IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & GATEMBU, JJA)

CIVIL APPEAL NO. 47 OF 2012

BETWEEN

NZOIA SUGAR COMPANY LIMITED.........................APPELLANT

VERSUS

FRANCIS OYATSI...RESPONDENT

(An appeal from the Award of the Industrial Court of Kenya at Nairobi

(Stewart Madzayo, J) dated 16th November, 2011

in

Industrial Court Cause No. 361(N) OF 2009)

****

JUDGMENT OF THE COURT

Introduction

1. In this appeal, the appellant has challenged an Award of Kshs. 13,646,271.00 rendered by the Industrial Court (S. Madzayo, J) in favour of the respondent on 16th November 2011 for wrongful termination of employment.

Background

2. On 24th July 2007, Francis Oyatsi, the respondent was appointed as the Managing Director of the appellant pursuant to Section 6(1)(b) of the State Corporations Act. His appointment was published in the Kenya Gazette on 27th July 2007 and was for a term of three years with effect from 23rd July 2007. He did not last in the employment for the term. On 31st December 2008 a special board meeting of directors of the appellant was convened. The only agenda for that meeting, at which the respondent does not appear to have been invited, was to discuss "*the conduct of the managing director*."

3. The minutes of that meeting show that a catalogue of complaints against the respondent were deliberated upon in his absence. Some of the complaints were that: he had an "*abrasive style of leadership*"; the appellant?s fixed deposit account was drawn without board approval; opening of fixed deposit account without board resolution; unauthorized sales of sugar resulting in loss of Kshs. 28.2 million; disregard of Treasury advice; making procurements without funds; and failure to meet statutory obligations in relation to NHIF and KRA leading to imposition of penalties.

4. The board resolved at that meeting "*to terminate the services of the Managing Director Mr. Francis Oyatsi with effect from 31st December 2008 in accordance with his employment contract*." On the same day, i.e. 31st December 2008, the decision of the board was promptly relayed to the respondent by a letter under the hand of the chairman of the appellant in the following terms:

> "***RE: TERMINATION OF EMPLOYMENT CONTRACT***
>
> *You are hereby notified that at its 99th Special Board Meeting held on 31st December 2008, the Board of Directors resolved to*

terminate your Employment Contract with immediate effect. Accordingly, you are directed to immediately handover the office to Mr. Saul Wasilwa. You will be paid your salary and house allowance for three months in lieu of notice as per your Contract. On behalf of the Board, I take this opportunity to thank you for the services you have rendered to the Company."

5. Aggrieved, the respondent filed a claim against the appellant before the then Industrial Court at Nairobi. In his memorandum of claim dated 9th July 2009, he complained that the decision to terminate his employment was unfair and in breach of his statutory rights under the Employment Act, 2007 and was null and void. He sought judgment for Kshs. 13,646,217.00 made up of:

a) Loss of salary and benefits for the remainder of the contract period from January 2009 to 23rd July, 2010 at the rate of Kshs. 445,000.00 per month totaling Kshs. 8,351,167.00.

b) Gratuity in the sum of Kshs. 3,403,300.00.

c) Leave accrued and to be earned upto the end of the contract period, 85 working days in the sum of Kshs. 1,891,120.00.

6. In its defence to the claim, the appellant denied that it had breached the respondent?s rights; it asserted that the respondent had failed to meet his targets under his performance contract; and that his removal from employment was justified. With regard to the claim for Kshs. 13,646,217.00, the appellant averred that "*upon finalization of the pending surcharge matters affecting him*", the respondent would be entitled to:-

Salary for three (3) months..Kshs. 915,000.00

House Allowance..kshs. 240,000.00

*Gross Pay...kshs. **1,155,000.00***

Tax Payable..kshs. 328,297.20

*Total Amount...kshs. **826,702.80***

Less Safari Imprest...kshs. 90,795.00

*Net Pay..kshs. **735,907.80***

7. After a trial conducted between July 2009 and October 2010, the Industrial Court delivered the impugned Award on 16th November 2011. It held that the termination of the respondent?s employment was wrongful and a nullity. In what would appear to have been a „cut and paste? exercise, the court awarded the respondent Kshs. 13,646,217.00 as claimed, made up of Kshs. 8,351,167.00 "*for the loss of salary and full benefits for the remainder of the contract period from January 2009 to 23rd July 2010 at Kshs. 445,000.00 per month*"; "*gratuity in the sum of Kshs. 3,403,800.00*"; and "*leave accrued and to be earned up to the end of the contract period, 85 working days in the sum of Kshs. 1,891,120.00.*"

The appeal and submissions

8. What followed is the appellant?s appeal now before us. Initially, and based on the notice of appeal and memorandum of appeal, the appellant intended to challenge the Award in its entirety. However, during the hearing of the appeal, learned counsel for the appellant Mr. E. Masafu abandoned the grounds of appeal relating to liability and confined his arguments to the quantum. The relevant grounds of appeal in that regard are that the award of Kshs. 13,646,271.00 is in excess of the compensation envisaged by Section 15 of the Labour Institutions Act (ground 5); that given the terms of the contract of employment and relevant provisions of the Employment Act, the awards for gratuity and accrued leave were not justified or payable (ground 6).

9. Counsel, urged that the Judge erred in awarding the respondent loss of salary and benefits for the remainder of the contract period, a period of 18 months, when the law allows for a maximum of 12 months? salary; that as the contract of employment provided for notice period in case of termination, the amount payable, following the decision of this Court in ***CMC Aviation Ltd vs Captain Mohammed Noor, Civil Appeal No. 199 of 2013***, would have been the notice period.

10. It was submitted that the court erred in awarding the respondent leave, benefits and other emoluments which could only have accrued if the respondent was working. In that regard reference was made to the decision of this Court in ***Kenya Ports Authority vs Edward Otieno, Civil Appeal No. 120 of 1997***,

11. With regard to gratuity, it was submitted that the same should have been pro-rated to the contact period the respondent worked as opposed to awarding gratuity that would have been payable had the respondent worked for the entire three year term. In that regard, the decision of the Industrial Court in ***Ben Panhill Sifuna vs Kenya Urban Roads Authority [2014] eKLR*** was cited.

12. Counsel concluded by submitting that the amount awarded included the amount that is deductible (statutory deductions) under Section 49 of the Employment Act for remittance to Kenya Revenue Authority.

13. Opposing the appeal, learned counsel for the respondent Mr. D. Oyatsi, submitted that the reliefs granted flowed from the declaration that

the termination of the respondent?s employment was a nullity. Reference was made to the judgment of Tunoi JA in ***Omega Enterprises (Kenya) Limited*** ***vs Kenya Tourist Development Corporation and 2 others, Civil Appeal No. 59 of 1993*** in which the Court cited with approval the dictum of Lord Denning in ***Macfoy vs United Africa Co. Ltd [1961]3All E R 1169*** to the effect that nothing can come out of a nullity. In that case, Tunoi JA posited that proceedings based upon a null and void order are "*a complete nullity since with such faulty foundation the entire house of cards must collapse without much ado*."

14. According to counsel, therefore, the Judge properly awarded the respondent all the emoluments which the respondent would have earned had he worked to the end of the contract term.

15. As for statutory deductions, counsel submitted that payment was made to the respondent net of deductions and the issue did not therefore arise.

Analysis and determination

16. We have considered the appeal and submissions by counsel. The appellant having abandoned the grievances relating to liability, the remaining issue for our consideration is whether we should interfere with the award of damages.

17. As already indicated, the respondent sought an award of Kshs.13,646,217.00 which was granted as prayed. Based on our review of the record hardly any evidence was led in support of the reliefs claimed. In his submissions before the trial court, the respondent submitted that "*the plaintiff has quantified his emoluments for the said period in the sum of Kshs.13,646,217.00. This figure has not been challenged or disputed at all by the respondent. The Claimant is entitled to judgment in the said sum*." The appellant on the other hand in its closing submissions urged that the respondent was not entitled to "*no more*" than the payments set out in the statement of defence as reproduced in paragraph 6 above.

18. The respondent?s employment was terminated on 31st December 2008. That is when the cause of action arose. The relevant employment statutory regime is therefore The Employment Act, 2007, Act No. 11 of 2007 which commenced on 2nd June 2008.

19. The grant or refusal by a court of the remedies under Section 49 of that Act involve the exercise of judicial discretion. This Court can only interfere with the exercise of such discretion if satisfied that the Judge misdirected himself in law or misapprehended the facts or considered extraneous factors or failed to consider relevant factors or the decision is plainly wrong. In famous words of Sir Charles Newbold, P in the Court of Appeal decision in ***Mbogo and Another vs. Shah [1968] E.A. 93*** at page 96:

> ***„…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...?***

20. Consistently with that proposition, this Court in ***International Planned Parenthood Federation vs Pamela Ebot Arrey Effiom [2016] eKLR*** followed the earlier decisions in ***Butt v Khan (1982-88) 1KAR 1*** and ***Berkley-Steward v Waiyaki (1982-88) 1KAR 1118*** and proceeded on the basis that the Court will not interfere with an award of damages unless the same was inordinately high or low or the judge proceeded on wrong principles.

21. Guided by those principles, do we have a basis to interfere with the award of damages? In his Award, the Judge concluded as follows:

> "***the court find(sic) that the Claimant?s contract of employment was terminated wrongfully and unfairly. The Claimant is entitled to the remedies sought. Accordingly, the court ORDER and Award in favour of the Claimant against the Respondent as hereunder:-***
>
> **1. That termination of the contract of Employment of the Claimant, Mr. Francis Lawrence Oyatsi be and is hereby declared wrongful and a nullity.**
>
> **2. The Respondent to pay the claimant, Mr. Francis Lawrence Oyatsi for the loss of salary and full benefits for the remainder of the Contract period from January 2009 to 23rd July, 2010 at Kshs. 445,000.00 per month totaling to Kshs. 8,351,167.00.**
>
> **3. Gratuity in the sum of Kshs. 3,403,800.00.**
>
> **4. Leave accrued and to be earned upto the end of the contract period, 85 working days in the sum of Kshs. 1,891.120.00.**
>
> **5. Certificate of Service be issued with immediate effect to the Claimant in terms of the Employment Act, 2007.**
>
> **6. Costs of the suit to be borne by the Respondent."**

22. In effect, what the Judge did, with great respect, was to "cut" the remedies pleaded in the memorandum of claim and "paste" them in his Award. No reasons at all were given by the Judge as to how he arrived at those awards or why he awarded the amounts that he did. This Court has on many occasions stressed the need to provide justification for awards in labour and employment disputes. In ***National Social Security Fund vs Grace K.*** ***Kazungu & another [2018] eKLR*** for instance, the 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.

35. **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, 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, which act then invites our intervention….. (Emphasis supplied).

36. ***As already stated, it is not clear how the learned judge arrived at the seven (7) months. There is no analysis of comparable awards made if termination of employment is un-procedural and wrongful. In the absence of justification for the seven-month basic salary compensation, and in the absence of analysis on comparable award, we find the learned judge erred in awarding seven months? basic salary as compensation for unfair termination.”***

23. In the absence of justification for the award of damages, we are entitled to review the same.

24. The first head of award was for Kshs. 8,351,167.00 for loss of salary and benefits for the remainder of the contract period from January 2009 to 23rd July 2010. That is a period of 18 months and 23 days. It is not in dispute that the respondent?s gross monthly emoluments were Kshs. 445,000.00 made up of basis salary of Kshs. 305,000.00; house allowance of Kshs. 80,000.00 and “*other remuneration*” of Kshs. 60,000.00.

25. In considering the appropriate remedies, the lower court should have, by dint of Section 50 of the Act, been guided by the provisions of Section 49 of the Employment Act under which a court can award either one or all of the following remedies depending on the circumstances of the case:

“(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.”

26. The court was required to consider such factors as the wishes of the employee; the circumstances in which the termination took place; the employee?s length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; the opportunities available to the employee for securing comparable or suitable employment with another employer; the right to press claims or any unpaid wages, expenses or other claims owing to the employee; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including *ex gratia* payment, in respect of termination of employment paid by the employer and received by the employee. See the decision of this Court in ***Bamburi Cement Limited v William Kilonzi [2016] eKLR***.

27. Although the contract of employment executed by the parties was not produced before the lower court, it was common ground that the respondent?s terms of employment were as set out in a standard form contract that was made available to the court. The appellant explained that it was not in a position to produce the executed contract of employment because the respondent did return to it the signed copy of the same. As regards termination of employment, the contract provided that:

“This contract may be terminated by either party giving a three months? prior notice, or on payment of an equivalent of three (3) months basis salary and house allowance only in lieu of such notice.”

28. That contractual provision is in consonance with one of the remedies the court is at liberty to grant under Section 49 of the Employment Act, but the Judge did not make any reference to it. Further, and bearing in mind that the employee?s length of service with the employer is yet another relevant factor, the Judge did not also consider that the respondent worked for less than half of the 3-year contract term; that under Section 49(c) of the Employment Act, the award for damages equivalent to a number of months? salary is capped at twelve months gross monthly salary of the employee at the time of dismissal.

29. In ***Chai Trading Co. Ltd v Joseph Kimathi Ikiamba [2018] eKLR*** this Court set aside an award of damages of the equivalent of 12 months? salary made by the lower court on the basis that no justification had been given and substituted the same with damages equivalent to 3 months? salary.

30. In ***Ronald Kimatu Ngeli v Ukulima Sacco Society Ltd [2011] eKLR***, this Court held that even where a contract is wrongfully terminated, the measure of damages would be the salary in lieu of notice. In ***Peter Amolo Akumu Gould v Kenya Commercial Bank Limited [2014] eKLR*** this Court cited with approval the decision of Lord Brightman L.J in the case of ***Gunton v London Borough of Richmond Upon Thame [1980] 3 ALL ER 577*** at page 592(g) where he stated that:

> ***"…In the case of a contract terminable by notice, the assessment [of damages] will extend over the period which would have had to elapse, before the defendant could lawfully have dismissed the plaintiff."***

31. In ***Ethics and Anti-Corruption Commission v Nicholas Mwenda Mtwaruchiu & 8 others [2018] eKLR*** the court declined to award the claimants, whose contracts were unfairly terminated, damages equivalent to the salaries they would have earned had they continued in employment until retirement. In that case, this Court in determining a just and fair award as compensation for unfair termination had regard to the length of service and awards made in previous cases.

32. Based on foregoing, we hold that the Judge erred in awarding the respondent damages for "*loss of salary and full benefits for the remainder of the contract period*" without justification.

33. In our view considering the length of service; the fact that less than half of the contract period had been served; the fact of accelerated payment; previous awards in somewhat similar circumstances; and the position held by the respondent, an award for the equivalent of 4 months? gross salary would in our view be reasonable compensation.

34. We turn to the award of gratuity. To begin with, we reiterate the views expressed by this Court in ***Bamburi Cement Limited v William Kilonzi*** (supra):

> ***"… that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment."***

35. The Judge awarded "Kshs. 3,403,800.00" under this head. Again, it is not clear how this figure is computed or arrived at. In relation to gratuity, the contract of employment provided:

> ***"Upon successful completion of each contract term, you will qualify for a one-off gratuity calculated at a rate of 31% of your annual basic salary. This gratuity is taxable. The gratuity shall not be paid if your separation from the Company is due to gross misconduct as provided for in the Employment Act. If you are on secondment or a member of some other retirement benefit scheme, you may opt to continue with the retirement benefit scheme to which you are already a member."***

36. As already noted the respondent?s basic salary was Kshs. 305,000.00 (excluding house allowance of Kshs.80,000.00 and other remuneration of Kshs.60,000.00 that raised the total monthly emoluments to Kshs.445,000.00). Consequently, the respondent?s annual basic salary was

Kshs.3,660,000.00.31% of the annual basic salary translates to Kshs.1,134,600.00. That is the amount the respondent would have been entitled to "*upon successful completion*" of the three-year contract term.

37. The respondent did not however work for the entire the term, although his employment was wrongfully terminated by the appellant. He worked for just under half of the contract period. The appellant argued, rightly in our view, that gratuity should accordingly be prorated to the period worked. The circumstances in this case are not dissimilar to those in ***Ben Panhill Sifuna vs Kenya Urban Roads Authority [2014] eKLR*** where Rika, J of the then Industrial Court had this to say:

> ***"Clause 14 of the contract granted the Claimant 31% of his annual basis salary as taxable gratuity, on the condition that he successfully completed his contractual term. He did not complete the 3 year contractual period. His contract was terminated at the instigation of the Respondent, on the 17th March. This Court has adopted the position in its past Awards, that where the Employee is not at fault for the premature termination of the contract, it would not be fair or reasonable to deny the Employee contractual gratuity, proportionate to the number of months served. Gratuity serves as reward and recognition for the time served by the Employee, and also is an important social security mechanism. The rationale in proportionate payment is the same, as applied in allowing the prayer for notice pay. Notice pay becomes payable as would be in regular termination, because the Employee is not at fault. Ms. Boen was honest and forthright in testifying that gratuity would be paid pro-rata, in event of a regular premature termination. In case where the Court finds the decision of the Employer was unfair, termination is at very least to be treated as regular, with all the benefits that have accrued to the date of termination, becoming payable. It was not the Claimant?s fault that he did not complete 3 years. Fairness demands he is not denied gratuity for the 17 months competed in service. The Claimant is granted pro-rata gratuity at 31% basis salary for 17 moths completed in employment, amounting to Kshs. 246,987."***

38. We respectfully agree. We accordingly set aside the award on gratuity of Kshs. 3,403,800.00 and substitute therefor an award of Kshs. 567,300.00 being half the amount of Kshs.1,134,600.00 that would have been payable had the contract been successfully completed.

39. The next and final matter for consideration is the award relating to "*leave accrued and to be earned up to the end of the contract period, 85 working days in the sum of Kshs.1,891,120.00*." The provision on leave in the contract of employment was:

> ***"You will be entitled to thirty (30) working days leave per calendar year. Leave will not be carried forward except with the written approval of the Board setting out the reason for extension. Any leave not taken during the year will be forfeited unless authority to carry over the leave days due has been granted in writing by the Board."***

40. In his testimony, the respondent confirmed that he was entitled "to 30 working days per annum". None of the parties provided the court below with relevant material on whether the respondent had taken any leave. Our rudimentary calculation of leave earned by the respondent in a calendar year based on the contractual provision would be Kshs.351,924.00. Based on the basic salary of Kshs. 305,000.00, and assuming 26 working days in every month, the daily rate would therefore be Kshs. 11,731.00. Multiplied by 30 days would yield Kshs. 351,924.00. As the respondent worked the whole of the year 2018, the leave earned for that calendar year would be Kshs. 351,924.00. For 2017, he worked approximately half of the year which would have earned 15 days leave in the amount of Kshs. 175,965.00. We would accordingly award Kshs. 527,889.00 for leave earned. We can see no justification for the award of Kshs.1,891,120.00 made by the Judge and the same is accordingly set aside and substituted with an award of Kshs. 527,889.00.

41. The order directing the appellant to issue the respondent with a certificate of service and the order granting the respondent costs of the suit have not been challenged and the same are hereby upheld.

42. In conclusion therefore, orders numbers 2, 3 and 4 of the Award of the Industrial Court given on 16th November 2011 are hereby set aside and substituted with the following orders:

> A. The appellant shall pay to the respondent damages in the amount of Kshs. 1,780,000.00 being the equivalent to 4 months? gross salary for wrongful termination of employment.
>
> B. The appellant shall pay to the respondent gratuity in the amount of Kshs. 567,300.00
>
> C. The appellant shall pay to the respondent accrued leave in the amount of Kshs. 527,889.00

43. The total amount payable to the respondent, if the same has not already been paid, is therefore Kshs. 2,285,189.00. In accordance with Section 49

(2) of the Employment Act, the said amounts shall be subject to statutory deductions.

44. As the appellant has substantially succeeded in the appeal and considering that the holding that the respondent?s employment was wrongfully terminated has not been challenged, each party shall bear its own costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of March, 2019.

W. OUKO, (P)

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

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

DEPUTY REGISTRAR