IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, MURGOR & SICHALE, JJ.A.)

CIVIL APPEAL NO. 429 OF 2018

BETWEEN

CAROLYNE NASIMIYU.....APPELLANT

AND

AGRICULTURAL FINANCE CORPORATION LIMITED.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Sergon, J.) dated 12th February 2016

in

HCCA No. 133 of 2011)

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JUDGMENT OF THE COURT

This is a second appeal by ***the appellant, Caroline Nasimiyu,*** from the judgment of the High Court at Nairobi **(Sergon, J.)** dated 12th February 2016. By that judgment the High Court agreed with the Chief Magistrate's Court at Nairobi that ***the respondent, the Agricultural Finance Corporation*** did not unlawfully terminate the appellant's employment and that she was not entitled to payment of ***Kshs. 264,374.50*** made up of compensation for underpayment, payment in lieu of notice and payment for days worked and not paid, as well as aggravated damages.

The background to the appeal is that the respondent employed the appellant as a legal officer (in-training) for an initial period of one year with effect from 1st March 2005. The contract of employment stipulated that her employment was temporary and the appellant was entitled to a salary of Kshs 28,003 per month and house allowance of Kshs 10,000 per month. Any party could terminate the contract by giving the other 24 hours notice or paying a day's salary in lieu of notice.

Upon expiry of that initial contract, the appellant applied for renewal and by a letter dated 26th April 2006 the respondent renewed the contract but on new terms, namely that the contract would be for a period of three months; the appellant's wages would be Kshs 455 per day; and that any party could terminate the contract by giving the other 24 hours notice or paying a day's salary in lieu of notice. The contract of employment was subsequently renewed from time to time on similar terms, the last renewal being vide a letter dated 14th December 2006 which renewed the contract for three months with effect from 30th October 2006 to 29th January 2007.

The appellant proceeded on maternity leave on 17th January 2007 and returned on 30th March 2007, when her contract of employment had already expired. On the same day she applied for renew of her contract, but the respondent declined vide a letter dated 16th April 2007. Aggrieved, the appellant filed a suit in the Chief Magistrates Court claiming that the respondent had unlawfully terminated her employment and praying for ***Kshs 264,374.50*** made up of:

(a) Underpayment for 13 months - ***Kshs 247,039***

(b) Payment in lieu of 24 hours notice - ***Kshs 1,333.50***

(c) Days worked but not paid for - ***Kshs 16,002***

The appellant also prayed for aggravated damages, interest and costs.

In its defence the respondent denied that it underpaid the appellant and pleaded that the appellant absconded from duty and purported to return to work when her contract had already expired. The respondent further averred that in the circumstances it did not terminate the appellant's employment but the same ended by effluxion of time and that the appellant was not entitled to any payment after the expiry of her contract of employment.

Both the trial and the first appellate courts found no merit in the appellant's claim and dismissed it, leading to this appeal.

On the date scheduled for virtual hearing of the appeal, neither the appellant nor the respondent appeared to highlight their written submissions. Satisfied that both were duly served with hearing notices, we directed that the appeal would be heard and determined on the basis of the written submissions filed by both parties.

In her memorandum of appeal and written submissions, the appellant impugns the judgment of the High Court on the grounds that the learned judge erred by ignoring her submissions which were on record and thus denying her the right to be heard; by holding that her employment was not unfairly or unlawfully terminated; by ignoring the doctrine of legitimate expectation, and by failing to apply the applicable law, namely the Employment Act 2007.

On the first ground of appeal, the appellant submitted that the judgment of the High Court was null and void because in arriving at it, the learned judge ignored her submissions, which he stated were not filed, yet they were on record. She contended that the failure to consider her submissions was a violation of her right to be heard under ***Article 50(1)*** of the ***Constitution***. In support of the submission the appellant relied on the judgments in ***JMK v. MWM & Another [2015] eKLR*** and ***Mbaki*** & ***Others v. Macharia & Another [2005] 2 EA 206*** and contended that a decision arrived at without hearing a party is null and void.

On the second ground, the appellant submitted that both courts below erred in holding that her contract of employment was a fixed term contract which ended as agreed by the parties. She contended that she proceeded on maternity leave during the term of the contract of employment and was therefore entitled to payment of maternity leave. She added that she was entitled to the maternity leave whether or not the contract of employment still subsisted and that she also had the right to return to work after her confinement. In support of those submissions the appellant cited ***Halsbury's Laws of England, Vol. 16, para 786,*** **the** ***Maternity Protection Convention, 2000***, and the ***Workers with Family Responsibilities Convention, 1981***. On the same ground of appeal the appellant submitted that her contract of employment expressly provided that either party could terminate it by giving the other a 24 hours notice or paying cash in lieu of notice, which the respondent failed or refused to do.

Next, the appellant submitted that the learned judge erred by disregarding her legitimate expectation that the respondent would pay her the initial monthly salary of Kshs 28,003 because the respondent promised to do so once its staff rationalisation program was completed. She added that it was on the basis of that assurance by the respondent that she accepted the subsequent payment of Kshs 455 per day. She cited ***Forsyth's Administrative Law, page 447*** and submitted that the respondent had promised her a benefit which she was entitled to.

Lastly the appellant submitted that the Employment Act obliges every employer to pay an employee for work done and failure to do so constitutes a criminal offence. She faulted the learned judge for not applying the Act. On that basis, she contended that she was entitled to be paid for the 19 days that she worked for the respondent after her return from maternity leave.

Opposing the appeal, the respondent expressed doubt whether, as regards the 1st ground of appeal, the appellant's submissions were indeed on record. The respondent argued that the court directed the parties to file written submission on 23rd October 2015 and therefore it was not possible for the appellant to have filed her submissions more than one year earlier on 21st August 2014. The respondent added that in its view, even if the learned judge did not consider the appellant's submissions, he considered all the evidence on record and reached a correct decision.

As regards the contract of employment, the respondent submitted that it was a fixed-term contract which expired by effluxion of time and that the appellant had no basis to expect automatic renewal of the contract. The respondent relied on the decision of this Court in ***Oshawa Academy (Nairobi) & Another v. Indu Vishwanath [2105]eKLR*** and that of the Employment and Labour Relations Court in ***Bernard Wanjohi Muriuki v. Kirinyaga Water & Sanitation Co Ltd & Another [2012] eKLR*** in support of the proposition that an employer is under no obligation to give reasons for non-renewal of a fixed term contact which has come to an end. It was also the respondent's view that the question of unlawful termination of the appellant's contract of employment did not arise because the contract lapsed by effluxion of time on 29th January 2007.

On legitimate expectation, it was submitted, on the authority of the judgment of the Supreme Court in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Ltd & 5 Others [2014] eKLR,*** that for it to arise, there must be a promise or practice by a public authority, which a party expects to be be honoured or to continue. The respondent maintained that it did not make any representation to the appellant other than what was in the contract that it would expire after three months.

Lastly on the alleged violation of the ***Employment Act, 2007,*** the respondent submitted that under ***section 17*** an employer is under an obligation to pay the employee the entire salary earned or payable when it is due and that the respondent paid the appellant all her dues.

We have carefully considered the record of appeal, the judgment of the High Court, the grounds of appeal, the written submissions by the parties, the authorities they relied on and the law. We shall start with the appellant's complaint that the learned judge failed to apply the provisions of the ***Employment Act, 2007***. We think there is no substance in that compliant because that 2007 Act received the President's assent on 22nd October 2007 and it came into operation on 2nd June 2008. The appellant's contract of employment on which her suit was founded was entered into on 14th December 2006 and was valid for a period of three months from 30th October 2006 to 29th January 2007. By the time the 2007 Act came into force, the appellant's contract of employment had already run its course and come to an end. In ***Kenya Tea Development Agency v. Lee Kimathi, CA No 267 of 2017***, this Court, faced with a similar issue expressed itself thus:

> *"It is common ground that the employment relationship between the appellant and the respondent was entered into and terminated under the repealed Employment Act. The employment contract was effective from 1st September 2004 until 19th December 2006 when it was terminated. The Employment Act, 2007, which, by section 92, repealed the previous Employment Act came into effect on 2nd June 2008, more than one and half years **after** the termination of the respondent's employment. It cannot therefore be gainsaid that the employer/employee relationship between the parties was regulated under the repealed Act and not under the current Employment Act*."

On the issue of the failure by the learned judge to consider the appellant's written submissions, the appellant states that her submissions were on record but the learned judge concluded that they were not. The respondent on the other hand, casts doubt on whether the appellant's submissions were really on record. On our part, we would give the appellant the benefit of the doubt because her submissions bear a court stamp, meaning that they were received by the court before the learned judge retired to prepare his judgment. We are however unable to hold that the failure to consider the submissions *per se* must render the judgment null and void. Whether a party has been fairly heard depends on the circumstances of each case. (See ***Judicial Service Commission v. Mbalu Mutava & Another [2015] eKLR)***.

In this case the learned judge did not determine the appellant's first appeal on the basis of the submissions alone; he considered the evidence adduced by the parties together with the appellant's grounds of appeal. He was alert to his duty as a first appellate court to re-evaluate the evidence and make his own independent conclusions, and even quoted the *locus classicus* on the issue, ***Selle & Another v. Associated Motor Boat Co Ltd & Others [1968] EA 123***. He devoted pages 4 and 5 of the judgment to analysis of the evidence that was adduced by both parties and the rest of the judgment to consideration of the appellant's grounds of appeal, before coming to his own independent conclusion that the first appeal had no merit. In these circumstances, we are not persuaded that the learned judge denied the appellant the right to a fair hearing.

Similarly we do not find any merit in the appellant's complaint that the learned judge erred in dismissing her suit.

On her contention that the respondent underpaid her, the evidence on record is crystal clear that when the initial contract for one year expired, the appellant and the respondent voluntarily entered into another contract for a shorter period and on different terms of payment. This contract was renewed from time to time and was the one in force when the relationship between the parties ended. We are satisfied that there was no basis upon which the court could apply or import the terms of the initial and expired contract into the subsequent contract of employment, which was voluntarily entered into by the parties with totally different terms. Secondly, by the time the appellant purported to report back to duty on 30th March 2007, her contract of employment had already expired on 29th January 2007 by effluxion of time. In those circumstances no payment in lieu of notice was payable to the appellant because the respondent did not dismiss her without notice. In the same vein, in absence of a contract of employment between the parties post-29th January 2007, we cannot see how the respondent could be compelled to pay the appellant for days that she claims to have worked for the respondent without a contract of employment.

Lastly on legitimate exception, the appellant did not adduce any evidence on the basis of which it may be concluded that the respondent had made any representation or promise that it would treat her differently from what was provided in the contract of employment. The appellant, a budding lawyer, agreed to enter into a contract which clearly stipulated the terms of employment. It is difficult to believe that the respondent had promised the appellant different terms of employment from those that were in the contract that she had accepted and signed. In our opinion, the appellant is simply inviting us to accept her oral evidence to modify the written terms of her contract of employment. That we cannot do because when parties have reduced the terms of their contract into writing as they did in this case, the court will not accept parole evidence to vary, alter or modify the written terms.

Ultimately, we have come to the conclusion that this appeal has no merit and the same is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 9th day of October, 2020.

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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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