IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: KARANJA, KIAGE & SICHALE, JJA]

CIVIL APPEAL NO. 302 OF 2016

BETWEEN

MOI UNIVERSITY .....APPELLANT

AND

ERIC KIMANI.....1ST RESPONDENT

BERNARD NZIOKA.....2ND RESPONDENT

LYDIA SAYA .....3RD RESPONDENT

(Being an appeal against the judgment and decree of the Industrial Court of Kenya at Nairobi (D.K. Njagi, J) dated 21st February, 2013

IN

Industrial Cause No. 900 of 2010

****

JUDGMENT OF THE COURT

Moi University (the appellant herein**)** filed the appeal against the Judgment of **Njagi Marete, J** delivered on **21st February, 2013.**

The genesis of this appeal stems from a claim filed at the Industrial Court of Kenya by **Eric Kimani**, **Benard Nzioka** and **Lydia Saya** (the 1st, 2nd and 3rd respondents herein) against **Moi University** (the appellant herein) contending that their dismissal on or about **22nd March, 2006** was unlawful and/or unfair, null and void; an order that they be reinstated to their former positions without any loss of benefits, seniority, salary or privileges; general damages for the mental anguish and suffering that they were forced to undergo due to the unlawful termination and /or unfair dismissal from duty and any other remedy that the court would deem just and expedient to grant.

In a Memorandum of Claim dated **2nd August, 2010**, it was alleged that the three respondents (the 1st, 2nd and 3rd claimants then) were at all material times gainfully engaged as employees with the appellant institution (Moi University) in different capacities and grades; that on **22nd March, 2006**, the appellant served the respondents with letters of dismissal from employment without valid and /or proper or substantive and/or legal reasons being given for the dismissal; that the respondents were not served with any notice or informed of any charges (if any) against them, neither were they given any chance to be heard in any disciplinary proceedings; that the matter was referred to the Labour Minister whose recommendations were that the respondents be reinstated to their duty without any loss of benefits, seniority, salary or privileges and, finally, that despite those recommendations by the Minister of Labour, the appellant has refused, neglected and /or is unwilling to comply with those recommendations – thus necessitating the claim.

Opposing the claim, the appellant filed a Memorandum of Defence dated **13th March, 2011,** in which it was contended in respect to the 1st respondent (**Erick Kimani**) that his services were terminated on **1st April, 2006** in accordance with the Terms of Service Clause 25 (i) for the Academic, Senior Library and Administrative Staff by paying him an equivalent of three (3) months' salary in lieu of notice; that in respect to the 2nd respondent (**Benard Nzioka**), his employment contract was terminated on **1st April, 2006** in accordance with the Terms of Service Clause 14 (b) for the Secretarial, Clerical, Administrative and Technical Staff by paying him an equivalent of three (3) months' salary in lieu of notice and with respect to the 3rd respondent (**Lydia Saya**), her employment contract was terminated on **1st April, 2006** in accordance with the Terms of Service Clause 14 (b) for the Secretarial, Clerical, Administrative and Technical staff by paying her an equivalent of three (3) months' salary in lieu of notice. The appellant therefore denied the respondents' claims that the termination of their employment was unlawful and /or illegal as the appellant acted within the applicable law at the time. It was contended that the findings and

recommendations by the Ministry of Labour were irrelevant and lacking basis in law and that employment matters are contractual. The appellant prayed that the respondents' claim be dismissed with costs.

The dispute between the parties was heard by **Njagi Marete, J** who in a judgment delivered on **21st March, 2013** held that:

> ***"In the premises, I am inclined to find for the claimants and order reinstatement and compensation for their wrongful, unfair and unlawful termination of employment as follows***:
>
> ***(i) I make a declaration that the dismissal of the three claimants by the respondent was unlawful, unfair and wrongful,***
>
> ***(ii) That I also make a declaration that the dismissal of the claimants by the respondent was null and void for lack of compliance with the law and procedure,***
>
> ***(iii) That the claimants be and are hereby reinstated to their former positions and employment without any loss of benefits, seniority, salary or privileges,***
>
> ***(iv) That the respondent be and is hereby ordered to pay the claimants their salaries, benefits and other emoluments for the entire period of unlawful termination from employment,***
>
> ***(v) That the claimants are ordered to report to their jobs and duty station tomorrow, the 22nd February, 2013 for deployment,***
>
> ***(vi) That the cost of this cause shall be borne by the respondent".***

The appellant was aggrieved with the findings of the learned judge and in a Memorandum of appeal dated **19th December, 2016,** listed 9 grounds of appeal faulting the learned judge for applying Section 84 of the Labour Relations Act and Section 15 of the Trade Disputes Act (now repealed) in a case that was not a trade dispute matter; for ordering reinstatement of the respondents after termination of employment for more than 6 years contrary to Section 12 (3) (vii) of the Industrial Court Act 2011 which limits such relief to (3) years; for ordering immediate reinstatement of the respondents thus prompting an order of specific performance in a contract of employment contrary to the common law principle; failing to consider that the termination of the respondents was lawful in accordance with the provisions of Section 16 of the Employment Act Cap 226 (now repealed); failing to consider that the applicable remedy for wrongful dismissal or termination then was damages payable in form of salary in lieu of notice; failing to determine the decretal sum payable to the respondents as well as to consider that calculation and assessment of damages and the decretal sum payable to a party is a judicial function which cannot be delegated; failing to consider that the appellant's laws and statutes applicable to their employees then allowed the appellant to terminate the respondents' employment contracts by giving of notice or payment of salary in lieu of notice, and finally, by erroneously applying the wrong provisions of the appellant's statutes thus arriving at a wrong conclusion. The appellant therefore urged the court to allow his appeal with costs, set aside the judgment delivered on **21st February, 2013** and to dismiss with costs the claimants' Memorandum of Claim.

On **2nd March, 2020**, the appeal came up before us for plenary hearing. **Mr. Masese**, learned counsel for the appellant in urging the appeal relied on his submissions filed on **11th November, 2019** and a list of authorities filed on the same date. His main contention was that the applicable law when the cause of action arose was the Employment Act, Chapter 226 of the Laws of Kenya; that there was no trade dispute since the claimants filed their cases individually, then they were covered by the Employment Act; that the judge erred in considering Section 84 of the Labour Relations Act and Section 15 of the Trade Disputes Act and came to the conclusion that the dispute was a trade dispute; that the respondents herein, as individuals, needed to go to the Magistrate's court and that going to the Industrial Court was through the Ministry of Labour; that the law as existed then did not anticipate due process of having a claimant heard or a reason being assigned for the termination as the parties were bound by a contract. Further, that it is impractical to implement an order of reinstatement after a period of six (6) years. **Miss Nyoike**, learned counsel for the respondent in opposing the appeal pointed out that the question of which forum to go to (whether a Magistrate's Court or the Industrial Court) was not raised in the trial court; that this was a trade dispute properly instituted before the trial court; that the remedy of reinstatement was proper; that the termination was done by the Vice Councilor (V.C) instead of Moi University; that there was lack of due process as anticipated by the Moi University Act.

We have considered the record, the rival oral and written submissions, the authorities cited 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".***

One of the issues raised by the appellant in this appeal is one of jurisdiction. They are of the view that the dispute was not a Trade Dispute to be heard and determined by the Industrial Court. The respondent is opposed to this line of argument as this issue was not raised in the trial court. The "***Memorandum of Defence***" dated **15th March, 2011** filed by the appellant was silent on this point. Hence, it did not fall for determination before the trial judge.

Be that as it may, it is common ground that all the three respondents were in the employment of the appellant until their termination vide letters dated **22nd March, 2006**.

> The respondents' Memorandum of Claim is dated **2nd August, 2010.** The cause of action is stated in paragraph 6 of the Memorandum of Claim. It states "6. ***The Claimants state that on or about the 22nd day of March, 2006 vide letters dated the same date, the respondent purported to dismiss the Claimants from employment without any valid and/or proper and/or substantive and/or legal reason being given for the said dismissal***".

The law governing employer/employee relationship at the time the cause of action arose was the Employment Act, Chapter 226 of the laws of Kenya (now repealed). The Employment Act was repealed on **2nd June, 2008**. Section 16 of the then Employment Act provided as follows:

> ***"Either of the parties to a contract of service to which paragraph (ii) or (iii) of sub-section (5), or the proviso thereto, of section 14 applies may terminate the contract without notice upon payment to the other party of wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of notice required to be given under corresponding provision of that Subsection".***

The provisions of Section 16 were variously interpreted by this Court. In the decision of ***Rift Valley Textiles Limited vs. Edward Onyango Oganda [1992],*** this Court stated:

> ***"With respect to the learned Judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here then the employer needs not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not arise. Again if the employee were to be minded to leave employment, say for a better – paid job, and he gives notice of his intention to leave the employee is not oblige to assign any reason of his intention to terminate the contract and it would be ridiculous for employer to insist that he be given a hearing before the employee leaves"***

As regards the respondents' claim for general damages for '***mental anguish and suffering***', we rely on this Court's decision of ***Kenya Ports Authority vs. Edward Otieno CA No. 120 of 1996*** wherein it was held:

> ***"In the leading case of Addis =vs= Gramophone Co [1909] A C 488 the House of Lords decisively rejected such a claim. The plaintiff there had been dismissed in a harsh and humiliating manner, and it was held that the manner of dismissal could in no way affect the damages…***
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> ***We think that the same position must apply in Kenya, as we can find nothing in our Employment Act Cap 226 which would abrogate or modify these general principles in respect of the law relating to the contract of employment***".

As for the issue of reinstatement, the position then was that courts frowned upon imposition of an employee onto an employer and vice versa. In another of this Court's decision of ***Dalmas B. Ogoye vs. KNTC CA No. 125 of 1995,*** it was held:

> ***"that courts do not order reinstatement in such cases because such an order would be difficult to enforce besides it would be plainly wrong to impose an employee who has fallen out of favour on a reluctant employer"***

Suffice to state that the respondents were bound by the contractual relationship between them and the appellant. Clause 14 (i) of the termination clause provide:

> ***"The University may terminate appointment by giving notice as shown under Clause 26 (should be clause 14) below or by paying the member of staff basic salary in lieu of notice for the equivalent period of such notice. The council, however, reserves the right to terminate appointment without notice or payment of basic salary in lieu thereof if in its opinion the member of staff has committed any of the following offences".***
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> Clause 14 provided:
>
> ***"During the period of probation following on first appointment, services may be terminated by either party giving the other one month's notice or by payment of month's basic salary in lieu of notice"***
>
> ***"After confirmation in the service of the University on completion of probation following on first appointment, appointment may be terminated at any time by either giving the other three months' written notice of intention to terminate the appointment alternatively by either party paying the other three months' salary in lieu of notice".***

In our view, the respondents were entitled to three (3) months' salary in lieu of notice. Accordingly, we allow the appeal and set aside the judgment of **Marete, J** of **21st February, 2013** and dismiss the appellant's Memorandum of Claim dated **2nd August, 2010** in its entirety.

Given the circumstances of this case, we direct that each party to bear it /his/her own costs.

Dated and Delivered at Nairobi this 7th Day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR