



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 109 OF 2020

BETWEEN

SOCIAL SERVICE LEAGUE

MP SHAH HOSPITAL.....APPELLANT

AND

JUDITH APUDO.....RESPONDENT

(Appeal from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 26th July 2018

in

ELRCC No. 13 of 2014)

JUDGMENT OF THE COURT

At all material times **the respondent, Judith Apudo** was employed by **the appellant, Social Service League MP Shah Hospital**, as a registered nurse at a monthly gross salary of **Kshs 58,100**. The respondent joined the appellant on 4th January 1995 as a trainee nurse, but the appellant summarily dismissed her on 4th December 2012 for alleged gross misconduct. The alleged misconduct arose from a strike at the hospital on 5th November 2012 during which it was alleged that the respondent and other employees violently assaulted a senior manager, **Ms. Chinwendu Achebe**.

On 13th January 2014 the respondent lodged a claim for unlawful, unfair and wrongful dismissal in the **Employment and Labour Relations Court (ELRC)**. She denied having assaulted Ms. Achebe and maintained that she was not at her place of work on the day in question. The respondent averred that the appellant did not inform her the reason for dismissal and further refused to give her a pre-dismissal hearing, in violation of **sections 5(7), 11 and 45** of the **Employment Act** and **Article 50(1)** of the **Constitution**. She claimed that her age and health status were the real reason for her dismissal, which constituted discrimination. Accordingly, the respondent prayed for a clearly exaggerated sum of **Kshs 12,669,200** made up as follows:

- i) Kshs 6,972,000 being anticipated salary until retirement at 60 years of age;
- ii) Kshs 5,000,000 for loss of earning capacity;
- iii) Kshs 697,200 being 12 months compensation;
- iv) General damages; and
- v) Interest and costs.

By its memorandum of defence filed on 15th September 2015, the appellant denied the respondent's claim and maintained that it lawfully

dismissed the respondent for gross misconduct after she physically assaulted her senior manager. The appellant added that by a letter dated 12th November 2012 it invited the respondent to a disciplinary hearing on 23rd November 2012, informed her of the allegations against her, and notified her of her right to be accompanied by an employee of her choice at the hearing. On 15th November the appellant further notified the respondent of her right to have a shop steward of her choice at the disciplinary hearing. The hearing did not take place on 23rd November 2012 because the respondent brought strangers to the hearing, and instead it was rescheduled to 26th November 2012. On that occasion the respondent requested for more time to prepare for the hearing and denied having participated in the strike or assaulting Ms. Achebe.

After the respondent refused to attend the disciplinary hearing on 26th November 2012, the appellant rescheduled the hearing to 28th November 2012 and advised the respondent accordingly. On the appointed day, the respondent again failed to attend the hearing and instead wrote to the appellant claiming that the disciplinary committee was biased against her. Ultimately the appellant dismissed the respondent on 4th December 2012 for gross misconduct, which dismissal the appellant maintained was lawful. The respondent subsequently cleared with the appellant and received her terminal dues of **Kshs 20,113**, on 11th March 2013. **Wasilwa J.** heard the claim with the respondent testifying on her behalf and the appellant calling one witness. The learned judge held that the appellant failed to prove that the reasons for the respondent's summary dismissal were valid because the statement by Ms Achebe which the appellant relied on was not signed. The learned judge further held that the appellant had denied the respondent a fair hearing. Accordingly, she awarded the respondent **Kshs 755,300** made up of one month's salary in lieu of notice (**Kshs 58,100**) and 12 month's salary as damages for unlawful and unjustified dismissal (**Kshs 697,200**). The respondent was also awarded interest, her pension benefits, and costs of the claim.

The appellant was aggrieved and preferred this appeal, in which it contends that the learned judge erred by holding that the appellant did not have valid reasons for dismissing the respondent; by holding that the appellant denied the respondent a fair hearing; and by disregarding the provisions of the **Employment Act** in awarding the respondent, including costs, **Kshs 799,824**. By consent of the parties, the appeal was heard through written submissions only.

Mr. Masese, learned counsel for the appellant submitted that the appellant afforded the respondent an opportunity to be heard which she declined to take up. He contended that the hearing scheduled for 23rd November 2012 did not take place because, in violation of the law, the respondent brought strangers to the hearing and refused to attend the hearings rescheduled on 26th and 28th November 2012. He added that the appellant fully complied with the law on fair opportunity to be heard and that the finding by the learned judge was not supported by the facts or the law. He relied on the decisions of the ELRC in **Patrick Onchoke v. Rainforest Farmland Ltd [2020] eKLR** and **Nathan Kipruto Kemboi v. University of Eldoret [2019] eKLR** and submitted that strangers are not allowed in disciplinary proceedings. He further cited the judgments in **Gideon Akwera v. Board of Governors, Church on the Rock Academy [2015] eKLR** and **Banking Insurance and Finance Union v. Barclays Bank of Kenya [2014] eKLR** and submitted that an employee who is notified of a disciplinary hearing and fails to attend without justification cannot blame the employer.

The respondent, represented by **Mr. Onyony**, learned counsel opposed the appeal, maintaining that the findings by the trial court were justified and supported by evidence and the law. As regards the dismissal of the respondent, counsel submitted that under **section 43** of the Employment Act, the onus was on the appellant to prove the reasons for the dismissal, and having failed to adduce any evidence to justify the dismissal, the trial court was entitled to find under **section 45** that the dismissal was unfair. The respondent relied on the judgment of this Court in **Pius Machafu Isindu v. Lavington Security Guards Ltd [2017] e KLR**, and that of the ELRC in **VMK v. CUEA [2013] eKLR** on the nature of the onus on the employer.

As regards fair hearing, the respondent submitted, on the authority of **Alphonse Maghanga Mwachanya v. Operation 680 Ltd [2013] eKLR** and **David Wanjau Muhoro v. Ol Pajeta Ranching Ltd [2014] eKLR**, that she was entitled to be informed of the reason for her dismissal in a language she understood, to be accompanied to the disciplinary proceedings by a fellow employee or a shop steward, and to have her explanation or representations considered by the employer. While conceding that she was invited to the disciplinary proceedings, the respondent contended that the appellant failed to ensure that the proceedings were fair and that ultimately no disciplinary proceedings were held. She contended that the appellant ignored her request for more time and her complaint regarding the composition of the disciplinary committee.

We have carefully considered the record of appeal, the memorandum of appeal, the judgment of the ELRC, the written submissions by both parties, and the authorities cited. There are only three issues for determination in this appeal, namely, whether the dismissal of the respondent was justified, whether the appellant afforded the respondent a fair hearing and whether the award of by the trial court was justified.

It is common ground that the appellant dismissed the respondent on the grounds that she had assaulted a senior manager, Ms Achebe, and maliciously damaged the appellant's property. The respondent denied these allegations and the onus was on the appellant to satisfy the trial court, on a balance of probabilities, that indeed the respondent assaulted Ms. Achebe and maliciously damaged property. The appellant's only witness, **Willy Njuguna Ndwashi**, did not witness the alleged assault or damage to property, but relied only on a statement allegedly prepared by Ms Achebe, which statement was not signed. Having considered this issue, the learned judge, properly in our view, discounted the unsigned statement. In the absence of any other evidence and granted the respondent's denial of involvement in the conduct in question, the appellant did not prove the reasons for the dismissal or that it was justified.

Under **section 43(2)** of the Employment Act, the appellant was obliged to prove the reason or reasons for the termination, namely the matters that the appellant genuinely believed to exist and which led the appellant to terminate the respondent's employment. Failure to prove those reasons automatically meant that the termination was unfair. (See **John Charo Ngumbao v.**

Tiwi Amani Beach Resort [2017] eKLR). We therefore do not see any merit in the appellant's first complaint.

As regards fair hearing, the evidence on record shows that on 12th November 2012 the appellant wrote to the respondent and notified her that a disciplinary hearing would be held on 23rd November 2012 at 9.00 am at the Hospital Boardroom to consider her representations regarding the allegation that she had assaulted Ms Achebe, maliciously destroyed property and participated in an illegal strike. The letter requested the respondent to have an employee of her choice present during the disciplinary hearing. Lastly, the appellant gave the respondent off from the date of the letter so that she could prepare for the hearing, a period of ten days.

On 15th November 2012, the appellant informed the respondent in writing that under **section 42 (1)** of the Employment Act, she was entitled to have another employee or a shop floor union representative of her choice present during the hearing. As the letter makes it abundantly clear, it was written in response to the respondent's queries whether she could bring to the hearing any person of her choice.

Notwithstanding the information in the letter of 15th November 2012, the respondent nevertheless turned up for the hearing on 23rd November 2012 accompanied by persons other than those specified in **section 42(1)** of the Employment Act, a development which forced the appellant to defer the hearing on account of what it termed "external interference". By a letter dated 23rd November 2012, the appellant advised the respondent that the disciplinary hearing had, due to the external interference, been rescheduled to 26th November 2012 at 10.30 am at the same venue. After reiterating that the respondent was entitled to be accompanied to the hearing by a fellow employee or shop floor union representative of her choice, the appellant implored the respondent as follows:

"Please note that we expect your co-operation to ensure that these proceedings are held in a fair manner without interference from external sources as was occasioned today."

On 24th November 2012, the appellant requested for postponement of the disciplinary hearing so that she could prepare for the hearing. She denied the allegations against her and demanded to be informed the names of the members of the disciplinary panel so that she could decide whether they were impartial or not. On 26th November 2012 the appellant wrote to the respondent and drew her attention to the fact that the disciplinary hearing had been adjourned twice at her instance.

She was advised that the hearing was rescheduled to 28th November 2012 at 10.30 am and informed that the hearing would proceed, her absence that day notwithstanding. The respondent did not attend the hearing on 28th November, 2012, as a result of which the appellant terminated her employment and communicated its decision in writing on 4th December 2012.

The above evidence shows that the appellant invited the respondent in writing to a disciplinary hearing scheduled for 23rd November 2012. The allegations against the respondent were spelt out and the appellant informed the respondent of her right to have present at the hearing a fellow employee or a union representative. On 15th November, after queries by the respondent, the appellant informed her that she was only entitled to be accompanied to the hearing by a fellow employee or union representative of her choice, not any other person. That notwithstanding, the respondent turned up with strangers, forcing the appellant to adjourn the hearing to 26th November, 2012. Next the appellant notified the respondent of the new hearing date and repeated that she was entitled to be accompanied to the hearing by a fellow employee or union representative of her choice. To thwart the hearing of 26th November, the respondent asked for more time to prepare herself and to be given the names of the members of the disciplinary committee to evaluate their impartiality. As of the date the respondent was asking for more time, the respondent had already given her ten days off to prepare for the hearing. Even before seeing the members of the disciplinary panel, the respondent was casting aspersions and making demands. The appellant accommodated the respondent and adjourned the hearing to 28th November 2012, when again, the respondent did not attend the hearing.

In view of the above evidence, we do not see how it can be contended that the appellant denied the respondent a hearing or a fair hearing. **Section 42(1)** of the Employment Act entitled the respondent to have at the hearing "another employee" or a "shop floor union representative" of her choice and not any other person. (See *Patrick Onchoke v. Rainforest Farmland Ltd [2020] eKLR* and *Nathan Kipruto Kemboi v. University of Eldoret [2019] eKLR*). The respondent was fully aware of this legal position, yet she turned up at the hearing with strangers, thus thwarting the hearing. The hearings scheduled subsequently were thwarted by the respondent who presented one excuse or another, even though the appellant had given her ten days off duty to prepare for the hearing.

We are satisfied that the appellant afforded the respondent adequate opportunity to be heard, but for reasons best known to her, the respondent was determined to undermine the hearing. On three occasions, the appellant was forced to adjourn the proceedings, and yet the respondent ultimately failed to turn up for the hearing. With respect, the conclusion that the appellant denied the respondent a fair opportunity to be heard is not borne out by the evidence on record. If anything, it was the respondent herself, through obvious mischief, who made it impossible for her to be heard. No court concerned with fair labour relations, and holding evenly the scales of justice between the interests of the employer and employee, ought to condone, let alone reward, the kind of mischief that was displayed by the respondent.

The last issue is whether in the circumstances of this appeal, the award of **Kshs 799,824** to the respondent for wrongful termination, was justified. The bulk of that award is made up of compensation equivalent to 12 months salary. **Section 49(1) (c)** of the Employment Act empowers the court to award, as compensation, the 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. The learned judge therefore awarded the maximum compensation allowed by the law. In determining the compensation to award, **section 49(4)** requires the court to take into account a number of factors, including the circumstances in which the termination took place and the extent to which the employee caused or contributed to the termination, the employee's length of service, opportunities for comparable employment, the conduct of the employee which caused or contributed in any extent, to the termination, among others. The learned judge did not consider any of these factors before deciding to award the respondent the maximum compensation allowed by law. As we have already stated, the respondent's conduct in this dispute left a lot to be desired, which the learned judge completely ignored. In *Co-operative Bank of Kenya Ltd v. Banking Insurance & Finance Union [2016] eKLR*, this Court stated that a decision arrived at without advertent to the stipulated considerations is symptomatic of a decision arrived at without taking into account relevant considerations. That demands that we interfere with the exercise of discretion by the learned judge as regards the award of compensation.

Even though we have found that the appellant did not deny the respondent a fair hearing as found by the trial court, nevertheless, the appellant, having failed to prove the reason or reasons for the termination, the termination remains unlawful and the respondent is entitled to compensation. Taking into account all the circumstances of this appeal including the conduct of the respondent, we allow this appeal in part. We set aside the award of 12 months compensation and substitute therefor an award of three months compensation (**Kshs. 174,300**). The rest of the award of the trial court shall remain undisturbed. The appellant is awarded half the costs of this appeal. It is so ordered.

Dated and delivered at Nairobi this 19th day of February, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR