IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WAKI, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 1 OF 2017

BETWEEN

ALBA PETROLEUM LIMITED.....APPELLANT

AND

JACKSON KIVILU.....RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Makau, J.) dated 14th September, 2015

in

E.L.R.C Cause No. 156 of 2015.)

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JUDGMENT OF THE COURT

[1] This is an appeal against the decision of the Employment and Labour Relations Court (ELRC) wherein the learned trial Judge found the respondent's services had been unlawfully terminated and awarded him 12 months' salary as compensation. A brief background is that Jackson Kivilu (deceased) who died during the pendency of this appeal and was substituted by the administrator of his estate, Mary Musangi Kivilu (the respondent), was employed by Alba Petroleum Limited (the appellant) in its operations department from September, 1996 until 1st October, 2013 when his services were terminated. At the time of his termination he was earning a gross salary of Kshs.134,848. His duties included fuelling boats at the Port of Mombasa as well as supervising members of staff under him.

[2] According to the respondent, he performed his duties diligently and never received any complaint from the appellant. This is why the warning letter dated 8th May, 2013 was received in utter surprise as it stated:-

> ***"RE: LOW PRODUCTIVITY***
>
> ***This is an official written reprimand to inform you of the management's great concern with your continuous deprived*** *(sic)* ***performance which impacts adversely on the company productivity.***
>
> ***Please be advised accordingly; with the capacity and capability the company has entrusted on your*** *(sic)****, it's under your jurisdiction to ensure you are attuned with your roles demand. Your action or omissions by large*** *(sic)* ***disregards your employment provisions thus entitling the company to take stern corrective measures against you.***
>
> ***At this point, rather than taking a severe disciplinary action against you, we are issuing you with a warning letter. We shall monitor your conduct and performance from time to time to ensure compliance and conformity with the company expectation. Any negative report henceforth on your part shall result to even more severe disciplinary action taken against you."***

In addition, the respondent claimed he was not aware of the particulars of the shortcomings alluded to in the said letter hence ~~it~~ he approached the appellant's Managing Director for clarification which was never given.

[3] A few months later on 1st October, 2013 the respondent's services were terminated and he was paid all his terminal dues under the contract of employment. However, he felt that his services were terminated unfairly thus he filed suit before the **ELRC** seeking maximum compensation under ***Section 49 (1) (c)*** of the ***Employment Act*** for the unfair dismissal.

[4] In response, the appellant maintained the respondent's performance was below par and it had negatively affected its production. Beatrice Ooko the then Human Resource Manager of the appellant, testified that the respondent had failed on several occasions to file returns or submit daily worksheets hence facilitating the theft of the appellant's property by the junior staff under his supervision. Prior to the warning letter herein above stated, the appellant had received numerous verbal warnings concerning his substandard performance. The appellant went as far as calling upon him to give an explanation to the Human Resource Department why his performance was deteriorating. Ultimately, the respondent was issued with the written warning letter but refused to improve leaving the appellant with no choice but to dismiss him.

[5] After weighing the evidence on record the learned Judge (Makau, J.) in a judgment dated 14th September, 2015 found that the respondent was unfairly terminated and granted him 12 months' salary as compensation. It is this decision that has provoked the appeal before this Court which is predicated on the grounds that the learned Judge erred in law and fact by:-

i. Disregarding the sums paid out by the appellant as per the contract between the parties.

ii. Finding that the respondent had not been heard prior to his termination.

iii. Finding that the appellant had not proved that the dismissal of the respondent was lawful.

iv. Awarding an inordinately high sum and/or maximum awardable sum as to represent an entirely erroneous estimate.

[6] The appeal was prosecuted by way of written submissions as well as oral highlights. There was no appearance for the appellant though there were written submissions filed on its behalf which we shall consider. Mr. Nyange appeared for the respondent. It was the appellant's position that the import and meaning of the warning letter dated 8th May, 2013 and the consequences thereof were never in doubt. As far as it was concerned, it met the procedural requirements under ***Section 41*** of the ***Employment Act*** through the warning letter which acted as the notice required under the said provisions. By failing to respond to the letter the respondent waived its right to be heard prior to his termination. In any event, the respondent was given adequate time to improve his performance which he failed to do. The reasons for his termination, *to wit*, substandard performance and theft of fuel under his watch constituted gross misconduct on his part warranting his dismissal.

[7] The appellant contended that even assuming that the respondent's termination was unfair, which it was not, the damages awarded were inordinately high. The learned Judge was faulted for not taking into consideration that the respondent had been paid his terminal dues in line with his contract of employment. It is on these grounds that the appellant urged that the appeal be allowed.

[8] On his part, Mr. Nyange began by submitting that the appellant in its pleadings and submissions before the trial court admitted that the elaborate procedure under ***Section 41*** of the ***Employment Act*** was never followed. Elaborating further, he referred to this Court's decision in ***Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR*** wherein he claimed that the Court never did away with oral hearing in disciplinary actions. Rather the Court stated that whether an oral hearing is necessary depends on the circumstances of each case. In this case the appellant never demonstrated that an oral hearing was impossible. He supported the learned Judge's findings that the appellant had not proved that the reasons for the respondent's termination were valid. Arguing that there is no reason for us to disturb the quantum of damages, Mr, Nyange stated that the learned Judge correctly took into account that the respondent was 60 years old and he had worked for the appellant for a period of 20 years.

[9] The primary role of the Court as the first appellate court is, to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In doing so the Court ought to be cognisant that it neither saw nor heard the witnesses testify and give due consideration of the same. See ***Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212.***

Whenever an issue of wrongful or unfair dismissal arises the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness. See ***Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR.***

[10] Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing. The right to a fair hearing is encapsulated in the *audi alteram partem rule* (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is this right that is safeguarded under ***Section 41*** of the ***Employment Act*** which stipulates: -

"41

1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

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

[11] It is clear from the warning letter set out herein above that the allegations thereunder are couched in a general manner. It is not clear if the respondent was ever given particulars of the general allegations and that is why he sought clarification from the Managing Director. This Court in ***County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR*** stated what a proper,notice should contain the following: -

> ***"Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary."*** Emphasis added.

[12] It is common ground that the respondent was never given a hearing prior to his termination. In as much as the appellant claims that he was given such a hearing through the warning letter but refused and/or neglected to respond, it is clear that the letter never invited the respondent to respond. Moreover, there was no evidence that the respondent had been asked to give explanation for his alleged poor performance. It is peculiar for such an institution as the appellant not to record minutes of disciplinary hearings as suggested by its then Human Resource manager. As it stood the evidence did not satisfactorily prove the allegations against the respondent. It was the respondent's uncontroverted evidence that the appellant had not set performance targets for him and no performance appraisal had ever been conducted. So what was the basis of gauging the performance of the respondent?

[13] As a result, the appellant failed to prove that the reason for the respondent's dismissal was valid as required under ***Section 45(2)*** of the ***Employment Act***. Lastly on the issue of assessment of damages we make reference to a statement made by; Kneller J.A in ***Kemro Africa Ltd. vs. Lubia & Another (No.2) 1987 KLR 30*** while discussing instances when an appellate court can interfere with quantum of,damages stated in his own words that:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the 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 damages."***

[14] Having concluded, as we have, that the termination of the respondent was not done according to the laid down procedure, the last issue to determine is whether the learned Judge erred by awarding 12 months' being the maximum compensation without considering laid down principles on assessment of damages. The learned Judge was faulted for not giving reasons for awarding the maximum compensation which was very high under **Section 49(1) (c)** of the **Employment Act**; for failing to consider all other terminal dues were duly paid and for not following decided cases or the principles of *stare decisis*. In this regard we make reference to the case of:- ***United States International University vs. Eric Rading Outa [2016] eKLR*** where this Court observed-

> ***"In the instant appeal the learned trial judge gave a maximum award of 12 months' salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made.***
>
> ***Although we have found, like the learned judge, that the appellants' termination of the respondents employment was wrongful, we find, on our own consideration of the matter, that the learned judge erred in making a maximum award. He did not assign any reason for doing so and in the event he fell into error by not considering any or any relevant factor that should have guided him to make an award of compensation for wrongful termination of employment."***

[15] In this case, reasons given by the learned Judge for the maximum award were that the appellant was of an advanced age of 60 years and there was no possibility of securing another employment and the fact that he had served the appellant for 27 years with no gratuity or pension. We agree with the appellant this reasoning does not support a maximum award because at the age of 60 years, indeed every average employee is bound to retire this being the general age of retirement; secondly, the Judge considered extraneous matters of pension and gratuity which were not part of the contract and overlooked the fact that all other terminal dues as per the contract of employment were settled and the appellant was only found to have flouted the procedure of termination.

[16] In this regard therefore this appeal ought to succeed in part to the extent that the maximum award of damages for unfair termination is hereby set aside and substituted with an award of 6 months being damages for wrongful termination and thus translating to an award of **Ksh.809,076** subject to statutory deductions. Interest shall accrue from the date of the trial court's judgment. In view of the orders granted, and this being an employment relationship, we do not wish to set these parties against each other any further. We order that each party shall bear their own costs of this appeal but the appellant shall bear the costs of the High Court proceedings as ordered.

Dated and delivered at Mombasa this 25th Day of January, 2018.

P.N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR