IN COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & MURGOR, JJ.A)

CIVIL APPEAL NO. 159 OF 2012

BETWEEN

MOI TEACHING & REFERRAL HOSPITAL.....APPELLANT

AND

JAMES KIPKONGA KENDAGOR.....RESPONDENT

(An appeal from the Judgment of the Industrial Court at Nairobi (C.P. Chemmuttut, J.), dated 25th April, 2012

in

Industrial Cause No.935 of 2010)

****

JUDGMENT OF THE COURT

When an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term, the termination amounts to a summary dismissal. As a general rule, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statute or by contract term. The exception to this rule is that an employee may be summarily dismissed on account of gross misconduct. **Section 44 (4)(a)** of the Employment Act, 2007 provides inexhaustive lists of what may constitute gross misconduct. For our purpose subsection **(4)(a)** is relevant. An employee will be dismissed for gross misconduct if—

> **"(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.....".**

It is common factor that the respondent was employed by the appellant as a clinical officer in 1st January, 2000. It would appear the respondent was a sportsman from the numerous letters he wrote seeking to be granted unpaid sports leave. It is perhaps because of this that it is alleged that he deserted duty between 25th and 29th July, 2009 without permission. The appellant issued a notice to him to show cause why disciplinary action should not be taken against him. The respondent replied on the 31st of July, 2009. However on 10th August, 2009 the appellant terminated the respondent's services on the grounds of desertion of duty. Aggrieved, the respondent appealed against the termination to the Hospital Staff Establishment Committee on 18th February, 2010. He was however not heard on his appeal and instead on 19th February, 2010 the appellant wrote to the respondent informing him that the decision to terminate his services had been upheld. This precipitated the suit in the industrial court (now the Employment and Labour Relations Court) for orders that: the termination of the respondent be declared unlawful and the respondent be reinstated with full pay; in the alternative that the appellant be found guilty of unfairly terminating the respondent's services and ordered to pay damages. The appellant denied all the allegations and blamed the respondent for bringing the dismissal upon himself by being absent without leave.

This dispute went before Chemmuttut, J. who in his determination found that the termination was unfair as there was no evidence that the procedures leading to the disciplinary action were followed; that the conduct of the respondent may have been wanting, but that alone was not an excuse for his summary dismissal in the manner it was executed; that the only payment made by the appellant to the respondent was in relation to his contribution to the Hospital's Staff Pension Scheme; and that that alone did not absolve the appellant from liability for wrongful and unfair summary dismissal. With that conclusion, the learned Judge awarded the following damages and compensation less statutory deductions under **section 12(3)(v)** and **(vi)** of the Industrial Court Act, now Employment and Labour Relations Act:

"(a) 12 months' compensation, based on his last salary at the time of his summary dismissal: (Kshs. 42,898/= x12) = Kshs. 514,776/=

(b) A further 12 months' damages, also based on his last salary as above: = 514,776/=

Total Kshs. 1,029,552/="

On 4 grounds the appellant has challenged that determination arguing that the learned Judge erred by: pronouncing an award in favour of the respondent when there was no factual basis for doing so; failing to hold that the respondent's termination was lawful and justified; holding that the disciplinary procedures were not followed prior to his termination and; making double compensation awards under **section 12(3)(v)** and **(vi)** of the Industrial Court Act without regard to the provisions of **section 49(1)(c)** of the Employment Act.

To demonstrate that the appeal should be allowed, the appellant argued that the dismissal of the respondent was justified for there was a breach of conditions of service by him; that he absented himself from work from the 25th to 29th of July 2009 without permission. This was not only in violation of the Employment Act but also clause 16.5.1 (a) and (b) of the appellant's Terms of Condition and Service Booklet; and that the dismissal was justified as the respondent had been subject of several disciplinary proceedings dating back to 2006.

The appellant also submitted that it followed the proper procedure in terminating the respondent's services; that the respondent was duly issued with a show cause letter and instead of responding to the letter he dispatched a letter insinuating that his life was in danger at the work place; and that the termination was strictly in accordance with section **45(2)(b)(i)** of the Employment Act.

Regarding damages, the appellant submitted that the double award of damages was made in error and against section **12(3)(v)** and **(vi)** of the Industrial Court Act and section **49(1)(c)** of the Employment Act for the reasons that: apart from the damages being awarded twice, it was not specified under which law the damages were being awarded and; there was no justification for the award. The appellant asserted that where there is a provision for the award of damages under two heads, only one, being the greater of the two, is to be granted by the court. The appellant relied on the case of **Mary Mutanu Mwendwa V. Ayuda Ninos De Africa Kenya**, Cause No.50 of 2012, for the proposition that under Industrial Court Act the court has jurisdiction to award damages in any circumstances contemplated under the Act or any other written law; and that under the Employment Act damages and compensation is capped to the equivalent of a maximum of twelve months gross wages.

The respondent in opposing the appeal submitted that contrary to the regulations in the Hospital Terms and Conditions of Service the appellant failed to give to the respondent a verbal warning as required by clause 16.7.1; that there was no written reprimand that ought to have issued after verbal warning contrary to clause 16.7.2; that the appellant ignored the respondent's reply to the show cause letter; that the accusations against the respondent were not clear in that the letter of termination was on the ground that the respondent deserted duty while the show cause letter complained that he was absent without leave, completely different employment infractions; and that the procedure for the invocation of either was not followed. The respondent cited **section 5(3)** of the Employment Act to contend that the appellant in making the decision to terminate the respondent's services was motivated by the alleged mental status of the respondent which in turn is a discriminatory conduct. It was submitted that under section **35** of the Employment Act, the respondent was entitled to challenge his dismissal as being unlawful; and that under section **41** and **43** of the Employment Act, the respondent was entitled to make representations and be given reasons for his termination. According to the respondent this procedure was not adhered to by the appellant thereby occasioning miscarriage of the rules of natural justice. Based on these submissions, the respondent urged that this appeal has no merit and should accordingly be dismissed.

This being a first appeal, our role in considering it is limited to re-evaluation of the evidence on the record and then to determine the correctness or otherwise of the conclusions reached by the learned trial Judge. See: **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates**, Civil Appeal No. 161 of 1999.

Further, it is established that this Court will not be inclined to disturb the quantum of damages awarded by the trial Judge. In order to justify reversing the trial Judge's decision on quantum, we 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 inordinately low as to make it an erroneous estimate of the damage to which the claimant is entitled. See: **Butt V. Khan** [1981] KLR 349 where Law, J.A said:

"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".

The foregoing sets out the law and the guiding principles which apply in the determination of this appeal. In our own assessment, the main complaints are that the learned Judge erred in finding that the dismissal was unlawful; that he went beyond the pleadings and the law by awarding 24 months damages amounting to Kshs. 1,029,522 whereas the respondent had pleaded Kshs. 514,776 in his plaint, which was contrary to **section 49(1)(c**) of the Employment Act which provides for 12 months compensation.

To be absent from work without leave or lawful cause, constitutes a misconduct that can justify the dismissal of an employee. By **section 50** of the Employment Act the courts, in determining a complaint or a suit involving wrongful dismissal or unfair termination of the employment of an employee, may consider paying the employee any or all of the following—

7**"(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;**

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became

due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph

(a) which the employee would have been entitled to by virtue of the contract; or

(c) 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.

(2) Any payments made by the employer under this section shall be subject to statutory deductions".

In addition to the foregoing, where it is established that the summary dismissal or termination of employment was unfair, the court may make an order of reinstatement of the employee or re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal at the same wage. In making the order, the court takes into account, *inter alia* the circumstances in which the termination took place, including how, if at all, the employee caused or contributed to the termination; and the employee's length of service with the employer.

Did the appellant prove that, without leave or other lawful cause, the respondent absented himself from his place of work? The following brief background will supply the answer to the question. The respondent was granted an annual leave up to 23rd July, 2009. On 21st July 2009, just before that leave ended the respondent applied for unpaid sports leave. This was also rejected by the appellant. Undeterred, on 28th July 2009 the respondent requested for 4 days emergency leave on the grounds that he was unable to work due to stress caused by the double rejection of his request for unpaid sports leave. He wrote again on 31st July, 2009 to explain why he was absent from work. On 5th August 2009, he wrote one more time requesting for leave. In rejecting this last request, the appellant warned the respondent against his continued absence. Before the ink on the letter could dry the appellant wrote to the respondent terminating his employment with effect from 7th August 2009 on grounds of desertion of duty.

Promptly, the respondent appealed to the appellant's director against the said decision. The Director invited the respondent to attend an Establishment Committee meeting on 18th February, 2010 at 9.00am. The next day, on 19th March, 2010 the appellant rejected the appeal and upheld the respondent's termination.

We have adopted this long route in order to illustrate that the appellant did not conduct a disciplinary hearing before punishing the respondent. Both the employee and employer under **section 35(3)** and **(4)** have specific rights regarding termination of employment. For example an employer or an employee has a right to terminate a contract of employment without notice so long as it is done in accordance with the law and procedure. Nothing stops an employer from summarily dismissing an employee, except that **section 44** requires an employer to demonstrate that the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service by doing or not doing series of things listed in that section and any other related things. But that is not all. **Section 41** provides the procedure for notification and hearing before termination on grounds of misconduct. An employer must, before terminating the employment of an employee, for example for reasons of misconduct;

"...explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make".

The appellant's own Booklet on Terms and Conditions of Service at Parts V, VI and VI recognises that an employee may be dismissed summarily on the same grounds as those enumerated under the Employment Act, including on the ground of being absent without leave or authority. It stresses, however, that in considering whether to dismiss an employee the proper procedure must be followed. For example there must be, first a warnings before a hearing by the Disciplinary Committee or Disciplinary Advisory Committees for various cadres. Under clause 16.8.3 an employee **"whose conduct is being inquired into must be availed an opportunity to appear before the disciplinary authority to defend himself".** The respondent was indeed invited to attend a disciplinary hearing but upon presenting himself was snubbed. Based on this uncontroverted evidence we come to the inevitable conclusion and in agreement with the trial Judge that the respondent was not heard before his employment was summarily terminated. The appellant's liability was proved by evidence to the required standard.

On quantum, the governing statutory provisions in determining a suit involving wrongful dismissal are set out under **section 50** of the Employment Act which we have reproduced earlier in this judgment and are to the effect that in a case involving wrongful dismissal or unfair termination of the employment of an employee, the Court can award to the employee, among other reliefs;

"(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service

(b) .....

(c) the equivalent of a number of months wages or salary <u>not exceeding twelve months</u> based on the gross monthly wage or salary of the employee at the time of dismissal"

The learned Judge awarded the respondent a sum of **Kshs. 1,029,522** less statutory deductions and justified the award as follows:

> **"…I also find that this is a fit case for an award of damages and compensation, but not reinstatement.**
>
> **… In my fair assessment of compensation and damages, I am of the considered view that the following amount will adequately satisfy the grievant's claim for compensation and damages under section 12(3) (v) and (vi) of the Industrial Court Act:**
>
> **(a) 12 months' compensation, based on his last salary at the time of his summary dismissal: (Kshs. 42,898/= x12) = Kshs. 514,776/=**
>
> **(b) A further 12 months' damages, also based on his last salary as above: = Kshs. 514,776/=**
>
> **Total Kshs. 1,029,552/="**

In the case of **Ol Pejeta Ranching Limited v David Wanjau Muhoro** Civil Appeal No. 42 of 2015, this Court expressed itself as follows:

> **"Was the award of Kshs. 3,489,084/- representing the respondent's 12 months gross salary as compensation for unfair termination justifiable? Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include....., payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as .....the conduct of the employee which to any extent caused or contributed to the termination.....**
>
> **The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the 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....."**

In his judgment, the excerpts of which we have reproduced in the previous paragraphs, the learned judge found that it was ultimately upon the respondent to justify compensation. Despite finding that the respondent's alleged "injured feelings" and difficulty to find alternative employment were not considerations in determining compensation, he still awarded the maximum 12 month's compensation in addition to damages equivalent to 12 month's pay. With respect the learned Judge failed to justify both awards, exceeding the respondent's own expectations and request that:

> **"…(iv) In the alternative and without prejudice to the prayers above, the respondent be declared guilty of unfair termination and be ordered to pay damages of Kshs. 514, 776/- ... "**

The prayer for reinstatement having been rejected, the court was left to consider the alternative award being compensation amounting to Kshs. 514, 776. By granting the statutory maximum equivalent to 12 months' pay without justification, the Judge exceeded his powers. See: **Mary Wakhabubi Wafula v British Airways PLC**, Civil Appeal No. 105 of 2007, where this Court cited with approval the case of **G M V V. Bank of Africa Kenya Limited,** Industrial Court Cause No. 1227 of 2011, where Rika J, in explaining the need for capping compensatory awards in employment matters echoed the principles of the House of Lords in **Eastwood & Another V. Magnox Electric PLC**; **McCabe V. Cornwall County Council & Others** [2004] UKHL 35, where the importance of capping awards was explained as follows:

> **"In fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of employers and employees, and social economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the Courts to extend further, a common law implied term, when this would depart significantly, from the balance set by legislature. To treat the statute as prescribing the floor, and not a ceiling, would do just that….. it would be inconsistent with the purpose Parliament sought to achieve, by imposing limits on compensatory awards payable in respect of unfair dismissal."**

The Judge took into account irrelevant considerations. He too failed to take into account relevant factors, for which reason we must interfere with the award. To the extent stated we allow the appeal by setting aside the entire award of Kshs. 514,776 under (a) in the judgment and reducing the award of Kshs. 514,776 under

(b) to six (6) months' salary. As the appeal has partially succeeded we give the appellant half of the costs of this appeal.

Dated and delivered at Nairobi this 22nd day of March, 2019.

W. OUKO, (P)

…….

JUDGE OF APPEAL

ASIKE – MAKHANDIA

…….……

JUDGE OF APPEAL

A.K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR