IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, GBM KARIUKI & AZANGALALA, JJ.A.) CIVIL APPEAL NO. 108 OF 2015

BETWEEN

NATION MEDIA GROUP LIMITED.....APELLANT

AND

ONESMUS KILONZO.....RESPONDENT

*(Being an appeal from the Ruling of the Industrial Court of Kenya at Nairobi (**Nzioki wa Makau, J**.) delivered on 24th March, 2014*

in

Industrial Cause No. 2355 of 2012)

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JUDGMENT OF GITHINJI, JA

[**1**] This is an appeal from the ruling of the Industrial Court of Kenya (now renamed the Employment and Labour Relations Court (ELRC) dismissing a preliminary objection to the claim filed by the respondent herein.

[**2**] On or about 21st November 2012, the respondent filed a claim in the ELRC against Nation Media Group Limited (NMG) alleging that his employment was unlawfully terminated and made the following claims.

(i) one month salary in lieu of notice……. Kshs. 130,000.00

(ii) Leave for two months…….....Kshs. 24,761.90

(iii) Salary for four months

uncompleted contract ….....…Kshs. 52,000.00

(iv) 12 months' salary for unlawful

termination….....…Kshs. 1,560,000.00

(v) Certificate of service

Total amount due…….....**Kshs. 2,234,76190**

The appellant filed a statement of defence denying the claim. In addition, the appellant averred in para 6 *inter alia:*

> ***"The claimant having been employed for only 2 months is precluded by section 45(3) of the Employment Act 2007 from bringing a complaint."***

Later, the appellant filed a notice of preliminary objection in the same terms and added that the court had no jurisdiction to hear and grant the reliefs sought.

[**3**] According to the statement of claim as read together with the letter of "**temporary employment**" dated 5th December, 2011, NMG employed the respondent to work as an online sub-editor – editorial department with effect from 1st December, 2011 at a monthly salary of Shs. 130,000/-. The letter of temporary employment provided, *inter alia*, that each party may terminate the employment by giving one week written notice. The respondent averred in paragraph 5 of the statement of the claim that on 30th January, 2012, NMG terminated the respondent's employment without any notice or payment in lieu thereof and that NMG did not comply with the mandatory provisions of section 41 of the Employment Act, 2007 and the principles of natural justice.

The terms of employment were not disputed nor did NMG dispute that the respondent had worked for 2 months and that the employment was terminated without notice.

[**4**] Section 45 of the **Employment Act** (**Act**) which the appellant relied on to support the preliminary objection provides:

> ***"(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 termination is valid***
>
> ***(b) that the reason for termination is a fair reason –***
>
> ***(i) related to the employee's conduct, capacity or compatibility; or***
>
> ***(ii) based on the operational requirements of the employer; and***
>
> ***(c) that the employment was terminated in accordance with fair procedure.***
>
> ***(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"***

Sub-sections 4 and 5 of section 45 respectively provide the circumstances under which the termination would be unfair and also the factors to be considered. Further, section 46 stipulates the matters that do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty.

[**5**] The court considered the preliminary objection and dismissed it as having no legal basis. In dismissing the preliminary objection, the court relied heavily on the decision of the High Court in **Samuel G. Momanyi v. The Hon. Attorney General** and **SDV Transami Kenya Limited,** ***Petition No. 341 of 2011 (2012) eKLR*** delivered on 18th May 2012 and said in part:

"13…

In Momanyi v AG & Anor, Lenaola, J. held that section 45(3) of the Employment Act 2007 is unconstitutional. When a court declares a part of a statute unconstitutional, the effect is that the particular section or part ceases to be law. Miss Ngige has predicated her entire preliminary objection on a non-existent provision of law. Section 45(3) of the Employment Act is no longer part of the law of Kenya.

14.

The period of 13 months in the erstwhile provision of the Employment Act was not a limitation as known in law. It was a denial of a right that could accrue. Limitation refers to the expiry of time within which one can seek redress for or enforcement of an infringed right. I agree with Lenaola, J. when he states that there is no magic in the 13 months."

[**6**] In Momanyi's case, a preliminary objection was raised to the claimant's claim of Ksh. 6,360,000 being compensation for unfair termination on the ground that the claimant had not worked for the employer for a continuous period of not less than thirteen months. The Industrial Court partly upheld the preliminary objection by severing the unfair termination claim from the contractual claim. It struck out the claim based on unfair termination and allowed the claimant to proceed with the claim based on notice pay, severance pay and relocation of allowances.

The claimant being aggrieved by the decision filed a constitutional petition in the High Court seeking *inter alia*, a declaration that section 45(3) of the Act, is inconsistent with Articles 28, 41(1), 47, 48 and 50(1) of the Constitution as the impugned section purports to deny him the rights and freedoms enshrined in the mentioned provisions of the Constitution.

[**7**] The High Court observed that the Attorney General had failed to respond to the petition which was "**weighty and serious**" and ultimately said:

"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 the claim. I have attempted on my own and without assistance from counsel to get justification for such provision but my efforts have come to naught."

The High Court ultimately granted a declaration that section 45(3) of the Act is invalid by reason of its violation of the rights and fundamental freedoms of the petitioner in the Bill of Rights.

[**8**] The claimant returned to the Industrial Court and filed an application for review of the earlier order striking out the claim based on unfair termination and for reinstatement of the claim. The Industrial Court (**Rika, J.)** dismissed the application for review holding that judgment of the High Court could in the circumstances explained, apply to claims based on unfair termination filed after the date of the judgment.

Although the Industrial Court did not question the validity of the judgments of the High Court in the constitutional petition, it referred in the course of the ruling to the English -

Unfair Dismissal and Statement of Reasons for Dismissal (Variation of qualifying period) order, 2012 and said:

"There are strong objective reasons why qualifying periods are deemed necessary, and it is best left to the social partners to set the rules that suit the employment relationship in enforcing a right or fundamental freedom in the Bill of Rights. Adequate care and judicial caution is necessary because some of the limitations on such a right or freedom are justifiable in an open and democratic society, as stated in article 22 of the Constitution. A probationary employee does

not have the right to claim unfair dismissal under section 42 of the Employment Act, 2007. Casual employees similarly, cannot bring such claims. To qualify for service pay under section 35 of the Act an employee needs to have worked for a specific period. There are qualifying periods for annual leave, etc. All these limitations do not appear to advance the principle of fairness and equality at work place, but are justifiable in an open and democratic society."

[**9**] The five grounds of appeal can be condensed into two main grounds, namely, that, the learned judge erred in law in holding that section 45(3) of the Employment Act, 2007 was unconstitutional and in holding that the declaration of unconstitutionality in Momanyi's case applied retrospectively.

[**10**] Ms. Wanjiru Ngige for the appellant submitted, amongst other things, that section 45(3) is not unconstitutional; that section 45(5) is a fundamental tenet of fair labour practices guaranteed to both employers and employees under Article 41; that the International Labour Organization – Termination of Employment, Convention 1982 (No. 158) in article 2(5) to which Kenya is a signatory, recognizes that a legislation may provide for qualifying periods; that Article 27(1) of the Constitution which gives right to equal protection and equal benefit to law applies to both employers and employees; that by the doctrine of classification, legislature can pass laws creating differences as to the persons to whom they apply without the law being unconstitutional and, lastly, that the Momanyi decision was not binding on the court, and, in any case, the High Court in Momanyi's case acted without jurisdiction by dealing with employment and labour relations dispute which is within the exclusive jurisdiction of the ELRC.

[**11**] On the other hand, Nyabena for the respondent submitted that it is only the High Court which had jurisdiction to determine whether parts of a statute are in conflict with the Constitution; that the decision in Momanyi case has never been challenged on appeal by any party and still stands; that section 45(3) having been declared unconstitutional cannot be relied upon by the appellant and that the High Court had jurisdiction to determine whether section 45(3) was unconstitutional.

[**12**] It is true as submitted by the respondent's counsel that the decision in Momanyi's case was not appealed against. This appeal is not directly against that decision. The appeal is against the decision of Nzioki wa Makau, J. which adopted the reasoning in Momanyi's case and held in essence that the qualifying period of thirteen months in section 45(3) is unconstitutional and that there was no justification for the qualifying period or for denial of right of redress for infringement of the employee's or employer's right.

[**13**] The correctness of High Court decision in Momanyi's case has been doubted by some judges of the ELRC. In **Mercy Njoki Karingithi v Emrald Hotels Resorts & Lodges Limited (2014) eKLR**, ***Radido Stephen J***. held that an employee who was on probationary contract and who had worked for two days had suffered unfair termination. However, the learned judge said at paragraph 32 and 33 of the judgment thus:

"32. I have my doubts whether the declaration (of unconstitutionality) presents the correct legal position as to whether the termination of the contract is subject to Article 47 of the Constitution (right to fair administrative action).

33. I must also note that the qualifying period of 13 months to allege unfair termination are replete in statutes of many jurisdictions but since the declaration was made by a court of concurrent jurisdiction with the High Court (but in employment disputes) and because the declaration had a polycentric effect and the need for certainty in legislation there would be no utility in me reaching a contrary conclusion or discussing the issue any further here."

In **Dismuss Jelango & Another v. Amicable Travel Services Limited (2014) eKLR**, Rika J., a senior and experienced judge in employment and labour relations matters held that the remedy for unfair termination does not apply to probationary contracts. The learned judge stated in para 20 of the judgment in part:

"The correct interpretation is that section 43 and 45 of the Employment Act both in terms of

procedure and substantive justification have no application to termination of probationary employment contracts"

and further in same paragraph:

"The effect of the High Court decision of Samuel G. momanyi and that of the Industrial Court in Mercy Njoki Karingithi is to nullify certain fundamental employment laws, such as the law of employment probation and blur the intention of Parliament in creating qualifying periods for employees to access certain rights and obligations.

[**14**] The appellant's counsel has also submitted that the International Labour Organization Convention – the Termination of Employment Convention, 1982 (No.

158) to which Kenya is a signatory provides that national legislation may provide for qualifying periods and the Employment Act contains limitations of rights of employers and employees and reflects a series of negotiated compromises between stakeholders.

[**15**] Both **Radido Stephen** and **Rika JJ** and, I hope other judges of ELRC, correctly appreciate that the High Court's decision in Momanyi's case is not binding on them. The High Court and ELRC are superior courts and each is autonomous and exercising different and distinct jurisdiction (see **Supreme Court decision in Republic vs. Karisa Chengo and two others – Petition No. 5 of 2015**). Furthermore, the ELRC has jurisdiction to interpret and apply the Constitution relating to questions of labour rights and Bill of Rights in general, directly arising in employment and labour disputes within its jurisdictional competence. (**Prof. Daneil M. Mugendi v Kenyatta University & three others 2013 eKLR; Judicial Service Commission v. Gladys Boss Shollei & Another 2014 eKLR**).

Thus, there is no compelling reason why judges of ELRC should continue applying a decision of the High Court if they find that it incorrectly interprets the employment law.

[**16**] The Act in part VI stipulates the manner of termination of various contracts of service and the respective remedies available to each category of an employee in case of unlawful termination. Two of them, summary dismissal and unfair termination are relevant to this appeal.

The general proposition of the law as stated in section 44(2) is that, no employer has a right to terminate a contract of service without notice or with less notice than that stipulated in statutory provisions or contractual term. However, section 44(1) allows the employer to summarily dismiss an employee – that is without notice or less notice if the employee has by his conduct indicated that he has fundamentally breached his obligation under the contract of service (S.44(3), or if the employee has committed acts of gross misconduct as stipulated in section 44(4). Such an employee has no right to be heard before summary dismissal. However, if the employer contemplates to summarily dismiss an employee on grounds of misconduct or poor performance, the employer is required before making a decision to summarily dismiss the employee to explain the reason, hear and consider the employee's representations (section 41(1) and 41(2)).

An employee who is summarily dismissed for a lawful cause is entitled to be paid all monies, allowances and benefits due to him up to the date of his dismissal - (s. 18(4).

On the other hand, if an employee is summarily dismissed for unlawful cause, he has a right to complain to a labour officer or file a suit in ELRC - (section 47 and 87). The remedies for wrongful dismissal are stipulated in section 49 and include wages or salary for a period not exceeding twelve months (s. 49(1) (c) and, reinstatement (S. 49(3)]

Secondly, an employer may terminate the employment of an employee upon giving him notice for other valid and fair reasons which the employer genuinely believes to exist and related to employees conduct, capacity or compatibility or based on operational requirements of an employer and upon according the employee fair procedure before termination (S.43(2); 45(2)).

Absent of valid and fair reasons and procedural fairness, the termination is unfair and the employee has a right to complain to Labour Office or file a suit in ELRC for redress. The remedies stipulated in section 49 are the same as those available to an employee who has suffered wrongful dismissal. However, by the impugned section 45(3), such an employee has no right to complain of unfair termination unless he has been continuously employed for a period of not less than thirteen months immediately before the date of termination.

[**17**] I have studied the respondent's claim which was filed in the ELRC and the two demand letters sent to the appellant before the claim was filed. In the first demand letter dated 11th April 2017 sent by the respondent to the employer, his complaint was "***unlawful termination of employment***" and his demand was based on unlawful termination of contract. By the demand letter dated 5th October, 2012 sent by respondent's advocates to the appellant, the respondent's advocates claimed that the appellant terminated the contract without any colour of right or notice and that the termination did not comply with the mandatory provisions of section 41 of the Employment Act. In paragraph 5 of the claim, the respondent claimed that the employment was terminated without notice or payment in lieu of notice and further that the appellant did not comply with the mandatory provision of section 41 of the Employment Act, 2007 and the principles of natural justice. Further, in paragraph 7 of the claim, the respondent repeated that the employment was terminated without giving him a notice or letter to show cause why he should not be terminated and contrary to provisions of section 41 of the employment Act and in breach of principles of natural justice. The appellant sought a declaration that termination of his employment was unlawful and unfair and monetary claims.

[**18**] As I understand it, the respondent's claim as pleaded was a wrongful or unlawful, summary dismissal claim as opposed to unfair termination claim. He expressly pleaded that the contract of service was terminated without notice. He also invoked section 41 of the Act and stated that the provisions of section 41 of the Act were not complied with. As already stated, section 41 provides, *inter alia,* that before an employer terminates the employment of an employee on grounds of misconduct or poor performance, he is required to explain to the employee the reason for the intended summary dismissal, hear the employee and consider his representations.

The requirements of procedural fairness in the special case where summary dismissal is contemplated on grounds on misconduct or poor performance, or the fact that the remedies for wrongful termination and unfair termination are similar does not transform a wrongful summary dismissal into unfair termination. The two are distinct concepts. The respondent did not invoke the provisions of section 45 which specifically deals with unfair termination. It is clear from the statutory provisions that Section 45(3) applies to a claim for unfair termination and not to a claim for wrongful or unlawful summary dismissal.

[**19**] It follows that the preliminary objection was based a on a nonexistent factual situation and on a right that the respondent had not yet asserted. To that extent, the legal issue raised, that is, the constitutionality of section 45(3), was moot, being an abstract question that did not arise from the existing facts or right and which had no practical effect on the respondent's claim based on wrongful summary dismissal.

As a matter of sound public policy, judicial resources should not be employed to decide abstract, hypothetical and academic cases except in certain circumstances. In my view, a court's decision on the issue raised will not authoritatively resolve the interpretation of section 45(3) and its decision will merely be advisory.

An authoritative decision of this Court should await an adequate, developed and concrete case of unfair termination more so because the ELRC has the competence and jurisdiction to resolve the constitutional question untrammeled by the decision of the High Court in Momanyi's case.

For reasons advanced, the appeal is dismissed for different reasons. The costs of this appeal shall be costs in the trial. The respondents claim for wrongful or unlawful summary dismissal shall be heard by a judge other than Nzioki wa Makau, J.

As G.B.M. Kariuki agrees, that shall be the judgment of the Court. This judgment has been read under

Rule 32(3) Court of Appeal Rules, **Hon. Azangalala, JA** having ceased to hold office.

Dated and Delivered at Nairobi this 17th day of November, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF G.B.M. KARIUKI, JA

I have read in draft the judgment of my brother, the presiding judge, Githinji, JA and I am in agreement with the decision he has reached and the findings he has made. I do not find it necessary to add anything to the same.

The appeal has no merit. I concur that it should be dismissed with no order as to costs.

Dated and delivered at Nairobi this 17th day of November, 2017.

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR