IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 171 OF 2013

(CORAM: W. KARANJA, OKWENGU & SICHALE, JJ.A)

BETWEEN

NELSON AGOYA

ABSOLOM LUVAYI GWAGA

RHODA MUSIMBI

JOHN IDAGIZA

WYCLIFFE MUKANGULA LUMASIA

TONY BARAZA SHIVAMBO

ERNEST OKUTE.....APPELLANTS

AND

KENYA UNION OF EMPOYEES OF VOLUNTARY &

CHARITABLE ORGANISATIONS (KUEVACO).....1ST RESPONDENT

DAYSTAR UNIVERSITY.....2ND RESPONDENT

(An appeal from the Judgment of the Industrial Court of Kenya at Nairobi

(**Isaac K. Mukunya, J**.) delivered on 3rd March, 2009

in

Industrial Cause No.37 of 2008)

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JUDGMENT OF THE COURT

[**1**] This matter appears to be quite convoluted. **Civil Appeal No. 171 of 2013** was filed by **Nelson Agoya, Absolom Luvayi Gwaga, Rhoda Musimbi, John Idagiza, Wycliffe Mukangula Lumasia, Tony Baraza Shivambo** and **Ernest Okute** (**appellants** herein), through a notice of appeal dated 6th June, 2013 lodged in the registry on the same date. The appeal originates from a judgment of the Industrial Court, (**Mukunya, J**) delivered on 3rd March, 2009. Leave to file the appeal out of time was granted by **Musinga, JA** on 31st May, 2013.

[**2**] The appellants were all former employees of Daystar University College. They filed a claim in the Industrial Court against their employer through their union, **the Kenya Union of Employees of Voluntary and Charitable Organizations**. The Union is the 1st respondent in the appeal while the employer is the 2nd respondent.

[**3**] The appellants' claim against their employer arose from the termination of their employment, which they claimed amounted to redundancy and was wrongful, as the employer did not follow the required procedures. In addition, the appellants each claimed pay in lieu of notice, severance pay, overtime claims, medical claims, annual leave claims, housing and house allowance claims, underpayment claims and other disputed salary deductions. Upon hearing the dispute, the learned Judge gave judgment in favour of the Union and ordered the appellants to be paid, concluding as follows:

> **"In the premises the employer/respondent is hereby ordered to compute and pay the terminal dues as enumerated in the report of the labour commissioner and pay them to the grievants within thirty (30) days. This will be on top of what the grievants have been paid. Since declaration of redundancy was wrongful, and the grievants lost their employment wrongfully, the respondent employer shall pay to each of them four (4) months salary as compensation for wrongful loss of employment also within thirty (30) days. In the event that the computation of the underpayments is not disputed by the claimant, then the Nairobi Provincial Labour Officer at the request of the claimant to assist the parties to do so, and the respondents to pay within thirty (30) days of such notification. All other demands and reliefs are hereby dismissed."**

[**4**] The appellants who were dissatisfied with the judgment, have filed a memorandum of appeal in which they have raised seven grounds stating that the learned Judge erred in law: by making his order based on a report that was erroneous and that did not have due regard to the appellants' claims; in asking the respondents to compute the award and benefits due to the appellants; in failing to decide the appellants' claim on the merits of the claim but instead relying on a report by the respondents; in refusing to allow the review of the award as sought by the claimants; in giving an award based on erroneous calculations; in finding that the authorities presented to court were irrelevant in the determination of the case; in arriving at the wholly misconceived decision to rely on the respondents calculations rather than the appellants submissions; and in dismissing other reliefs sought by the appellants. The appellants urged the Court to allow the appeal and enter judgment as pleaded in the superior court so that the appellants are awarded general damages.

[**5**] On 26th November, 2010, **Mukunya, J** delivered a ruling in which he declined to review the award that he had made on 3rd March, 2009. In the application for review, the Union had asked the court to reconsider its award and order the employer to produce the computation of the benefits of every claim that had been made by the appellants, and for the court to determine the computation. The learned Judge found that there was no discovery of new or important matter that was not within the knowledge of the parties, such as would justify the review. The learned Judge also noted that the parties had accepted and endorsed by consent a report by the labour officer, which determined the issues in dispute and that the judgment and the award made by the Industrial Court was based on that consent.

[**6**] By a notice of motion dated 5th November 2013, the Union through its Secretary General, one **Odim Boaz Otieno (Janitor**), moved the Court under rule 4 of the Court rules and **Article 159 (2)(d)** of the Constitution to have time extended for the Union to file an appeal against the ruling of the Industrial Court dated 26th November 2010.

[**7**] The Union's motion was opposed through a replying affidavit sworn by **Ann Ndundu,** an advocate for the 2nd respondent. The 2nd respondent urged the court not to grant the motion as the 2nd respondent had not explained the delay of two years. In addition, its application was fatally defective, and further that the Union would not suffer any prejudice as the appellants had already been paid their dues.

[**8**] On 26th January 2015, **CA No. 171 of 2013** came up for hearing. An objection was raised by the 2nd respondent regarding the locus of the appellants to pursue the appeal, given that the claim in the Industrial Court was filed by the 1st respondent. Having heard he submissions, the Court delivered a ruling dated 8th July 2016, in which it found that the appellants were interested parties, who would be directly affected by any orders made in the appeal, and therefore had *locus standi* to pursue the appeal. The Court having been informed that there was another appeal that was filed by the 1st respondent, being **Civil Appeal No. 303 (A) of 2013**, and which involved the same parties directed that the two appeals be consolidated and heard together.

[**9**] On 22nd September, 2016 the appeal came up for hearing but was adjourned at the appellants' request. An order was made for the 1st respondent to be added as an appellant in the appeal and the 1st respondent's Secretary General was given 21 days within which to file a memorandum of appeal. On 16th May, 2017, the 1st respondent filed a memorandum of appeal in which they indicated that they would seek to be heard on a preliminary objection on points of law regarding the legitimacy of the appeal, *locus standi* and consolidation of the two appeals. The memorandum of appeal also included fifteen (15) grounds against which the 1st respondent challenged the decision of the Industrial Court delivered on 26th November, 2010.

[**10**] On 23rd January 2018, following several attempts to have the consolidated appeals heard, the Court having called for **CA No. 303 (A) of 2013**, established that there was no appeal that had been filed but only a notice of motion for extension of time to file an appeal that has already been referred to herein. The Court therefore set aside the order for consolidation of the two appeals, and ordered the main appeal **CA No. 171 of 2013** to be heard on its own.

[**11**] Looking at the memorandum of appeal that was filed by the 1st respondent on 16th May, 2017, it is evident that its appeal is against the ruling of the Industrial Court made on 26th November, 2010 which was the decision of the learned Judge rejecting the application for review. On the other hand, **CA No. 171 of 2013** is an appeal against the judgment and award of the Industrial Court made on 3rd March, 2009. This means that although the parties are essentially the same, the 1st respondent's appeal cannot be entertained in this appeal. The order for consolidation having been set aside, we would strike out the 1st respondent's appeal, as the same cannot be treated as a cross-appeal or determined in this appeal.

[**12**] During the hearing of **CA No. 171 of 2013**, the appellants relied on written submissions that were duly highlighted by their counsel **Ms. Mwaura**. The appellants submitted that the learned Judge erred in making orders based on the report of the labour officer that was erroneous and not relevant to the appellants' claim. The appellants reiterated that the issue was whether the claim for overtime was untenable, and whether the award made by the Industrial Court was done in accordance with **section 49** of the Employment Act. The appellants urged the Court to be guided by the provisions of the Employment Act and policies, and set aside the judgment of the Industrial Court and award the appellants general damages.

[**13**] In his memorandum of appeal, the 1st respondent also challenged the validity of **CA No. 171 of 2013** and the appellants' *locus standi*. The appellants contended that the Court has no jurisdiction to entertain the appeal, as the appeal was from the judgment of the Industrial Court, which was then a tribunal, against whose judgment leave to appeal was required, and no leave to appeal was given. Concerning the issue of the *locus standi* of the appellants, this was addressed by this Court in its ruling dated 8th July, 2016, when the Court ruled that the appellants were persons who would be directly affected by any orders made in this appeal and therefore, they had the requisite *locus standi*. We reiterate this position and need not say more.

[**14**] As regards the issue whether this appeal is properly before the Court, we appreciate that the judgment, subject of the appeal, is a judgment of the former Industrial Court. Under **section 27 (1)** of the **Labour Institutions Act No. 12 of 2007** that came into effect on 2nd June, 2008, a right of appeal to this Court against the judgment of the then Industrial Court was provided on matters of law. The issue of leave to appeal does not therefore arise.

[**15**] The 2nd respondent also filed written submissions that were highlighted by learned counsel **Mr. Biwott**. In the submissions, it was reiterated that the judgment of the Industrial Court was based on the report of the Labour Commissioner, which was not erroneous as alleged. It was pointed out that it was the Industrial Court that directed the Labour Commissioner to prepare and file the report; that the Labour Commissioner prepared a report which addressed all the issues that were raised by the appellants; that the report of the Labour Commissioner was in fact accepted and endorsed by the parties; and that the Court can only set aside the judgment on grounds of fraud or misrepresentation, which grounds the appellants have not established.

[**16**] With regard to the computation of the award, the 2nd respondent contended that in accordance with the orders of the Industrial Court, the calculations/computations were done following the report made by the Commissioner and that the appellants had the liberty to seek the assistance of the Nairobi Labour Provincial Officer if no satisfied with the computation done. As regards the review, it was submitted that there was no ground upon which the Court could interfere with its earlier ruling. The 2nd respondent pointed out that the appellants had in fact accepted the amounts awarded to them, and the attempt to challenge the award after benefiting from the same should be deprecated as approbation and reprobation. The Court was therefore urged to dismiss the appeal.

[**17**] We have carefully considered the appeal, the submissions and the authorities cited. It is clear to us that the appellants' claim in the Industrial Court was handled by the 1st respondent and that a judgment was issued in favour of the appellants. The following extract from the judgment is instructive.

> **"Upon careful consideration, the Court holds that the report of the Labour Commissioner which was acceptable to both parties forms a reasonable proposal for settling this dispute. It is hereby accepted and endorsed as a basis of formulating an award.**
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> **In the premises, the Employer/Respondent is hereby ordered to compute and pay the terminal dues as enumerated in the report of the Labour Commissioner and pay them to the grievants within THIRTY (30) days. This will be on top of what the grievants have already been paid. Since declaration of redundancy was wrongful and the grievants lost their employment wrongfully, the respondents/employer shall pay to each of them four (4) months salary as compensation for wrongful loss of employment also within THIRTY (30) days. In the event that the computation of the underpayments is disputed by the Claimant, then the Nairobi Provincial Labour Officer at the request of the Claimant to assist the parties to do so and the respondent to pay within THIRTY (30) days of such notification. All other demands and reliefs are herby dismissed."**

[**18**] It is evident from the above that the award of the Industrial Court was based on a report which was prepared by the Labour Commissioner and which was acceptable to both parties. The court awarded the appellants general damages of 4 months salary as compensation for their wrongful dismissal. The award of damages was a matter within the discretion of the trial court, and this Court can only interfere if it is satisfied that the trial court did not exercise its discretion judiciously. Nothing was laid before us to show that the trial court considered matters it ought not to have considered, or failed to consider matters it should have considered or in any way acted capriciously. In our view, the learned Judge properly exercised his discretion in the award of compensation.

[**19**] As regards the computation for other claims, the learned Judge sought the intervention of the labour officers and all the parties including the appellants through the 1st respondent accepted the report, which formed the basis of the court's award. The learned Judge gave the appellants the leeway to revert to the labour office in the event that they were dissatisfied with the computation that was done. We therefore find no merit in this appeal as neither the appellants nor the 1st respondent have established any reason as to why we should fault the award made by the learned Judge. In the circumstances, we dismiss the appeal and order each party to pay their own costs.

Dated and delivered at Nairobi this 6th day of March, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR