



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & WARSAME JJA)

CIVIL APPEAL NO. 352 OF 2017

BETWEEN

KENYA BROADCASTING CORPORATION.....APPELLANT

VERSUS

GEOFFREY WAKIO.....RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Nduma, J.) dated 9th May 2014 and 4th December 2014

in

Industrial Cause No 565 of 2012)

JUDGEMENT OF THE COURT

[1] By a statement of claim dated 3rd April 2012, the respondent herein GEOFFREY MWAKIO, filed a suit in the Employment and Labour Relations Court at Nairobi seeking orders for:

- (i) a declaration that the interdiction and subsequent dismissal was unlawful;***
- (ii) payment of half (1/2) salary for the period of interdiction;***
- (iii) reinstatement with full payment of salary arrears; or***
- (iii) Compensation for the unlawful and unfair termination of employment.***

[2] The respondent was employed by the appellant, a corporate body, on 22nd January 1985 in the position of Assistant Inspector (Electronics). He served the corporation for a period of about 20 years during which time he was promoted to Senior Inspector, then to senior superintendent. On 6th October 2005 he was arrested on allegations that he, together with 10 others, had colluded to defraud the appellant.

[3] In a letter dated 6th December 2005 the respondent was placed on interdiction and put on half (1/2) pay until the criminal case was concluded. As it happens, payment of half salary was only made up to 21st June 2006 when the respondent's employment was terminated citing 'loss of confidence' by the appellant.

[4] The respondent was subsequently acquitted of the fraud charges on 11th November 2011 whereupon he filed the claim for unfair termination. The trial Judge found the respondent's testimony credible and that the appellant did not place any evidence before the court to show that the respondent was guilty of fraudulent conduct that warranted the dismissal. Therefore, the learned Judge held that the termination of employment had been unfair under the provisions of **section 43(1)** of the Employment Act 2007.

[5] In the pertinent paragraph, the learned Judge stated thus:

“The dismissal on 21st June 2006 was unlawful and unfair taking all the circumstances of the case into account and the court, in view of the immense loss suffered by the claimant including having to persevere lengthy criminal trial in which he was fully exonerated from any wrong doing based on the evidence of the Principal Internal Auditor of the respondent, the claimant fully deserves to go back to his employment.

However, a lot of time has elapsed since the dismissal took place and it is impractical in the court’s view to reinstate the claimant back to his position since a lot may have changed at the respondent’s work place. It is the court’s considered view that the limited maximum compensation of 12 month’s salary is inadequate to mitigate the loss and damage the claimant has undergone pursuant to the unlawful and unfair action by the respondent.

The court, in the circumstances, awards the claimant general damages in lieu of reinstatement which I assess at Ksh.3 million. The respondent has however, in the alternative, the option of re-engaging the claimant to his previous job or to any other suitable position within 30 days from the date of this judgment and in addition pay twelve (12) month’s salary in the sum of Ksh.311,604 being compensation for the unlawful dismissal. If the claimant is not re-engaged within the stipulated 30 days then this alternative remedy shall abate and the respondent shall pay the Ksh. 3 million general damages to the claimant as directed above.”

[6] The awards as reflected in the decree were particularized as follows:

(i) salary arrears for the period he was under interdiction from 6th December 2005 to 11th November 2011 in the sum of Ksh.3,525,863.50;

(ii) general damages in lieu of reinstatement in the sum of Ksh.3,000,000; and;

(iii) 12 month’s salary amounting to Ksh.311,604.

[7] The learned Judge directed the respondent to compute the award granted to him and serve the appellant, who then was to confirm the computation within 14 days and notify the court for it to consider and finalize the matter. The respondent computed salary arrears from 2005 to 2014 amounting to Ksh. 6,290,063.50 The appellant did not comply with the order of the court to confirm the computation and the court went ahead to enter judgment on quantum dated 4th December 2014 based on the respondent’s computation of salary arrears for the period of interdiction from 6th December 2005 to 11th November 2011, a sum of Ksh.3,525,863.50.

[8] The appellant was ordered to pay the respondent a total sum of Ksh 6,525,863 being salary arrears of Ksh.3,525,863 and general damages Ksh 3,000,000 together with interest at court rates, from the date of the judgment until payment in full. The appellant was also ordered to pay the costs of the suit and to provide the respondent with a certificate of service within 30 days of the judgment.

[9] Dissatisfied with the ruling on quantum, the appellant filed a notice of appeal on 10th December 2014 followed by an application dated 13th January 2015 for stay of execution of the judgment on quantum pending determination of the appeal. The application was supported by an affidavit by one **Paul Jilani**, the appellant’s Company Secretary who contended that the respondent was only entitled to compensation to the extent prescribed by the Employment Act. He urged that payment of the award of Ksh 6,525,863 would severely affect the appellant’s operations.

[10] The respondent opposed the application for stay and filed a notice of motion dated 12th November 2015 seeking orders that the appellant deposit the balance of the decretal sum of Ksh.3,525,863 together with interest as security. The court (**Nduma, J**) dismissed the respondent’s application allowing the appellants file a memorandum of appeal dated 10th October 2017. The memorandum raising two main issues;

(i) that the award was excessive and unjustified; and

(ii) That the learned Judge had issued two judgments on the same matter which was against the law.

[11] When the matter was heard before this Court, **Mr. Saende**, learned counsel for the appellant, relied on the written submissions and list of authorities dated on 5th October 2018. The respondent did not file written submissions and **Mr. Ogeto** learned counsel for the respondent, relied fully on the list of authorities filed on 17th September, 2019.

[12] It was submitted for the appellant, first, that the appellant was not contesting the ruling on unfair dismissal, but the award of damages which was excessive and unjustified. To augment their argument, the Court was referred to the cases of **George Onyango Akuti vs. G4S Security Services Ltd [2013] eKLR**, and **Joseph Njogu Kamunge vs. Charles Muriuki Gachari [2016] eKLR** ,in support of the assertion that general damages are not awarded for wrongful termination but are an exercise of the trial court’s discretion which should be applied reasonably. Secondly, it was contended that **section 49** of the Employment Act does not have provision for general damages in instances of unfair termination; that the employment

relationship terminated on 12th June 2006 therefore, the respondent should only be remunerated for the period he was on duty. Cited were the cases of *Timon Otieno Mboga vs. Kenya Forest Service [2015] eKLR* and *Shedd Dennies Simotwo vs. Speaker, Narok County Assembly & Another [2015] eKLR* and *James Mugeru Igati vs. Public Service Commission [2014] eKLR* in support of their submission that the interdiction period was lawful and the respondent was only entitled to salary arrears for the period he was interdicted. It was counsel's prayer that the appeal be allowed.

[13] Opposing the appeal, **Mr. Ogeto** made oral submissions arguing that the respondent's claim was for salary arrears and that the award of damages was made at the court's discretion; that the discretion did not limit the court to award the 12 months compensation prescribed under **section 49** of the Employment Act; that although the claim did not specifically plead for damages, the Anti-corruption and Economic Crimes Act gives provision that a person must be retained on ½ pay during interdiction in addition to the 12 months compensation for unlawful dismissal. Reference was made to the cases of *Robi Stephen Nyamohanga vs. Judicial Service Commission [2017] eKLR*; *Omar Bakari Hanzi & 5 others vs. The County Government of Mombasa, The Mombasa County Public Service Board [2018] eKLR* and *Peter M. Kariuki vs Attorney General [2014] eKLR* in support of the submission that the award was merited. Counsel prayed that the appeal be dismissed.

[14] Developing the appellant's argument further, **Mr. Saende** submitted that a disciplinary decision can only be initiated after the completion of a criminal case; that an acquittal does not automatically render an employee immune to disciplinary action; that **section 49 (4) (m)** does not apply to this matter since an award under **section 49(1) (c)** had been made; and that the trial court awarded what was not pleaded.

[15] As the first appellate court, it is our duty to reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial Judge are consistent with the evidence. (See *Sanitam Services (EA) Ltd. vs. Rentokil [2006] 2 KLR 70*).

[16] We have carefully considered the judgment of the trial court, the record of proceedings, the submissions by learned counsel both written and oral, as well as the authorities from different jurisdictions that were presented to us. We find the issue for our determination is whether the learned Judge, in exercise of judicial discretion, made an award that was so grossly excessive as to be a misdirection in law, justifying our interference.

[17] The law on when an appellate court can interfere with an award of damages is firmly established. General damages are awarded if the claimant establishes in principle his legal entitlement to them, and a trial Judge must make his own assessment of the *quantum* of such general damages. In order to justify reversing the award of damages, this Court must be convinced that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (See *Rook vs. Rairre [1941] 1 ALL ER 297*).

[18] This principle was aptly stated in *Butt vs. Khan [1981] KLR 349* as follows;

“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”.

(See generally *Southern Engineering Company Ltd vs. Mutia [1985] eKLR*; *Kenfro Africa Ltd t/a Meru Express Services vs. Lubia & Another (No 2) [1985] eKLR* and *Gicheru vs. Morton & Another (2005) 2 KLR 333*)

[19] The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal. The appellant's main complaint is that the respondent was awarded damages over and beyond what is prescribed under **section 49 of the Employment Act**.

[20] On the conclusion that the respondent was unfairly terminated from his employment, **section 49** grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case. This is made clear by **section 49 (4)** which sets out some 13 considerations which the trial court must take into account before determining what

remedy is appropriate in each case. Those considerations include, *inter alia*, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement or re-engagement.

[21] In the instant matter, the trial Judge was of the opinion that reinstatement was impractical and instead awarded the equivalent of 12 months' salary as compensation under **section 49 (1) (c)** which provides for '*the equivalent to a number of months wages or salary not exceeding 12 months based on gross monthly wage or salary of the employee at the time of dismissal or termination*'..

[22] This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Oi Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR* this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.

[23] The learned Judge explained that the award of 12 months gross salary was in consideration of the immense loss suffered by the respondent during the long criminal trial, the blatant disregard for fair labour practices by the appellant and the impracticality of reinstatement. In his judgment, the learned Judge concluded that reinstatement was impractical due to the long period that had passed since the dismissal.

[24] We agree with this reasoning as practicability is one of the factors to be considered when determining whether or not to order reinstatement. (See *Kenya Airways Ltd vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*). From the record, the respondent's efforts to be reinstated were frustrated for a long time. It was not until judgment was entered in his favor that the appellant decided to reinstate the respondent. By then, the relationship was beyond repair and the respondent had already suffered much mental and financial damage. Therefore, we find that the discretion to award maximum compensation of 12 months' pay was judicially exercised and will not interfere with the same.

[25] We now come to the award of Ksh.3,000,000 being general damages in lieu of reinstatement. It is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice.(See *Alfred Githinji vs. Mumias Sugar Company Ltd Civil Appeal No 194 of 1991*).

[26] In the case of *Central Bank of Kenya vs. Julius Nkonge [2002] eKLR* this Court held that the trial Judge had erred by computing damages beyond the notice period. It was the Court's view that on the assumption that the respondent's dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of notice, namely, three months, and that the trial Judge erred in awarding him more.

[27] Similarly, in *CMC Aviation Limited vs. Mohammed Noor [2015] eKLR*, this Court held that despite a finding of unfair termination of employment, the fact that the employment contract was terminable by one month's notice meant an award of one month's salary in lieu of notice was reasonable compensation.

[28] In this instance, the learned Judge concluded that the award of 12 months' salary was inadequate to mitigate the loss and damage suffered by the respondent. There is no doubt that the accusations of fraud caused irrevocable damage to the respondent's career and reputation. However, in light of the fact that the respondent was awarded the maximum compensation possible under **section 49(1) (c)**, we find no legal justification to award a further sum in form of damages.

[29] One of the guiding principles for the remedies under **section 49** is that they are awarded to compensate the claimant, not as punishment to the employer. (See *Jephtar & Sons Construction & Engineering Works Ltd vs. The Attorney General HCT-00-CV-CS-0699-2006; Mosisili vs. Editor Miller Newspapers CIV/T/275/2001*) This is based on the principle of "*restitutio in integrum*" which means that the injured party has to be restored as nearly as possible to a position he or she would have been in had the injury not occurred. (See *Mawenzi Investments Ltd vs. Top Finance Co. Ltd & Another HCCS No. 02 OF 2013*).

[30] It is our view that the respondent's legal entitlement for unlawful termination of employment

was six (6) months' salary in lieu of notice. We find that in awarding the respondent the sum of Kshs.3 million as general damages, the trial Judge acted contrary to the principles concerning wrongful dismissal as set down in ***Central Bank of Kenya vs. Julius Nkonge (supra)*** and ***CMC Aviation vs. Mohamed Noor (supra)*** and contrary to provisions of **section 49** of the Employment Act.

[31] This brings us to the award of salary arrears for the period the respondent was under interdiction. This is the crux of the appellant's grievance; what was the actual period of interdiction? The appellants filed an application seeking interpretation of the judgment delivered on 9th May 2014. In their memorandum, the learned Judge was faulted for being ambiguous and his judgment lacking finality; that by issuing further orders for monetary compensation, the learned Judge was essentially acting *functus officio*, contrary to the law.

[32] This Court in ***Telkom Kenya Limited v John Ochanda (Suing On his own behalf and on behalf of 996 former Employees of Telkom Kenya Limited) [2014] eKLR*** defined the term *functus officio* as follows:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.”

[33] In ***Raila Odinga & 5 Others vs. Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR***, the Supreme Court cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, ***“The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832*** which reads: -

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

[34] Under **Order 21 Rule 3 (3)** of the Civil Procedure Rules, a judgment once drawn up, issued and entered cannot afterwards be altered or added to, save as provided by **section 99** of the Civil procedure Act which allows correction of a judgment only where there are clerical or arithmetic mistakes; or errors arising therein from an accidental slip or omission. The law only allows the corrections of mistakes, errors or slips, but not merit-based decisional re-engagement with the case (see ***Telkom Kenya Ltd vs. John Ochanda (supra)***).

[35] To sum up, a court is *functus* when the proceedings are fully concluded and the judgment or order has been perfected. This, however, does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court including any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court. (See ***Bellevue Development Company Limited vs Vinayak Builders Limited & Another [2014] eKLR***).

[36] In our view, the judgment of 4th December 2014 was null and void as the court had already dispensed with the merits of the case and made its orders in the judgment dated 9th May 2014.

[37] As was rightly held by the trial Judge, the respondent was dismissed on 21st June, 2006 thereafter what he would be entitled to is remedies prescribed under **section 49** for unlawful and unfair termination, if it is proved.

[38] Now that we have taken that position, the upshot of our consideration of the record of appeal, the submissions by learned counsel and the relevant law is that this appeal is meritorious and partly succeeds. In the result, we set aside the award of general damages of Ksh.3 million and order that the appellant shall pay the respondent 12 months' salary as compensation for the unfair termination taking into account the respondent's length of service, the failure to reinstate the respondent.

[39] In addition the appellant shall pay salary arrears, if not paid, from 6th December, 2005 to 21st June, 2006; that was when the respondent's relationship and status ended with the appellant. Thereafter there was no employer/employee relationship, as he was terminated from his engagement. Therefore between the dates aforementioned, the respondent is entitled to his half salary that was withheld. It is therefore incorrect for the trial court to have said that the respondent was entitled to salary after his dismissal on June, 2006.

[40] In conclusion therefore the appeal succeeds to the extent stated herein above. We order each party to bear own costs in

this appeal.

Orders accordingly.

Dated at Nairobi this 20th day of December, 2019

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E. M. GITHINJI

JUDGE OF APPEAL

.....

W. KARANJA

JUDGE OF APPEAL

.....

M. WARSAME

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR