



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KOOME & M'INOTI, JJ.A)**

**CIVIL APPEAL NO. 106 OF 2017 BETWEEN**

**REGENT MANAGEMENT LIMITED.....APPELLANT**

**AND**

**WILBERFORCE OJIAMBO OUNDO.....RESPONDENT**

*(An appeal from the award of the Employment and Labour Relations*

*Court at Nairobi (Ndolo, J.) dated 2<sup>nd</sup> December, 2013*

*in*

***Industrial Cause No. 200 of 2011)***

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**JUDGMENT OF THE COURT**

1. Pursuant to **Section 35(4)** of the **Employment Act** every employee whose services have been terminated has the right to dispute the lawfulness or fairness of his/her termination. This is exactly what **Wilberforce Ojiambo Oundo** (the respondent) did following the termination of his services by **Regent Management Limited** (the appellant) on 22<sup>nd</sup> November, 2010.

2. The respondent was employed by the appellant on 15<sup>th</sup> August, 1999 as a property manager and rose in ranks to become Chief Executive Officer (CEO) earning a gross monthly salary of Kshs.331, 310. In addition, he was a director of a number of the appellant's subsidiaries. At the time of his termination he was serving a three year contract which commenced from 1<sup>st</sup> January, 2008 and was to end on 31<sup>st</sup> December, 2010. According to the respondent, his woes begun when he turned down several unethical requests by the then Chairman of the appellant's Board of Directors, one Chris Kisire.

3. On 17<sup>th</sup> August, 2010 the Chairman summoned him to his office and tried to pressurize him into signing documents transferring his shares in the subsidiary companies to unknown persons and a letter of resignation. When he declined to do so, the Chairman called two officers from the Criminal Investigation Department (CID) who were on standby and he was arrested. The officers informed him he was being investigated for an alleged loss of Kshs.5,000,000. He was also served with a suspension letter of even date which read in part as follows: -

***“The attention of the Board has been drawn to certain financial anomalies in the company***

***which have been transacted contrary to procedure and company policies. The flouting of the internal financial controls has the effect of exposing the company to financial loss and or damage which may result in third party claims. As the Chief Executive Officer it is your duty to ensure that proper controls are put in place.***

***The above anomalies touch on your office and the Board has decided to suspend you forthwith from the date of this letter for a period of 30 days to enable thorough investigations to be carried out...***

4. It appears that after the respondent's suspension, the appellant engaged Kimaru Kerrets & Company on 31<sup>st</sup> August, 2010 to carry out a forensic audit investigation into the loss of the amount in question. The mandate of the said auditors was set out in the resulting forensic audit report as-

***"We were appointed on 31<sup>st</sup> August, 2010 to carry out an investigation on irregular payments that may have been made from client account by the former Chief Executive Officer and the Chief Accountant... we were authorized to start the investigation from 1<sup>st</sup> January, 2008 to 31<sup>st</sup> July, 2010." Emphasis added.***

5. Subsequently, when the suspension period was drawing to a close and the respondent had not received any further communication, he sought directions from the appellant vide a letter dated 14<sup>th</sup> September, 2010. In response, the appellant by letter of even date issued the respondent with a notice to show cause why disciplinary action should not to be taken against him for gross misconduct. The relevant portion thereof stated-

***"Following your suspension from duty and the ongoing investigation into the loss of company assets, you are hereby given 14 days from the date of this letter to show cause why disciplinary action should not be taken against you on the following ground:***

***There are indications that company procedures, internal controls and processes that were flouted and or breached through your commission, omission and/or negligence of your duty as the CEO of the company....***

***The Board requires you to show cause by 29<sup>th</sup> October, 2010 at 2:00 p.m. ... why disciplinary action for gross misconduct should not be taken against you."***

6. Perhaps due to the general terms of the notice to show cause, the respondent vide a letter dated 28<sup>th</sup> September, 2010 sought further particulars of the charges leveled against him. In turn, the appellant supplied the respondent with a long list of charges comprising of nine main charges and over 20 sub-charges. The appellant also informed the respondent that a disciplinary hearing would be conducted on 29<sup>th</sup> September, 2010. However, the hearing did not take place as scheduled and was adjourned at the instance of the respondent who claimed he had neither been supplied with requisite documents which the appellant intended to rely on nor given adequate time to prepare his defence.

7. Thereafter, by a letter dated 1<sup>st</sup> November, 2010 the appellant gave notice to the respondent that the disciplinary hearing was rescheduled for the 8<sup>th</sup> of November, 2010. The documents which he had earlier sought would be available for his perusal at the Chairman's office on 3<sup>rd</sup> November, 2010 from 8:00 a.m. to 5:00 p.m. and during the hearing. The respondent was not happy with this arrangement and by a letter dated 4<sup>th</sup> November, 2010 he expressed that he would not attend the disciplinary hearing unless he was supplied with the certified copies of the following documents:-

***a. Human Resource Manual***

***b. Standard Operation Manual***

*c. Departmental and Branch mandates for the years 2008 and 2009.*

*d. Strategic Plan as revised in 2009*

*e. Job evaluation for the year 2008*

*f. Approved budgets for the years 2007, 2008, 2009 and 2010*

*g. Management accounts as at July, 2010*

*h. Audited accounts for the years 2007, 2008 and 2009*

*i. Forensic Audit report prepared by auditor Kimani & Kerrets duly signed and sealed by the said auditor*

8. It seems the appellant did not acquiesce to the respondent's request hence the respondent did not attend the disciplinary hearing. Be that as it may, the hearing proceeded in his absence and the disciplinary committee resolved that the respondent be summarily dismissed for gross misconduct and negligence. The respondent was informed of the said decision by a letter dated 11<sup>th</sup> November, 2010 and he filed an appeal against the said decision on 16<sup>th</sup> November, 2010. Ultimately, the appellant communicated its decision to stand by the disciplinary committee's recommendation vide a dismissal letter dated 22<sup>nd</sup> November, 2010.

9. Convinced that there was no valid reason for his termination, the respondent filed suit in the Industrial Court (now known as the Employment and Labour Relations Court) claiming that his termination was unfair and the appellant had wrongfully withheld his terminal dues. The gist of the respondent's case was that he had at all material times performed his duties diligently and in accordance to his contract of service. He was terminated for no apparent reason and the charges were trumped up against him to justify the unfair termination. The appellant had withheld his salary from the time of his suspension up to his dismissal, leave allowance, gratuity and other entitlements without any colour of right. Further, he had not been given a fair hearing as envisioned under **Section 41** of the **Employment Act** before the termination of his services. As a result, he sought the following reliefs:-

*a. Kshs.419,659 being the value of the remaining term of his contract of employment (23<sup>rd</sup> November - 31<sup>st</sup> December, 2010);*

*b. Kshs.1,236,890 being unpaid salary from August, 2010 to the date of summary dismissal (22<sup>nd</sup> November, 2010);*

*c. Kshs. 17,000 being refund of entertainment expenses incurred in the course of duty in July, 2010;*

*d. Kshs.552,183.33 being pay in lieu of 50 days' leave;*

*e. Kshs.117,936 being leave allowance for 16 days leave taken in August 2010;*

*f. Kshs. 2,385,432 being 3 years' gratuity (1<sup>st</sup> January, 2008 to 31<sup>st</sup> December ,2010) at 20% of payroll salary;*

*g. General damages for breach of contract;*

*h. General damages for mental suffering and anguish and*

*i. General damages for loss of career and expected earnings.*

10. In its statement of defence, the appellant denied the respondent's allegations maintaining that his dismissal was above board. The summary dismissal was justified on the grounds that firstly, the appellant believed that the respondent negligently approved irregular cash payments totaling to Kshs.5,000,000 from a client's account namely, National Hospital Insurance Fund (NHIF) which ultimately caused it to lose business with the said client. Secondly, the respondent was facing criminal charges of stealing by an officer of a company contrary to **Section 282** of the **Penal Code** in the subordinate court being Criminal Case No. 3705 of 2015. Thirdly, following his suspension the respondent had irregularly contacted Kenya Ports Authority and Lake Victoria Water Services Board on bids placed by the appellant. Fourthly, by a letter dated 17<sup>th</sup> February, 2010 the respondent had irregularly awarded himself a salary increment. Fifthly, a forensic audit investigation revealed that he was responsible for the loss of Kshs. 5,000,000 and had over claimed entertainment allowance to the tune of Kshs. 340,397.80. All in all, the respondent's actions amounted to gross misconduct and negligence. It was also the appellant's case that it had followed the proper procedure before terminating the respondent's services.

11. The appellant also filed a counter-claim seeking :-

***a. Kshs.5, 000,000 being the sum of money lost by the respondent between January, 2008 to 31<sup>st</sup> July, 2010.***

***b. Kshs.340, 398 being the amount of excessive and unauthorised entertainment allowance paid between January, 2008 to 31<sup>st</sup> July, 2010.***

***c. Kshs. 12,473/= being the balance of insurance premium paid by the respondent on motor vehicle registration number KAZ 234Z.***

***d. Kshs. 117,867/= being the total amount of insurance premium paid by the respondent on motor vehicle registration number KBJ 961H.***

***e. Kshs. 2,000/= which was unaccounted petty cash.***

***f. Kshs. 4,824,000/= which represented the loss of business opportunities occasioned by the negligent acts of the claimant.***

12. After weighing the evidence before her the learned Judge (Ndolo, J.) issued an award dated 2<sup>nd</sup> December, 2013 in favour of the respondent in the following terms:-

***a. 12 months' salary in compensation for unfair termination- Kshs. 3,975,720.***

***b. 3 months' salary in lieu of notice – Kshs.993,930.***

***c. Salary for August-22<sup>nd</sup> November, 2010 (3 months and 22days –Kshs. 1,236,890.***

***d. Pay in lieu of 50 days' leave – Kshs.552, 183.***

***e. Prorata gratuity at 20% of basic salary (35 months) - Kshs. 1,375,920.***

Taking into account the admission by the respondent that he owed the appellant insurance premiums paid on his behalf as claimed, the learned Judge directed that the said amount be deducted from the respondent's award. That was as far as she allowed the counter-claim.

13. It is that decision that has provoked the appellant to file the appeal before us which is anchored on the grounds that the learned Judge erred by-

***i. Proceeding with the civil case while there was a pending criminal case against the respondent on the same subject matter.***

**ii. Concluding that the appellant had failed to establish a valid reason for the respondent's termination.**

**iii. Finding that the respondent had been unfairly terminated.**

**iv. Awarding reliefs not sought.**

**v. Awarding the damages she did in favour of the respondent.**

14. The appeal was disposed by written submissions as well as oral highlights by the parties' respective counsel. Learned counsel, Mr. Obura appeared for the appellant while learned counsel, Mr. Oundo appeared for the respondent.

15. Citing **Section 6** of the **Civil Procedure Act**, Mr. Obura faulted the learned Judge for entertaining the respondent's suit which sought his exoneration from the theft of Kshs.5,000,000 yet that issue was subject of the criminal proceedings before the subordinate court. He argued that the criminal proceedings were commenced first in time, that is, on 11<sup>th</sup> September, 2010 while the respondent's suit was instituted on 15<sup>th</sup> February, 2011. As such, the learned Judge ought to have stayed the respondent's suit pending the determination of the criminal proceedings.

16. The appellant criticized the learned Judge for not only finding that there was no valid reason for the respondent's termination but also that his termination was unfair purely on the basis that the appellant had failed to avail its financial policies and standard operating procedures to establish that the alleged loss was attributable to the respondent's conduct. In doing so, the learned Judge failed to appreciate the criminal charges facing the respondent which to the appellant were sufficient to warrant his dismissal. Mr. Obura added that the respondent as the CEO bore the ultimate responsibility of any loss of money arising out of his or any of his subordinates' failure to observe operational procedures. Furthermore, the learned Judge ignored evidence which pointed to the respondent's negligence. In point of fact the respondent had admitted negligence on his part in the loss of the money and apologized for the same in a letter dated 11<sup>th</sup> September, 2010.

17. Disagreeing with the quantum of damages awarded, Mr. Obura contended that the learned Judge erred in considering the respondent's contract as being for an indefinite period thus re-writing the terms of the contract contrary to the law. As far as he was concerned, this misapprehension led the learned Judge to grant 12months salary as compensation and 3months salary in lieu of notice which had not been sought by the respondent. Besides, compensation (if any) ought to have been within the period of employment in the contract and not beyond. The respondent's contract was to end on 31<sup>st</sup> December, 2012 hence the 12months salary compensation and 3months salary in lieu of notice went beyond the tenure of the contract bearing in mind his services were terminated on 22<sup>nd</sup> November, 2010.

18. On his part, Mr. Oundo contended that the pendency of the criminal proceedings did not bar the respondent from instituting civil proceedings. In any event, the said issue was never raised before the trial court. According to him, the nature of the reliefs sought in the criminal proceedings was distinct from what the respondent sought in the civil proceedings. He went on to point out that the criminal proceedings had since been finalized and the respondent had been acquitted of all the charges against him.

19. Supporting the learned Judge's finding that there was no valid reason for the respondent's dismissal, Mr. Oundo submitted that the disciplinary committee dismissed the respondent on charges that had been dropped. Mere suspicion that the respondent was responsible for the loss of money in question was not sufficient to warrant his summary dismissal. He also challenged the respondent's suspension.

20. He submitted that the respondent was denied access to the documents which formed the basis of the charges against him and his appeal was not determined on merits. Therefore, the respondent was denied a fair hearing. In conclusion, he argued that there was no reason for this Court to interfere with the quantum of damages. Mr. Oundo urged us to dismiss the appeal.

21. We have considered the record, submissions by respective counsel and the law. Our primary role as the first appellate court was succinctly put in *Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212* ;

***“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”***

22. In our view, the issues that arise for determination are whether the pendency of the criminal proceedings barred the determination of the civil suit filed by the respondent; whether the respondent’s services were unfairly terminated; whether the learned Judge exercised her discretion properly in awarding the damages she did.

23. To begin with there is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. This distinction was appreciated by Okwengu, J.A in the case of *Judicial Service Commission vs. Gladys Boss Shollei & another [2014] eKLR* . In *R. v. Wigglesworth (1984), 1984 CanLII 2275 (SK CA), 11 C.C.C. (3d) 27, 7 D.L.R. (4th) 361, 38 C.R. (3d) 388 (Sask. C.A.)* correctly observed-

***“A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one’s duty to another, constitute a private cause of action for damages for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one’s office or calling, in which event the actor must account to his professional peers. For example, a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the State; to a judgment for damages, at the instance of the patient, and to an order of discipline on the motion of the governing council of his profession. Similarly, a policeman who assaults a prisoner is answerable to the State for his crime; to the victim for the damage he caused and to the police force for discipline.***

- ***In the light of this I think Constable Wigglesworth’s contention must fail since the proceeding before the R.C.M.P. service tribunal was purely disciplinary. It was concerned only with the professional aspect of his conduct: the “offence” of which he was found guilty, a “major service offence”, lay in the breach by him of his policeman’s duty not to treat his prisoners harshly, cruelly, or with unnecessary violence. He must still answer to society for the criminal aspect of his conduct, or for his “criminal offence.”***

24. It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this Court’s decision in *Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others [2015] eKLR*. With the foregoing in mind we concur with the majority decision of this Court in *Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR* that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal. Consequently, we find that the learned Judge did not err in entertaining and determining the respondent’s suit during the pendency of the criminal proceedings.

25. As noted by this Court in *Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR*, 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.

26. Delving into whether the reasons for respondent's termination were fair we caution ourselves that we ought not to substitute our decision for that of an employer. Our duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. See this Court's decision in *Alfred Mutuku Muindi –vs- Rift Valley Railways (limited) [2015] eKLR*. The learned Judge correctly observed that the loss of Kshs. 5,000,000 played a fundamental part in the respondent's dismissal.

27. From the record it is not in dispute that the said amount had been withdrawn from the NHIF account with the appellant and had not been forwarded to it. In that regard, the appellant's version was that the respondent approved those payments without observing the requisite financial operations procedure. In particular, he approved a memo from the then Chief Accountant requesting for advance remittance of the said amount allegedly on behalf of NHIF and also executed a cheque of the same amount without the requisite supporting documents.

28. The respondent maintained that he had followed the established practice within the appellant's organization. It was normal for the appellant's clients to request advance remittance of rent collected on their behalf. Daniel Kiprotich Cheruyiot (RW1) who took over the respondent's position after his dismissal confirmed as much. Such a request would commence by a memo from the property manager which would first be approved by the Chief Account and then brought to his attention for the final approval.

29. We note that the appellant did not produce any evidence before the trial court on its financial policies and standard operating procedures. In fact Nimrod Kipyego Kurgat (RW3) who participated in the forensic audit and prepared the report thereto testified that at the time the appellant did not have a finance manual outlining the approval procedure to be followed. This scenario in our minds raises questions *to wit*, on what basis did the appellant find that the respondent failed to adhere to the requisite procedure in approving the advance remittance? Could the audit report properly form the basis of concluding that the respondent hadn't followed the proper procedure without evidence of the approval procedure adopted by the appellant?

30. We do not think there was evidence pointing to respondent's culpability in the loss of Kshs.5, 000, 000 based on the foregoing circumstances. In any event, as noted by the learned Judge the charge relating to loss or theft of the said amount was dropped by the disciplinary committee during the hearing held on 8<sup>th</sup> November, 2010 on the grounds that it was not possible for the same to be proved. It follows therefore that the respondent had no basis of terminating the respondent on the loss of the said amount.

31. The allegation that the respondent had irregularly reviewed his salary is rendered moot for the simple reason that the appellant does not dispute that the review was adopted by its Board of Directors. Similarly, the allegation that the respondent caused the appellant to lose business opportunity with NHIF on account of the loss of the aforementioned amount fails. Daniel in his testimony stated that by the time the loss of the said amount was discovered the appellant's contract with NHIF had already come to an end.

32. The appellant did not demonstrate that the respondent had irregular contact or interfered with its clients or business ventures as alleged. There was also no evidence that the respondent had over claimed entertainment allowances as alleged. In the end, we like the trial court find that the appellant failed to establish that the reasons for the respondent's dismissal were valid.

33. In as much as we do not condone the respondent's conduct of failing to attend the disciplinary hearing on 8<sup>th</sup> November, 2010 we cannot shut our eyes to the glaring procedural flaws committed by the appellant. It is clear from the suspension letter whose contents is set out herein above that the respondent was suspended for a period of 30 days. However, he was left in limbo regarding the said suspension after the expiry of the said period despite seeking directions on the same. From the minutes of the disciplinary meeting held on 8<sup>th</sup> November, 2010 the disciplinary committee purported to remedy the same albeit belatedly by extending the suspension to the date of the said hearing. The respondent was also denied his salary from the date of his suspension up to his dismissal without any reason.

34. Nimrod admitted that during the investigations the respondent was not interviewed because of shortage of time. In light of the gravity of the allegations against the respondent coupled with the fact that the forensic report indicated that one of the methods employed by the auditor was interviewing relevant parties, we find that the respondent was not heard prior to the findings and recommendations made in the said report.

35. We are at a loss as to why the appellant refused to grant the respondent certified copies of the documents requested even at his own expense. In our view, these documents were integral to the respondent preparing his defence. By only availing the documents for his perusal at its premises for a number of hours was not adequate. It is also not clear whether the appellant considered the respondent's appeal.

36. For the reasons outlined above we concur with the learned Judge that the respondent's dismissal was unfair.

37. On the quantum of damages issued, we are guided by this Court's sentiments in *Peter M. Kariuki vs. Attorney General [2014]* eKLR thus,

*"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 large 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 judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."*

38. The award of payment in lieu of 50 days' leave aggregating to Kshs. 552,183 is in the nature of special damages. It is trite law that special damages must be pleaded and proved. See this Court's decision in *Mohammed Ali & another vs. Sagoo Radiators Limited [2013]* eKLR. The record shows that all that the respondent did as far this relief was concerned was to simply specify it in the claim without proving it. We hold that the learned Judge misdirected herself in finding that the same had been proved simply because the appellant had not tendered any evidence that the respondent was not entitled to the same. The onus was on the respondent to prove the same.

39. Notwithstanding that the respondent's termination was unfair, the learned Judge ought to have given reasons as to why she opted to give the maximum compensation under *Section 49* of the *Employment Act*. In failing to do so she did not act judiciously. See this Court's decision in *United States International University v Eric Rading Outa [2016]* eKLR. The learned Judge ought not to have left her reasons to guesswork or implication. The compensation for unfair termination in the circumstances of this case, in our view, ought to have been within the terms of the contract of employment. See this Court's decision in *CMC Aviation Limited vs. Mohammed Noor [2015]* eKLR. Therefore, since the contract was terminable by three months' notice, three months' salary in lieu of notice would have been adequate.

40. The totality of the foregoing is that we interfere with the award of damages by setting aside the award of 12 months salary and payment in lieu of 50 days leave. The rest of the award is hereby upheld. The appeal having succeeded in part each party shall bear its own costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of January, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**