenya). This Statute did not provide for reinstatement of a sacked

worker. Indeed, jurisprudence in this area hitherto mirrored the common law position that the court should not force an employee on an unwilling employer, or the other way round, the relationship of employer/employee being a fairly personal one.

However, by the time the matter was concluded, the ground had shifted and there was a new law in place, which introduced a shift in the employment paradigm. The new law, i.e. the Industrial Court Act 2011, later replaced by the Employment and Labour Relations Act, provided for the relief of reinstatement of a dismissed employee in whose favour an Award had been rendered. The learned Judge decided to invoke this new law, and ordered reinstatement of the respondent. Unfortunately, the learned Judge overlooked the fact that the same law he decided to invoke had a caveat. The caveat was that an employee who had been out of the job for more than 3 years could not be reinstated. For ease of reference, the relevant provision provides as follows:-

> **Section 12(3) vii**
>
> **"In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:-**
>
> **…**
>
> **An order for reinstatement of any employee within three years of dismissal subject to such conditions as the court thinks fit to impose under the circumstances contemplated under any written law."**

The respondent herein had been dismissed in 2005 and the order of reinstatement was made in 2012. Clearly, this was an order that was not compliant with the operative law. Learned counsel for the respondent was right to concede that ground. That order in the impugned Award is not legally sustainable.

On the issue of due process and fair hearing, the appellant contends that the respondent admitted having received the money in writing in two statements, which we have referred to earlier; he was served with a notice to show cause, and he was given seven days within which to respond. Respond he did, but according to the employer, the evidence provided against the respondent was too strong and consequently favoured a decision to dismiss him and so he was dismissed.

It is instructive that before the dismissal, the interdiction was prompted by the respondent's arrest in the act of receiving money from an employer, in the course of his employment. The interdiction was not therefore engineered or initiated by the appellant. The appellant just complied with Clause 3: 6 of its Code of Regulations. Is the rule of natural justice restricted to or synonymous with oral hearing? We think not. In this case, the respondent was arrested by agents who were totally independent of the appellant. He was hauled to court and charged with several corruption related charges. When asked about it, he recorded statements and admitted having received the money, which he nonetheless explained away as "a token of appreciation." The respondent, in accepting the "gift" went contrary to Clause 1: 16 of the Appellants Code of Regulations which provides as hereunder.

> **"ACCEPTING OF GIFTS AND REWARDS"**
>
> **It is a serious offence for an employee corruptly to solicit or accept any gift or consideration as an inducement or reward for:**
>
> **a. Doing, or refraining from doing anything in his official capacity, or**
>
> **b. Showing favour or disfavor to any person in his official capacity."**

The respondent having admitted in his statement that he took the money, and thereafter having been given time to show cause why he should not be disciplined, cannot say that he was denied natural justice. He did not have to be given a verbal hearing. Indeed the operative statute then was different from the current

one which has more elaborate procedures that require an oral hearing with a shop steward in tow, who is also mandated to speak on behalf of the employee. We hold the view that the respondent was not condemned unheard. His dismissal was not therefore unlawful.

He should nonetheless have been given adequate notice, or payment in lieu of such notice.

The last issue is whether the acquittal of the respondent entitled him to be reinstated back to work, or for the interdiction to be lifted. Counsel for the respondent has cited Clause 3:7 (g). We have looked at the said provision. We note that in the instant case, the respondent was actually interdicted long before the court proceedings were over. Was this contrary to the above Clause?

The Clause clearly allows the employer to discipline an employee for matters other than those included in criminal charges. In this case, there was evidence that the respondent had already been served with a "final warning" on 3rd February, 2005 and warned that;

> **"In addition, you are required to make a written commitment that you will amend (sic) your behavour."**

That was before the subsequent arrest. It was evident therefore that there were already some serious disciplinary issues against the respondent, and he was not dismissed solely for the reason that he was arrested and charged in court. The appellant's action of dismissing the respondent did not therefore breach the appellant's Code of Conduct.

Having considered all the material before us, we come to the conclusion that the dismissal of the respondent was not unlawful.

For the foregoing reasons, we are satisfied that this appeal has merit. We allow it and consequently set aside the Award of Madzayo, J. dated 13th July 2012, and delivered by Justice Onesmus Ndumbuthi on 19th September, 2012 in Industrial Court cause No. 408 of 2010.

In view of the respondent's pecuniary position *vis a vis* that of the appellant, we order that each party bears its own costs.

Dated and delivered at Nairobi this 21st day of July, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

…………………..…….

JUDGE OF APPEAL

P. O. KIAGE

…………………..…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR