IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KIAGE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 303 OF 2015

BETWEEN

NEBERT BERNARD MURIUKI.....APPELLANT

AND

MULTIMEDIA UNIVERSITY OF KENYA.....RESPONDENT

(Being an appeal against the Judgment and Decree of the Employment and Labour Relations Court at Mombasa (O.N. Makau, J.) dated 22nd *October, 2015 in ELRC Case No. 1200 of 2013)*

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JUDGMENT OF THE COURT

This is an appeal from a claim in the Employment and Labour Relations Court for discrimination and unfair termination from employment of the appellant by the respondent. It is common factor between the parties that the respondent is the successor of the defunct Kenya College of Communications Technology (KCCT), a subsidiary of the defunct Kenya Posts & Telecommunications Corporation; that it was the latter that had employed the appellant in October 1981; that the appellant worked at the KCCT where he received promotions that saw him occupy the office of Deputy Director, Academic Affairs in 1992; that he held this position up to September, 2010 following the events that we relate below.

It is equally not in dispute that in July 2007 the ownership of KCCT changed from Kenya Posts & Telecommunications Corporation to Communications Commission of Kenya (CCK). KCCT was later elevated to a university status, the Multimedia University of Kenya, the respondent in this appeal.

It was the appellant's case that he had been employed on a permanent and pensionable terms on a salary scale of a Deputy Director which was last reviewed in 1999; that when the respondent succeeded KCCT, it reviewed the terms of service of the directors and deputy directors but left out the appellant; that his salary was also not reviewed upwards; that that action amounted to discrimination against him and was in violation of the provisions of **Article 27** of the Constitution and **Section 5(5)** of the Employment Act, which guarantee equal pay for equal work; that upon being interviewed by the respondent, he was offered the position of Chief Lecturer of Practice in Digital Communications which was a lower position than that which he had held; and that he nonetheless accepted the offer for the sake of his family welfare but raised his concerns over the apparent demotion and reduction in wages.

According to the appellant, the respondent, however, neglected to address those concerns; that it ought to have adjusted the appellant's salary appropriately for the period between July 2007 and September 2010; and that the failure to do so resulted in an underpayment of Kshs. 14,044,800. Further, the appellant complained that he was subjected to harassment, humiliation, denial of access to the institution and inhuman ejection from the premises.

The appellant protested that instead of the respondent addressing these concerns, it terminated his services on the pretext that he had declined the appointment by his letter of 30th June, 2010 and that he had accepted to be retrenched. The appellant considered the termination unprocedural, unfair, unjust, discriminatory and unlawful for which he asked for damages for unfair termination equivalent to 12 months salary, gratuity at the rate of 31% less Kshs. 3,405,164.00, amount already paid, refund of pension contributions for July and August 2007, underpaid salary for the period of July, 2007 to 2nd September, 2010, at Kshs.369,600 per month, salary for the months of 3rd to 15th September, 2010, interest and costs of the suit.

On its part, the respondent maintained that the appellant's employment commenced on 8th January, 2009 when he was appointed to act as the Deputy Principal in charge of Research and Consultancy; that on 24th June 2009 he was appointed Acting Deputy Principal in charge of

Research and Innovation as well as in charge of Academic Affairs on specific terms and conditions of service; that the appointment letters outlined those terms and conditions; that the appellant was later offered the position of Chief Lecturer of Practice in Digital Communication, which he declined to accept; that he mistakenly sought to be treated like other employees whose contracts and terms of employment were different and specific to them; and that the appellant, having applied for the post of Chief Lecturer of Practice in Digital Communication, attended the interview and accepted the offer without coercion or duress, cannot demand any benefit outside his letter of employment. The respondent denied that the employment was unilaterally terminated, and blamed the appellant for declining to take the offer; and that he was nonetheless paid his salary and all terminal dues.

In his determination of the claim Nzioki, J stated as follows:

> **"15. The termination was stated to be pursuant to the elevation of KCCT to University College. A generous package was paid to the Claimant and his grouse is the manner of termination as well as discrimination in employment. The Claimant's case was that he was terminated without notice and without being afforded an opportunity to defend himself. His termination from the evidence adduced was not the normal termination but emanated from the take over of the college under statute. The Claimant was retained on the permanent and pensionable terms while the other employees were retained on contracts. The Claimant did not indicate during his testimony whether he draws a monthly pension from the former employer as he was on permanent and pensionable terms before his services were terminated. While it seems unfair, the payment at different scales was justified on basis that the employers were different and the Claimant was not employed by CCK which seemed generous as an employer. The Claimant therefore was not able to prove discrimination in treatment. It is unfortunate that he did not connect the former employer and his status as one who was paid less than his colleagues on contract. The Claimant did not bring in the former employer against whom demands for refund of contribution could be made. In the Court's mind, the Claimant was retained by the Respondent for purposes of resolving the issues of payments between July 2010 and September 2010. No proof of payment was exhibited by the Respondent and its witnesses could not categorically prove that the payments were made. In the premises the only payment the Claimant may receive is the payment for salary due in August and September, 2010. The Court would peg the salary at the amount the Claimant was receiving which is Kshs. 96,184 basic plus House allowance of Kshs, 51,600/-.**
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> **16. In the final analysis I enter judgment for the Claimant for,**
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> **a. Kshs 295,568/-**
>
> **b. Certificate of service."** (Our emphasis).

Aggrieved by this decision, the appellant has lodged this appeal on a whopping 20 grounds which were however consolidated and argued as follows; that the appellant's termination was unfair, unlawful and contrary to the law as the respondent had failed to prove that the reason for termination was valid as provided for under **section 43(2)** of the Employment Act; that it was incorrect for the respondent to state that he declined to be absorbed into the University employment through his letter dated 30th June, 2010 when the truth of the matter was that he was merely expressing his concerns over the reduction of his salary; that in addition, the letter dated 23rd June 2010 appointing him to the new post was not signed but nonetheless upon receiving it, he raised his concerns the next day; and that the letter required him to accept the appointment by 1st July, 2010 giving him no time to respond. In a nutshell, it was his case that the learned Judge erred in failing to find that he did not decline the appointment; and that he was neither given a notice to show cause nor a hearing before his termination.

As a result of the foregoing, the appellant urged us to find that the Judge erroneously failed to determine his claim for damages for unfair termination; that he was entitled to a salary of Kshs.369,600 per month as he had 15 years experience being the amount paid to his colleagues who had just been employed; that he did not opt for retirement as he never applied for retirement; that contrary to the conclusion by the learned Judge, there was evidence of discrimination; that it was not necessary to join in the proceedings Telkom Kenya Limited since there was only change of shareholding from Telkom Kenya Limited to CCK; that he was entitled to a refund of pension contributions; that the Judge in awarding him salary for August and September 2010 at Kshs.96,184 and house allowance at Kshs.51,600 made a grave mistake as there was no basis for this award when in fact his pay slips showed that his gross pay as at 30th July, 2010 was Kshs.255,895; and finally that he was entitled to the underpaid salary for the period of July to September 2010 at Kshs. 369,600 per month less the paid amount of Kshs. 10,722,080 and gratuity on the salary of Kshs. 369,600.

The respondent, for its part, submitted that the appellant was employed at KCCT as Deputy Principal/Academic Affairs and was later appointed in an acting capacity as Deputy Principal (Research and Consultancy) through a letter dated 8th January, 2009 without any change in his terms and conditions of service; that KCCT was established in 1992 as a subsidiary of Kenya Post Corporation; that in 1999 there was a separation of entities to Telkom Kenya Limited, Post Corporation Kenya and Regulatory Authority that later became CCK; that Telkom Kenya Limited went through restructuring by which Telkom Kenya Limited was required to divest KCCT; that at the material time Telkom Kenya Limited owed CCK license fee for which, by an agreement dated 27th June, 2007 between TKL and CCK, the latter agreed with the former that KCCT would be transferred to CCK in lieu of the purchase price as a set-off against the license fee; that the effect of this was that the employees of Telkom Kenya Limited ceased to be under the control of Telkom Kenya Limited and instead, were to be under the general direction of KCCT board; that pursuant to this transfer, only the oversight function was transferred from Telkom Kenya Limited to CCK, as KCCT remained as an independent separate legal entity with its own Articles of Association and board.

It follows, the respondent urged, that KCCT staff did not transfer their services to CCK but were to remain employees of KCCT under the terms and conditions of service as determined by KCCT and; that this was the guiding principle as to what terms of employment would apply to the employees who were formerly under the general direction of Telkom Kenya Limited.

The respondent further submitted that, indeed, following the aforementioned restructuring, the appellant was an employee of KCCT, hence the terms and conditions that applied to him were those of KCCT. The respondent rejected accusations of discrimination and asserted that the appellant was working on permanent and pensionable terms of KCCT whilst the other directors that he was comparing himself with were

engaged under the terms of CCK on a contractual basis. Thus, KCCT could not offer him the terms of employment by CCK as KCCT was a separate entity that operated independently of CCK. Further, that the directors and deputy directors positions at CCK were advertised and interviews carried out; that the appellant did not participate in those interviews and therefore remained under KCCT; and that he had an option to participate in the interviews but failed to do so.

On the question of the appellant's claim for gratuity, it was posited that those employed under contract would have their gratuity at 31% and those employed on permanent and pensionable terms, like the appellant, were entitled to a monthly pension; that since the appellant belonged to the latter group, he could not claim gratuity; and that the claim by the appellant for payment of Kshs.369,600 in monthly salary had no foundation as it was on the highest side of the salary scale of the deputy directors employed on contract after many years of service and their entry level being at Kshs.201,000. For these reasons, it was argued that the appellant was not discriminated against but was paid salary in accordance with the terms of his employment with KCCT.

Of significance, the respondent clarified that when KCCT was elevated to the respondent, University, the employees were evaluated and based on their qualifications were placed in positions that they qualified to be in; that this notwithstanding, the appellant was offered the position of Chief Lecturer of Practice in Digital Communications which he declined on the ground, that the salary offered in the position was lower than what he was earning initially. Instead, he opted for the retrenchment package.

In the circumstances, the respondent submitted that it had been very fair to offer the appellant the aforesaid position even though he was not fully qualified for it; that it was only because of his several years of exemplary service to the KCCT that he was considered for the post; and that the respondent advised the appellant to acquire post graduate qualifications in order to meet the academic requirement for the salary category he yearned for. Pursuant to **section 5(4)(b)** of the Employment Act, the respondent contended that it was justified to offer the appellant the said position and that this did not amount to discrimination.

The respondent maintained that the appellant was himself involved in the processing of his retrenchment as he voluntarily submitted his request for the retrenchment package; that he was a signatory to the bank account and it was his duty to sign the severance package cheque, hence, nothing caught him by surprise. In those circumstances, he was not unfairly terminated; that out of his own choice, he declined the appointment and opted to leave employment; that in any case his termination was occasioned by the restructuring of his previous employer which action was authorized by Legal Notice No. 155 of 28th November, 2008, which in turn elevated KCCT to Multimedia University College of Kenya, a constituent college of Jomo Kenyatta University of Agriculture and Technology; and finally, that the respondent followed the right procedure in the process of termination of appellant's services.

On a first appeal from a decision of any superior court below, acting in the exercise of its original jurisdiction, like this one, we are required by **Rule 29(1) (a)** of the Court of Appeal Rules to re-appraise the evidence and to draw our own independent inferences of fact by subjecting the evidence as a whole to a fresh and exhaustive examination, acknowledging, however, that the trial court had the advantage of hearing and seeing the witnesses. See **Peters vs. Sunday Post** (1958) E.A 424.

We take as correct the issues framed by the judge and for ourselves believe that this appeal can be determined on the following issues: whether the appellant faced discrimination in the manner his employment was terminated and whether the termination was unfair and unlawful. Depending on the determination of these two questions, the related issue is that of the reliefs.

Addressing the first issue, the gravamen of the appellant's argument was that his duties were similar to those of other Deputy Directors and that when the posts of two Deputy Directors were advertised, his position was not advertised as he was already performing the duties of a deputy director; that he was qualified for the position as he had 15 years experience; that he was entitled to a salary of a deputy director at Kshs.369,600 per month; and that as such, the respondent was obligated to pay him a salary commensurate with the duties he was performing, invoking the principal of equal work for equal pay.

We dispose first the simple question, whether the appellant was an employee of the respondent. It is not in dispute that the appellant continued to work at the University even after the takeover by the respondent. Communication between him and the respondent leaves us in no doubt that an employer/employee relationship existed beyond the takeover. It is the respondent who, by its letter of 8th January, 2009 appointed the appellant Acting Principal and informed him that;

> **"Following the elevation of the College to University status, it has become necessary to reorganize a number of key positions in the College to fit the University structure.**
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> **In this disregard I am pleased to inform you that you have been appointed to be the Acting Deputy Principal (Research and Consultancy). Your other terms and conditions of employment will remain the same until the necessary approvals regarding the Terms and Conditions of Service are obtained from the Government and the University Council."**

In addition to this, in a letter to the appellant dated 24th June, 2009, the Principal confirmed additional responsibilities to the appellant's previous duties. The letter that forms the genesis of this dispute was dated 23rd June, 2010 in which the appellant was appointed to a permanent and pensionable position of Chief Lecturer of Practice in Digital Communications Scale 13, following an interview conducted on 17th June, 2010 (we believe erroneously stated as 17th June, 2008). The appellant was given until 1st July, 2010 to accept the offer. He did so albeit one month late on 29th July, 2010. We shall in due course return to this issue.

Was there evidence of discrimination against the appellant by the respondent? By **section 5** of the Employment Act, employers and courts are required to promote equality of opportunity in order to eliminate discrimination in employment.

In addition, an employer is enjoined not to discriminate directly or indirectly against an employee on any of the grounds listed in subsection (3). It is, however, not discrimination to;

"(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job"

Under **Section 5(7)** of the Employment Act, in any proceedings where it is alleged that there has been discrimination in employment, the employer bears the burden of proving that the discrimination did not take place as alleged.

It is clear to us, from the analysis of the entire evidence that KCCT was elevated to a university status. Following this, employees were evaluated to ascertain their suitability and qualifications for the available positions. The appellant, though a former employee of KCCT was not exempted from that exercise; and that based on his qualification, the respondent offered him the position of Chief Lecturer of Practice in Digital Communications. The assertion by the respondent that the appellant did not meet the qualification for the post he sought to be considered for has not been controverted. Likewise, it was stated that the appellant did not apply when the positions of directors and deputy directors were announced.

The appellant finally accepted the new post of Chief Lecturer of Practice in Digital Communications and its terms in his letter of 29th July, 2010, where he said;

"This concern has been adequately addressed by the College by paying off my service as Deputy Director of KCCT and clearing all loans with the college.

I am therefore writing to confirm acceptance of the Council appointment as Chief Lecturer of Practice in Digital Communications. With this appointment my understanding is that the acting appointment as the Deputy Principal Academic Affairs will automatically end when the newly appointed Director Principal Academic Affairs reports on duty".

By this letter, the appellant unequivocally accepted his fate. In any case, it was fallacious for him to seek terms of deputy directors. Apart from their qualification, the two deputy directors were interviewed and employed on contractual terms whilst the appellant, as we have noted, did not participate in the interviews and remained on permanent and pensionable terms. The deputy directors also had higher qualifications than the appellant, whose only claim to the post was experience.

In conclusion on this ground, we are satisfied that the terms of service assigned to the newly-recruited deputy directors vis a vis those of the appellant did not amount to discrimination in the work place, as the employer is permitted to discriminate **"on the basis of an inherent requirement of a job"**. See **section 5(4)(b)** of the Employment Act. In view of this the respondent has discharged the burden of disapproving discrimination as alleged by the appellant and this ground of appeal, in our view, has no merit and accordingly fails.

Turning to the crux of this appeal, whether the termination of the appellant's employment was unfair, we observe that by its letter of 18th August, 2010 headed **"Termination of services on elevation of KCCT to University College"** and by the use of the word "retrenchment", the respondent, in fact, declared the appellant redundant. That is the context of an earlier letter seeking authorization of the Principal to pay the appellant severance package. The request was approved. We reiterate, however, that the reason proffered for terminating the appellant's services was that he had

"declined to be absorbed into the University employment through your letter dated 30th June, 2010". In that letter, the appellant wrote that;

" … as directed by the Principal I raise the matter with the Chairman of the University Council on the same day.

The Chairman's position is that individual cases will be addressed after all staff members have been given the appointment letters.

Kind notify me the appropriate time to discuss and finalize the concerns arising from the appointment."

We do not believe, that in terms of this letter, the appellant declined to be absorbed by the respondent. There were on-going negotiations which culminated in a respite as reflected in the appellant's subsequent letter to which we have made reference. The respondent, in the circumstances acted prematurely and in a rush. We also find no evidence that the appellant opted for early retirement.

Part IV of the Employment Act provides for various ways in which employment contracts may be terminated or reasons for which an employee may be dismissed. For our purpose **Section 40** deals with termination on account of redundancy. It is a cardinal requirement that before an employer terminates a contract of service on account of redundancy, the employer must comply with the following conditions—

"b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

……

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service".

However, for every termination of employment, there must be proof by the employer of the reason or reasons for doing so. S**ection 43** as read with **section 45(2)** of the Employment Act stipulates that:

"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

An unfair termination under **section 45(2)** occurs when an employer fails to prove –

"a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason –

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure."

Under this section, termination of employment must be both substantively and procedurally fair. For the reasons we have given, we reiterate that the reason advanced to terminate the appellant's services was not valid. It is also common factor that upon receiving the appellant's letter of 30th June, 2010 seeking to further discuss his dilemma with the Principal of the respondent following his appointment to a new post that came with a reduction of salary, the respondent simply went ahead to terminate his employment without hearing him.

Besides paying the appellant for his accrued leave, one month's salary in lieu of notice and severance pay, there is no evidence that the appellant was personally notified in writing of the intention to declare his services redundant. The letter we have alluded to was addressed to the Principal and not even copied to the appellant. A notice ought to have issued to the appellant before termination of his employment even though the respondent intended to pay for notice under **section 40 (1) (f).**

"The purpose of the notice under section 40(1) (a) and (b) of the Employment Act, as is also provided for in the….ILO Convention No. 158 - Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

See **Kenya Airways Limited vs. Aviation & Allied Workers Union of Kenya & 3 Others** [2014] eKLR.

The respondent, having failed to comply with **Section 40** and having failed to justify the reasons for the redundancy, the declaration of the appellant's services as redundant amounted to a wrongful dismissal and unfair termination of employment. The termination was both substantively and procedurally unfair.

Remedies for wrongful dismissal and unfair termination, according to **section 49** of the Act, include payment of the wages which the employee would have earned had the employee been given the period of notice to which he was entitled, the proportion of the wage due for the period of time for which the employee has worked, any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice which the employee would have been entitled to by virtue of the contract, or the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

The learned Judge, on the basis of the letter appointing the appellant to the post of Chief Lecturer of Practice in Digital Communications, awarded the appellant salary and house allowance in the sum of Kshs. 96,184 and 51,600 per month, respectively for the months of August and September, 2010. We cannot fault him on this. Similarly, we find no error in the payment of severance pay in the sum of Kshs. 5,661,740, notice pay of Kshs. 174,880, gratuity of Kshs. 696,069.80 or in the payment of all the other heads tabulated in the letter dated 20 th July, 2010 to the Principal, whose total aggregate amounts to Kshs. 6,067,425.33, less unpaid loan of Kshs. 2,196,817.20

The only question which we now turn to consider is whether the appellant was, in addition to the foregoing, entitled to compensation for unfair termination of employment. Of the remedies for unfair termination of employment under **section 49** is the payment of compensation based on the number of months salary not exceeding twelve months. Considering the manner in which the appellant's services were terminated and the length of his service, we award him eight (8) months compensation based on his last salary (Kshs. 96,184) at the time of termination of his service.

Regarding claim for refund of pension contributions for the period between July and September, 2010, like the learned Judge we find no evidence of contribution to the respondent's pensions scheme by the appellant for the two months in question or at all.

In the result, and for all the reasons we have given, this appeal succeeds and is accordingly allowed with costs.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR