Kimongo v Shrink Pack Limited (Civil Appeal 182 of 2018)
[2024] KECA 678 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KECA 678 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 182 OF 2018

MA WARSAME, S OLE KANTAI & JM MATIVO, JJA

JUNE 14, 2024

BETWEEN

TABITHA MUMBUA KIMONGO ..... APPELLANT

AND

SHRINK PACK LIMITED ..... RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Labour Relations Court of Kenya, Nairobi (Mbaru, J.) dated 10th August 2017 in Milimani ELRC Cause No. 92 of 2014)

JUDGMENT

1. Tabitha Mumbua Kimongo (the appellant), was employed by Shrink Pack Limited (the Respondent), as a Graphic Designer from 16th August 2012 to 27th September 2013 when her employment was verbally terminated for reporting to work late. She was asked to immediately go back home.

2. Aggrieved by the termination of her employment, the appellant sued the respondent at the Environment and Labour Relations Court (ELRC) in Nairobi ELRC Cause No. 92 of 2014. In her memorandum of claim dated 28th January 2014, amended on 28th March 2014, she prayed for a declaration that her termination was illegal and contrary to fair labour practices, payment of terminal dues and compensation amounting to Kshs.736,995/= plus costs of the suit.

3. In its reply, the respondent admitted employing the appellant on 16th August 2012, and stressed that after completing her probation period, the appellant's employment was confirmed on 16th November 2012. The respondent averred that the appellant repeatedly reported to work late despite numerous verbal warnings. Specifically, the respondent averred that on 11th June 2013, the appellant was issued with a written warning for reporting late, but she failed to heed the warning. Another written warning was issued to her on 21st June 2013, but she did not heed to the warning. A third written warning was issued to her on 11th July 2013 cautioning her that repeated late reporting to work would lead to termination of her employment. Despite the repeated warnings, on 17th August 2013 and 24th August

2013, the appellant reported to work late. On both occasions, she apologized and promised not to repeat the same misconduct.

4. On 28th September 2013, the appellant failed to report to work. It was the respondent's case that by her conduct, the appellant terminated her employment with the respondent. The appellant declined the respondent's offer to be paid her terminal dues upon clearing with the respondent.

5. After hearing the dispute, Mbaru, J. in the impugned judgment stated:

> "I find not good cause for the claimant's various absence from work. This is coupled with the apology made by the claimant on 5th October, 2013 where the claimant takes responsibility for her misconduct. On absent from work. On 17th August, 2013 a similar matter arose and the claimant sent an apology. There are several instances of similar occurrences where the claimant was issued with warning letters.
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> At the end of it, when the claimant failed to attend work from 27th September, 2013 the duty was on the Respondent to issue a letter of summary dismissal, notice to show cause or a warning as appropriate. To go silent on an employee who absconds duty or is in desertion of work is not the solution. Such only negates the right on the employer to dismiss such an employee.
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> Section 35 of the *Employment Act*, 2007 requires the employer to issue a written notice of termination of employment. It is not sufficient that the claimant wrote an apology admitting to her miscount on 5th October, 2013. Far from it, immediately the claimant failed to attend duty on 27th September, 2013 prior (sic) had a series of warning notices, the Respondent should have issued a letter terminating the employment relationship. Such was not done. The desertion of duty by the claimant was not regularised with a termination notice. Such is an unfair labour practice."

6. Having concluded that the respondent never issued the appellant with a termination letter, the trial Court found the respondent culpable of unfair labour practices meriting compensation to the appellant. However, the learned Judge considered the appellant's misconduct of repeatedly reporting to work late, her admission that she reported to work late and her apologies for her lateness, the several warning letters issued to her, her failure to heed to the warnings, and held that awarding damages in such circumstances, is tantamount to sanctioning gross misconduct.

7. Accordingly, the learned Judge dismissed the appellant's claim and found that the offer made by the respondent for her September salary, leave days due and the deductions made was a reasonable and generous offer.

8. Aggrieved by the verdict, the appellant filed this appeal against the whole judgment of the ELRC citing the following grounds:

   (a) the learned judge erred in failing to appreciate that the appellant's case was in respect of unlawful and unfair termination.

   (b) the learned judge erred in failing to find that the respondent had engaged in unfair and unlawful labour practices by terminating the appellant's employment orally and without notice.

   (c) the learned judge failed to find that the appellant had a good cause for reporting late or being absent and that she always provided reasons for her absence.

(c) the learned judge erred in holding that awarding compensation to her amounted to sanctioning gross misconduct.

(d) the learned judge erred in finding that the appellant disserted work from 27th September 2013 instead of finding that she was orally dismissed.

(e) the learned judge erred in failing to find that the appellant had worked for over a year satisfactorily and sometimes worked overtime without pay and therefore misapplied section 45 of the *Employment Act*, 2007.

(f) the learned judge erred in failing to appreciate that the respondent had admitted the claim.

9. During the hearing of the appeal, Ms Maina holding brief for Mr. Muturi represented the appellant while Ms Okina represented the respondent. Counsel for both parties highlighted their written submissions.

10. The appellant submitted on three grounds. One, that her rights to fair labour practices as enshrined in Article 41 (1) of *the Constitution* were violated when her services were terminated without being issued with a termination letter, therefore, she is entitled to compensation. The appellant contended that on the 4 occasions she was late out of the 410 days she worked for the respondent, she explained the circumstances via e-mails, which were ignored by the respondent. That, on 27th September 2013, she was turned away at the gate without being given an opportunity to clear with her employer. Further, she worked overtime, without lunch breaks and without pay.

11. Two, even though compensatory awards are discretionary, the discretion must be exercised judiciously. Consequently, the learned judged erred in relying on section 45 (5) of the *Employment Act*, instead of section 49 (4) of the Act in determining the quantum of damages awardable. Further, the learned judge elevated issues of warning letters, effectively reversing her own finding that the termination was unfair. Further, the learned Judge erred in lumping up her gross salary together with the compensation award under section 49 of the *Employment Act*.

12. Third, the appellant contented that having concluded that the respondent had violated her right to fair labour practices, and that the termination was unfair, it was not open for the learned judge to dismiss the entire claim. The appellant cited the South African Labour Appeals Court in AlphaPlant and Service (Pty) ltd vs Simmonds 2001 22 ILJ 35 in support of the proposition that compensation for the wrong of failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for loss of the right, and is punitive to the extent that an employer who breached the right must pay a fixed penalty for causing the loss. The appellant also cited the ELRC finding in GMV vs Bank of Africa Kenya Limited [2013] eKLR that the court does not take away from an employee what the employer has given.

13. In opposition to the appeal, Ms. Okina, maintained that the trial court arrived at the correct conclusion. The respondent submitted that it is not that the trial court found that the termination of her employment was unlawful for want of notice or employment contract. Rather, the trial court' found that the respondent had engaged in unfair labour practice by not issuing the appellant with a termination letter after she deserted her employment, therefore compensation was awardable.

14. The respondent contended since the court never found the appellant's termination to be wrongful, the remedies under section 49 of the *Employment Act* were not available to her. Therefore, the trial court took into consideration the appellant's conduct and the several warning letters, and found that it declined to exercise its discretion in favor of the appellant and award compensation for the unfair labor practices.

15. The respondent submitted that the argument relating to constructive dismissal was raised in this appeal for the first time since it was not raised in the trial court. Therefore, the same is highly inappropriate, prejudicial and amounts to trial by ambush. The appellant cited this Court in Dellian Langata Limited vs Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education [2018] eKLR, in support of the proposition that issues of fact not investigated or tested by the trial Court should not be allowed in appeal. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case.

16. On whether the trial Judge misapplied section 45 (5) of the *Employment Act*, it is the respondent's case that since the appellant's case was that of unfair termination, she bore the burden of proving her termination was unfair and unlawful as provided under section 47 (5) of the *Employment Act*. However, that burden was not discharged because the appellant led no evidence to prove that she was turned away from her place of work. The respondent referred to the appellant's e-mail of 5th October 2013 expressing remorse for her historical behavior of late coming and absenteeism. The respondent maintained that the said apology was inconsistent with an employee who had been unlawfully terminated. It is on that basis that the trial court declined to hold that the appellant had been unlawfully dismissed and instead made a finding that the appellant had deserted her duties and the respondent was sanctioned for having not regularized the said desertion by not issuing either a termination notice or a notice to show cause.

17. Regarding the argument relating to unfair or fair labour practice, the respondent stated that fair or unfair labour practices have not been defined in *the Constitution* or the *Employment Act*. This is unlike the statutory framework obtaining in other jurisdictions such as South Africa where section 186 (2) of the *Labour Relations Act* has defined unfair labour practices as follows:

> "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving –
>
> a. unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
>
> b. unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
>
> c. a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
>
> d. an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

18. The respondent also cited George Onyango Akuti vs G4S Security Services Kenya Ltd [2013] eKLR where the ELRC stated:

> "unfair labour practice is a flexible term not capable of precise definition. Therefore, it is left to the Courts to define and determine the scope, content and extent of what would qualify to be an unfair labour practice, or to put it in the converse what conduct or practice would amount to an unfair labour practice."

19. The respondent urged that the trial court having noted the respondent's default in acting on the appellant's desertion, described the default as an unfair labour practice attracting compensation. The trial court having arrived at that conclusion applied the principles outlined in section 45 (5) of the *Employment Act*. Nevertheless, the trial court was mindful not to strip the appellant of the respondent's offer to pay her September, 2013 salary and her leave days due, minus all reasonable deductions. Lastly, regarding costs, the respondent maintained that costs should follow the event.

20. This is a first appeal, therefore, our role is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. (See Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2 EA 212). We have considered the appeal, the submissions, the authorities cited and the law. Three issues fall for determination, namely; (a) whether the appellant was unlawfully/unfairly terminated from her employment; (b) whether the appellant was entitled to an award of damages for the violation of her right to fair labour practices; and, (c) whether the issue of constructive dismissal was raised in the appellant's memorandum of appeal.

21. On the question, whether constructive dismissal was raised in the appellant's Memorandum of Appeal, this Court in *Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others Ex-Parte Tom Mbaluto* [2018] eKLR stated:

> " Rule 104 of the *Court of Appeal Rules*, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The Appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage. It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the Appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the Appellant did not raise the issue in his memorandum of appeal in this

22. We note from the record that the appellant in her memorandum of appeal never raised the issue of constructive dismissal. Accordingly, the instant appeal would become a trial in disguise if we were to entertain the said issue and this Court would end up making decisions without the benefit of the input of the Court of the first instance. We decline the invitation to address the said issue.

23. We now address the question whether the appellant was unfairly terminated. Earlier in this judgment, we reproduced an excerpt of the judgment in which the learned judge addressed inter alia the issue under consideration. Briefly, the trial Court found no good reason for appellant's repeated absence from work. It also noted the appellant's apology for her conduct for which she took responsibility. However, it found that the respondent had a duty to issue the respondent with a letter of termination owing to her repeated absence from work. The trial Court faulted the respondent for being silent on an employee who absconds from duty and described the respondent's inaction as a negation of its right to dismiss an employee. The trial Court proceeded to assert that section 35 of the *Employment Act* requires the employer to issue a written notice of termination of employment. Lastly, the trial Court held that the appellant's desertion from duty was not regularized, which the Court concluded amounted to unfair labour practice.

24. Section 47(5) of the *Employment Act* provides:

> (5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

25. The appellant's case is that her termination was unfair. We find no contest that the appellant repeatedly reported to work late. We also note that the appellant wrote an e-mail dated 5th October 2013, to the appellant. We find it appropriate to reproduce the e- mail here below verbatim.

> " Dean Mr. Shah/ Mn. Deep,
>
> I take this opportunity to say thank you to all the. directors, management and also to the entire Shrink Pack family for having had given me the opportunity to serve you. you gave me a job and i must admit i learned a lot and has so much fun be around.
>
> I however wish to apologize mainly for the inconvenience and friction my timing brought to everyone involved. I tried to make it work by all means but the pressure became increasingly challenging... I was unable to move nearby to due to my kids schooling, it was almost impossible for me to afford moving... its not your fault, if anyone to blame, I solely take all the blame. I believe its the end of the road for me and i've have faith fate has something in store for me.
>
> Thanks for all your understanding, persevering and love you showed towards me. I'm just so grateful.
>
> I'll be visiting soon for my final formalities, i hope that won't be a problem.
>
> Best Regards Tabitha Mumbua

26. The tone of the above e-mail portrays a person who is remorseful and incapable of continuing to work because of her inability to be punctual. Her admission is unequivocal. She took full responsibility for her repeated absence from work. She even thanked her employer for being understanding. She opted to quit all together and absolved her employer from any blame. Despite her clear communication admitting blame, the appellant mounted a case founded on unfair dismissal.

27. In dismissal cases, as clearly stipulated in section 47 (5) reproduced above, the employee is required to establish the existence of the dismissal. On the other hand, the employer must prove that the dismissal is fair. There is no shift of the burden of proof from one party to the other in dismissal cases. In a dismissal dispute, each party bears the burden of proof in relation to separate issues (ie the employee regarding the fact of dismissal and the employer regarding the fairness of the dismissal). Fairness comprehends that regard must be had not only to the position and interests of the employee, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a honest or value judgment to established facts and circumstances. As was held by the Labour Appeal Court of South Africa in Branford vs Metrorail Services (Durban) 2003 24 ILJ 2269 (LAC) 2278H-2279 A :

28. Much as the appellant asserts unfair dismissal, she admitted the allegations of lateness/absenteeism. The question now narrows to whether, in the circumstances of this case, to use the words of the trial Court, the respondent failed to "regularize" the termination by issuing a termination letter. The trial Judge held that the appellant was neither issued with a termination letter nor a notice to show cause why a disciplinary action should not be taken against her, after she absconded duty. Consequently,

the learned Judge concluded the respondent's action amounted to an unfair labour practice, and the remedy to such action or inaction was compensation. We appreciate the respondent's contention that the appellant had ceased coming to work. In our view, nothing stopped the respondent from summarily dismissing the appellant in writing. The other option was to follow due process as obligated by the law so that the dismissal is deemed as fair in the eyes of the law.

29. We now turn to the question whether the trial Judge misdirected herself by declining to award damages to the appellant despite finding that compensation was payable for unfair termination. We note that the learned Judge took into account section 45(5) of the *Employment Act*, 2007 which provides as follows:

> " On the finding that the claimant was not issued with a termination letter and the same ended in an unfair labour practice, compensation is due. In assessing the compensation payable to the claimant, the court is required to put into account the provisions of section 45(5) of the *Employment Act*, 2007 which provides as follows;
>
> (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider.
>
> a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
>
> b. the conduct and capability of the employee up to the date of termination;
>
> c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
>
> d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
>
> e. the existence of any pervious warning letters issued to the employee."

30. The above finding aggrieves the appellant. She argues that the learned judge ought to have applied section 49 of the *Employment Act*. The said section provides for remedies for wrongful dismissal and unfair termination. The respondent on the other hand is of a contrary view. It reiterated that the trial court never found the appellant was unlawfully/unfairly terminated for section 49 to apply.

31. Our reading of the record leaves us with no doubt that the trial court only found in favour of the appellant regarding violation of the appellant's right to fair labour practices guaranteed under Article 41 (1) of *the Constitution*. The trial learned Judge found that the appellant's right to fair labour practice had been violated and therefore, the appellant was entitled to compensation. However, addressing her mind whether or not to award the compensation, the learned Judge stated as follows:

> "Taking into account the conduct of the claimant, the gross misconduct of failure to report to work on various occasions in good time; the admission by the claimant that indeed she was reporting to work late and thus apologised; and fundamentally that the claimant had

been issued with several warning letters but failed to take heed, the compensation due being discretionary, to award would be to sanction gross misconduct."

32. The award for damages is essentially a matter of exercise of judicial discretion. As was stated by this Court in Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR :

> " It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just 'according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. (emphasis supplied) The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement, which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration..."

33. The learned Judge took into account the appellant's gross failure to report to work on time and her admission and apologies for her lateness. The learned Judge also considered the fact that the appellant had been issued with several warning letters but failed to take heed. Consequently, exercising her discretion power the learned Judge concluded that the appellant was not deserving of any compensation.

34. The general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled. This Court can only interfere with the exercise of judicial discretion by a lower court in very limited circumstances. The East African Court of Appeal in Mbogo & Another vs Shah, [1968] EA, set out the applicable principles as follows:

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice."

35. In the words of this Court in Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR:

> "the Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice."

36. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, it if it mistakes the facts, if it does not take into account some relevant consideration, then an appellate Court will intervene. The decision by the trial Court not to award compensation for violation of the right guaranteed under Article 41(1) of *the Constitution* was an exercise of discretion. (See Kenfreight (E.A.) Limited vs Benson K. Nguti [2016] eKLR (Civil Appeal 31 of 2015)).

37. In our considered opinion, the appellant has failed to demonstrate that the learned judge abused her discretion, did not exercise her discretion judiciously, considered irrelevant factors, ignored relevant matters, or abused her discretion. The appellant has failed to satisfy us as to why we ought to disturb the decision not to award her damages. This appeal therefore fails, and we hereby dismiss it with Costs to the respondent.

38. We note that the respondent had offered to pay the appellant her September 2013 salary and leave days due upon clearing with the appellant. The dismissal of this appeal does not preclude the respondent from paying the appellant the sums it had offered to pay (if it is still unpaid).

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

M. WARSAME

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR