



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 204 OF 2011

1. KENNETH KIPKEMBOI SETTIM

2. JOSSY M. KIOKO.....CLAIMANTS

VERSUS

NATIONAL SOCIAL SECURITY FUND

THE BOARD OF TRUSTEES.....RESPONDENT

RULING

1. Mr. Okeche argues that the Anti-Corruption and Economic Crimes Act came into force after the arraignment of the officials of the Respondent who were charged with various offences of corruption. Mr. Okeche submitted that the Court may adopt and implement on its own motion or by motion of the parties any means of conclusion of matter by applying Article 159(2)(c). A recommendation was made by way of the Conciliation report. The recommendation is to the effect that the 2 Claimants herein be suspended but the Respondent does not agree with that. The grounds advanced are as per the final Submissions made headed Respondent's Written Memorandum filed on 24th April 2013
2. Mr. Okeche urged the Court not to disregard the form that is to be undertaken in respect to the conciliation that took place. He submitted that there should be minutes, there should be evidence of who attended etc. He also submitted that the substance of the report is riddled with errors and contradictions. One error he pointed out was the finding that dismissal took place a few months after the offences is wrong. He submits that it was after 8 years. He stated that in the report the conciliator finds the claim is time barred and recommends that they should thus be re-instated and then suspended. The conciliator suggests the civil case must wait until criminal case is concluded. Mr. Okeche submits that the dismissal of the Claimants was in line with the provision of S.17(1) (g) of the Employment Act Cap 226 (now repealed). He states that they were reasonably suspected of committing offences under the law and were accordingly dismissed. He urged the Court not to allow the application of the law retrospectively. He relied on various unreported cases **Clement Mutiso Muinde & British American Insurance Co. Ltd. Cause 1415/2011** per Rika J. and **Kenya Re v. Eliud Ndirangu HC Civil Appeal 1 of 2004** per Mutungi J.
3. Miss Mungaki for the Claimant submits that the report should be adopted and enforced. She submitted that the Claimants were dismissed on 9th July 2003 while the ACECA which was applicable came into effect on 2nd May 2003. She submitted that the conciliators report has been made. The Respondent should have challenged the report but not at this time. She submitted that the objection cannot lie now as the matter has been concluded by conciliator. Miss Mungaki

submitted that the supreme law of the land which is the Constitution of Kenya provides under Article 159(2)(d) an effective means of dispute resolution. She submitted that the report is factual, contains not mistakes or errors. Miss Mungaki submitted that the Constitution has a presumption of innocence clause and the case which Mr. Okeche is relying on for their termination is still ongoing, it is not concluded. She submitted that the Respondent in writing stated it would abide the decision. She submitted that one cannot abrogate Claimant's rights just like that.

4. The law is clear. S.15 of the Industrial Court Act provides as follows:-

15. (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution. (2) The Court may refuse to determine any dispute, other than an appeal or review before the Court, if the

Court is satisfied that there has been no attempt to effect a settlement pursuant to subsection (1).

(3) Subject to any other written law, a certificate issued by a conciliator accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator, shall be sufficient proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.

(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

(5) In the exercise of its powers under this Act, the Court shall be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.

5. Whereas the law does not make conciliator a judicial official, it grants the Court the leeway to adopt the findings of the conciliator. It could also decline. The powers of the Court cannot be delegated. The conciliation was an attempt at a settlement and no more. The Court was not bound by the findings of the Conciliator. He is not a judicial body exercising judicial authority as encapsulated in Article 159 of the Constitution. The report of the Conciliation was at best a tool to guide the Court if a resolution of the matter was not reached at that level. I am not strictly bound by it.

6. However, the report makes an argument as regards the Claimants status which compels the Court to make a determination. They were dismissed after the interdiction and are now out of work. The Conciliator recommends that the 2 Claimants be reinstated then suspended. The Anti-Corruption and Economic Crimes Act 2003 came into force in May 2003. The offences the Claimants are accused of came were allegedly committed in on 23rd July 2002 before the commencement of the Act. At the time of the commission of the offences, the Claimants were subject to the Employment Act cap 229 now repealed.

7. The employment law in operation at the time provided under Section 17(g) as follows:-

17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -

(g) if an employee commits, or on reasonable and sufficient grounds is suspected of having

committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

Nothing in the law precluded the Respondent from applying these provisions of the law. I would on my part note that when a party is in breach of a cardinal section of statute, there can be no resiling from the decision of application of that law. The Claimants seek that they be reinstated as proposed by the conciliator and then suspended in accordance with section 62(1) of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003. Section 62 provides as follows:-

62. (1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.

(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the Attorney-General—

(a) this section does not apply to the charge unless permission is given by the court or the Attorney-General to prosecute or the proceedings are taken over by the Attorney-General; and

(b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.

(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(7) This section does not apply with respect to a charge laid before this Act came into operation.

8. The provisions of Section 62(1) are as clear as can be. A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge. Section 62(4) continues to make very clear provision as follows. **This Section does not derogate from any power or requirement under any law which the public officer may be suspended without pay or dismissed.**

9. There is therefore residual power in the Respondent to suspend without pay or even dismiss the public officer. The only catch is that there should be power or requirement under any law. In this case, there is the Employment Act Section 17(g) which is equivalent to Section 44(4)(g) of the Employment Act 2007 which provides:-

44(4) (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

10. The action by the Respondent is within the law and thus cannot be challenged. In the premises I find and hold that the dismissal was in accordance with statutory provision and is without blame. I would on my part dismiss the Claim with costs.

It is so ordered.

Dated and delivered at Nairobi this **14th** day of **June** 2013

Hon. Mr. Justice Nzioki wa Makau

Judge