



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.64 OF 2015

BONVENTURE KIOKO MUTUKUPETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

BRITISH COUNCIL, KENYA 2ND RESPONDENT

RULING

1.The Petition herein was filed on 13th June 2015 by the Petitioner Bonventure Kioko Mutuku and seeking to enforce his fundamental rights and freedoms pursuant to the provisions of articles 27(1), (2) and (5), 28, 35(1)(b), 41(1) & (2) and 50(1) of the constitution. Further that the respondents be found to have violated the provisions of section 41(1), 42(1), 43 and 45(3) of the Employment Act.

2.The foundation of the Petition is that the 2nd Respondent breached constitutional and legal rights of the Petitioner in the course of his last month of probation vide its letter dated 22nd June 2015 where in an alleged premeditated move, unfairly terminated the petitioner's contract of employment without a valid and fair reason. That the 2nd Respondent subsequently issued the Petitioner with a Certificate of Service dated 14th July 2015. That the 2nd Respondent in a blatant violation of the Constitution and the Employment Act purports to unfairly terminate the petitioner's employment contract in circumstances that are illegal, unconstitutional and seeking reliance on section 42 of the Employment Act in that the employment contract was terminated during probation period and without being given fair reason as required under section 45 or without being given an opportunity to be heard as required under section 41 of the Employment Act.

3. With the petition, the Petitioner also filed a Notice of Motion seeking urgent orders of reinstatement back to his position with the 2nd respondent.

4.The Petitioner has also enjoined the 1st Respondent herein on the basis that as the legal advisor to the government, the office has mandate to protect, promote, uphold the rule of law and defend the public interest. That the questions of Constitution and law raised in the Petition warrant the 1st Respondent to attend.

5. In response, the 2nd Respondent filed Notice of Preliminary Objections challenging the jurisdiction of the Court and further seeking that based on the alleged violations of the Constitution and Employment Act and the nature of declarations sought with regard to the constitutionality of sections 41, 42(1) and 45(3) of the Employment Act, and by provisions of Article 165(3) (d) (i) of the constitution, Hon. the Chief Justice should empanel a 3 judge bench to hear the petition.

6. The 1st Respondent supported the objections of the 2nd respondent.

7. By ruling dated 28th September 2015, the Court found there was jurisdiction and that the question of the constitutionality of the outlined sections of the Employment Act and reference to Hon. the Chief Justice to empanel a bench to hear the petition, the same should be addressed at the hearing of the Petition as the Petitioner had an application seeking urgent orders.

8. The Petitioner followed with submissions that he has since found another employment and no longer keen to the order of reinstatement sought in his Notice of Motion filed together with his petition. This Notice of Motion dated 13th June 2015 has since been withdrawn.

9. Parties have since exchanged their submissions on the petition.

10. The question of empanelling a 3 judge bench before taking directions on the hearing of the petition.

11. On 18th August 2016 I gave directions that upon the pleadings of the parties and application by the 2nd Respondent with support of the 1st Respondent and concession by the Petitioner that the matters raised in the Petition raise substantial questions on the application of the Constitution that challenge the constitutionality and application of the Employment Act and thus it was necessary to empanel an enlarged bench. The matter was thus referred to the Presiding Judge, Employment and Labour Relations Court for reference to Hon. the Chief Justice for the same.

12. On the same date, 18th August 2016, the presiding judge, gave orders and seeking reasons for the directions for an enlarged bench to hear the matter.

13. In the preliminary objections raised by the 2nd respondent, noted above, submissions with regard to the constitutional questions addressed in the Petition were raised and extensive submissions made by all the parties herein. The questions raised in the Petition relate to the declarations sought in the Petitioner and noting that **section 41, 42(1) and 45(3) of the Employment Act** are inconsistent with the provisions of **articles 41(1), 47(1), 48 and 50(1) of the Constitution** as the sections purports to deny the Petitioner the rights and freedoms enshrined therein with regard to the right to fair labour practice, fair administrative action and the right to a fair hearing by an independent Court and therefore such law and its provisions are invalid.

14. Through Hon. the Chief Justice Practice directions with regard to reference of matters to an enlarged bench, the Court must first be satisfied that the issues are weighty enough to amount to substantial question of law as envisaged under Article 165(4) of the Constitution and warrants the expansion of the bench to hear the petition.

15. The Court is therefore being called to interpret the Constitution vis-a-vis the application of fundamental rights and freedoms under articles **41(1), 47(1), 48 and 50(1) of the Constitution** as against key provisions of the Employment Act at section 41, 42(1) and 45(3). These I find to be key and substantial questions of that have come before the Court and require to be addressed by an enlarged bench.

16. In the case of **Samuel Momanyi -v- SDV Transami & Another (2012) eKLR**, the High Court held that **section 45(3) of the Employment Act were unconstitutional. This was by a single judge.**

17. **The issue of the application of section 45(3) of the Employment Act arose again in Onesmus Kilonzo versus Nation Media Group Limited, Cause no.2355 of 2012 before a single judge where similar questions of law and Constitution arose at the preliminary stage. Upon submissions on the application of section 45(3), the judge held that;**

It is not lost on the Court that the real dispute revolves around Section 45 (3) of the Employment Act. In Momanyi -v- SDV Transami & another (2012) eKLR Lenaola J. held that Section 45 (3) of

the Employment Act is unconstitutional. When a Court declares a part of statute unconstitutional, the effect is that that particular section or part ceases to be law. In short 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 in Kenya.

18. The employer, Nation media Group Limited lodged an appeal to the Court of Appeal. While the Court of Appeal was addressing an application seeking stay of proceedings pending the hearing and challenge to the ruling of the Court in addressing objections with regard to the application of section 45(3) of the Employment Act, a bench of 3 judges of the Court of Appeal (G.B.M. Kariuki, J. Mohammed and Otieno-Odek, JJ.A) in **Nation Media Group versus Onesmus Kilonzo, Civil Application No. Nai.102 of 2015 (UR 83/2015)** made a further analysis with regard to the application of section 45(3) of the Employment Act by this Court thus;

From the case law cited by the applicant, there is prima facie differing perspectives from decisions of the Employment & Labour Relations Court on constitutionality of Section 45 (3) of the Employment Act. For instance, in the case of Danish Jalango & another -v- Amicabre Travel Services Limited Industrial Cause No. 1068 of 2012, Rika, J. critic the decision in Samuel Momanyi case (supra) stating that “it blurs the intention of Parliament in creating qualifying periods for employees to access certain rights and obligations; that employees are not normally recruited at face value and parties must be allowed a period of learning each other.” Radido, J. on constitutionality of Section 45 (3) of the Employment Act in Mercy Njoki Karingithi -v- Emerald Hotels Resorts & Lodges Limited 2014 eKLR expressed himself as follows:

“Before discussing appropriate remedies, I must confess that I may have reached a different conclusion were it not for the decision of Lenaola J in Samuel G. Momanyi -v- Attorney General & Another (2012) eKLR, declaring that Section 45 (3) of the Employment Act was inconsistent with Articles 28, 41 (1), 47, 48 and 50 (1) of the Constitution and therefore invalid. ... I have my doubts whether the declaration presents the correct legal position as to whether the termination of an employment contract is subject to Article 47 of the Constitution (right to fair administrative action). I must also note that statutory qualifying period of 13 months to allege unfair termination are replete in statutes in many jurisdictions but since the declaration was made by a Court with concurrent jurisdiction and this Court has similar status with the High

Court... there would be no utility in me reaching a contrary conclusion or discussing the issue any further here. Lenaola J. sat as a primary Court (Court of first instance) and this Court is similarly determining the present case as a primary court. The challenge may need to await the decision of a higher court.”

19. Though the Court of Appeal has not rendered itself on the substantive issue(s) before it with regard to the constitutionality of section 45(3) as raised herein, it is apparent that the Court has been faced with similar questions by litigants seeking declaring that Section 45 (3) of the Employment Act was inconsistent with Articles 28, 41 (1), 47, 48 and 50 (1) of the Constitution and therefore invalid in the current suit, in **Samuel Momanyi versus Attorney General; Onesmus Kolonzo versus Nation Group; Danish Jalango & another -v- Amicabre Travel Services Limited and Mercy Njoki Karingithi -v- Emerald Hotels Resorts & Lodges Limited**, cited above. Such question will not cease unless addressed conclusively by an enlarged panel.

20. While appreciating that this Court has dealt with the issue of application of the Bill of Rights in employment and labour relations, the Petitioner contends that Article 27(1), (2) and (5), 28, 35(1)(b) 41(1), 47(1) and (2) and 50(1) of the Constitution giving him rights of equality before the law and equality and non-discrimination; human dignity; access to information; fair labour relations, administrative action, and hearing have been violated by the respondents application of the provisions of section 41, 42(1) and 45(3) of the Employment Act with regard to being given a fair hearing during his probation period and that he has been in employment for less than 13 months and thus does not have the right to lodge a complaint of unfair termination. That such provisions of the law are in conflict with the

Constitution and therefore unconstitutional.

21. In this petition, I find substantial questions that have been raised; whether an employee terminated during probation period has a right to a hearing; whether an employee terminated during the probation period should be given reasons; and whether an employee terminated during the probation period can claim rights under sections 41 and 45 of the Employment Act with regard to unfair termination of such employment.

22. These issues are in my view by no means insubstantial. They are issues which may not only affect how employers and employees relate at the shop floor and how the Court has rendered itself in similar cases and forward. Therefore the questions of rights within the probation period of an employee or an employer must be addressed. The rights and freedoms under the Constitution and the safeguards and or restrictions under the Employment Act must once again come into serious scrutiny.

23. As noted above, the Petition raise substantial questions of law under Article 165(4) as read with under clause (3) (b) or (d) of Article 165 of the Constitution as to justify the empanelling of a bench of uneven number of Judges of this Court of not less than three, assigned by Hon. the Chief Justice.

I so certify.

Accordingly, I direct that the Petitions be transmitted to the Hon. the Chief Justice forthwith to consider empanelling the said bench. Further directions will await the decision by Hon. the Chief Justice.

Dated this 19th day of September 2016.

M. MBARU

JUDGE

In the presence of

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