Kenyatta University v Mola (Civil Appeal 377 of 2018)
[2024] KECA 1213 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1213 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 377 OF 2018

SG KAIRU, JW LESSIT & GWN MACHARIA, JJA

SEPTEMBER 20, 2024

BETWEEN

KENYATTA UNIVERSITY ..... APPELLANT

AND

BEATRICE N MOLA ..... RESPONDENT

(Being an appeal from the Judgement and Decree of Employment and Labour Relations Court at Nairobi (Hon. Nzioka Wa Makau, J.) dated 15th April 2015) in NAIROBI ELRC Cause No. 605 of 2012)

JUDGMENT

1. By a Memorandum of Claim dated 12th April 2012 which was later amended on 8th May 2013, the respondent, Beatrice N. Mola, sued Kenyatta University, the appellant, praying for: terminal benefits as per the Collective Bargaining Agreement CBA) dated 20th September 2012 computed as; gratuity service of Kshs.2,209,970/=, payment in lieu of notice of 3 months' salary of Kshs.481,565/=, payment in lieu of leave of Kshs.481,565/=, unpaid salaries for the months of December 2011, January, February and March 2012 of Kshs.162,770/=, arrears on the basic salary as per the CBA) agreement for the months of July 2010 to March 2012 of Kshs.341,820/=, arrears on house allowance as per the CBA) agreement from the month of July 2010 to March 2012 at the rate of Kshs.2,202/=; payment of reasonable compensation for the illegal and unlawful termination of employment; costs of the suit with interest; and any other relief that the court deemed fit to grant.

2. The respondent's claim was that she was employed by the appellant as a Purchasing Officer on 6th February 1997 working in various positions resting with the Stores Department up to the time of her termination. Vide a letter dated 6th December 2011, the appellant alleged that the respondent received 336 computers on its behalf without authority, and which computers did not allegedly comply with the specifications required. In the letter, the appellant further alleged that the respondent's actions

amounted to negligence and gross misconduct contrary to section 44 (4)(c) of the *Employment Act*. As a result, the respondent was suspended from conducting her duties.

3. Later, by a letter dated 3rd January 2012, the respondent was invited to a disciplinary hearing. On 26th January 2012, the disciplinary hearing took place which culminated in the decision to terminate her employment, which decision was communicated to her in a letter dated 12th March 2012. She appealed against the decision to terminate her employment vide a letter dated 26th March 2012. However, the appellant did not respond to the appeal letter, but instead asked the respondent to vacate its premises on or before 14th April 2012. The respondent pleaded that her termination from employment was wrongful, unlawful, not in good faith and was actuated by malice; and that she was not accorded a fair hearing as she was not given an opportunity to respond to the allegations levelled against her.

4. In its Amended Memorandum of Response dated 19th December 2023, the appellant denied the respondent's claim and stated that she was dismissed from employment on 12th March 2012 for the reason of receiving on its behalf, 336 computers which did not comply with specifications required without prior authority; that the respondent chose on her own accord to appear before the disciplinary board without counsel; that in the termination letter, the respondent was advised that she would be paid her dues subject to clearance, which she had not done as at the date; and that therefore, the respondent's claim was premature.

5. Further, the appellant argued that since the respondent was employed on permanent and pensionable basis, she was not entitled to gratuity. It denied that the respondent was entitled to half of the salary withheld during the suspension period unless she was to be exonerated as stipulated under Clauses 1. (k) and 5.2 (a) of the CBA). It urged the trial court to dismiss the respondent's claim as pleaded in her amended memorandum of claim with costs.

6. At the hearing, the respondent testified in support of her case while Mr. Nderitu Gikaria, the Human Resource Manager testified on behalf of the appellant. Both parties largely reiterated the contents in their respective pleadings and further produced documents in support of their case. We need therefore, not rehash the evidence.

7. On 15th April 2015, Nzioki wa Makau, J. entered judgement in favour of the respondent. The court noted that there was general concession by both parties that the respondent was entitled to 3 months' salary in lieu of notice, payment for 48 days of leave not taken, luggage and baggage allowance and arrears on basic salary and house allowances in line with the CBA). The learned Judge narrowed down the issues for determination to be whether the respondent's termination was lawful; whether she was entitled to gratuity or service pay; and as to costs of the suit.

8. On whether the termination was unfair and unlawful, the learned Judge held that the evidence before him was that one Mr. Nelson Ng'ang'a admitted that he received the computers; and that the respondent erred in issuing the Goods Received Note for goods that the ICT Director approved, but that this was not enough to warrant the respondent's termination. The court was of the view that a reprimand or warning would have sufficed. For those reasons, the learned Judge was satisfied that the respondent was not terminated for a just cause and he awarded her 12 months' salary for the unlawful dismissal.

9. It was further held that since the respondent was employed on permanent and pensionable basis, she was not entitled to service pay or gratuity, but to pension; and that she was entitled to the withheld half salary during her suspension. On costs, each party was asked to bear its own costs since the respondent approached the court before the internal dispute resolution mechanism came to an end.

10. Dissatisfied with the learned Judge's decision, the appellant moved this Court vide a Notice of Appeal dated 27th April 2015 and on 9 grounds of appeal in a Memorandum of Appeal dated 9th October 2018, which grounds we have condensed as follows: That the learned Judge erred: in failing to appreciate that the respondent had not exhausted the internal appellate disciplinary mechanism before filing her claim; in holding that the respondent was not terminated for a just cause even after finding that the respondent may have erred in issuing the Goods Received Note on behalf of the appellant; in awarding the respondent a maximum of 12 months' salary compensation for the alleged unlawful dismissal on the erroneous basis that the respondent has sought reinstatement; in awarding the respondent the withheld half salary during the suspension period on the erroneous basis that her termination was in a false premise; and in failing to appreciate that before the respondent could be paid her terminal dues, she had to do clearance with the appellant to account for any assets and liabilities that may be due to the appellant.

11. The appellant urged that this appeal be allowed; that judgement and order of the trial court dated 15th April 2015 be set aside; that it be awarded costs; and that the Court do grant any other relief and remedies that it may deem just and expedient.

12. The appeal was canvassed by way of written submissions with brief highlights from counsel of both parties whom we heard via this Court's GoTo virtual platform on 8th April 2024.

13. In summarising the appellant's written submissions dated 18th October 2023, learned counsel Mr. Khaseke consolidated the 9 grounds of appeal into 3 clusters, namely: whether the suit was filed prematurely; whether the termination of the respondent was unlawful and unfair; and whether the compensation awarded to the respondent was proper.

14. On the first issue, it was submitted that the respondent exercised her right to appeal, but instead of exhausting the internal appeal mechanism, she opted to file her claim in court. The appellant relied on, and asked us, to be persuaded by the superior court's ruling in *Mulwa Msanifu Kombo v. Kenya Airways* (2013) eKLR and this Court's case of *Geoffrey Muthinja Kabiru & 2 Others v. Samuel Munga Henry & 175 Others* (2015) eKLR where in both courts, the main issue for determination was propriety of court intervention where there is an established internal dispute resolution mechanism which an employee has not exhausted. The appellant urged that the respondent's suit before the trial court ought to have been dismissed for being prematurely filed.

15. On the second issue, which is whether the termination of the respondent was unlawful and unfair, it was submitted that whereas the trial court found that the respondent erroneously issued or raised the Goods Received Note, it held that the termination was unwarranted and that the respondent ought to have been reprimanded. The appellant questioned whether the trial court was justified to substitute the appellant's disciplinary decision meted out with its own suggestion. It was further submitted that the respondent had previously appeared before the disciplinary committee for insubordination.

16. On the 3rd cluster, regarding the compensation, learned counsel faulted the learned Judge for awarding the maximum compensation of 12 months' salary despite having found that the procedure preceding the termination was above par and secondly, having accepted that a different punishment was appropriate. The appellant submitted that the principle for awarding the maximum 12 months' salary compensation under section 49 (1) (c) of the *Employment Act* is when a party proves that the termination was unlawful and unfair which was not the case herein. It was contended that even in awarding the compensation, the learned Judge did not give reasons for exercising his discretion as required by section 49 (4) of the *Employment Act*; and that therefore, the award given was not only unwarranted, but it was also unjustified.

17. On the payment of the withheld half salary, it was submitted that there was no justification for its payment since the termination process was not only lawful but it was also fair, and carried out in accordance with the law and the internal human resource procedure of the appellant.

18. In opposing the appeal, learned counsel Mr. Edmund Wesonga, briefly highlighted the respondent's written submissions dated 30th November 2023. On the issue of exhaustion of internal dispute resolution mechanism, it was submitted that while it is true that the respondent filed the claim during the pendency of the appeal, this was solely informed by the fact that she was issued with a notice to vacate the appellant's premises while the appeal was pending which the appellant did not mention in its notice.

19. Counsel contended that the respondent asked for an extension of time before vacating the appellant's premises which was granted, but even then, the appellant did not communicate on the fate of the pending appeal. The respondent's position is that it is the appellant who frustrated her, hence leading her to file a claim in court. The respondent referred us to the persuasive decision of *Aboud Suleiman Salim v. Kenya Power & Lighting Company Limited* (2020) eKLR for the proposition that if a party makes it impossible for a dispute to be taken through an internal dispute resolution mechanism, the difficult party should not claim there was no exhaustion of internal remedies.

20. On the merit of the appeal, it was submitted that under the law, the process for dismissal, may be termed unfair and wrongful if, either the process is not in tandem with the law, or there is no substantive reason for termination. In this instance, in the suspension letter of 6th December 2011, the charge was that the respondent received 336 computers which the appellant stated were not as per its specifications.

    However, in the letter of termination dated 12th March 2012, the appellant gave the reason for termination to be signing the goods received but not facilitating their payment. Hence, the respondent was terminated for a different cause.

21. Counsel submitted that even assuming that the respondent was terminated for what she was charged for, the disciplinary proceedings indicate that the computers were received by one Nelson Nganga, the ICT officer, and not the respondent. It was further emphasised that one Samuel Kirii, the respondent's immediate supervisor confirmed that she (the respondent) did not receive the computers. Therefore, there was no justification to terminate the respondent's employment given that she was not the recipient of the computers. To support this submission, reliance was placed on the case of *Pius Machafu Isindu v. Lavington Security Guards Limited* (2017) eKLR.

22. As to whether the reliefs granted were justifiable, it was submitted that having found that the termination was unjustified, there was no basis for the appellant to continue withholding the other half of the respondent's salary. On the compensation for unlawful termination, it was urged that the same can only be interfered with if the trial court wrongly exercised its discretion, which the appellant had not demonstrated. Furthermore, the learned Judge had accorded sufficient reasons in awarding maximum compensation, which are that there was no possibility of reinstatement of the respondent who is currently past the age of retirement and that there was no justification for termination as provided for under section 49 of the *Employment Act*. We were accordingly urged not to disturb the learned Judge's discretion in awarding the 12 months' compensation, and to dismiss the appeal with costs.

23. Our duty as the first appellate court is to re-evaluate and reconsider the evidence adduced before the trial court so as to draw our own independent conclusions as was held in the case of *Selle v. Associated Motor Boat Company* (1968) E.A. We must also examine and satisfy ourselves on whether the conclusions reached by the learned Judge were based on no evidence, or a misapprehension of the

evidence or on application of the wrong principles as was held in the case of *Sanitam Service (EA) Ltd v. Rentokil (K) Ltd & Another* (2006) eKLR.

24. We have carefully considered the record of appeal, the written and oral submissions by both counsel as well as the cited authorities. We have deduced that the following 4 issues fall for determination, namely: whether the proceedings before the ELRC were instituted prematurely; whether the respondent's termination was unfair and unlawful; whether the respondent was entitled to the withheld half salary; and whether the learned Judge exercised his discretion properly in awarding the respondent 12 months' salary as compensation.

25. The appellant argued that the proceedings were instituted prematurely by the respondent, having failed to exhaust the internal appeals process before filing her claim in court. We are cognizant that Article 159 (2) (c) of the *Constitution* implores the courts in exercising their judicial authority, to be guided by the principles of promoting all forms of alternative dispute resolution. In *Imwatok (MCA) v. Nairobi City County & 7 others; Attorney General & Another* (Interested Parties) (Civil Appeal 300 of 2018) (2024) KECA 509 (KLR) (26 April 2024) (Judgment), this Court held that parties will seldom be allowed to circumvent using the alternative dispute resolution put in place unless a party can aptly demonstrate that the court should invoke an exception based on the circumstances before it.

26. The respondent was first suspended vide a letter dated 6th December 2011 on the grounds that she allegedly received 336 computers on behalf of the appellant which were not as per the appellant's desired specifications and without authority. She was later subjected to disciplinary proceedings which took place on 26th January 2012. The outcome thereof, was that she was terminated from employment which information was communicated in a letter dated 12th March 2012. In its letter, the appellant stated that the respondent was at liberty to file an appeal within 14 days of the letter. The respondent proceeded to file an appeal against the decision to terminate her employment vide a letter dated 26th March 2012.

27. According to the respondent, the move to file her claim before the trial court, was coupled with the fact that she was given a notice to vacate the appellant's premises and no committee was set up to hear her appeal. Thus, the apprehension on her part.

28. We have laboured through the document christened the appellant's 'Terms of Service for Academic/ Senior Library and Administrative Staff.' Clause 9.4 (ii) states that a member of staff whose employment has been terminated, has the right of appeal to the full Council within three weeks of the notification of termination. Notably, the document is silent on the duration within which the appeal ought to have been heard and determined. Similarly, in both its amended memorandum of response and submission, the appellant did not guide this Court sufficiently on the timelines required for the appellant to consider an appeal for it to claim that the suit before the trial court was filed prematurely.

29. In as much as learned counsel Mr. Khaseke put up a spirited submission that the respondent ought to have asked for more time to stay in the appellant's staff houses in order to have her appeal heard, we do not think that the appellant was ready to hear the respondent's appeal. Having offered the respondent more time to stay in the staff houses for a further 14 days, it was during that intervening period that the appellant should have at least given the respondent clear guidance on how her appeal was to be heard. There was no mention of when the respondent would have expected her appeal to be heard and determined in the appellant's letter dated 5th April 2012.

30. It is rather uncanny, against all forms of fair administrative actions and legitimate expectations, to keep an aggrieved party in indefinite suspension as he or she awaits the outcome of his or her appeal. In the

instant case, and from the chronology of events elucidated above, it is clear that appellant's actions proved that it was not willing to hear and determine the respondent's appeal.

31. A court would not hesitate to listen to a party whose rights are highly likely to be infracted. In *Fleur Investments Limited v. Commissioner of Domestic Taxes & another* (2018) eKLR, this Court had this to say:

> " Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

32. Accordingly, the court is entitled to intervene in circumstances where discretion is not exercised rationally, fairly and where discretion is exercised arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. Consequently, on the first issue, we find and hold that the claim before the ELRC was not filed prematurely.

33. On the merit of the disciplinary process, section 45 (2) of the *Employment Act* provides the parameters which constitute an unfair termination as follows:

> A termination of employment by an employer is unfair if the employer fails to prove-
>
> a. That the reason for the termination is valid;
>
> b. That the reason for the termination is a fair reason-
>
> i. Related to the employees conduct, capacity or compatibility; or
>
> ii. Based on the operational requirements of the employer; and
>
> c. That the employment was terminated in accordance with fair procedure.

34. In the respondent's letter dated 12th March 2012, the reason behind the respondent's termination was that of receiving 336 computers which were not as per the appellant's specifications. It was also alleged that the respondent signed the Goods Received Note to facilitate the payment for the same. According to the appellant, this amounted to scandalous, disgraceful and gross misconduct contrary to section 44 (4) of the *Employment Act*.

35. In her defence before the appellant's Disciplinary Board, the respondent stated that in fact, the Stores Department does not receive computers because of their technicality, and that it is a function of the ICT Department. The Good Received Note is a document which is simply a forwarding note for preparation of the invoice. The respondent admitted to receiving the 336 computers and her duty was limited to only verifying the number of computers received but not their specifications. She asked assistance from a person from the ICT Department to confirm the specifications.

36. Mr. Samuel Kirii, the appellant's Head of Stores stated as follows on the role of the respondent in the said computers:

> "That when the computers were being delivered, the Stores Officer, Mrs. Mola called Mr. Nganga from ICT who came and witnessed the computers being received. That Mr. Nganga

> confirmed the numbers were correct and Mrs. Mola received them on this knowledge. Mrs. Mola was not wrong to have received the computers and that if she was wrong, he would have been the first one to write a letter to his immediate boss."

37. From the record, it is apparent that the respondent was terminated wrongfully and unfairly. There was no link between the reasons given for her termination and the duties which she was assigned to perform by the appellant. Furthermore, in asserting that the respondent had received the computers which did not have the correct specifications, the appellant did not adduce evidence to demonstrate the co- relation between the respondent receiving the 336 computers and any losses it may have incurred. The burden to justify the grounds for the termination or employment or wrongful dismissal rests with the employer as per section 47 (5) of the *Employment Act*.

38. We lay emphasis that in as much as the process leading to an employee's dismissal from employment was lawful and adhered to the minimum statutory requirement, the reason behind the termination must also be lawful. This is a burden which the employer must prove. In *Kimongo v. Shrink Pack Limited* (Civil Appeal 182 of 2018) (2024) KECA 678 (KLR) (14 June 2024) (Judgment), this Court expounded on the provisions in section 47 (5) of the *Employment Act* thus:

> "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 an honest or value judgment to established facts and circumstances as was held by the Labour Appeal Court of South Africa in *Branford v. Metrorail Services (Durban)* 2003 24 ILJ 2269 (LAC) 2278H-2279 A"

39. In concluding our discourse on the second issue for determination, we reiterate that there was no procedure which the respondent violated notwithstanding that the learned Judge was of the view that a reprimand would have been appropriate. It is clear that the respondent called the ICT Officer, one Mr. Ng'ang'a who gave the 336 procured computers a clean bill of health leading to the respondent signing the Goods Received Note and keeping the computers in the store. The respondent's responsibility started and ended with ensuring all the equipment under her care were properly safeguarded. We do not then hesitate to find that her dismissal was without valid reason, thus, it was unfair, unlawful and wrongful.

40. On the question of whether the respondent was entitled to the other half of the withheld salary, having found that there was no valid reason for her termination, it then follows that the suspension was unwarranted. Had the respondent not been suspended, she would have been earning her full salary and all the benefits attendant thereto.

41. Turning to the question of whether the 12 months' salary compensation was reasonable, section 49 of the *Employment Act* makes provision for a wide range of remedies for wrongful dismissal and unfair termination. Amongst the remedies is an equivalent of a number of months, wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. In awarding the respondent the maximum of 12 months' salary, the learned Judge was of the view that since the order for reinstatement was not tenable due to the statutory limitation of time, the award of 12 months' salary compensation would suffice. It is therefore not true as submitted by

the appellant that there were no reasons advanced by the trial court in awarding the 12 months' salary as compensation.

42. In the case of *Coffee Board of Kenya v. Thika Coffee Mills Limited & 2 Others* (2014) eKLR, this Court held that the Court ought not to interfere with the exercise of such discretion, unless it is satisfied that the judge misdirected himself or herself 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 an injustice.

43. One of the essential considerations which the court should make prior to awarding compensation such as the case before us, is the time period served as well as the remaining period for the employment to come to an end. The respondent served the appellant for a period of 14 years. The record is silent on the remaining period which the respondent was to serve prior to retirement. That notwithstanding, the respondent served dutifully and rose through the ranks within the appellant's institution.

44. We observe that although Mr. Samuel Kirii who headed the Stores Department at the material time and was the respondent's immediate supervisor, testified in favour of the respondent. Interestingly, the appellant's Disciplinary Board opted to transfer him but terminate the respondent's employment. The respondent was found culpable even after being exonerated by her supervisor. By all standards and in our view, the action of the appellant's Disciplinary Board against the respondent was unfair.

45. In the instant appeal, the respondent lost 14 years in employment rather abruptly and capriciously with no fault on her part. Whilst the learned Judge awarded her 12 month's pay in lieu of notice, our view is that since she was paid three months' salary in lieu of notice, a 10-month salary compensation will suffice.

46. In the end, we find and hold that this appeal is devoid of merit. It is accordingly dismissed with costs to the respondent save for the adjusted compensation of 10 months' salary.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR