IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & ASIKE-MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 418 OF 2017

BETWEEN

GRACE OTIENO.....APPELLANT

AND

THE SALARIES AND REMUNERATION COMMISSION.....RESPONDENT

(Being an Appeal from the judgment of the Employment & Labour Relations Court at Nairobi (Abuodha, J.) dated 17th *February, 2017* in ELRC No. 862 of 2014)

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JUDGMENT OF THE COURT

1. On or about the 20th May, 2014 ***Grace Otieno*** (the appellant) filed a claim before the ***Employment and Labour Relations Court*** (ELRC) seeking that judgment be entered against the ***Salaries and Remuneration Commission***, (the respondent) (hereinafter referred to as SRC) in the following terms: -

> **"1. A declaration that the claimant suffered unfair and unlawful termination by the respondent.**
>
> **2. Damages for wrongful and/or unlawful termination.**
>
> **3. Payment of all the lawful terminal dues set out under paragraph 10 of the claim.**
>
> **4. Maximum 12 months compensation for wrongful termination.**
>
> **5. Costs of the suit with interest thereon."**

2. The matter fell for hearing before **Abuodha, J.** who in a considered judgment faulted SRC for failing to follow the provisions of ***section 41 (1)*** of the **Employment Act** with the result that the appellant's termination of service was held to be unfair. Accordingly, judgment was entered for the appellant against SRC as follows:-

> **"a) One month's salary in lieu of notice Ksh. 715,600**
>
> **b) 38 days of leave Ksh. 906,414**
>
> **c) Six months compensation for unfair Termination of services Ksh. 4,296,600**
>
> **Total Ksh. 5,099,841**
>
> **d) Costs of the suit**

e) The above shall be subjected to taxes and statutory deductions"

3. The appellant being aggrieved by the aforesaid judgment, appealed before this Court, contending that the learned trial Judge erred in law and fact by holding that she was not entitled to gratuity notwithstanding that the same was part of the terms of engagement; by holding that she was not entitled to the difference in her salary as compensation for the period she went back to serve in the civil service; by not awarding 3 months' salary in line with the provisions of the State Corporations Act and SRC's Human Resource Manual in force at the material time; in awarding 6 months compensation instead of 12 months and for not awarding interest on the damages awarded. On the basis of the foregoing the appellant urged that the Judgment of ELRC be set aside/ varied or reviewed and she be awarded costs.

4. This appeal came up for hearing on 20th July, 2020 vide a virtual platform pursuant to the Court of Appeal Practice Directions to mitigate the effects of COVID 19 Pandemic. ***Ms Guserwa*** learned counsel for the appellant wholly relied on the written submissions filed on behalf of the appellant and did not make any oral highlights. The respondent did not appear during the hearing nor did its counsel file written submissions notwithstanding that their counsel on record was duly notified of the hearing date.

5. Nonetheless, the absence of the respondent does not lessen the duty placed on this Court in dealing with a 1st appeal; which is to re-assess and re-evaluate the evidence tendered before the trial court and reach its own independent conclusions while giving due reverence to the Judge's exercise of discretion and findings of fact and law, unless there is no evidence in support of the said findings, or the findings are plainly not founded in law. This much was restated by this Court in **Musera vs. Mwechelesi & Another ([2007]) KLR 159** as follows: -

> **"We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."**

Also, in **Mbogo & another vs. Shah ([1968]) EA 93** at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that was clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

6. Bearing in mind the above parameters we have revisited the evidence adduced before the trial court albeit in summary. Prior to the events complained of by the appellant, she used to work for the ***Public Service Commission***. On 23rd March, 2012 she was appointed as Secretary to SRC following a competitive interview. However, when the appellant took up the employment which was for a fixed term of five (5) years, she never disclosed to SRC that she was on secondment from the Public Service Commission. The appellant worked as the Secretary to the Commission for 2 years and 3 months and according to her, she discharged her duties diligently but on 7th November, 2013 she received a letter from SRC accusing her of having a casual and unprofessional attitude in handling the Commission's work in relation to the preparation and presentation of a report on Remuneration setting for state officers at the County government that was to be presented to the Senate by 4th November, 2013.

7. The appellant responded to the issues raised by SRC vide a letter dated 8th November, 2013 which highlighted some challenges that she faced when discharging her duties and in particular when preparing a certain report. The appellant told the trial court that she had applied for sick leave in June, 2013 which was followed by another leave of 50 days to recuperate. She resumed work on October, 2013 and found out that the financial statements and annual reports were not complete and embarked on completing them. However, when issues were raised by the Chairman of SRC regarding the poor report presented to the Senate, despite her explanation, the appellant pleaded that her services were summarily terminated vide a letter dated 19th March, 2014 which was handed to her and instructed to leave the office premises immediately. The appellant contended that the decision to dismiss her summarily was made in haste and without prior notice or justification and at best was laced with malice. For this the appellant stated that she suffered damage to her professional career and standing.

8. During the hearing, the appellant gave evidence in support of her claim. She testified that at the time of the trial she was working as the Principal Administrative Secretary at the Public Service Commission. Regarding the allegations that she was incompetent, she claimed that the report she had prepared was to form talking points for the Chairman to assist her in answering questions by the Senate Committee, but she handed it over to the Senate. Concerning her termination, she asserted that it was contrary to the provisions of ***section 17*** of the **SRC Act** which required that the Secretary be given an opportunity to defend herself which was not done. During cross-examination, the appellant agreed that she had never informed SRC that she was on secondment from the Public Service because she thought that they were aware of it. On the claim for payment of gratuity, the appellant stated that it was payable to her because she was serving on a fixed contract.

9. The claim was countered by SRC who pleaded that it had on various occasions expressed dissatisfaction with her performance; which was brought to her attention verbally and in writing. The appellant conceded to this by justifying her lackluster performance in her responses which were considered at a meeting of the entire commission and found unsatisfactory. Due to her dismal performance, SRC terminated her services in accordance with the provisions of ***section 17 (1) (c)*** of the **SRC Act** after she was given an opportunity to defend herself.

10. SRC Commissioner, ***Isaiah Kubai*** gave evidence in defense of the claim. He was categorical that the appellant had difficulties in performance of her work which impacted negatively on the delivery of the mandate of the Commission. The witness went on to state that the appellant was to assist and guide the Commissioners who were part-time employees of the commission, but they did not know that the appellant was seconded from the Public Service Commission which perhaps affected her performance due to divided loyalty. He faulted the appellant for failing to disclose that she was on secondment and accused her of lacking integrity.

11. On the claims made by the appellant, ***Mr. Kubai*** was of the view that the appellant was not entitled to gratuity because she had not

completed contract of employment of five (5) years. On the termination, he contended that besides the letter dated the 7th November, 2013 that notified the appellant of her dismal performance, a meeting was held to discuss her performance after which a decision was made to terminate her services as per the **SRC Act**. According to SRC, the disciplinary process employed in the case of the appellant was as per the **SRC Act.** That the appellant was issued with letters that gave her the reasons for intended dismissal and given time within which to respond. The appellant had responded, but the respondent found the explanations given for her poor performance unsatisfactory and therefore made the decision to terminate her.

12. The learned trial Judge seems to have fastidiously gone through this evidence by reviewing the correspondence that was exchanged between the appellant and respondent. The Judge was persuaded that the appellant was given an opportunity to defend herself as she did so in writing and therefore rejected the claim that she was not given a fair hearing. Commenting on the two letters issued to the appellant by the respondent, the Judge found that the 1st letter of the 7th November, 2013 was merely cautioning the appellant to take the work of the respondent seriously. The second letter called upon the respondent to answer to the issues within thirty (30) days and according to the Judge, this was an elaboration of the 1st letter and did not state the fact that the respondent wanted to dismiss the appellant on account of poor performance.

13. Thus, the Judge ruled that the two letters did not expressly or equivocally demonstrate that the respondent intended to terminate the appellant's contract and that the letters did not state the reasons for the termination. For that reason, the Judge faulted the process of termination as if failed to accord to the provisions of ***section 41 (1)*** of the **Employment Act** which obliges an employer before terminating an employee's contract on grounds of poor performance as in this case to explain to the employee the reasons for the termination. As a consequence, the termination of the appellant's employment was held to have been carried out through unfair procedure. On the specific claims, regarding, three (3) months' notice, the Judge found the appellant did not produce a contract to show she was entitled to three (3) months' salary in lien notice and awarded her one (1) months' notice as per the provisions of ***section 35 (1) (c)*** of the Employment Act. With regard to gratuity the Judge did not find any provision for payment of gratuity as the letter of appointment referred to a schedule which detailed her remuneration package yet the appellant had not produced it in evidence. On the payment for remainder of the contract period the Judge disallowed for the same reasons that the appellant had no guarantee that she would complete the contract which had a provision for termination by either party. Secondly the appellant was seconded from the Ministry where she went back to work as at the time of the hearing. For those reasons the appellant was awarded the amount stated in the opening paragraphs of this judgment.

14. We have considered the record of appeal, as summarized above, in discharging our mandate of evaluating the evidence placed before the trial court, that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages awarded that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This principle was enunciated in **Rook vs. Rairrie [1941] 1 ALL E.R.** 297. It was also echoed with approval by this Court in the time honoured case of **Butt vs. Khan [1981] KLR 349** when it held as per Law, J.A that:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730** Kneller J.A. said: -

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages"**

15. The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal. In our view, although, as we have stated, the appellant raised some five (5) grounds, we believe this appeal turns only on three issues; that is whether the learned Judge misapprehended the evidence and failed to award the appellant;

> **1. Three (3) months' pay in lieu of notice**
>
> **2. payment of gratuity, remainder of the period of contract and,**
>
> **3. Twelve (12) months award for unfair dismissal**

16. As stated above, the respondent did not oppose the appeal, and in our own considered view, there is nothing to challenge the conclusion made by the Judge that the appellant's contract of employment was unfairly terminated without notice. On the ground of appeal that the appellant should have been awarded three (3) months' salary in lieu of notice. Just like the trial Judge we have perused the appellant's letter of appointment and confirmed that it had no provision that kind of for notice period. Was the Judge wrong in invoking the provisions of ***section 35 (1) (c)*** of the Employment Act? We are not in the least persuaded by the appellant's argument that the Judge erred by turning to the provisions of ***section 35*** of the aforesaid Act which makes provision for categories of contracts and the manner of their termination in the absence of such provisions in the appellant's letter of appointment. Of relevance is ***section 35(1) (c)*** and ***(2)*** of the Employment Act which is to the effect that a contract of service for an indeterminate period, where wages or salary are paid periodically at intervals of or exceeding one month, is terminable by either party at the end of the period of twenty-eight (28) days next following the giving of notice in writing. It

follows that failure to give one month's notice, the employer was obliged to pay one month's salary in lieu of notice.

17. Similarly on the issue of payment of gratuity, the appellant did not adduce any evidence to support her claim. We also note that the provision for payment of gratuity was not provided for in the letter of appointment and as such we wonder the basis upon which the Judge would have made the award. In dealing with these two issues of notice and gratuity this is what the learned Judge posited in one of the key paragraphs of the impugned Judgement;

> **"Concerning the claimant's claim for the months' salary in lieu of notice of termination, the claimant did not produce any contract that showed she was entitled to three months' notice or pay in lieu thereof. The court will therefore have recourse to section 35 (1) (c) and award the claimant one months' pay in lieu of notice. The same case applies to gratuity. The court did not have the benefit of seeing any contract where it was provided that the claimant was entitled to gratuity. The claimant's letter of appointment refers to an attached schedule which purportedly detailed her remuneration package yet no such schedule was filed with her pleadings. This claim is therefore disallowed for lack of proof"**

18. We agree with the above conclusion and hasten to cite the cardinal principle of law that, *"**he who alleges must prove"*** as captured in ***sections 107*** to ***109*** of the **Evidence Act** which reads as follows: -

> **"107.**
>
> **1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
>
> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

19. On the last issue whether the Judge erred by awarding the appellant six (6) months' pay for unfair termination instead of twelve (12) months, we recognize that this was an exercise of the Judge's discretion and we can only interfere if the same was not exercised judiciously. The Judge was obviously conscious that the appellant's contract of five (5) years was terminated but he also reasoned that the appellant was not entitled to be paid for the remainder of the contract for reasons that there was no certainty that she would have served the full term as the contract of employment contained a termination clause. Further, the fact that the appellant was on secondment to the respondent and was able to return to her former job was also a factor that influenced the Judge's decision in declining to award the appellant the salary for the remaining period of the contract and in arriving at the award of 6 months' pay as damages for unfair termination. Awarding the appellant salary for the remainder of the period of contract when she had returned to her former job would in our view have amounted to undue enrichment.

20. Was the award of 6 months' salary as damages unreasonable? It has been held in many decisions of this Court that an award of maximum twelve (12) months must be accompanied with cogent reasons. In **National Social Security Fund vs Grace K. Kazungu & another [2018] eKLR** for instance, This Court stated:-

> **"The trial court also awarded the respondents seven (7) months' salary compensation for unfair termination. There is no explanation how the Judge arrived at seven months. In CMC Aviation Limited vs. Mohammed Noor [2015] eKLR, this Court expressed itself as follows:**
>
> > **"The trial court did not state why it opted to give the remedy provided under section 49 (1) (c) that is, twelve months " gross salary , and not the other remedies under section 49 (1) (a) or (b). The court should have been guided by the provisions of section 49 (4) but the trial Judge said nothing about the reasons that led him to exercise his discretion in the manner he did."**

In **OlPejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR,** this Court in considering whether a maximum award of 12 months' gross salary compensation is justifiable expressed as follows:-

> **"The trial Judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention…"** (Emphasis supplied).

21. Having regard to the above, we find the Judge cannot be faulted for awarding the appellant 6 months' salary as damages because she had gone back to her former job, she was found to have performed dismally as Secretary of the respondent only that the procedure that was adopted to terminate her services was found wanting. In the result we find all the grounds of appeal lacking in merit. Accordingly, the appeal is hereby dismissed with no order as to costs as the respondent did not participate.

Orders accordingly.

Dated and delivered at Nairobi this 20*th* day of November, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR