REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), NAMBUYE, & OKWENGU, JJA

CIVIL APPEAL NO. 406 OF 2018

KENYA REVENUE AUTHORITY.....APPELLANT

VERSUS

JAMES OMONDI WERE.....RESPONDENT

(Appeal from the Judgment and order of the Employment and Labour Relations Court of Kenya at Nairobi (**Byram Ongaya, J**) Dated 31st July 2018 in Employment and Labour Relations Cause No. 974 of 2017)

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JUDGEMENT OF THE COURT

The appeal arises from the Judgment of the Employment and Labour Relations Court (ELRC) of Kenya at Nairobi (**Hon. Mr. Justice Byram Ongaya, J.)** dated 31st July, 2018.

The background to the appeal is that, the Respondent was employed by the Appellant in its Customs Department. He allegedly worked diligently until 12th October, 2015 when he was retired from the Appellant's service in the 'authority's interest'. He filed a statement of claim dated 24th May,2017 challenging the Appellant's decision to retire him in the 'Authority's interest', alleging that, the disciplinary procedures resulting in his retirement 'in the authority's interest', were flawed and discriminatory; that the Appellant leveled against him allegations of misconduct in respect of which he was served with a notice to show cause. He successfully defended himself against those allegations before the Appellant's disciplinary tribunal which found those allegations unfounded and therefore absolved him of any misconduct in the discharge of his duty as had been alleged against him by the Appellant; that the Appellant introduced new charges in their letter retiring him 'in the Authority's interest' which were neither brought to his notice through a notice to show cause, nor was he ever given an opportunity to defend himself against those allegations before he was retired in the Authority's interest; that on 27th October, 2015, he appealed against the decision to retire him 'in the Authority's interest,' to which he received no response; that the flawed disciplinary process coupled with the dragged appeal process not only contravened his constitutional rights as entrenched under **Article 47** of the Kenya Constitution 2010, but also went against the provisions of the Employment Act 2007 (The Act), and the KRA, Employment Code of conduct. He therefore sought a declaration that his retirement by the Appellant 'in the Authority's interest', coupled with the undisputed delay in taking administrative action on his appeal was illegal, null and void; an order that he be adequately compensated for the time lost while out of the employment, general damages, costs, interest on the amount claimed for and awarded as prayed for in the claim and any other relief the Court may deem fit to grant.

In rebuttal, the Appellant filed a statement of response dated 24th May, 2017, admitting that on 21st January, 2012, the Respondent was informed of his suspension due to grounds of gross misconduct contrary to the Respondent's code of conduct. He was given an opportunity to show cause as to why disciplinary action should not be instituted against him resulting in his retirement 'in the Authority's interest and prayed for the Respondent's claim to be dismissed with costs.

The Respondent filed a reply to response dated 25th May, 2018 joining issue with the Appellant on its rebuttal of his claim. He also reiterated that the disciplinary tribunal in its letter dated 12th October, 2015 found allegations leveled against him unsubstantiated. His purported retirement 'in the Authority's interest was therefore unfair and unlawful.

Both James Omondi Were the Respondent (CW1) and **Grace Njeri Mwangi (RW1)**, Appellant's Human Resource Manager, adopted their respective pleadings, witness's statements and documents filed in the cause by the respective parties as their evidence.

At the conclusion of the trial, the trial Judge assessed and analyzed the record, identified issues for determination, whose determination resulted in the impugned decision giving rise to this appeal and whose reasons we shall revert to at a later stage of this judgment.

The Appellant was aggrieved and filed this appeal raising five (5) grounds of appeal, subsequently abandoning grounds 1 and 3 leaving grounds 2,4 and 5 for consideration, now renumbered as 1,2&3. These are that the learned Judge erred in law and fact:

1. **By failing to consider the allowable compensation under the Employment Act.**

2. **By ordering reinstatement of the Respondent contrary to law, facts, submissions, authorities and judicial precedents.**

3. **By failing to appreciate that the process leading to the Respondent's retirement was fair, lawful and constitutional.**

The appeal was canvased by written submissions filed, fully adopted and highlighted by learned counsel for the respective parties to this appeal. Those for the Appellant were dated 19th December, 2018 and filed on 24th December, 2018, while those of the Respondent were dated 14th January, 2019 and filed on 7th February, 2019. For plenary hearing, learned counsel **Miss Laparashao Patricia** holding brief for **Mr. Twahir Alwi Mohamed,** appeared for the Appellant, while learned counsel **Mr. Odhiambo** appeared for the Respondent.

In support of the appeal**, Miss Leparashao** relied on the case of **Moi Teaching & Referral Hospital versus Hosea Cheruiyot Maru [2017] eKLR,** and submitted that the learned Judge erroneously ordered the reinstatement of the Respondent with effect from 12th October, 2015 with full benefits together with attendant withheld remuneration from the date of resumption of duty, contrary to the prerequisites in **Section 49 (1) (c)** of the Employment Act. Citing the case of **Sheihk Abubakar Bwanakai Abdalla versus Judicial Service Commission & another [2017] eKLR** and **Moi Teaching and Referral Hospital versus Hosea Cheruiyot Maru** (supra), counsel submitted that the Employment and Labour Relations Court Act No. 20 of 2011, provides for reinstatement of an employee within three years of dismissal; that upon the trial court confirming that the Respondent was interdicted on 21st January, 2013, it was erroneous for the learned Judge to order his reinstatement; that, the Respondent was subjected to fair administrative process as he was given a notice to show cause on allegations of misconduct leveled against him. He was also given an opportunity of being heard before the Appellant's Disciplinary Committee on the said allegations. His retirement 'in the Authority's interest' was therefore fair, lawful and constitutional. On that account, counsel prayed for the appeal to be allowed as prayed.

Opposing the appeal, **Mr. Odhiambo,** submitted that **section 49** of the Act provides for an equivalent of a number of monthly wages and salary not exceeding twelve months' gross monthly wages /salary of the employee at the time of dismissal as basis for the court assessing an appropriate award for compensation. It does not therefore affect back payment where termination has been declared illegal, null and void and the employee ordered to be reinstated like in the circumstances of this appeal. The learned Judge was therefore entitled to order back payment to the Respondent.

On reinstatement, **Mr. Odhiambo** admitted that the Employment and Labour Relations Court Act, No. 20 of 2011, provides at **Section 12 (3) (vii),** that reinstatement of an employee be done within 3 years of dismissal; that the Respondent was terminated on 12th October, 2015 and judgment ordering his reinstatement delivered on 31st July, 2018, which was less than 3 years from the date of termination; that the learned Judge rightly computed the 3 years period from the date of termination as opposed to the date of interdiction; as in **Mr. Odhiambo's** view, the period spent by an employee on interdiction does not in law count for purposes of computing the statutory 3 years for reinstatement. It is his argument that, during interdiction, an employee continues to earn half salary which entitles such an employee to be considered as one who is still in the employer's employment. Counsel therefore maintained that it does not therefore count towards computation of time for purposes of reinstatement; that, the Judge also considered the authorities relied upon by the Appellant in opposition to the Respondent's claim namely, the case of **Sheikh Abubakar Bwanakai versus Judicial Service Commission & another** (supra) and the case of **Moi Teaching and Referral Hospital versus Hosea Cheruiyot Maru** (supra), both relied upon by the Appellant on appeal and correctly found them distinguishable from the circumstances of this appeal.

Mr. Odhiambo also submitted that the Appellant exercised its mandate with a lot of impunity and in total disregard to laws, rules and regulations governing employment. The Judge therefore, acted within his mandate in arriving at the impugned decision especially, when the Respondent established that the allegations of conflict of interest which constituted the reason for terminating his employment with the Appellant 'in the Authority's interest' were never brought to his notice, contrary to **Section 41** of the Employment Act. Neither was he accorded an opportunity to be heard on the said allegations before basing a decision thereon to retire him in the 'Authority's interest'. The termination of the Respondent in the circumstances demonstrated above was therefore unfair both procedurally and in substance, especially when DW1 not only acknowledged but also failed to give explanation as to why the Respondent's period of suspension was almost three years as opposed to the requisite 6 months. Neither was any explanation given as to why the Respondent's appeal was never determined. The Appellant also failed to explain why the letter of interdiction and show cause dated 21st January, 2012 referred to events which allegedly occurred in July, 2012, and which in **Mr. Odhiambo's** view was clear evidence of malice on the part of the Appellant in the manner they terminated the Respondent's employment with them.

Relying on the case of **Parliamentary Service Commission versus Christine Mwambua [2018] eKLR**, **Mr. Odhiambo** submitted that the Respondent had sufficiently demonstrated that his rights enshrined in **Article 47** and **35** of the Kenya Constitution 2010, had been infringed and urged the Court to sustain the impugned decision as in his view, it was well founded both on the facts and in law.

Being a first appeal, this Court in **J. S. M. versus E. N. B. [2015] eKLR** aptly put our role as a first appellate court as follows: -

> **"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge**

demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

See also the case of **Sumaria & another vs Allied Industries Limited [2007] KLR1**, where this Court expressed itself as follows:

"Being a first appeal, the Court was obliged to consider the evidence re-evaluate it and make its own conclusion in mind that a Court of Appeal would not normally interfere with a finding of fact by the trial court unless, it was based on a misapprehension of the evidence or that the Judge was shown demonstrated to have acted on a wrong principle in reaching the finding we did."

In light of the above mandate, we are enjoined to revisit the evidence presented before the trial court below afresh and analyze it in order to arrive at our own independent conclusion thereon, but bearing in mind that we did not see or hear the witnesses as they testified. See also **Seascape Ltd Vs Development Finance Company of Kenya Ltd, (2009) KLR 384.**

We have considered the record in light of the above rival submissions and principles of law relied upon by the respective parties to this appeal in support of their opposing positions. In our view, the issues that fall for our determination are those raised by the Appellant in its three grounds of appeal, save that we shall consider them in reverse order as paraphrased hereunder namely, whether:

i. The process leading to the Respondent's retirement 'in the Authority's interest' was fair, lawful and therefore sustainable.

ii. Ordering the Respondent's reinstatement in the circumstances of this appeal was contrary to law.

iii. The trial court properly appreciated and applied section 49 of the Act, prerequisites before arriving at the Award forming the impugned decision.

On the first issue, it is not disputed and as correctly found by the trial Judge, that the Appellant's Disciplinary Committee found allegations leveled against the Respondent in the show-cause letter, and in respect of which he appeared and successfully defended himself before the said disciplinary committee, unsubstantiated and on that account, absolved him of any misconduct with regard to the discharge of his duties. Instead, of lifting the Respondent's interdiction for him to resume duty, the Appellant retired him 'in the Authority's interest' over alleged conflict of interest in the discharge of his duties in the course of his employment with the Appellant. It is also undisputed that the Respondent was neither given a notice to show-cause with regard to the alleged allegations of conflict of interest nor an opportunity to be heard on the alleged new charge. It is also undisputed that it is this latter charge which formed the reason for the Appellant's termination of his employment with them. The correct procedure that the Appellant was obligated to apply if it desired to terminate the Respondent's employment with them, on account of the alleged new charge of 'conflict of interest' is as set out in **sections 41 and 43** of the Act. In the cases of **Bamburi Cement Ltd Vs Willima Kilonzi [2016] eKLR;**

International Planned Parenthood Federation vs Pamela Ebot Arrey Effiom [2016] eKLR; **Kenfreight EA Ltd Vs Benson K. Nguti [2016] eKLR,** it was stated, *inter alia,* that obligation lies on the employer to demonstrate justification for termination of an employee from his/her employment. Second, that unfair termination of an employee arises where no valid reason is given by the employer for such termination. Third, that due process as laid down in the Act must be followed to relieve an employee of his employment with the employer. In **Janet Nyandiko vs Kenya Commercial Bank Limited [2017] eKLR,** and which we fully adopt, the Court summarized those procedures as follows: -

"Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to provethat the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

In light of the above threshold, we find no error in the trial Judge's finding that the process followed by the Appellant to retire the Respondent 'in the Authority's interest' was flawed, unfair, unlawful and therefore not sustainable for failure to adhere to the procedures laid down in the relevant provisions of the Act as aptly crystalized by the court in the **Janet Nyandiko** case (supra).

On the second issue, **Section 12 (3)** (vii) of the Employment and Labour Relations Court Act which donates to the ELRC mandate to order

reinstatement of a dismissed employee, provides *inter alia* that:

> **"(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—**
>
> **……..**
>
> **vi. an award of damages in any circumstances contemplated under this Act or any written law;**
>
> **vii. 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**
>
> **viii. any other appropriate relief as the Court may deem fit to grant.**
>
> **(4) …"**

In light of the above provision, it is not disputed that the Respondent received the letter of retirement on 12th October 2015, while the judgment of the Court was delivered on 31st July 2018. It is therefore our finding that it was correctly computed and found by the trial court that from 12th October, 2015 to 31st July, 2018 a period of three years had not lapsed, bringing the Respondent's reinstatement within the ambit of the above provision, save that the trial court and now this Court on appeal was and is obligated to bear in mind the factors that justify reinstatement of an employee back to his employment. These were restated by the Court in the case of **National Bank of Kenya vs. Samuel Nguru Mutonya [2019] eKLR** and **National Bank of Kenya Limited vs Anthony Njue John [2019] eKLR** as follows:

> **"Remedy for reinstatement is provided for under** *Section 49(3) (a)* ***of the Act. Factors to be considered by a court of law when considering reinstatement as an appropriate remedy for an aggrieved employee are as set out in*** **Section 49(4) (a)** ***to*** **(m)."**

In the same cases of **National Bank of Kenya vs Samuel Mutonya** (supra) and **National Bank of Kenya vs Anthony Njue John** (supra); it was observed and which we fully adopt that:

> **"The remedy of reinstatement is not an automatic right for** ***an employee. It is discretionary as each case depends on its own set of facts and circumstances."***

The position taken by the Court in the above cases of **National Bank of Kenya vs Samuel Mutonya** (supra), and **National Bank of Kenya vs Anthony Njue John** (supra), had earlier been crystalized by the Court in the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR,** when the Court explicitly stated *inter alia* that:

> **"the remedy of reinstatement should not be given except in very exceptional circumstances."**

The relief is therefore discretionary. The position we take, in line with the decision of this Court in the case of **Coffee Board of Kenya Vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR**, is that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and therefore occasioned injustice.

The trial Judge considered and applied the threshold in the case of **Kenya Power & Lighting Company Limited Vs Aggrey Lukorito Wasike [2017] eKLR,** and ruled correctly, in our view, that reinstatement cannot be made except in very exceptional circumstances and after the court has seriously considered prerequisites provided for in **Section 49 (4) (a)** to **(m**) of the Act, which in our view is in line with the threshold set in the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others** (supra).

The trial Judge then identified factors which in his view favoured the order ultimately granted in favour of the Respondent of reinstatement. These may be summarized that the Respondent was an experienced officer, he was willing to continue in employment, he had a clean record of service, the Tribunal found him not culpable of misconduct or poor performance as had been alleged against him by the Appellant, the Appellant while aware that the Respondent was innocent, purported to retire him allegedly on conflict of interest that was unfounded and not established at all. The learned Judged found the Appellant's conduct in the manner it handled the Respondent's disciplinary process not in good faith for failure to give no explanation as to why the letter of interdiction and show-cause dated 21/01/2012 referred to events that occurred in July, 2012. In the trial court's view, such conscious and glaring error on the part of the Appellant went to show that the Appellant was not keen and serious in making genuine allegations against the Respondent. In the result, the trial court opined that the disciplinary proceedings were therefore maliciously initiated; especially when it was not disputed that for unexplained reasons, the Appellant did not determine the Respondent's appeal against his retirement 'in the Authority's interest'. Neither had the Appellant offered a reasonable justification for that failure. The statutory 3 years for an award of the remedy for reinstatement had not lapsed. Neither did the Appellant raise any bar to the said remedy being accorded to the Respondent. There was therefore no established impracticability to the court granting an order for reinstatement in favour of the Respondent. The trial Judge upon reviewing the case law relied upon by the Appellant in opposition to awarding the remedy of reinstatement in favour of the Respondent found these distinguishable from the circumstances of the case before him. There was therefore justification for the trial court granting the remedy of reinstatement in favour of the Respondent.

From the above reasoning, it is clear that the trial Judge did not address his mind to the period the Respondent was on interdiction. If that period was computed in addition to the period preceding the Judgment, it would have been in excess of three years.

The question however is whether the period of interdiction should be taken into account when considering the three-year limitation. **Section 12(3) (vii)** of the ELRC Act is explicit that, an order for reinstatement can only be made within three years of dismissal. Time starts running after dismissal and not earlier. The period the Respondent was on interdiction was to be excluded from the computation of the mandatory statutory period of 3years for purposes of **section 12 (3) (vii)**. On this point, we conclude that the learned Judge committed no error. In any case an order of reinstatement is discretionary which is exercised on case by case basis. But we add that the policy behind reinstatement can be explained on both factual and legal considerations. Both **sections 12** of the Employment and Labour Relations Court Act and **section 49** of the Employment Act must be read together. It is perhaps in the latter that the rationale for the three years within which reinstatement can be ordered is found. The first principle is that, the remedy of reinstatement should not be given except in very exceptional circumstances. The circumstances of the parties are bound to change after a period of 3 years; the practability of reinstatement; the employee's reasonable expectation of the length of time the employment was to last but for the termination, among others. Though the Judge properly found that three years had not lapsed, we think, going by the above principles, especially the time that has passed since termination of the Respondent's employment in 2015, that reinstatement cannot be an efficacious remedy.

On issue number No (iii), it must be noted that, in addition to reinstatement which we have discounted, the Appellant was entitled to other remedies-crystalized by the court's finding that he had been unfairly and unlawfully terminated, a position we have affirmed. He was therefore entitled to a remedy in terms **section 49** of the Act. The position in law and which we fully adopt is as was restated by the Court in the case of **Elizabeth Wakanyi Kibe vs Telkom Kenya Limited [2014] eKLR**, that, compensation by way of an award of damages is not meant to facilitate an unjust enrichment of an aggrieved party but to redress economic, injuries suffered by the aggrieved party in appropriate circumstances.

An award of compensation is one of the remedies provided for under **section 49** of the Act. The threshold on the mode of assessment of this remedy and which we adopt is as was set by the Court in the case of **Co-operative Bank of Kenya Ltd V. Banking Insurance & Finance Union CA No. 188 of 2014** as follows:

> **"Our understanding of the Act is that the prescribed remedies…are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies….are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."**

To reiterate the above threshold, the exercise of mandate under **section 49** of the Act is discretionary. The principle that guide this Court in determining whether to interfere with the trial court's exercise of mandate in arriving at the impugned award of back payment is the same as those set out in the case of **Coffee Board of Kenya Versus. Thika Coffee Mills Limited & 2 others (supra)**. See also **United India Insurance Company Limited Vs. East Africa Underwriters Kenya Limited [1985] KLR98**.

We have applied the above threshold to the trial Judge's reasoning as basis for exercising discretion to grant the impugned orders and proceed to make the following orders:

1. The appeal partially succeeds.

2. The order declaring the Appellant's termination of the Respondent's employment with them unfair and unlawful is affirmed.

3. The order of retirement "in the Authority's interest" which has been vitiated is commutted to normal retirement with full benefits.

4. The order on reinstatement is vitiated and set aside for the trial court's failure to properly appreciate the length of time the Respondent had been out of his employment notwithstanding that he was on half pay throughout the whole of that period especially when there was no evidence that he was performing any duties for the employer during that period.

5. The order for back payment is sustained but limited to payment of the half pay salary withheld by the employer during the period of interdiction.

6. The Respondent is awarded six month's salary as compensation for the unfair and unlawful termination.

7. Interest on all monetary awards granted above is allowed at court rates from the date of Judgment in the trial court.

8. Each party to bear own costs.

Dated and Delivered at Nairobi this 22nd day of May, 2020.

OUKO (P)

…….……..

JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR