



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI CAUSE NO. 670 (N) OF 2009

NICHOLAS OTIENO.....CLAIMANT/RESPONDENT

v

PATCO INDUSTRIES LIMITED.....RESPONDENT/APPLICANT

RULING

1. The matter before me is a review application dated 18th February 2011 in which the Respondent seeks the Review of the Award of the Court dated 7 th February 2011 delivered by Judge Kosgey. In the Award the Claimant was successful to the extent of being awarded 150,000/- compensation thus provoking the Review.
2. The Respondent/Applicant appeared through Mr. Okeche urged this Court to review the decision of Judge Kosgey who sat in the predecessor of this Court on the basis that the award of compensation for 5 months for an employee who had not completed 13 months contrary to Section 45(3) of the Employment Act. Mr. Okeche submitted that the 13 months was for the purpose of finding if the employee is suitable. Mr. Okeche submitted that the decision was wrong at the time it was given.
3. Mr. Nyabena appeared for the Claimant/Respondent and in the main opposed the Application for review on the basis that the Respondent/Applicant did not demonstrate grounds for review in terms of s.32 of the Industrial Court Rules. Mr. Nyabena submitted that the Applicant (Respondent) has not attempted to show the grounds are available, no proof of new matter found, there is no evidence that the decision is contrary to the law. He submitted that if there was any error on the law the appropriate thing was to file an appeal. He submitted further that the Application was overtaken by events in that the High Court in *Samuel G. Momanyi v. AG and SDV Transami* declared Section 45(3) unconstitutional for purporting to deny workers who have not completed 13 months legal redress as contemplated in the section.
4. Mr. Okeche in a brief response reiterated that the breach of Section 45(3) is a ground allowed in Rule 32(1)(c) of the rules of this Court. The Court was urged to ignore the ruling of the High Court as the Award herein was given on 7/2/2011 long before the decision of *Momanyi v. AG* and he thus urged the Court to allow the review.
5. Having considered the submissions of Counsel and the Application the following are the issues for determination:-
 - i. is the Award open for review?
 - ii. was the judge in error to overlook the provisions of Section 45(3) of the Employment Act?
6. The Award of the Court was made in February 2011 after the coming into effect of the Industrial Court Act 2007. The Act under Section 16 provides the following about reviews:-

16. *The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.*

7. The Rules provide the following under Rule 32 of the Industrial Court Rules 2010:-

32. *Review.*

(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—

(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

(2) An application for review of a decree or order of the Court under subparagraphs (b), (c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.

(3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.

(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.

(5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.

(6) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(7) An order made for a review of a decree or order shall not be subject to further review.

8. The plain reading of the above cited Section and Rule 32 demonstrate beyond any peradventure that this Court has the power to review decisions of the former Industrial Court as well as those of the current Court. Judge Kosgey had continued to sit in terms of Section 33 of the Industrial Court Act. Now that the judge no longer sits, this Court as the successor of the Tribunal he was part of, is permitted to review the decisions of the predecessor of this Court. The predecessor of this Court was established pursuant to the Labour Institutions Act Part III and in particular Sections 11 to 27 which were repealed by the Industrial Court Act No. 20 of 2011. The march toward the establishment of this Court pursuant to Article 162(2) was upon the interview and appointment of judges by the Judicial Service Commission. The proceedings before the predecessor of the Court were to continue in terms of Section 33. Section 33 of the Industrial Court Act 2011 provides as follows:-

33. All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.

9. This Court has now come into operation pursuant to the Swearing in of the Judges of the Industrial Court. The President appointed the 12 Judges of the Court vide a Special Issue of the Kenya Gazette

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The case before me was heard by a Judge who had continued to sit in terms of section 33 and thus amenable to review by me.

10. The Respondent has made heavy weather of Section 45(3). The provisions of

Section 45(3) are as follows:-

45. (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.

11. The decision in **Samuel G. Momanyi v AG & SDV Transami** was made in May 2012. In this case, the Hon. Mr. Justice Lenaola held at paras 21 and 22 of the decision as follows:-

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.”

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.

12. The decision in **Samuel G. Momanyi v AG & SDV Transami** was made in May 2012 long after the decision in this Cause. Be that as it may, it is sound reasoning which Judge Kosgey applied long before the declaratory decision by the learned Judge in the constitutional case. I am in agreement with the

learned Judge in his holding that the Section was unconstitutional. The provisions of Section 45(3) of the Employment Act (which section is reproduced above) was discriminatory.

13. In relation to the Award by Judge Kosgey, it was therefore not erroneous for the Judge to apply the spirit of Article 41 of the Constitution and admit the Claim for hearing and determination in spite of the “magical” 13 months. The purposive interpretation of the Section in light of Constitutional provisions underpinning the rights of labour and capital leads to the inevitable conclusion that Judge Kosgey did not err. Lord Denning in the case of **Notham v. London Borough of Barnet (1978) 1 WLR 220** held the purposive interpretation was permitted to “promote the general legislative purpose underlying the provisions”.

14. The House of Lords in the case of **Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 (HL)** had occasion to delve into the issue of interpretation. Viscount Simonds sat alongside Lord Normand, Lord Morton of Henryton, Lord Tucker & Lord Somervell of Harrow in the unusual claim to British nationality now known as the Prince of Hanover case. At page

461 Viscount Simonds stated as follows:-

*“So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use “context” in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.”*

15. An authority on the subject Sir Rupert Cross in his book **Statutory Interpretation (3rd ed,**

1995), gave vent to the unified approach to interpretation. In this postulation, the following are the combination of approaches used. The judge begins by applying or using the grammatical and ordinary or technical meaning of the context of the piece of legislation and if this produces an untenable or absurd result then the judge may apply any secondary meaning possible. The judge may imply words into the statute or alter or ignore altogether some words to prevent a provision from being unconstitutional, unintelligible, unworkable or absurd. In applying these rules the judge may resort to various aids and presumptions.

16. The words of Section 45(3) were not in consonance with the Constitution and there was no error on the part of the judge reading into the Section as he did as the limit of 13 months was not Constitutional since it would have barred the Claimant herein from agitating for his rights due to not meeting this vaunted figure of 13 months.

17. In the premises, on the basis of the foregoing and in consonance with the Constitution, the decision by judge Kosgey was correct and I uphold it. The review application is dismissed with Costs to the Claimant.

It is so ordered.

Dated and delivered at Nairobi on this 15th day of January 2013.

Justice Nzioki wa Makau

Judge of the Industrial Court

Appearances

Mr. Okeche instructed by Federation of Kenya Employers (FKE) For Applicant

Mr. Nyabena instructed by Nyabena & Co. Advocates For Respondent