



IN THE COURT OF APPEAL

AT NYERI

ICORAM: KIAGE, SICHALE & J. MOHAMMED, J.J.A

CIVIL APPEAL NO. 81 OF 2016

BETWEEN

BEATRICE WANJUGU MAKIRA.....APPELLANT

AND

THE BOARD OF MANAGEMENT,

KANJURI HIGH SCHOOL.....RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nyeri (Byram Ongaya, J) dated 12th June, 2015

in

ELRC CASE NO. 67 OF 2013

(FORMERLY CAUSE NO. 218 OF 2011 AT NAIROBI

JUDGMENT OF THE COURT

Beatrice Wanjugu Makira (Beatrice) (the appellant herein) proffered an appeal against the judgment of **Byram Ongaya, J** dated **12th June, 2015** at the Employment and Labour Relations Court (ELRC) at Nyeri.

The genesis of this appeal stems from a claim filed at the Industrial Court of Kenya at Nairobi in Cause No. 218 of 2011 wherein the appellant sued **E.K Nguyo** on behalf of the **Board of Governors, Kanjuri High School** and the **Attorney General** for wrongful termination. The appellant's claim against the respondents at the Industrial Court was for Kshs 185,807.98 as terminal benefits, compensation for wrongful dismissal to a maximum of 12 month's wages amounting to Kshs 111,564.00, costs of the suit, interest and any other relief that the court might deem fit and just to grant. The appellant's claim was however dismissed with costs for want of prosecution by **Monicah Mbaru, J.** vide an order dated **1st November, 2012**. Aggrieved with the dismissal of her claim, the appellant applied for a review of the dismissal order and for reinstatement of her claim. She filed a Memorandum in support of the review dated **2nd April, 2013** in which she blamed her counsel then on record, **M/s T.M. Kuria & Co. Advocates** for failure to attend court on her behalf before she opted to act in person and urged the court to vacate the orders issued on **1st November, 2012** and to reinstate the suit at the Industrial Court. The application for review of the orders of **1st November, 2012** was heard by **James Rika, J** who in a ruling dated **26th March, 2013** allowed the application for review in the following terms:

“(a) The award dated 2nd August, 2012 is set aside;

(b) Hearing to proceed de novo;

(c) Parties to agree on a suitable hearing date at the Court Registry; and

(d) No order on the costs”.

Following the reinstatement of her claim, the appellant filed an Amended Memorandum of Claim dated **11th July, 2013**, in which she named the **Attorney General** on behalf of the **Board of Governors, Kanjuri High School**, as the respondent. Her prayers as per the Amended claim were: *“The sum of Kshs 201,673.35 as particularized in paragraph 6 of the claim; compensation for wrongful dismissal to a maximum of 12 months wages amounting to Kshs 111,564.00 and General damages, emoluments/contingencies at the rate of 15% of the total amount amounting to Kshs 266,257.75, costs of the suit, interest in (i) and (ii) above and any other relief as the Court may deem just”.*

The respondent opposed the claim through a Memorandum of defence dated **23rd June, 2011** where it contended that it had no locus standi to be sued in the matter. In their written submissions dated **4th June, 2015**, the respondent contended that Section 41 of the Employment Act was followed to the letter as the appellant was notified of her deeds which amounted to misconduct and that she was accorded a fair hearing. It was contended further that Section 43 of the Employment Act, was strictly followed as sufficient proof of the reasons for the appellant’s termination was given. The respondent submitted that the appellant was earning a basic salary of Kshs. 6,250.00 which was then multiplied by the years of her service thus totaling to Kshs 125,000.00 which was duly paid to the appellant as terminal dues. On the issue of unpaid leave days, the respondent submitted that the appellant had no balance of any leave days since the appellant had spent all her leave days as at the time of termination of her service and as indicated in her leave application dated **28th November, 2006**, her balance of leave days was “nil”. Further, the respondent submitted that while the appellant was on compulsory leave, she used to earn a full salary as opposed to half pay, hence the appellant was not entitled to one month’s salary in lieu of notice; that the issue of off days was a new issue which was not raised in evidence and that in any case, the appellant was entitled to one day off per week, which she utilized. The respondent finally submitted that the appellant’s termination was procedural and lawful. However, the respondent was agreeable to the appellant’s claim for seventeen (17) days worked in the month of **March, 2008**. Otherwise, the Court was urged to dismiss the appellant’s claim for wrongful dismissal with costs to the respondent.

The appellant’s claim was heard at the Employment and Labour Relations Court by **Byram Ongaya, J.** who in a judgment dated **12th June, 2015** entered judgment in favour of the appellant against the respondent in the following terms:

“(a) the respondent to pay the claimant Kshs 40,258.00 by 01.08.2018 in default the respondent to pay interest thereon at court rates from the date of termination, 15.03.2008, till full payment.

(b) The respondent to pay 50% of the claimant’s costs of the suit.”

The appellant was aggrieved by the decision of **Ongaya, J.** and she filed a Notice of Appeal dated **23rd June, 2015**, through Gori & Company Advocates. In a Memorandum of Appeal dated **4th November, 2016**, the appellant faulted the trial judge for erroneously holding that the respondent had a valid reason to terminate her employment; for erroneously holding that the appellant’s dismissal was lawful; for erroneously holding that the appellant had not established the justification for the other reliefs sought, thus erroneously dismissing her claim; and for holding that the respondent should only pay 50% of the costs. The appellant asked this Court to set aside the judgment of the ELRC and enter judgment in her favour as prayed in the Memorandum of Claim with full costs in both courts.

The appeal came up for hearing before us on **7th December, 2020**. **Mr. Makura**, learned counsel holding brief for Gori & Company Advocates appeared for the appellant. There was no representation for the respondent although service of the hearing notice was effected upon them on **30th November, 2020**. The appellant’s counsel relied on their written submissions dated on **23rd June, 2017** in their entirety. In the written submissions, the appellant submitted that **Ongaya, J.** erroneously failed to enter judgment in her favour as prayed in the Memorandum of claim. She urged the court to find merit in her claim and allow it as prayed. She relied on the decisions of

Bamburi Cement Limited vs. William Kilonzi Mombasa COA Civil Appeal No. 62 of 2015 and International Planned Parenthood Federation vs. Pamela Ebot Arrey Effiom, Nairobi COA Civil appeal No. 132 of 2011, for the proposition that she is entitled to damages on account of the wrongful termination.

We have considered the appellant's Memorandum of Appeal, her written and oral submissions made before us, the authorities cited and the law.

For a start, this is a first appeal. The position of the law as regards a first appeal is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123* wherein it was stated:

"I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -vs- Ali Mohamed Sholan (1955)22 EACA 270".

Suffice to state that the appellant sought judgment for a total sum of Kshs 579,489.10. The particulars of this sum were set out in paragraph 6 of the amended Memorandum of Claim dated 1st July, 2013. These were:

" (a) Basic salary x years worked (167,000 -125,000) Kshs 42,271.00

(b) Accrued annual leave

1996	- (9297/30x12x1)	Ksh.	3,718.80
1997	- (9297/30x21x1)	Ksh.	6,507.90
1998	- (9297/30x7x1)	Ksh.	2,169.30
2002	- (9297/30x6x1)	Ksh.	1,854.00
2004	- (9297/30x21x1)	Ksh.	6,507.90
2005	- (9297/30x21x1)	Ksh.	6,507.90
2006	-(9297/30x21x1)	Ksh.	6,507.90
			Ksh. 33,773.70

(c) Pay in lieu of Notice Ksh. 9,297.00

(d) Off days 144 (8x144x1/225x2x9297) Ksh 95,201.28 Ksh.109,847.65

(e) 17 days worked in the month of March,2008 Kshs 5,268.30 Ksh. 6,484.00

(f) 12 months maximum compensation for unfair termination 9,297.00 x12 months Ksh. 111,564.00

(g) General Damages Emoluments/Contingencies at the discount of 15% of the total amount. (313,237.35 x 85) 100 Ksh. 266,257.75

TOTAL AMOUNT ~~Kshs. 185,807.98~~ Ksh. 579,489.10"

Ongaya, J. considered the issue as to whether the appellant was lawfully terminated. He came to the conclusions that:

“The 1st issue for determination is whether the termination was unfair. There is no doubt that the claimant was accorded notice and hearing as envisaged in section 41 of Employment Act, 2007. The claimant has admitted that she was late in reporting back at work at 4.30 p.m. instead of 1.00 p.m. on 13.09.2007 and as per her letter of 7.02.2008, she admitted as much in her evidence in court. She further admitted in her said letter that she reported on duty late on some weekends when she was expected at work so as to attend to her private matters. The court has considered the claimant’s employment record that showed several warnings and together with the admissions finds that the respondent had a valid reason to terminate the claimant’s employment as envisaged in section 43 of the Act. Thus, the court finds that the dismissal was not unfair”.

The learned Judge further found that the appellant was entitled to Kshs 33,774.00 as pay in lieu of notice and salary for 17 days worked in **March, 2008**, thus a total of Kshs 40,258.00 . The Court noted that the appellant had been paid gratuity of Ksh. 125,000.00.

In her statement dated **19th November, 2013**, the appellant stated that on **17th September, 2007**, she was served with a letter to proceed on compulsory

leave. She remained on leave until **16th October, 2007** and upon reporting, she was served with another letter to continue with the said leave. On **4th February, 2008**, she received a letter accusing her of gross misconduct. She made her written

defence and on **23rd February, 2008**, she appeared before the School’s Board of Governors. She was “... ***asked a few questions by the Principal and over four (4) persons ...***”. After the questioning, she was informed that she had been terminated and would be paid her terminal benefits. There were also several warning letters addressed to the appellant for dereliction of duty. In our view, and given the appellant’s own testimony, we find that the respondent followed due process as per the provisions of Section 41 of the Employment Act. Consequently, we find that the termination was not unlawful, hence the appellant was not entitled to any payment for unfair termination.

As regards leave days, we note that in her application for annual leave dated **28th November, 2006**, the appellant indicated her leave days as “***nil***”. She was therefore not entitled to any payment for leave. However, **Ongaya, J** found that:

“The claimant has filed the relevant leave forms showing outstanding leave days as at the time of termination and as claimed in the memorandum of claim. The court finds that the claimant is entitled to Kshs 33,774 as submitted for pay in lieu of leave due but not taken during the service with the respondent”.

In spite of the appellant having “***nil***” leave days and in spite of **Ongaya, J** finding that she was entitled to Kshs 33,774.00 as pay in lieu of leave, we note that the respondent did not challenge this finding by way of a cross-appeal and we shall not disturb that finding.

The respondent was agreeable to paying the appellant seventeen (17) days worked in the month of **March, 2008**, a sum of Kshs 6,484.00, which we find is her entitlement. As for her gratuity, her basic salary was Ksh. 6,250.00 and not Ksh. 9,297. This multiplied by years worked (20) gave a total of Kshs 125,000, which sum she was paid.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed. However, given the circumstances of this case, we deem it fit to direct that each party do bear its/her own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

P.O KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR