TEC Institute of Management Limited v Owuor (Civil Appeal 74 of 2017) [2022] KECA 125 (KLR) (11 February 2022) (Judgment)

Neutral citation: [2022] KECA 125 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 74 OF 2017

J MOHAMMED, PO KIAGE & M NGUGI, JJA

FEBRUARY 11, 2022

BETWEEN

TEC INSTITUTE OF MANAGEMENT LIMITED ..... APPELLANT

AND

FRED J. OWUOR ALIAS FRED O.R.J OWUOR ..... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu (M. Onyango, J.) dated 4th May, 2017 in Cause No. 19 of 2014)

JUDGMENT

1. Fred J. Owour, the respondent was employed by the TEC Institute of Management Limited, the appellant at its Eldoret Campus as a lecturer with effect from 1st September 2008. He earned a gross salary of Kshs. 23,000. He was promoted to Deputy Principal on 1st June 2010 and eventually to the position of Principal in January 2011. The respondent terminated his employment via a letter dated 19th September 2013. The grounds for dismissal were; absenteeism, incompetence, lack of teamwork, being uncooperative, insubordination, cancelling and rescheduling of lectures, taking phone calls during lectures and failure to deliver course content.

2. Aggrieved by the appellant's decision to terminate his employment, the respondent filed a Statement of Claim at the Kisumu Employment and Labour Relations Court claiming that the respondent subjected him to inhumane work conditions, underpaid him, withheld his salary and allowances and made him work for up to 12 hours for 6 days a week without remuneration for the overtime. This led to the irretrievable break down of his marriage and deterioration of his health requiring a lot of medication which the appellant declined to cater for. He sought a declaration that the termination of his employment was unfair, and compensation particularized as follows;

    a. Arrears Kshs.122,598

b. Leave allowance ..... Kshs. 306,000

c. House allowance .....Kshs. 732,000

d. Travelling allowance ..... Kshs. 90,000

e. Severance pay ..... Kshs. 173,000

f. Termination benefit ..... Kshs. 30,000

g. Extra working hours ..... Kshs. 5,755,480

Total ..... Kshs. 7,209,098

3. The appellant filed a reply denying the claims and affirming that the termination was fair as due process was followed, and that it paid the respondent what was due to him, and therefore he was not entitled to any compensation.

4. Onyango, J. found that the appellant did not give the respondent an opportunity to respond to the allegations levelled against him contrary to the provisions of Section 41 of the *Employment Act*. She held that the termination of the respondent's employment was unfair and unlawful for want of fair procedure and valid reason. Judgment was entered in favour of the respondent for;

a. Salary in lieu of notice ..... Kshs. 50,000

b. Leave allowance .....Kshs. 250,000

c. Termination benefit .... Kshs. 600,000

d. Salary Arrears .....Kshs. 181,667

Total .....Kshs. 1,081,667

5. Disgruntled with the judgment, the appellant has filed the instant appeal on several grounds summarised as, the learned judge erred in law by;

a. Holding that respondent's summary dismissal was unfair for want of procedure and valid reason.

b. Holding that the respondent was entitled to Kshs. 50,000 as salary and in lieu of notice.

c. Holding that the respondent was entitled to leave allowance, termination benefits and salary arrears.

6. The firm of Anassi Momanyi & Company Advocates is on record for the appellant, while the firm of Angu Kitigin & Company Advocates is on record for the respondent. By consent, both parties elected not to appear for the hearing but instead rely on their written submissions, which I shall summarize.

7. It was submitted on behalf of the appellant that the learned Judge erred by holding that the termination was unfair for want of procedure and valid reason. It was contended that the termination was fair as it was due to failure to provide services and absenteeism, and the respondent was paid his requisite dues. The appellant issued the respondent with warning letters which he failed to respond to. At the time the respondent had been demoted from Principal earning a consolidated salary of Kshs. 50,000 to Head of Department earning Kshs. 29,850. The learned Judge therefore erred by finding that the respondent was entitled to earn the earlier Kshs. 50,000 and erroneously calculated the impugned award on that basis.

8. Additionally, the respondent sought Kshs. 122,598 as salary arrears and Kshs. 30,000 as termination benefits, yet the learned Judge awarded Kshs. 181,667 and Kshs. 600,000 respectively in total disregard of the principle that parties are bound by their pleadings. The respondent was not entitled to more leave allowance as he was duly compensated for the 33 unutilised leave days.

9. Finally, that the Kshs. 600,000 award which equalled 12 months pay was baseless since the respondent was only entitled to one month's pay in lieu of notice which he was given. Further, the respondent's salary was subject to statutory deductions which the learned Judge failed to take into account as she considered the award. We were urged to allow the appeal in its entirety.

10. In opposition, it was submitted that the learned Judge exercised her judicial discretion appropriately when she found that the respondent having not been accorded a hearing, his termination was therefore unfair, and the remedies as provided for in Section 49 of the *Employment Act* (Act) were applicable. We were urged to uphold the judgment and dismiss this appeal.

11. As a first appellate Court we are bestowed with a duty to re-evaluate and re-analyze the evidence adduced at the trial court and make a fresh, independent determination on the same. See *Robin Angus Paul & 2 Others V Miriam Hemed Kale* [2019] eKLR.

12. The remedies provided in Section 49 of the Act are within the discretionary power of the trial Judge exercised on a case by case basis. This was settled by the Supreme Court in *Kenfreight (E.A) Limited vs. Benson K. Nguti [2019] eKLR*;

> " What then should be the correct award on damages be based on" Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy" The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder ..."

13. As such, I shall pay due respect to the findings of the learned Judge and will be slow to interfere with the same, unless satisfied that the learned Judge misdirected herself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that she was clearly wrong in the exercise of discretion and occasioned injustice. See *Kenya Revenue Authority & 2 Others vs. Darasa Investments Limited [2018] eKLR*.

14. The learned Judge held that the respondent's termination was unfair as he was not accorded a hearing, in contravention of Section 41 of the Act. She found that the issuance of 4 warning letters prior to the dismissal without a hearing was in contravention of due procedure as contemplated by the Act. She further opined that since the respondent was not given an opportunity to respond to the allegations levelled against him, the reasons given for the dismissal were not valid, in violation of Section 43 of the Act.

15. The dismissal letter dated 19th September 2013 stated that the same was pursuant to the issuance of four warning letters and the respondent's failure to improve on the issues that were raised therein. The content of that letter is a clear indicator that the respondent was not accorded a hearing prior to his dismissal. Additionally, George Ambani, who testified on behalf of the appellant, merely stated that a hearing was conducted prior to the dismissal. He neither gave the date, details nor any proof that the alleged hearing took place. According to the evidence on record, the appellant simply issued the four warning letters to the respondent then terminated his employment.

16. Section 45 (5) of the *Employment Act* contains five considerations to be taken into account by the court in determining whether a termination was unfair. Two of them include the procedure used to communicate the termination to the employee, how an appeal of the same was handled and if any warning letters were issued. Issuance of warning letters alone without a hearing does not constitute fair termination.

17. In view of the circumstances, I am persuaded that the respondent was not accorded a hearing as contemplated in Section 41 of the Act. Its purpose is not just for the employer to explain the reason(s) for the employee's dismissal but hear and consider any representations that the employee may have. See *Kenya Ports Authority vs. Fadhil Juma Kisuwa [2017] eKLR* . A hearing must precede a decision to terminate. I concur with the learned Judge's finding that the termination was unfair and unjustifiable as the respondent was never accorded a chance to respond to the allegations. As such the appellant's complaint has no limb to stand on and should fail.

18. The appellant also complained that the learned Judge erred by calculating the impugned award using Kshs. 50,000 as salary yet the respondent was demoted and was earning Kshs. 29,850. The learned Judge reasoned that the reduction of the salary was a fundamental change in the terms of employment and the appellant should not have effected it without discussing the same with the respondent. According to her, this constituted an unfair labour practice and she remedied the same by calculating the award based on the salary prior to the demotion.

19. The demotion was via a letter dated 30th March 2012 which informed the respondent that his position as the Principal had been affected and stated that his new position was Head of Department with reduction of salary. The letter did not indicate the reason that informed that decision. The appellant made a decision that fundamentally affected the respondent in an arbitrary manner, without notice or according him an opportunity to be heard. I associate myself with and would affirm the persuasive dicta of Mbaru, J. in S*everine Luyali vs. Ministry of Foreign Affairs & International Trade & 3 Others [2014] eKLR*;

> "39. The fundamental shift now incorporate what the Industrial Court has interpreted to be before an employer can take any action, positive or negative on an employee, there is need for Fair procedure, reasonableness and consultation. Even where there is a benefit given to an employee, fair procedure entail that that employee be reasonably to made aware that such a benefit has been conferred and the reasons for such a benefit. On the other hand where an adverse decision is made by the employer, a similar requirement is expected to follow as a matter of law."

20. Article 41 of the *Constitution* provides, *inter alia* that every employee has a right to fair labour practices, fair remuneration and reasonable working conditions. A good work environment is one where there is communication and consultation between employer and employees based on good faith, where employees are heard and considered in decisions that affect them directly and their dignity is affirmed. I would agree with the learned Judge's holding that the demotion was unfair and uphold her decision to use the salary prior to the demotion as the basis for the award. The challenge thereto also fails.

21. Lastly, the appellant considered that the respondent was not entitled to a month's salary in lieu of notice, leave allowance, terminal benefits and salary arrears. The appellant maintained that the respondent was paid all that was due to him and was therefore not entitled to anything. I have no reason to fault the reasoning of the learned Judge in her arrival at the award on the salary in lieu of notice, leave allowance and salary arrears. She exercised her discretion judicially.

22. However, I think that the respondent was not entitled to the maximum 12 months' salary as terminal benefits. The maximum relief must never be the instinctive default amount of compensation. See *Kenya Airways Limited vs. Alex Wainaina Mbugua [2019] eKLR* . That appeal, on which I sat adopted the position I had espoused in *Kiambaa Dairy Farmers Co-operative Society Limited vs. Rhoda Njeri & 3 Others [2018] eKLR* as follows;

> "I agree with that reasoning and state categorically that the compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and, even where appropriate, there must be an assessment with the range of zero to twelve months in mind. To my mind, this means, as it must, that the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Awards of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal."

23. In the end the appeal partly succeeds, I would set aside the award of Kshs. 600,000 as terminal benefits which equalled to 12 months pay and substitute it with Kshs. 300,000 which equals to 6 months pay.

24. I would order that the respondent shall have two-thirds of the costs the appeal having largely failed.

25. As J. Mohammed & Mumbi Ngugi, JJ.A. agree, it is so ordered.

DATED AND DELIVERED IN KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

CONCURRING JUDGMENT OF J. MOHAMMED, J.A.

I have had the benefit of reading in draft, the judgment of my Brother, P.O. Kiage, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT KISUMU, THIS 11TH DAY OF FEBRUARY, 2022.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

JUDGMENT OF MUMBI NGUGI, JA

I am in in full agreement with the judgment of my learned brother Kiage, JA and have nothing useful to add thereto.

As J. Mohammed, JA is also agreed, the appeal shall be disposed of as proposed by Kiage, JA.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR