



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & MURGOR, JJA)

CIVIL APPEAL NO. 95 OF 2013

BETWEEN

SAMUEL G. MOMANYI.....APPELLANT

AND

SDV TRANSAMI KENYA LTD.....RESPONDENT

(Being an appeal from the Ruling and Order of the Industrial Court

of Kenya at Nairobi (James Rika, J.) dated the 27th February, 2013

in

Industrial Cause No. 358 of 2010)

JUDGMENT OF THE COURT

Ever since the appellant instituted his claim in the Industrial Court, the precursor to the current Employment and Labour Relations court seven years ago, the dispute has had a somewhat chequered history in the court corridors. The appellant filed his memorandum of claim dated 31st March 2010 in the Industrial Court claiming alleged unfair and unlawful termination of his employment by the respondent. By the time of his termination on 27th February 2010, the appellant had been in the employ of the respondent for a period of 11 months and 27 days. During the said period, the appellant initially served as the respondent's project manager in Mombasa but was later transferred to Nairobi. He earned a monthly basic salary of Kshs.400,000/- plus other benefits including house allowance, car allowance, utility allowance, fuel, mobile phone, school fees entitlement and medical scheme. By the time of his termination, he had completed his probationary period and had been confirmed for employment on permanent and pensionable terms.

His claim was based on the allegations that he had not committed any act warranting his dismissal; had been given no prior warning nor a chance to be heard before his termination. Since he had been given a 19 day notice before his termination, he claimed the 11 days balance of his monthly salary in lieu of notice at Kshs.194,133.33; one year severance pay at Kshs.265,000/-; relocation allowance of Kshs.795,500/- and 12 months' salary compensation of Kshs. 6,360,000/- on account of unfair termination of employment

The above allegations were denied by the respondent in its response. It denied that the respondent was unfairly terminated and averred that it paid the appellant all his terminal dues. It denied that the appellant was entitled to severance pay since he had not completed one year in its employment as envisaged by **section 35(5)** of the **Employment Act, 2007** “*the Act*”. Further, the respondent contended that, even if the appellant had completed one year in employment, he still would not have been eligible for severance pay by virtue of **section 35 (6)** as he belonged to a registered pension and/or provident fund scheme under the Retirement Benefits Act. However and most important to this appeal, the respondent denied the appellant’s claim for 12 months compensation for alleged unfair termination since he had been in employment for less than 13 months. For that contention, the respondent relied on **section 45 (3)** of the Act which provides *inter alia*;

“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.”

Before the suit could proceed to trial, the respondent formally raised a preliminary objection on the main ground that the appellant’s claim contravened the aforesaid section. That the appellant had only been in its employment for a period of 11 months and 27 days and was therefore precluded from pursuing a claim for unfair termination considering the purport of the section. The respondent therefore sought the dismissal of appellant’s entire claim on that basis.

The appellant responded by arguing that his claim was not solely seeking compensation for unfair termination but was also seeking other terminal dues. Further, that section 12 of the **Labour Institutions Act, 2007** gave the Industrial Court wide jurisdiction to entertain the dispute. The appellant contended that section 45 (3) of the Act could not act as a bar to his claim since he could not suffer a wrong in law without a remedy and it could not have been the intention of Parliament to deny an injured party a remedy in law. The court was asked to disregard the objection and proceed to hear and determine the appellant’s claim on merit.

The objection fell for determination before **Rika, J.** with **P. Osero** and **J. Olokwee** as members, who in a ruling dated 10th December 2010 upheld the respondent’s objection and struck out the appellant’s claim for 12 months compensation but sustained the claim on notice pay, severance pay and relocation allowance. They opined as follows in upholding the preliminary objection;

“The claimant was employed on 1st March 2009 and had his services terminate 11 months and 27 days later, on 27th February 2010. He stated he was not given any justifiable cause, or reason at all, and was not heard under section 41 of the Employment Act. To this extent, in our view, he was telling the Court his contract, was unfairly terminated. Section 45 (3) would apply to his situation, as he had not met the length of service criteria. There must be a reason why parliament included this section in the Employment Act 2007, and the Court cannot ignore it.”

Opting not to proceed with the hearing of the upheld claims, and remaining unfazed by the above ruling, the appellant filed a constitutional, **Petition No. 341 of 2011**, in the Constitutional & Human Rights Division of the High Court ‘*the High Court*’ alleging breach of his fundamental rights and freedoms under **Articles 27, 28, 35, 41, 47, 48 and 50** as read together with **Articles 2(1) and (4), 10, 19, 20, 21, 23 and 24** of the Constitution. The appellant alleged that he had been deprived of the right to human dignity, access to justice, access to information, fair labour practices and the right to fair hearing merely on ‘*technical provisions*’ imposed by section 45(3) of the Act. The appellant argued that section 45(3) of the Act, which had come into force before the Constitution 2010, contravened or was inconsistent with the cited constitutional provisions. Further, that termination of his employment without valid reasons and without first according him the opportunity to be heard was a violation of his right to fair labour practices as envisaged under **Article 40** of the Constitution. He averred that his right to a fair hearing had been impeded by application of **section 45(3)** of the Act and the upholding the respondent’s preliminary objection. According to the appellant, it was unfair for that section to purport to deny employees who had gone through probation, but had not completed 13 months of service to pursue compensation for unfair termination. He also contended that the court’s refusal to hear his claim on compensation was a violation

of his right to access justice as per Article 48 of the Constitution. The appellant therefore sought a declaration by court that his right to fair labour practices enshrined in Article 41(1) of the Constitution had been infringed and violated by the respondent by virtue of the fact that he was not accorded a fair hearing on allegation resulting in the termination of his employment nor were the said allegations substantiated which further contravened Article 35 of the Constitution, a declaration that section 45 (3) was unconstitutional, null and void. He also sought a declaration to the effect that he had a right to be heard on his claim for unfair termination and that the ruling delivered as aforesaid, violated his rights and ought to be reviewed or set aside.

The respondent in countering the petition denied the appellant's allegations and assertions that it had infringed on his rights and freedoms. It also denied that the appellant had advanced any credible reasons known in law to warrant a declaration that section 45(3) of the Act was unconstitutional. That the petition was an afterthought filed to defeat the respondent's successful preliminary objection in the Industrial Court and that if the declarations sought in the petition were granted, they could infringe on the constitutional rights of the respondent as the declaration would disentitle the respondent's constitutional right to protection of the law which had accrued.

The petition was determined by **Lenaola, J** (as he was then) who in a reserved judgment dated 18th May 2012 declared section 45(3) of the Act as being inconsistent with Articles 28, 41(1), 47, 48 and 50(1) of the Constitution and thus infringing on the appellant's rights and freedoms as guaranteed by those constitutional provisions. The learned Judge reasoned that there was no explanation or justification why only a person who had worked or been employed for a minimum period of one year and three months could pursue a claim for unfair termination and not a person who had worked for any period shorter. The Judge saw no merit in closing the doors of justice to an otherwise deserving litigant who had worked for a period less than the one envisaged by section 45(3) of the Act. He termed the provision as unreasonable, discriminatory and expressed the need to bring the law prevailing before the enactment of the Constitution 2010 into conformity with it. This is especially since the Employment Act, 2007 was passed before the promulgation of the Constitution 2010. The learned Judge however refused to declare that the ruling delivered in Industrial Court as having violated the appellant's rights and freedoms. The Judge also refused the appellant's prayer to review and set aside the said ruling.

Undeterred by those findings, the appellant moved back to the Industrial Court through a motion on notice dated 19th July 2012, seeking a review and setting aside by that court of its ruling dated 10th December 2010. In essence, the appellant was seeking reinstatement of his claim for unfair termination which had been struck out by the said court on a preliminary objection. The application was buoyed by the High Court's judgment declaring section 45(3) of the Act as unconstitutional. According to the appellant, after the said declaration by the High Court in his favour, there was nothing in law to bar him from proceeding with his claim for compensation due to unfair termination by the respondent. That on the basis of the High Court finding, there was now sufficient cause to warrant the review of the court's ruling dated 10th December 2010.

The appellant's application was however opposed by the respondent who maintained that the appellant had not lodged any appeal in respect of the ruling dated 10th March, 2010 and so was deemed to have been satisfied with the same. It was also deponed on the respondent's behalf that, the declaration by the High Court that section 45 (3) of the act was unconstitutional did not have any effect on already determined matters and the same did not overturn the ruling sought to be impugned as it did not apply retrospectively.

The application was also opposed on the basis that it did not meet the requirements that would justify or warrant the court's review of its earlier ruling. The respondent contended there was no new and important evidence which was not within the appellant's knowledge even after the exercise of due diligence or which could not be produced by him or her when the order was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The respondent maintained that by the time it made the ruling, the Industrial Court had correctly applied the law as it was then, and the subsequent declaration of section 45(3) of the Act as unconstitutional could not otherwise form the basis for review or setting aside of the ruling.

The court dismissed the appellant's application for review in a ruling dated 27th February 2013, and rendered itself thus,

“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.” (sic)

It should be borne in mind that it was 18th May 2012 that the High Court declared section 45(3) of the Act as constitutional.

Still aggrieved by the above findings, the appellant is now before this Court on appeal against the aforementioned ruling. The appeal is premised upon 6 grounds which can be paraphrased and summarized as follows; that the learned judge:

- considered extraneous matters resulting in a wrong conclusion.
- erred in law and fact in ignoring the findings in **Constitutional Petition No. 341 of 2011** that the appellant's claim be heard and determined on merit.
- misdirected himself as to the correct interpretation of the Constitutional Court's judgment and therefore arrived at a wrong conclusion by rejecting the appellant's application for review.
- erred in law and fact in failing to appreciate the facts of the appellant's case.
- erred in purporting to sit on appeal of the High Court by declining to implement the judgment of the court.
- wrongly exercised his judicial discretion.

The appeal was canvassed by way of written submissions.

In his written submissions the appellant faults the learned Judge for raising the same issue that had been canvassed before the High Court as to the constitutionality of section 45(3) of the Act, though that issue had been rendered moot. He contends that the High Court Judge strayed from the real issues and arrived at a wrong conclusion. Hanging on section **7(1)** of the Sixth Schedule Part 2 of the Constitution, the appellant argues that section 45(3) of the Act became unconstitutional on the promulgation of the Constitution notwithstanding the fact that a declaration to that effect had not been made by any court. The aforementioned section provides *inter alia*;

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

According to the appellant, the above section read together with Article **2 (4)** of the Constitution, rendered section 45(3) of the Act invalid from date of promulgation of the Constitution and it was not necessary to wait for any declaration as to its invalidity. This is because the said section was deemed to have been altered to bring it into conformity with the Constitution on the constitution's promulgation. The appellant is in essence faulting the Industrial Court's finding that the said section was good law until 18th May 2013, when the High Court declared it unconstitutional. That it was erroneous in the first place to have struck out his claim since the Constitution had by then come into force on 27th August 2010. He further submitted that by failing to allow his application for review and thus allow reinstatement of his claim for unfair termination, the industrial court ignored the declaration or invalidation of section 45(3) of

the Act. That it would have sufficed to only serve the declaration on the Industrial Court for implementation as the review application was unnecessary. He submitted that the Judge misdirected himself by misinterpreting the declaration by the High Court as to the effect it had on his claim. In a nutshell, that the declaration by the High Court automatically meant his unfair termination claim was valid and could proceed to hearing. For those propositions the appellant cited the following authorities - **Posh Aborwa v Independent Election & Boundaries Commission & 2 Others (2014) eKLR** and **Joseph Nyamanba & 4 Others v Kenya Railways Corporation (2015) eKLR**.

The appellant also impugns the learned Judge's reliance on **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** in reaching the erroneous decision on the ground that the facts of that decision were different from his case. In that case, the issue before the Supreme Court was whether litigants could reopen a case that was finalized by the Court of Appeal (by then the highest court in the land) before the promulgation of the current Constitution. The Supreme Court held that if it were to allow appeals for other cases that had been finalized before the commencement of the Constitution, it would trigger an avalanche of prior finalized cases. The appellant contends that his case was different in the sense that it had not been finalized before the commencement of the Constitution and so the Constitution in coming into force applied retrospectively to his case. Thus, by nullifying section 45(3) of the Employment Act, his claim for unfair termination was automatically reinstated. The appellant cited the case of **Mary Wambui Munene v Peter Gichuki King'ara & 2 others (2014) eKLR**, where the Supreme Court cited with approval the holding in **A. v The Governor of Arbour Hill Prison (2006) IESC 45, (2006 4 IR 88**, that a judicial decision may be relied upon in matters or cases not yet finally determined. That however, the common law position was that retrospective effect of a judicial decision is excluded from cases already finally determined.

The appellant also submits that the Industrial Court erred in purporting to sit on appeal of the High Court decision by declining to 'implement' the decision. He reiterated that the Industrial Court should have implemented the High Court's declaration informally. According to the appellant, it was not open to the Industrial Court to give its own interpretation as to the effective date of the unconstitutionality of section 45 (3) of the Act. That the court should have given regard to article 159 of the Constitution to dispense substantive justice without having regard to technicalities. That as it was, the Industrial Court exercised its discretion arbitrarily and imposed "bottlenecks" hindering the hearing of the appellant's claim on merit.

The respondent on its part submitted that the impugned section had the automatic effect of disqualifying the appellant's claim for unfair termination since he had not met the 13 month qualifying period stipulated under section 45 (3) of the Act. It denied that the Industrial Court committed any error that would warrant interference of the Industrial Court's exercise of its discretion upon the well known guidelines, the basis of which this Court interferes or would interfere with the exercise of a judge's discretion. It submitted that though the appellant had quoted or invoked many provisions in its application, the relevant provision in considering the review application was rule 32 of the repealed Industrial Court (Procedure Rules), 2010, which according to the respondent, was in *parimateria* with the review grounds set out under the Civil Procedure Act and the rules made thereunder.

The respondent denied the assertion that the learned Judge of the Industrial Court considered extraneous matters. It pointed out that though the Industrial Court considered the justification for the qualifying period under section 45 (3) of the Act which the High Court decision had not provided, the Industrial Court recognized that the court was bound by the High Court's declaration that the said section was unconstitutional. That for purposes of determination of the application before it, the Industrial Court rightly concentrated on the issue of retrospectivity or effective date of the declaration of the unconstitutionality of a statute which had not been addressed by the High Court. It termed as mistaken the appellant's assertion that the learned Judge arrived at a wrong conclusion by holding that section 45 (3) of the Act was good law up until 18th May 2013. The respondent cited the case of **Mary Wambui Munene v Peter Gichuki King'ara & 2 others** (above), where the Supreme Court held that as a matter of finality of court processes, parties cannot reopen concluded causes of action. This was in support of its submission that the High Court's declaration was not intended to unsettle or revive unfair termination claims decided before 18th May 2010 (when the declaration was made) as found by the High Court.

The respondent has also denied that the High Court's declaration was in the form of a directive to the Industrial Court and asserted that it was incumbent upon the latter court to decide the effect of that declaration. That the Constitutional & Judicial Review Division of the High Court's role or mandate was limited to a declaration that section 45 (3) of the Act was inconsistent with the provisions of the Constitution. The respondent further contended that the effect of reinstating the appellant's claim on unfair termination would have gone against the principle that the retrospective effect of judicial decisions is excluded from cases already finally determined as held by the Supreme Court in the case of **Mary Wambui Munene v Peter Gichuki King'ara** (supra).

The respondent has also challenged the appellant's attempt to create the impression that his claim for unfair termination was struck out on a procedural technicality which was curable under Article 159(2) of the Constitution. According to the respondent, what was before the Industrial Court was an application for review that raised the issue of retrospective application of the judgment of the High Court which the former court determined with regard to advancement of judicial certainty and preservation of the rule of law. To counter the appellant's assertion that his claim for unfair termination should not have been struck out in the first place, the respondent submitted that the qualifying period provided in section 45(3) went to the root of the appellant's *locus standi* to institute a claim for unfair termination. That the appellant was from the institution of his claim divested of *locus standi* or the right to bring a claim for unfair termination by virtue of the qualifying period. According to the respondent, the qualifying period could not be considered a procedural technicality since as at the 10th December 2010 when the Industrial Court upheld the respondent's preliminary objection, the impugned section was a valid legal provision that established *locus standi* as to who qualified to bring a claim for unfair termination.

In our view, the submissions of both parties are peculiar and woefully off tangent in the advancement of their cases before this Court. Both parties have gone to considerable lengths to argue about retrospective application of the High Court declaration of section 45 (3) as unconstitutional and to some extent the merits or demerits of that decision. But this appeal emanates from the ruling and order of the Industrial Court dated 27th February 2013, refusing the appellant's application for review. As already stated, the said ruling was in respect of a notice of motion application dated 19th July 2010 instituted by the appellant. The main prayer sought in the said motion was that;

“This Honourable 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 for kshs.6,360,000/- against the respondent which was struck out pursuant to the said Ruling.”

Essentially what was being sought by the appellant was a review of the ruling that upheld the respondent's preliminary objection. But under what provision was the review of the said ruling sought? The application was expressed to have been brought pursuant to section 12(3) (vii), section 16 of the Industrial Court Act, No. 20 of 2011 and rules 32(1) (e), (3) and (4) of the **Industrial Court (Procedure Rules), 2010**.

Rule 32 of the said rules provide as follows;

“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.”

An aggrieved party may therefore bring an application for review on any of the grounds set out in the said rule, and the appellant specifically invoked rule **32 (1) (e)** of the said rules. His application was therefore premised on the ground that there was sufficient reason (s) necessitating the Industrial Court to order a review of its earlier ruling. According to the application, the sufficient reason that warranted a review was the declaration by the High Court that section 45 (3) of the Act was unconstitutional. The issue then becomes, did the learned Judge of the Industrial Court err in dismissing the review sought by the appellant on this ground? To put it in another way, was that ground proper and sufficient for a review order to issue?

As submitted by the respondent and as can be discerned from a reading of rule 32, the rule is analogous and in *parimateria* to **Order 45 rule 1** of the Civil Procedure Rules which provide as follows,

(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

Similarly, the substantive law for review as provided under sections **80** of the Civil Procedure Act, 2010 and section **16** of the Industrial Court Act, 2011 is couched in comparable terms. There are no qualifying words to both sections to fetter the discretion accorded to court in both instances. Section **80** of the Civil Procedure Act provides that any person who considers himself aggrieved may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit. The only other condition under the Act is that such a party should not have proffered an appeal where one is allowed. Section **16** of the Industrial Act reads as follows;

“The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”

The effect of this provision was expounded by this Court in the case of **Pancras T Swai v s. Kenya Breweries Ltd (2014) eKLR**. The Court held that,

“...Section 80 of the Civil Procedure Act conferred an unfettered discretion in the court to make such order as it thinks fit on review and that the omission of any qualifying words in that section was deliberate.”

Having come to the conclusion that the powers of review granted to court are discretionary, the principles upon which this Court may interfere with the exercise of a judge’s discretion have been well canvassed in our jurisprudence and are settled. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, this Court held that it could only interfere with the exercise of judicial discretion if satisfied either that the judge: -

(a) misdirected himself on law, or

- b) misapprehended the facts, or
- (c) took account considerations of which he should not have taken an account, or
- (d) failed to take account of consideration of which he should have taken account, or
- (e) His decision, albeit discretionary one, was plainly wrong.

Put simply, the appellant's main issue or argument before this Court is that the Industrial Court should have considered itself bound to implement the decision of the High Court or review its earlier ruling in his favour and reinstate his claim for unfair termination. The appellant has in fact gone further to aver that the Industrial Court should have implemented the High Court's declaration as a matter of course without even being moved. But was that court (Industrial Court) bound to reinstate the appellant's claim in view of the High Court's declaration? In determining the preliminary objection the court was as a matter of course bound to apply the prevailing law then. Section 45(3) of the Act was by then statute law applicable to the appellant's case. In considering the respondent's objection, the Industrial Court was bound to apply the law as it was then. It would be preposterous to state or hold otherwise. The learned judge of the Industrial Court reasoned and held as follows;

“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. ”

We entirely agree with the learned Judge's rendition of the law and find no reason that would warrant this Court's interference. That was the law then. Since, whether or not to allow an application for review is an exercise of unfettered discretion, it was certainly also a factor to be considered by the Industrial Court.

Moving on now, we must examine whether the appellant's ground was sufficient for the court to review its earlier decision. As already stated, the appellant had invoked rule 32 (1) (e) of the Industrial Court Rules which gives that court power to review where there is sufficient reason (s). The reason advanced by the appellant was the High Court's declaration that section 45 (3) of the Act was unconstitutional. In **Pancras T. Swai vs. Kenya Breweries Ltd (2014) eKLR**, (supra) this Court observed;

“The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now order 45) relates to issues of facts which may emerge from evidence. The discovery does not relate to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to”.

As can be readily discerned from the above holding, it would have been wrong for the Industrial Court to allow a review based on the reason advanced by the appellant. The reason advanced by the appellant does not satisfy or qualify as a reason or ground for review. It cannot be said to be a new and important matter that could not have been discovered upon exercise of due diligence nor does relate to issues of facts

which can be said to have emerged from evidence. It relates to issues of law which as seen above are not reasons available for review. Having elected to pursue a review on the above ground, we are satisfied that the appellant's application failed to meet the criteria set out for the courts to exercise of discretion in his favour.

Both parties, as already stated, have gone to considerable lengths to discuss whether the declaration by the High Court was retrospectively applicable to the appellant's claim for unfair termination. Although in our view the retrospective application of the law does not arise, for completeness of this determination however, we think it prudent to consider the same. The appellant has maintained that invalidity of section 45 (3) of the Act became effective from the promulgation of the Constitution since that section was from then construed as having been altered to bring it into conformity with the Constitution by dint of section 7(1) of the Sixth Schedule as read together with Article 2(4) of the Constitution. The appellant argues that the striking out of his claim on 10th December 2010 by the Industrial Court ought not to have occurred since the Constitution had by then come into force and the court should not have waited for any declaration from the High Court as to the invalidity of that section in view of the clear provisions of the law. That argument in our opinion does not suffice. As already stated, section 45(3) was the law until being declared otherwise by the High Court. The Supreme Court in **Mary Wambui Munene v Peter Gichuki Kingara & 2 others (2014) eKLR** quoted with approval Murray CJ in **A v The Governor of Arbour Hill Prison (2006) IESC 45, (2006) 4 IR 88**, where the Judge stated that,

“Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position”.

See also **Suleiman Said Shabhal v Independent Electoral and Boundaries Commission & 3 Others (2014) EKLRL**.

So that even if we were to argue that the decision of the High Court applied retrospectively to the appellant's claim, still the appellant's case fails to meet the requirements of review on the basis that there was already a determination on the applicability of section 45(3) which could not be reopened. The common law position is that judicial decision may be relied upon on a matter not yet determined. However, the retrospective effect of a judicial decision is frowned upon on cases already finally determined. Thus, the ruling by the Industrial Court on the preliminary objection effectively determined the place of section 45(3) of the Act in the scheme of things and could not be revisited in the appellant's review application. Perhaps the appellant would have had a case had the Employment Act which contains the impugned section, been enacted after the commencement of the current Constitution, for the position under common law is that a statute enacted after the promulgation of the a constitution, which is subsequently found to be unconstitutional, such unconstitutionality will only date back to the date of the promulgation of the Constitution. This position is buttressed by the South African case of **Sias Moise v Transitional Local Council of Greater Germison Case, CCT 54 of 200** in which it was held thus:

“If a statute enacted after the inception of the Constitution is found to be inconsistent, the consistency will date back to the date on which the statute came into operation in the face of inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.’ Because of the order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective the moment the Constitution came into effect. That

is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.”

Yet, this is not the case here. The Employment Act came into force on 2nd June, 2008 long before our current Constitution was promulgated.

For all these reasons, we find no merit in this appeal which is accordingly dismissed with no order as to costs.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR