IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, MURGOR & SICHALE, JJ.A]

CIVIL APPEAL NO. 253 OF 2019

BETWEEN

JOSHUA RODNEY MARIMBAH.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Makau, J) dated 24th May, 2019.)

IN

Nairobi ELRC Cause No.1739 of 2015)

****

JUDGMENT OF THE COURT

On **12th June 2019, Joshua Rodney Marimbah** filed an appeal against the judgment of **Makau, J** dated **24th May 2019.**

The appeal stems from a claim filed at the Employment and Labour Relations Court by the appellant (the then claimant) against the respondent in which the appellant had alleged that his contract of service was unfairly and unlawfully terminated by the respondent and therefore sought the following reliefs: a declaration that the suspension, disciplinary proceedings and ultimate dismissal of the appellant was a sham, unfair, un-procedural, wrongful and unjust; the immediate unconditional reinstatement of the claimant to his employment; payment of all outstanding salary and benefits from the date of suspension up to reinstatement; damages for loss of credit and integrity and interests on (b) and (c) hereinabove at court rates.

The matter was heard by **Makau J** who in a judgment delivered on 24th May 2019, dismissed the same holding inter alia that:

> ***"I have found that there was a valid and fair reason that justified the dismissal of the claimant from service, namely his dishonesty conduct that rendered him incompatible with the respondent. However, I have further found that the termination was rendered unfair by the failure by the respondent to follow a fair procedure as provided under the contract of service. Finally, I have declined to grant the reliefs sought either due to limitation period provided by the law or because of lack of merits altogether. Consequently, I dismiss the suit but with no costs."***(sic)

The appellant was aggrieved with the findings of the honourable judge and in a memorandum of appeal dated **6th June 2019**, listed 8 grounds of appeal faulting the learned judge for dismissing the claim namely; the learned judge erred in law and misdirected himself when he applied the provisions of Section 12 (3) (vii) of the Employment and Labour Relations Act No. 12 of 2011 to decline to reinstate the appellant without taking into account the delay caused by the respondents through numerous unwarranted adjournments in contravention of the provisions of Article 41 as read together with Article 22 and Article 2 of the Constitution; in dismissing the claim when in actual fact the appellant had proved his case on the required standards and proceeded to give judgment that went against the weight of the evidence before court; misdirected himself in punishing the appellant for delay solely occasioned by the respondents who sought and obtained umpteen adjournments in the matter on very flimsy, and unsupported and baseless grounds; in failing to reinstate the appellant to his employment with full benefits and an award of damages; in misdirecting himself when he deduced that the appellant returned to the shop and the only matter the appellant could discuss with the shop attendant was solicitation of a bribe; deciding on matters that were not canvassed before him by either the respondent or the appellant and finally, that he misconstrued and misdirected himself in holding that the appellant returned to the inspected premises to solicit for a bribe.

The appeal came up for hearing on **9th December, 2020. Mr. Omondi,** learned counsel appeared for the appellant whilst **Ms Mburugu,** learned counsel appeared for the respondent. **Mr. Omondi** while urging the appeal sought to condense the grounds of appeal into two. It was his submission that the learned judge did not address his mind to the fact that the appellant had proved his case on a balance of probability as the respondent did not call any evidence and as such the evidence of the appellant remained uncontroverted. He further contended that despite the learned judge having exonerated the appellant from all the allegations against him, he failed to reinstate him as had been prayed. On behalf of the respondent, learned counsel **Ms. Mburugu** while indeed admitting that the respondent did not adduce any evidence contended that the respondent had filed its defence. She further urged that the appellant produced his own documents which showed that he lacked integrity and that the judge correctly found that there were enough reasons to warrant a dismissal as there was evidence to show that he regularly flouted working procedures.

We have anxiously considered the record, the rival oral and written submissions by the parties and the law.

The appeal before us is a first appeal. Our mandate as a first appellate court 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".***

We consider the facts of this matter to be fairly straight forward. In our view, the grounds of appeal in the memorandum of appeal can be summarized into three as follows: whether the learned judge erred in law when he applied the provisions of section 12 (3) (vii) of the Employment and Labour Relations Court in declining to reinstate the appellant without taking into account the time delay caused by the respondent through the alleged numerous unwarranted adjournments in contravention of the provisions of Article 41 as read together with Article 22 and Article 2 of the Constitution; whether the learned trial judge erred in law and fact in dismissing the claim when in actual fact the appellant had proved his case on the required standards and whether the learned judge erred in law and fact in failing to reinstate the appellant to his employment with full benefits and award of damages.

It is indeed not in dispute that the appellant had been employed by the respondent until 30th June 2015 when he was dismissed. The dismissal letter read in part: -

> ***"your conduct at Gilmart supermarket in Gilgil town was found to be in gross violation of the laid down work procedures, and consequently the authority has lost confidence in you.***
>
> ***……..it has been decided that your services with KRA be terminated with immediate effect on grounds of misconduct."***

With regard to the first issue and as to whether the learned judge erred in law when he applied the provisions of section 12 (3) (vii) of the Employment and Labour Relations Court in declining to reinstate the appellant without taking into account the time delay caused by the respondent through numerous unwarranted adjournments in contravention of the provisions of Article 41 as read together with Article 22 and Article 2 of the Constitution, a cursory perusal of the record does not show that there were numerous adjournments occasioned by the respondent as has been contended by the appellant and neither was this issue raised before the learned judge. In our view the learned judge was therefore right in declining to issue an order for reinstatement since a period of three years had lapsed from the date of dismissal pursuant to the provisions Section 12 (3) (vii) of the Employment and Labour Relations Court Act which provides:

> *" (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:*
>
> *(viii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or ...."*

From the circumstances of this case we find no reason to fault the learned judge for failing to grant an order for reinstatement as he was clearly bound by the provisions of Section 12 (3) (vii) *(supra).* In any event, even if the claim had been brought within the 3-year period as envisaged by Section 12 (3) (vii) the remedy of reinstatement would still not have been available to the appellant for reasons that we shall demonstrate shortly. Consequently, nothing turns on this point.

With regard to the other issue raised by appellant namely that the learned judge erred in law and in fact in dismissing the claim when in actual fact the appellant had proved his case on the required standards and that he proceeded to give judgment that went against the weight of the evidence, the learned judge while analyzing the evidence in his judgment stated inter alia thus:

> ***"the foregoing lacuna notwithstanding, it is without peradventure that the conduct of the claimant during the visit to the wines***

and spirits shop and the supermarket on 4.3.2014 at Gilgil entitled the employer to reasonably suspect him for being dishonest and likely to bring her into disrepute contrary to rule 6.2.5.4 and 6.2.6.9 of her code of conduct. Whereas the KRA surveillance team were divided into groups of at least 2 persons, the claimant was either returning to the premises or being left there talking to the managers while his colleague, Mr. Ouma walked away. Although Mr. Ouma never witnessed any bribes being given, the said conduct by the claimant breached work procedures and opened opportunity for him to demand bribes from the traders or to be falsely accused of the offence and thereby bring disrepute to respondent. The respondent conducted private investigation and made a report which found the claimant culpable of contravening the said sections of the code of conduct. The said report and the statements collected from the various witnesses including his companion Mr. Ouma were considered against the defence offered by the claimant both in writing and before the disciplinary committee, and a decision was reached that the claimant had misconducted himself contrary to the code of conduct. Under Section 43 of the Employment Act, the reason for terminating the employee's contract are those things which the employer honestly believed to exist at the time when termination was done and which made him to decide to terminate the contract. In this case, the respondent considered the said evidence collected by her investigator and made opinion that the claimant could not be trusted anymore with the tasks he was employed to undertake for her. The termination letter dated 30.6.2015 cited the reason for the termination as loss of confidence. The letter stated thus: -

> ***"your conduct at Gilmart supermarket in Gilgil town was found to be in gross violation of the laid down work procedures, and consequently the authority has lost confidence in you.***
>
> ***……..it has been decided that your services with KRA be terminated with immediate effect on grounds of misconduct."***
>
> ***Despite the failure by the respondent to call any witness herein, I am satisfied by the documentary evidence adduced by the claimant himself that the respondent had a valid and fair reason for terminating the claimant's contract of service. His conduct of breaching work procedures was no longer compatible with the respondent and had the potential of bringing the respondent and her other staff into disrepute and frustrate her public duty. I therefore return that the termination was justified.***

From the above passage and in our view, it is our considered opinion that the learned judge properly analyzed the evidence that was before him and correctly found that despite the failure by the respondent to call any witness, the documentary evidence adduced by both the appellant and the respondent, the respondent had a valid and fair reason for terminating the appellant's contract of service.

In the case of **Kenya Power & Lighting Company Limited v Aggrey Wasike [2017] eKLR** this Court stated as follows:

> ***"Under* Section 43 *of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he** "genuinely believed to exist," **causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores. Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. There were.***
>
> ***It bears repeating that the standard of proof an employer needs to be satisfied about an alleged act of criminality on the part of an employee is the lesser one of balance of probabilities (Emphasis added)"***

From the circumstances of this case we are satisfied that the learned judge was right in holding that in light of the documentary evidence adduced by both the appellant and the respondent, the respondent had a valid and fair reason for terminating the appellant's contract of service and we see no reason to interfere with the learned judge's finding on this. Similarly, we are not convinced that the learned judge misdirected himself when he deduced that the appellant returned to the shop and the only matter the appellant could discuss with the shop attendant was solicitation of a bribe nor that he considered extraneous matters. As a matter fact, suspicions of taking bribes was one of the charges that had been laid against the appellant. Consequently, nothing turns on this point.

With regard to the other ground namely that the learned judge erred in law and fact in failing to reinstate the appellant to his employment with full benefits and award of damages, the learned judge in declining to order reinstatement cited the provisions of Section 12 (3) (vii) of the Employment and Labour Relations Court Act which barred the court from granting that relief where three years have lapsed from the date of dismissal. In this case 3 years had lapsed from the date the appellant had been dismissed. The learned judge was therefore right in declining to order reinstatement. A cursory perusal of the pleadings reveals that the appellant had sought **immediate and unconditional reinstatement to his employment.** An order for reinstatement is not automatic and the same is allowed only in very exceptional circumstances depending on the facts and circumstances of each case. In this case the learned judge having found that that the appellant's conduct of breaching work procedures was no longer compatible with the respondent and had the potential of bringing the respondent and her other staff into disrepute and frustrate her public duty, it is our considered opinion that an order for reinstatement was not tenable nor appropriate in the circumstances. **In Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR,** Maraga J (as he then was) stated

thus:

> ***"As I have said, in Kenya, reinstatement is one of the remedies provided for in*** *Section 49(3)* ***as read with*** *Section 50* ***of the*** *Employment Act* ***and*** *Section 12 (3) (vii)* ***of the*** *Industrial Court Act* ***that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal. (Emphasis supplied).***
>
> ***Under the Kenyan Employment Act, the factors to be taken into account when considering reinstatement are enumerated in*** *Section 49(4)* ***of the*** *Employment Act****. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor".***

We think we have said enough to demonstrate why an order for reinstatement would not have been issued in the circumstances of this case and the learned judge so rightly declined to award the same.

The appellant further faulted the learned judge having failed to award him full benefits and award of damages. As was rightly observed by the learned judge, the appellant did not pray for alternative prayer for compensation for unfair termination under Section 49 (1) of the Employment Act. Consequently, none could have been awarded for failure to plead. It is indeed trite law that parties are bound by their pleadings and the court cannot purport to re-write the pleadings for the parties and award what has not been asked for. Similarly, with regard to the claim for salary from the time of suspension to the date of reinstatement as was rightly observed by the trial judge, none could have been awarded because the order for reinstatement was not tenable. The appellant further admitted that he was paid his salary from the date of suspension to the date of termination. Consequently, nothing turns on this point.

Accordingly, it is in view of our above conclusions that we find this appeal to be devoid of merit. It is hereby dismissed with no order as to costs.

DATED AT AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, **2021.**

W. KARANJA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR