IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 61 OF 2018

BETWEEN

THE CENTRAL BANK OF KENYA.....APPELLANT

AND

JAMES KABINGA KIBUGU….....1ST RESPONDENT

PAUL NGARI NGUGI….....….2ND RESPONDENT

(An Appeal from Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi ***(Hellen Wasilwa, J.)*** *dated 20th July, 2016*

in

ELRC Cause No. 470 OF 2015)

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JUDGMENT OF THE COURT

James Kabinga Kibugu "*the 1st respondent*" and **Paul Ngari Ngugi** "*the 2nd respondent*" instituted two separate suits in the High Court at Nairobi against the Central Bank of Kenya "*the appellant*" as **Nairobi Civil Cases No. 1899 of 1997** and **No. 1900 of 1997** respectively. Both suits were founded on similar facts, seeking similar reliefs and against the same defendant. The suits were for those reasons consolidated and heard together, ultimately culminating in the High Court's decision of 20th July 2016, from which this appeal emanates.

In their claims the respondents alleged that they had been in the employment of the appellant from 1974 when they were engaged as clerks and that they rose through the ranks to the position of supervisors, Foreign Exchange Department which position they held until the termination of their employment. Prior to their termination, they had been interdicted by the appellant on allegations of gross misconduct under Regulation 6.35 of the appellant's Staff Rules and Regulations.

In September 1994, the respondents were asked to show cause why disciplinary action should not be taken against them for gross misconduct. Their responses to the said notices were that there was no charge that could be made against them under Regulations 6.31 and 6.34. They claimed that no charge had been specified as required under Regulation 6.31 and that they had not been found guilty of the misconducts specified in Regulation 6.34. Regardless, the appellant in October 1994 informed the respondents that it had lost trust and confidence in them and proceeded to terminate their services on that ground.

It was then that the respondents mounted the suits giving rise to this appeal. They sued the appellant on grounds that its decision was biased, contrary to its Staff Rules and Regulations, and was in breach of the rules of natural justice. *Inter alia*, they sought special damages of Kshs. 9,235, 202.40 each comprising loss of salary, house and transport allowances.

In defence, the appellant denied that the respondents had been in its employ as alleged and stated that the respondents' contracts of employment were properly and lawfully terminated on 18th October 1994. It pointed out that the respondents had respectively filed **Miscellaneous Civil Suit No. 38 of 1995** and **Miscellaneous Civil Suit No. 1455 of 1994** against it on matters that were directly and substantially in issue in their present suits and therefore were *res judicata.*

Perhaps its opportune at this juncture to set out albeit briefly the facts leading to the two suits. In February 1994, the respondents were

arrested and questioned by police in connection with theft of surrendered foreign exchange bearer certificates. Based on the said allegation and pursuant to Regulation 6.35 of its Staff Rules and Regulations, the appellant interdicted them and subsequently charged them with gross misconduct. In September 1994, the appellant demanded that they show cause why appropriate disciplinary action ought not be taken against them.

The respondents maintained in their defence that they were not guilty of any misconduct nor had they been convicted of a criminal offence to warrant the invocation of the aforesaid staff rules and regulations. The appellant was nonetheless persuaded that the respondents' conduct was culpable on account of gross misconduct which led the appellant to lose confidence in them. It was on that basis that the appellant terminated the respondents' employment. The appellant was categorical that it had properly and lawfully exercised its right to terminate the respondents from its employment and denied that they had suffered loss or damage as claimed or that they were entitled to any terminal dues despite conceding that they had been employed on permanent and pensionable basis.

Following a full hearing and in a considered judgment, **Wasilwa, J**. found that the respondents' termination was unfair and unjustified and that they were entitled to their terminal dues. The learned Judge ordered damages in the sum of Kshs. 2 million be paid by the appellant to each respondent for breach of contract and further awarded them costs.

The appellant challenges those findings by way of this appeal on grounds that the learned Judge misapprehended or misapplied the law relating to the dispute; erroneously awarded damages for unlawful termination or breach of contract; misdirected herself in the interpretation of the appellants Staff Rules and Regulations and thus arrived at a wrong conclusion; the decision arrived at was not supported by evidence or the award of damages based on any known legal principles and finally that she failed to consider the appellants authorities tendered in support of its case.

The appeal was canvased by way of written submissions with limited oral highlights.

In its written submissions, the appellant concedes that at the time of their termination both respondents worked at its Foreign Exchange Department as supervisors. It reiterated that sometime in February 1994, the respondents were suspended following investigations into the reported loss of two bags of Forex Certificates. That on 1st March 1994, the respondents were summoned by police on the disappearance of the said Forex Cs, they recorded statements and were later released from police custody on 4th March 1994. On 9th June 1994, it sent the respondents' letters to show cause. According to the appellant, on the said date, the respondents were interdicted and that during the interdiction period they received half salary plus allowances. On 18th October 1994, their services were terminated on grounds that the appellant had lost trust and confidence in them and in accordance with its staff rules and regulations. It submitted that it paid the respondents withheld half salary during the time they were interdicted and a further 3 months' salary in lieu of termination notice.

The appellant submitted that the applicable law in resolving the dispute was **Employment Act Cap 226 (now repealed**) as opposed to the **Employment Act, 2007** since the cause of action arose in 1994 and the suits were filed in 1997. That as such, certain remedies that could have been available to the respondents under the current employment law regime were not available under the former Act or legal regime. The appellant, relying on the authority of **Mary Wakhabubi Wafula v British Airways PLC (2015) eKLR**, was categorical that the latter Act could not be invoked retrospectively unless there was a clear intention to that effect expressed by its framers. Further and on the same authority, it was submitted that the court only had jurisdiction to award the remedies available at the time, and in the present case, it was salary in lieu of notice.

In respect to the Judges award of Kshs. 2 million to each respondent as damages for breach of contract, the appellant argued that the applicable law to this dispute did not allow for such relief. Relying on their above cited case again, it argued that this Court had held that under the old regime, the only damages available to the respondents ought to have been salary in lieu of notice even where the dismissal was wrongful or unlawful. A plethora of this Court's previous decisions were cited to buttress the position, namely: - **Kenya Revenue Authority v Menginya Salim Murgani (2010) eKLR; Ombanya v Gailey & Roberts Limited (1974) EA 522; Githinji v Mumias Sugar Company Ltd, Civil Appeal No. 194 of 1991** (unreported) and **Kenya Commercial Bank v Omambia, Civil Appeal No. 166 of 1991** (ur). The appellant contended that having duly paid the respondents 3 months' salary in lieu of notice, half salary retained during interdiction and salary for leave days not taken, as required by its staff rules and regulations, the respondents were not entitled to any other damages.

In their joint written submissions, the respondents stated that the High Court had in Judicial Review Application No. 38 of 1995 and 1455 of 1994 (consolidated) found or held that the respondents' claim as against the appellant lay in breach of contract. That the appellant did not appeal against the said ruling. According to the respondents, the High Court had determined their claims based on the peculiar circumstance that the appellant dealt with the respondents' dishonestly by giving false reasons for their termination. They argued that the repealed law was applicable to their case but with the necessary modifications to bring it into conformity with the **Constitution of Kenya, 2010** and in particular **section 7 of the sixth schedule.** The respondents submitted that all laws immediately in force before the promulgation of the current Constitution continued to be in force but with necessary alterations or modifications to bring them into conformity with the Constitution. The respondents in essence were referring to Article **41** which enshrines the right to fair labour practices. They contended that in some instances, the retrospectivity of constitutional provisions may arise or is allowed. In their view, there is no basis for non-application of the Constitution 2010 to the circumstances of this case. Finally they submitted that the trial court was right in awarding the damages and there was no reason to warrant this Court to interfere with the discretion exercised by the High Court in awarding damages.

In his oral highlights, **Mr. Chacha Odera,** learned counsel for the appellant stated that the appellant was no longer challenging the High Court's findings on liability. The appellant was only now challenging the quantum of damages awarded. He submitted that the legal regime applicable to the dispute was as it existed in 1997. That the regime did not envisage an award of damages to an employee whose contract of employment was terminated. Rather the damages available to a wronged employee was salary in lieu of notice.

On his part, learned counsel for the respondents **Mr. Mwenesi** reiterated that the respondents were never heard or found guilty of misconduct. He submitted that the appellant's conduct was arbitrary and unconstitutional thus rendering the award of damages justifiable. He urged this Court not to interfere with the award of damages since there was no proper reason to do so.

The appellant, through its counsel has made it manifest that it is not contesting the finding of unfair termination of the respondents by the learned Judge. The appellant is only contesting the quantum of the damages awarded. An award of damages is an exercise in discretion by the trial Judge and so this Court will only interfere with such exercise of discretion upon certain well known guidelines.

In the case of **Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company advocates (2013) eKLR** this Court stated: -

> **"We agree that this court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. This is the general principle to be found in Rook v Rairrie [1941]1AII E.R. 297. This principle was adopted with approval by this Court in Butt v Khan [1981] KLR 349 where it was held per Law, JA:**
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> ***"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."***

In this appeal, the appellant's core contention is that the legal regime applicable in resolving the dispute did not provide for an award of damages for breach of employment contract. It submits that when the cause of action arose, the law on employment matters was principally governed by the repealed Employment Act which did not provide or envisage an award of damages to an employee who had been terminated. According to the appellant the applicable provision was section 16 of the Act which provided *inter alia*:-

> **"Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.**" (Emphasis added)

Subsection (5) is to the effect that;

> **"(5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be-**
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> **(i) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;**
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> **(ii) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing;**
>
> **(iii) where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing:**
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> **Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.**"

In this appeal, the appellant maintains that it had the legal right to terminate the respondents' employment even without affording them reasons as long as it paid them salary in lieu of notice, the equivalent of the termination period which in the present case was 3 months, which it did. To fortify its position, the appellant cited several of this Court's previous decisions on the issue. In **Kenya Commercial Bank Ltd v Jackson O. Omambia, Civil Appeal No. 166 of 1991 (ur)**, for instance, the High Court had awarded the respondent general damages equivalent to 12 months' salary for unwarranted dismissal. In reversing the decision, this Court stated as follows;

> "**With greatest respect the above finding bristles with violent misdirection. Firstly, there existed the termination clause of one moth notice or one month's salary in lieu thereof of either party. It follows therefore, that the respondent was entitled to one months' salary following his wrongful dismissal by the appellant and no more. If the appellant had paid the respondent one month's salary and dispensed with his services forthwith, the respondent would have had no cause of action**…"

In **Ombanya v Gailey Roberts Ltd (1974) EA 522**, this Court stated,

> **"…it is established that where a person is employed and one of his terms of employment included a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current. In the instant case, the Plaintiff would have been legally dismissed by one month's notice and the defendant could have dispensed with his services on that period of notice. In this respect, the Plaintiff would have no cause of action."**

In a more recent case, this Court restated the principle in the case of **Kenya Revenue Authority v Menginya Salim Murgani** (supra) that even where the dismissal or termination was wrongful, the damages payable to the employee is the salary which would have been paid in lieu of notice. Although some of the authorities cited above were referred to in the High Court, the Judge ignored them for no apparent reason. Instead, she hinged her decision on the fact that the reasons given by the appellant for the respondents' termination were not genuine. The

Judge then held that "*as found in the Misc Appl. 38/95 and 1455/94 (consolidated) the Claimants are entitled to a remedy for breach of contract.*" This was a wrong approach. This statement did not give the learned Judge a carte blanche to ignore settled law and award damages from the air and where none are payable. All that the learned judge should have done was to comply with law applicable and the authorities cited to her.

In any event this Court has previously held that general damages are not normally awardable for breach of contract and the Judge therefore erred in awarding the same. Just recently, this Court buttressed the position in **Kenya Tourist Development Corporation V Sundowner Lodge Limited [2018] eKLR** when it observed that;

> **"…as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR. The same situation applies to the case at par in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.**
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> **Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages."**

The damages for breach of contract awarded to the respondents by the leaned judge were therefore untenable. The only remedy available to the respondents was as stipulated under section 16 of the repealed Employment Act. The respondents were entitled to salary for the 3 months' in lieu of notice. The appellant duly paid the respondents the 3 months' salary in lieu of notice. The respondents have not disputed this fact. In fact, they have conceded that much.

Probably upon the realization that the repealed employment law could not come to their aid or was limited in its reliefs, the respondents have in this appeal sought to exercise the protection provided under Article 41 of the Constitution 2010 which enshrines the right to fair labour practices. Despite their cause of action having arisen way before the promulgation of the Constitution on 27th August 2010, the respondents have urged that some aspects of it applied retrospectively by dint of section 7 of the sixth schedule. The provision provides that all laws immediately in force before the promulgation of the current Constitution would continue to be in force but with necessary alterations or modifications so as to bring them into conformity with the Constitution. It is apparent that under the Constitution or current employment law, the circumstances leading to the respondents' termination would have been unfair and therefore entitling the respondents to damages. They contend that in some instances, the retrospectivity of constitutional provisions may arise or is allowed.

Not only was that point never canvassed before the High Court, but again the same is untenable. The respondent did not make a case to satisfy the Court in our view how Article **41** should apply retrospectively to the circumstances of this case. In any event, the issue appears to have been settled in the case of **Mary Wakhabubi Wafula v British Airways PLC (2015) eKLR** when this Court stated;

> **"We have already stated in this judgment that the contract of employment was made in 1989 while the suit was filed in 2001. The remedies that were available to employees who suffered wrongful dismissal or unfair termination before the year 2007 were clearly set out in the repealed Employment Act, Cap 226 and the repealed Trade Disputes Act, Cap 234, Laws of Kenya……. All that said, then, is to say that this Court only has jurisdiction to award the remedies available at the time of the wrongful dismissal or unfair termination, that is, when the cause of action arose. These are the remedies that are provided for under the repealed Employment Act, Cap 226, Laws of Kenya and the repealed Trade Dispute Act, Cap 234, Laws of Kenya.**"

The respondents cannot therefore seek to exercise non-existent law as at the time when their cause of action arose as the appellant and indeed other parties legitimately expect it ought to be. A party cannot be expected to abide by laws that were non-existent at the time of engagement with the other. The respondents' remedies were limited to the reliefs available to them as per the prevailing law when they were terminated.

The respondents were duly paid three months' salary in lieu of notice period, and that is all that they were entitled to. The learned judge therefore erred in awarding Kshs. 2 million as damages to each of the respondents. It is obvious therefore that the judge misdirected herself on the law, and the decision albeit discretionary, was plainly wrong thereby inviting our intervention.

The upshot is that the appeal has merit and is allowed. The judgment and decree dated 20th July, 2016 together with consequential orders are set aside. There shall be no order as to costs.

Dated and delivered at Nairobi this 7th day of June, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR