



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 30 OF 2017**

**BETWEEN**

**KENYA POWER AND LIGHTING COMPANY LIMITED.....APPELLANT**

**AND**

**LYDIA CHEPKOSGEI MUTAI ..... RESPONDENT**

**(Being an appeal from the judgment and decree of the Industrial Court of Kenya at Kisumu (Hon. Wasilwa J.) dated 12<sup>th</sup> January 2015 in Industrial Cause Case No. 312 of 2013)**

**JUDGMENT OF THE COURT**

1. The respondent filed a claim against the appellant before the Employment and Labour Relations Court seeking damages for unfair termination and breach of contract of employment. The respondent's employment was terminated by letter dated 16<sup>th</sup> May 2013. During the trial, the respondent claimed salary compensation for 22 years being the balance of years to work until retirement. The total sum claimed was Ksh. 38,397,264 calculated as loss of salary for the balance of 22 years; 10% annual increment on salary; house allowance for 22 years as well as compensation for travelling allowance.

2. In its memorandum of response, the appellant asserted the termination of the respondent's employment was lawful and due process was followed. It was asserted that the appellant was not obliged to employ the respondent until her retirement age of 60 years; that at the time of termination of employment, the respondent owed the appellant a sum of Ksh. 356,242; the appellant pleaded and made a counterclaim for the said sum. It was further averred the appellant was not obliged to give the respondent a 10% annual salary increment for the 22 years as claimed or for any period or at all.

**BACKGROUND FACTS**

3. The respondent was employed by the appellant as Clerk Grade IV on 9<sup>th</sup> August 1994 in the Finance Division. Upon completion of her probation period, she was upgraded from Clerk Grade IV to Clerk Grade III on 30<sup>th</sup> March 1995. During employment, she was promoted to various cadres within the Finance Department. Whilst in employment, she received a letter of commendation and numerous ascending salary adjustments.

4. On 11<sup>th</sup> February 2013 the respondent received a letter demanding explanation, within 72 hours, of an alleged fraudulent reallocation and misappropriation of Ksh. 14,221,877/30. She responded to the allegations and denied any fraud. In the meantime, she was suspended from duty. A Board of Inquiry was held at Kisumu on 25<sup>th</sup> March 2013 to consider the alleged misappropriation of Ksh. 14,221,877/30. Following presentations to the Board, the respondent's suspension was lifted on 28<sup>th</sup> March 2013 and she was ordered to report to work immediately.

5. In her claim, the respondent stressed that on 17<sup>th</sup> October 2013, out of the blue and without notice, she received a letter of termination dated 16<sup>th</sup> October 2013 the reason given being fraudulent reallocation and misappropriation of the sum of Ksh. 14,221,877/30.

6. In her claim before the Labour Court, the respondent contended that the Board of Inquiry had considered the allegation of misappropriation and reallocation of Ksh. 14,221,877/30 and exonerated her from any blame; that it was no longer open to the appellant to use the same allegation to terminate her employment. It was contended that the appellant had no genuine or lawful reason to terminate the respondent's employment and such termination without a valid reason and notice was unlawful and unfair.

7. Upon hearing the parties, the trial judge made a finding that the respondent's employment was unfairly terminated; that the appellant had no valid reason to terminate the respondent's employment; and that the reason given by the appellant in its letter of termination was non-

existent. In the final decree, the respondent was awarded three and a half months' salary in lieu of notice which had already been paid. The respondent was further awarded damages for unfair termination being twelve (12) months' salary totaling Ksh. 1,129,920/= less statutory deductions.

## **GROUND OF APPEAL**

8. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing the following grounds in its memorandum:
- i. The judge erred in finding the appellant had not proved the reasons for termination in accordance with Section 43 of the Employment Act.
  - ii. The judge erred by failing to consider the reasons for termination as per the appellant's letter of 17<sup>th</sup> May 2013. (sic)
  - iii. The court erred in finding that the reasons for termination were non-existent, contrary to the evidence on record.
  - iv. The court erred in finding that the disciplinary process against the respondent was concluded on 25<sup>th</sup> March 2013, in the absence of any evidence to support the finding.
  - v. The court erred in finding without any evidence that the disciplinary hearing exonerated the respondent from all blame.
  - vi. The court erred in awarding the maximum compensation of twelve (12) months' salary when the appellant had proved the reasons for termination of services following a lawful and fair procedure.

9. At the hearing of this appeal, learned counsel Mr. Odhiambo Justus Okoth appeared for the appellant while learned counsel Mr. Ondego holding brief for Mr. Mukoya appeared for the respondent. All parties filed written submissions and cited authorities in the appeal.

## **APPELLANT'S SUBMISSIONS**

10. The appellant rehashed background facts leading to the instant appeal. On the merits of the appeal, it was urged that before an employer can exercise the right to terminate an employment contract, there must be a valid reason(s) for such termination; that in the instant appeal, the trial court erred in finding that there was no valid reason for termination of the respondent's contract of employment. Counsel submitted that the reasons given for termination of employment were genuine; that the complaint against the respondent related to misappropriation and reallocation of the sum of Ksh. 14,221,877/30; that whereas the complaint and allegation had been heard before the disciplinary committee, the disciplinary panel did not exonerate the respondent from any blame; that the trial court erred in finding the disciplinary committee had exonerated the respondent from any wrongdoing; to this end, the judge arrived at a wrong conclusion of fact and law and erroneously determined the appellant had no valid and existing reason to terminate the respondent's contract of employment.

## **RESPONDENT'S SUBMISSIONS**

11. In opposing this appeal, it was urged that the trial court correctly found the respondent was subjected to a disciplinary panel hearing on 25<sup>th</sup> March 2013 whereupon her suspension was lifted on 28<sup>th</sup> March 2013. The respondent asserted that the lifting of her suspension was indication and expression that the allegations of misappropriation or complaint against her had been considered and she was exonerated from any blame; that upon such exoneration, it was not open to the appellant to use the same complaint and allegation to terminate her contract of employment.

12. Counsel submitted that the trial court properly held that there was no valid and existing reason for termination of employment and thus the termination was unlawful and unfair. Counsel urged us not to interfere with the findings of fact by the trial court; that pursuant to Section 49 of the Employment Act, the respondent was entitled to damages for unfair termination.

## **ANALYSIS and DETERMINATION**

13. We have considered the grounds of appeal as well as submissions by all counsel and authorities cited in the matter. Being the first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**).”

14. This appeal turns on two main issues: first, is whether the trial judge erred in evaluating the evidence on record thereby arriving at a wrong conclusion; second is whether the judge erred in law in awarding the maximum compensation for 12 months' salary as stipulated in Section 49 of the Employment Act.

15. It is the appellant's contestation that the judge erred in evaluating the evidence on record. More specifically, it is asserted that the learned

judge failed to consider the reasons for termination of the respondent's contract of employment stated in the letter dated 16<sup>th</sup> May 2013; the judge erred and arrived at an erroneous conclusion that the Board of Inquiry had exonerated the respondent from blame in relation to the alleged misappropriation of the sum of Ksh. 14,221,877/30.

16. The reason given for termination as per the appellant's letter dated 16<sup>th</sup> May 2013 is that the respondent "has reallocated and misappropriated Ksh 14,221,877/30 to undeserving customers' accounts which resulted to the appellant losing substantial revenue; that this was not only un-procedural but fraudulent to the appellant company."

17. We have examined the Minutes of the disciplinary hearing held on 25<sup>th</sup> March 2013 on the allegation against the respondent for misappropriation of the sum of Ksh. 14,221,877/30. The conclusions as captured in the Minutes do not expressly exonerate the respondent from any wrongdoing. The concluding remarks as per the Minutes is that the respondent stated she had "no reason to use reallocation money while she could as well have used Ksh. 2 million cash float that she handles on a daily basis." Of relevance to the assertion that the disciplinary process exonerated the respondent is the Minute that shows "the employee was asked to explain some reallocation made into her own accounts. She stated that those were not her accounts and that the accounts in question were in her landlord's name."

18. The trial court in considering whether the reasons given for termination of the respondent's contract of employment were genuine expressed itself as follows:

On 11. 2. 2013, the claimant received her notice to show cause letter and was expected within 72 hours to explain why disciplinary action could not be taken against her for misappropriating Ksh. 14,221,877.30. She made a reply on 14. 2. 2013. After her explanation she was called before a disciplinary panel on 25. 3. 2013.

After this (sic) disciplinary hearing, the claimant was served with a letter dated 28<sup>th</sup> March 201, lifting her suspension and was asked to report on duty with immediate effect...The lifting of the suspension was therefore related to the concluded disciplinary hearing which apparently exonerated the claimant from all blame.

The termination letter seems to go back to the same issues already addressed in the disciplinary hearing which culminated in the claimant's suspension being lifted. What then was the new thing that came up in May 2013 which caused the respondent to terminate the claimant. There seems to be no new thing or reason which could have warranted the termination of the claimant on 17. 05. 2013. This contravenes the provision of S.43 of the Employment Act 2007....

On the issue of due process, there was no new thing that cropped up after 25. 3. 2013. The process that the claimant was subjected to was concluded on 25. 3. 2013 thereby closing the chapter of the disciplinary process and also lifting her suspension on 28. 3. 2013. It is therefore apparent that terminating the claimant's services on 17. 5. 2013, was based on non-existent reasons and without subjecting her to due process.

19. We have considered the reasons given by the trial court for coming to the conclusion that the termination of the respondent's contract of employment was due to a non-existent reason. The record reveals that the allegation of misappropriation of the sum of Ksh. 14,221,877/30 was the subject matter of the disciplinary proceedings held on 25<sup>th</sup> March 2013. The lifting of the respondent's suspension from employment was after the disciplinary hearing. What would a reasonable person infer and conclude if suspension is lifted after a disciplinary process? In our considered view, a reasonable person would conclude that the allegations leading to suspension had been considered and the explanation given satisfactory. We find the lifting of the respondent's suspension by the appellant was an intimation that the allegations of misappropriation and reallocation of the sum of Ksh. 14,221,877/30 had been settled. To this end, we find that the trial court did not err in arriving at the conclusion that the appellant did not have any new or sufficient reason for termination of the respondent's contract of employment. In the absence of such reason, we find that the judge did not err in holding the termination was unfair.

20. We now consider whether the trial judge erred in awarding the respondent the maximum compensation of 12 months' salary as damages for unfair termination. In this matter, the respondent made a claim for compensation for salary until retirement. In **Kenya Ports Authority – v- Edward Otieno Civil Appeal No. 120 of 1997** it was stated that it was unreasonable for a claimant to believe that it was his/her entitlement and right to be employed during his/her whole working life; that such expectation has no basis in law as employment relationship is contractual and terminable under terms of the same contract. In both **Kenya Ports Authority -v- Silas Obengele, Mombasa Civil Appeal No. 38 of 2005** and **Kenya Revenue Authority -v- Menginya Salim Murgani, Nairobi Civil Appeal No. 108 of 2010** it was held that no damages are awardable for unlawful termination of contract before the age of retirement. In **Ethics & Anti-Corruption Commission -v- Nicholas Mwenda Mtwaruchiu & 8 Others, Civil Appeal No. 346 of 2014** it was stated that a claim for unpaid salary until retirement cannot be maintained in law.

21. In the instant appeal, the trial judge awarded the maximum 12 months' compensation as provided for in Section 49 (1) (c) of the Employment Act. In **CMC Aviation Limited –v- Mohammed Noor [2015] eKLR**, this Court expressed itself as follows on such awards;

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. (Emphasis added)

22. In **Ol Pejeta Ranching Limited -v - David Wanjau Muhoro [2017] eKLR**, this Court in considering whether a maximum award of 12 months' gross salary compensation was justifiable stated 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

aforsaid 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).

23. In this appeal, we have confirmed the finding that the respondent was unfairly terminated from employment. The learned judge did nothing at all to justify the award of 12 months' salary as damages. The question is what quantum of damages was appropriate? The law on the assessment of damages is well settled. In the case of **Peter M. Kariuki vs Attorney General [2014] eKLR** this Court stated in part: -

"The principles which guide an appellate court in this country in an appeal on award of damages are now well settled. In Kemfro Africa Ltd vs Lubia & Another, (No. 2) 1987 KLR 30, Kneller, JA identified the principles as follows:

"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 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 wholly erroneous estimate of the damage."

24. Later in **Johnson Evan Gicheru -vs- Andrew Morton & Another, CA No. 314 of 2000**, this Court reiterated the same principles in the following words:

"It is trite that this court will be disinclined to disturb the findings 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 it will generally be necessary 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 small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

25. In the **Elizabeth Wakanyi Kibe –v- Telkom Kenya Limited [2014] e-KLR**, this Court held that employees have the obligation to move on, and look for fresh employment after termination, and not sit back in the hope of enjoying anticipatory remuneration. Employment remedies must be proportionate, and employees must be discouraged from replicating employment wrongs and multiplying remedies. These principles were observed in **Industrial Court Cause [Nairobi] Number 611 [N] of 2009 between Maria Kagai Ligaga –v- Coca Cola East & Central Africa** [see also subsequent decision in **Civil Appeal between Coca Cola East & Central Africa Limited –v- Maria Kagai Ligaga [2015] e-KLR**]. It is now settled that employees are expected, under Section 49 (1) of the Employment Act, to reasonably mitigate their losses and not to expect compensation in the form of salary until retirement age.

26. Taking all factors into account and guided by the emerging jurisprudence, we are inclined to interfere with the judgement of the trial court. We hereby set aside the 12 months' salary awarded as damages for unfair termination and substitute in its place an award of 6 months' salary as damages.

27. Regarding the counterclaim lodged by the appellant, we have examined the record and agree with the trial court that the appellant did not lead any evidence to prove it.

28. The upshot is that this appeal succeeds in part partially. We vary the judgment of the trial court dated 12<sup>th</sup> January 2015 by setting aside the award of 12 months' salary as damages for unfair termination and substitute in its place an award of six months' salary as damages which comes to the sum of Ksh. 6 X 94,160 = 564,960/= less statutory deductions. All other orders of the trial court are affirmed and upheld. As the appeal is partially successful, each party is to bear its/her own costs in the appeal. It is so ordered.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of May, 2019.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**