REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 358 of 2010

SAMUEL G. MOMANYI……………………… ……………………………………..CLAIMANT

VERSUS

**SDV TRANSAMI KENYA LIMITED………………………...………………………
RESPONDENT**

Rika J

CC. Elizabeth Anyango

Mr. Opini instructed by Onyoni Opini & Gachuba Advocates for the Claimant;

Mr. Chenge instructed by Muriu Mungai and Company Advocates for the Respondent

RULING

1. On 10th December 2010, the Industrial Court made a Ruling that the claim for unfair termination and compensation to the amount of Kshs.6,360,000 is improperly before the Court. This part of the claim was struck out, and the Claimant granted an opportunity to proceed with his claim on notice pay, service or severance pay, and re-location allowance.

2. The Ruling was premised on a preliminary challenge mounted by the Respondent, relating to the qualifying period of ***not less than thirteen months immediately before the date of termination,*** created under section 45 (3) of the Employment Act 2007, for employees to have the right to bring claims for unfair termination.

3. Samuel G. Momanyi worked for SDV Transami Kenya Limited for 11 months and 27 days. He had not worked continuously for the Respondent, for a period ***not less than thirteen months immediately before the date of termination,*** the 27th February 2010. He filed Industrial Court Cause Number 358 of 2010 on 7th April 2010, seeking balance of 1 month's salary in lieu of notice at Kshs.194,333.33; service or severance pay of 1 year at Kshs.265,000; re-location allowance 1 ½ month's salary at Kshs.795,000; and 12 months' salary in compensation for unfair termination of Kshs.6,360,000. His monetary claim added up at Kshs.7,614,333.33, the bulk of which consisted compensation for unfair termination.

4. The Industrial Court, in the Ruling of 10th December 2010 partly upheld the preliminary challenge made by the Respondent, by severing the unfair termination claim, from the contractual claim. The result was that Momanyi was prevented from pursuing compensation, which at Kshs.6,360,000, contained the bacon of the claim. Dissatisfied with the turn of events, the Claimant approached the High Court of Kenya at Nairobi, filing Petition Number 341 of 2011 at the Constitutional and Human Rights Division, against the Hon. Attorney-General and SDV Transami Kenya Limited.

5. He asked for the following orders before the High Court:-

(i) 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 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.

(ii) 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 rights and freedoms enshrined in the said Articles of the Constitution.

(iii) 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.

(iv) A declaration that the Petitioner has a right, to be fairly heard on his claim against the 2nd Respondent on unfair termination, and further, a declaration that the Ruling delivered by the Industrial Court on 10th December 2010 in Cause Number 358 of 2010, violated the Petitioner's rights and fundamental freedoms, and the said Ruling be reviewed and set aside.

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

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

(vii) All and any such Orders as this honourable Court shall deem just.

6. The High Court did not have the input of the Attorney-General, who as is his tradition, kept away from the proceedings. There was no-one to assist the Court on the justification for qualifying period in unfair termination. The honourable High Court attempted on its own to find any justification for such a provision as Section 45(3), but its efforts came to naught. The High Court on 18th May 2012 granted 2 of the main prayers to the Petitioner, declaring:-

(a) 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.

(b) Section 45(3) of the Employment Act 2007 is invalid by reason of its violation of the rights and fundamental freedoms in the Bill of Rights.

7. After obtaining these favourable Orders from the High Court on 18th May 2012, the Claimant lodged an application at the Industrial Court, dated 19th July 2012 asking for Orders that:-

(a) This Court be pleased to review and set aside its Ruling and Order made by the honourable Mr. Justice James Rika dated and delivered on 10th December 2010, and reinstate the Claimant's

claim for unfair termination and subsequent compensation of Kshs.6,360,000 against the Respondent – which was struck out pursuant to the said Ruling.

(b) The cost of this application be to the Claimant in any event.

8. The application was argued by Mr. Opini for the Claimant, and Mr. Chenge for the Respondent, on 26th November 2012.

CLAIMANT'S POSITION

9. The Claimant holds that in view of the invalidation of Section 45 (3), this Court should review its Ruling to allow the Claimant to follow compensation. The provision was declared to be inconsistent with the Constitution. Section 16 of the Industrial Court Act No. 20 of 2011, allows the Court to review its judgments, awards orders or decrees in accordance with the Rules. Rule 32 of the Industrial Court (Procedure) Rules, 2010 stipulates that the Court can review its decisions on among other grounds, matters of law. The Ruling of the Court severing the unfair termination claim, was based on a law that has been invalidated. Section 45 (3) was a bad law. The 6th Schedule of the Constitution provides that all laws in force at the time the Constitution came into effect shall continue to be in force with the necessary adaptation to bring them in line with the Constitution. The Ruling should be reviewed, to fall in line with the Constitution. Section 45 (3) cannot be made valid by legislative intervention; it is declared to be invalid by the Constitution.

10. The Judgment by the High Court re-sated the position of the Constitution. Even without the High Court Judgment, the qualifying period provision, would still be invalid under the 6th Schedule of the Constitution. Mr. Opini does not agree with the position that invalidation of Section 45 (3), can only take effect from the date when the High Court delivered its Judgment. The case of ***Kenya Bankers Association & Another v. Minister for Finance & Another (High Court at Nairobi, Miscellaneous Civil Application No. 908 of 2001),*** which was given in the Respondent's submissions on record, is not relevant to the dispute herein. The case related to retrospective application of penal laws. Section 45(3) became invalid immediately the constitution came into effect. The Claimant prays the Court to review its ruling, and reinstate the claim for unfair termination.

RESPONDENT'S POSITION

11. Mr. Chenge argues that the Industrial Court does not have the jurisdiction to review it Ruling. The Court became ***functus officio***, after delivering its Ruling. The issue cannot be re-opened. This Court would be sitting on appeal of its own decision. The High Court declared section 45 (3) unconstitutional. This applies from the date the decision was made, on the 18th May 2012. It cannot operate retrospectively. Before the High Court decision, section 45(3) was good law. It was not intended that the High Court Judgment prejudices vested rights, imposes new burdens and/or impairs existing obligations on the citizens. It cannot apply retrospectively**.** In ***Kenya Bankers' Association & Others v. Minister for Finance & Another (2002),*** Judges Kuloba and Mbaluto held:-

> ***"The Central Bank of Kenya (Amendment) Act No. 4 2001 is inconsistent with the Constitution to the extent the Act is void. The Act is void to the extent that it is penal and retroactive."***

The decision of the High Court of 18th May 2012, applies from 18th May 2012 onwards. The invalidity must be effected through amendment to the Law by Parliament, and not as sought by the Claimant. The Court cannot take away the right of a party vested in Law.

12. If this Court allows review, it will have allowed retrospective operation of the Law. The Court acted in accordance with the Law when it severed the claim for unfair termination under the qualifying period provision. The High Court found Industrial Court to have acted in accordance with the Law. Section 45(3) was good as of 10th December 2010. Parliament has to amend the Law in accordance with the High Court's decision. The 6th Schedule of the Constitution says Laws shall be enacted to be in

accordance with the Constitution. The Law would not be known without enactment. The Claimant has not shown any ground under Rule 32 of the Industrial Court (Procedure) Rules 2010, to justify review.

The Court Finds and Orders:-

13. From which date did the condemned Section 45 (3) of the Employment Act 2007 become invalid? What are the consequences for acts done in reliance on that provision, prior to the Judgment of the High Court? Should the Industrial Court review its Ruling, and reinstate the claim for unfair termination?

14. The Claimant's view is that Section 45 (3) was inconsistent with the Constitution, even as of 10th December 2010, when the Industrial Court gave its Ruling. He invoked Schedule 6 of the Constitution. The provision was a bad Law because it was inconsistent with the Bill of Rights. Even without the declaration of the High Court, the provision would not be enforced by the Industrial Court. The declaration of invalidity stretches back to the date of enactment of section 45 (3), which is 2nd June 2008.

15. This position has had strong support from as early as 1890. In the ***Supreme Court of Indiana (US) case of Carr v. State (1890) 127 ind.204, 26 N.E. 778; 11 L.R.A. 370,*** the Court stated,

"A provision of the Law which violates the Constitution has no power and can, of course, neither build up nor tear down. It can neither create new rights, nor destroy existing ones. It is an empty legislative declaration, without force or vitality."

16. Advanced by Mr. Opini, this viewpoint holds that a law declared unconstitutional is invalid from the date of its enactment. It is ***void ab initio*** and fatally smitten at its birth. Section 45 (3) in this line of thinking, has never been a Law; it conferred no rights and imposed no duties; it afforded no protection; it is in legal contemplation, as inoperative as though it had never been passed.

17. The Industrial Court should consequently treat section 45(3), as fatally smitten at its birth on 2nd June 2008. The declaration by the High Court serves to clarify that this Law had no force of Law from its inception. The Claimant adopts the traditional rule of retrospectivity; when a Law is declared invalid, it is deemed invalid from the date of its inception.

18. The counter-argument is that the declaration of invalidity can only take effect with respect to unfair termination disputes, filed after 18th May 2012, when the High Court read its Judgment. Invalidity can only apply prospectively, from 18th May 2012. This alternative thought seeks to protect vested rights, by ensuring rights of litigants acquired prior to the invalidation of the relevant Law, are not adversely affected. All the proceedings prior to the declaration, do not stand invalidated. Decisions taken prior to invalidation are not disturbed.

19. The Constitution requires existing Laws to conform to it, which calls for revision of existing laws. At the same time the Constitution upholds the rule of Law, which entails legal certainty. Citizens need to know if they have acquired a right under statute, if they have suffered deprivation under statute, and know if their conduct conforms to the Law. Without certainty, the people would not be able to organize their lives.

20. The Attorney General of Kenya, and the Employers' and Employees' Groups did not participate in the High Court Petition. The Court was not given a justification for the 13 months' qualifying period in unfair termination claims. It perhaps would have added value to the outcome, if the tripartite stakeholders made their presentations at the High Court. Qualifying periods exist in different Labour Markets. The High Court noted the South African Jurisdiction, where an employee who has worked for less than 24 months, may have no claim in unfair termination.

21. On 6th April 2012, a month before the qualifying period was outlawed in Kenya, the ***Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying period) Order 2012,*** increased the qualifying period for the right claim unfair dismissal in England from 1 year, to 2 years. Before this, Section 108 of the Employment Rights Act 1996, provided that employees had to have been continuously employed by their employer for at least 1 year, to claim protection against unfair dismissal.

22. In England, increase in the number of months to qualify for a claim in unfair termination was justified on several grounds, among them being the need to provide more time for employers and employees to resolve workplace difficulties; give employers greater confidence in taking on people; and ease the burden on the industrial justice system. The qualifying period is aimed at strengthening the employment relationship; reduce unfair dismissal claims and improve business confidence particularly in recruitment and retention of employees. The employment relationship needs a period of consummation. Not all rights accrue before such consummation.

23. The right to claim unfair dismissal was introduced in England by the Industrial Relations Act 1971. The qualifying period started off at 2 years. In 1974, it was reduced to 1 year, raised to 1 year again in 1979, and to 2 years in 1985. The Labour Government reduced this to 1 year by Order of 1999, and this has been the prevailing period, until the change on 6th April 2012.

24. It is important to note that an employee who has not completed the relevant period of service, can claim compensation in discrimination and automatically unfair dismissal cases, in England. Our Employment Act 2007 lumps all these cases together, and there is no independent legislative framework to regulate discrimination cases. Section 49 of the Employment Act 2007 lists some of the cases that would fall in the category of discrimination and automatically unfair dismissal, but these would still have been subject to the condemned section 45 (3) of the Act. Cases such as those relating to maternity and pregnancy ordinarily would not warrant the qualifying period.

25. The qualifying period has generated controversy in UK/EC employment and human rights jurisdiction. In ***R v Secretary of State for Employment ex parte Seymour – Smith and Perez, (1996) 1 All ER (EC) 1*** the Court of Appeal ruled that the 2 years qualifying period was discriminatory in certain circumstances. M/s Seymour – Smith and Ms. Perez were both dismissed in May 1991, after having been employed for 15 months. **The *Unfair Dismissal (Variation of the Qualifying Period) Order 1995,*** had increased the period to 2 years. The 2 ladies could not move to the Industrial Tribunal.

26. They approached the High Court for judicial review, seeking to have the 1985 Order quashed, and declared incompatible with ***EC Equal Treatment Directive (76/207/EEC***). Their argument was that fewer women than men were able to meet the qualifying rule; that there was no objective justification unrelated to sex, for the rule; and that it therefore breached the Directive's prohibition on indirect discrimination against women in employment. In the year 2000, the House of Lords ruled against the employees. The Court agreed the 2 year qualifying period rule was indirectly sex discriminatory, but held at the time of dismissal in 1991, the 2 year qualifying period rule was objectively justifiable, on the ground that had there not been a 2 year qualifying period in time of recession, employers would not have taken on new staff ***(Seymour-Smith v. SS Employment UKHL; (2000) 1 A11 ER 857).***

27. 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 fundamental 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 principles of fairness and equality at the workplace, but are justifiable in an open and democratic society.

28. The question when the Judgment of the High Court took effect should ideally have been answered by the High Court. There is no requirement under the Kenya Constitution however, for the High Court to state the effective date but parties who have moved the High Court to declare the Law invalid, ought to seek clarification on the effective date from that Court. It is not proper that issues are truncated, and answers to legal questions, sought from different Courts. The Judgment of the High Court does not answer this question, because the parties opted not to ask the question, but have opted instead to come to the Industrial Court for an answer.

29. The High Court exercised its jurisdiction under Article 23, and in accordance with Article 165 of the Constitution, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Under Article 23(2) the Court may among other remedies, declare invalid any Law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights.

30. There is no specific rule guiding retroactivity or retrospectivity on declaration of invalidity in the Kenyan Constitution. There is no rule for suspension of the declaration of invalidity, to allow competent authorities, to bring the Law in line with the Constitution and correct the inconsistencies pointed out, by the Constitution Court. Section 98 of the Interim Constitution of South Africa offered some guidance on the effective date of invalidity stating:-

"Unless the Constitution Court orders otherwise, the declaration of invalidity of a Law or provision thereof existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof, before coming into effect of such declaration of invalidity."

Section 172 (1) of the current South African Constitution offers assistance in the following way:-

"When deciding a Constitutional matter within its power a Court –

(a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency; and

(b) May make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period, and on any condition, to allow the competent authority to correct the defect."

31. These rules recognize that societies that are in a transition are delicate, and require a high degree of legal certainty in organizing their lives.

32. In the ***Supreme Court of Kenya Case of Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited and 2 Others, Application No. 2 of 2011, (e.KLR 2012)*** the problem of retrospectivity was evaluated. The Court laid down the rules as follows:-

"A Constitution is not necessarily subject to the same principles as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with restrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of Law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such a caution is still more necessary, if the importation of retrospectivity, would have the effect of divesting an individual of their

rights legitimately acquired before the commencement of the Constitution. Parties to the Appeal derived rights and incurred obligations, from judgment of that Court. If the Supreme Court were to allow Appeals for other cases that had been finalized before the commencement of the Constitution of Kenya 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens."

33. This decision upholds the protection of vested rights. It advances the case for judicial caution, legal certainty and preservation of the Rule of Law. SDV Transami objected to the validity of the unfair termination claim in its statement of response filed on 18th June 2010. Paragraph 8 of the statement of response states,

"It is the Respondent's submission that these proceedings offend the mandatory provisions of section 45 (3) of the Employment Act 2007."

The Respondent acquired the right to raise this defence before the passage of the new Constitution, and before Section 45 (3) was declared invalid. The Industrial Court went on to adjudicate the preliminary challenge and made a Ruling upholding the Respondent's position. This was before the invalidation. There are many unfair termination claims between 2nd June 2008, and 18th May 2012, which have been dismissed for offending Section 45(3). If this Court rules that the provision was fatally smitten at birth and allows review, all these unsuccessful unfair termination Claimants would troop back to Court seeking review. It would trigger a turbulence of pernicious proportions in the private legal relations of the citizens.

34. The Judgment of the High Court in the view of this Court, can only apply to unfair termination claims, filed after 18th May 2012. The Judgment is not intended to unsettle vested rights, and revive unfair termination claims decided before 18th May 2012. Every Law of the Legislature, however repugnant to the Constitution, until expressly declared invalid by the Court, has not only the appearance and semblance of authority, but the force of Law. This was the case with Section 45 (3) of the Employment Act 2007, prior to 18th May 2012. ***IT IS ORDERED:-***

1. The application for review is rejected;

2. Parties to agree on a date for the hearing of the main claim; and

3. Costs in the cause.

Dated and delivered at Nairobi this 27th day of February 2013

James Rika
Judge