



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 262 OF 2014

BETWEEN

JULIMATT ENTERPRISES LIMITED APPELLANT

AND

VINCENT MUGADIA KITAZI RESPONDENT

(Appeal from the Award and Decree of the Industrial Court of Kenya at Nairobi, (Wasilwa, J.), given on 11th December, 2012 in Industrial Court No. 834 OF 2012)

JUDGMENT OF THE COURT

1. This is an appeal from the Industrial Court of Kenya, (now known as the *Employment and Labour Relations Court*), where the trial court found that the termination of the respondent's employment by the appellant was unlawful and awarded him 6 months' salary amounting to **Kshs.189,000/=** and arrears of house allowance amounting to **Kshs.226,800/=**.
2. The appellant appealed against that decision saying that the award of Kshs.189,000/= as 6 months' salary was too high a compensation, considering that the respondent had worked for only 4 years, and that the award of Kshs.226,800/= was improper since the respondent had not made any claim for house allowance.
3. The respondent's claim before the trial court was that sometimes in 2008, he was employed by the appellant as an Internal Control Systems Manager; that on 30th April, 2012 his services were terminated without any warning and before he was given any opportunity to be heard; that his gross salary at the time was Kshs.31,500/= which was discriminative as other accountants were being paid Kshs.38,000/=; that he was entitled to Kshs.26,390/= being one month's basic pay in lieu of notice; a bonus of Kshs.12,000/= and 12 months' salary as compensation for wrongful dismissal.
4. It is important that we cite the specific prayers that were made before the trial court. They were as follows:

“18. In view of the aforementioned, the claimant prays that this Honourable Court awards as follows:

(i) The sum total of all monies, allowances and benefits due to him from the time of the

interdiction to date.

(ii) General, aggravated, exemplary and/or special damages, whichever combination the court may deem just and expedient.

(iii) Costs of this suit.

(iv) Interest on (i) above.

(v) Any other relief that this Honourable Court may deem just and expedient to grant.”

5. The appellant filed its memorandum in reply to the respondent’s claim and stated that it terminated the respondent’s services on the ground of poor and unsatisfactory performance; the particulars thereof were set out in the reply. The appellant denied the respondent’s claim for bonus, overtime and discrimination in payment of his monthly salaries.

6. The appellant contended that the respondent’s suit was an abuse of the court process because he had failed to demonstrate his entitlement to the claims made and had also failed to disclose that upon termination of his employment he was paid a sum of Kshs.58,042/= as salary in lieu of notice, pro-rated leave and the entire salary for the month of April, 2012.

7. In his testimony before the trial court, the respondent stated that although he had written a letter to the appellant admitting negligence on his part that resulted into loss of some money, he had written that letter under duress. He denied any illegal use of the appellant’s fuel cards. He insisted that the termination of his employment was unfair as he had neither been given any advance warning nor heard before his dismissal.

8. The appellant’s Managing Director testified that throughout the period of his employment, the respondent was unable to meet the targets set for him; that he spent a lot of time on the internet; that he had defrauded the company of a sum of Kshs.214,000/= but repaid a sum of Kshs.49,150/= and requested for a waiver of the balance of Kshs.164,850/=, which request was granted; that he had fraudulently used the appellant’s fuel cards to fuel an unauthorized vehicle; that he was neither entitled to any overtime pay as he was a manager; and/nor was he entitled to any bonus.

9. In view of all the aforesaid transgressions, the appellant’s witness stated, the respondent’s services were terminated. He was, however, paid one month’s salary in lieu of notice, his leave dues and salary for the days worked.

10. The trial court set out two issues for determination; first, whether the termination of the respondent’s services was wrongful or unlawful; and secondly, if so, the remedies he was entitled to.

11. The trial court found that although the appellant cited the reason for terminating the respondent’s services as non-performance, *“the respondent was not accorded any opportunity to be heard in order to establish this non-performance or otherwise.”* The court cited **section 41** of the **Employment Act, 2007**, which states that:

“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”.

The court concluded that the termination of the respondent’s services was unfair and wrongful.

12. On the second issue, that is, the remedies for unlawful termination of employment, the learned judge expressed herself as follows:

“What remedies is the claimant entitled to then? He was already paid 1 month salary in lieu of notice plus leave on prorated basis. I will in addition award him:

1. 6 months’ salary

Compensation for unlawful and unfair dismissal = 31,500x6

– Kshs.189,000/=

2. House allowance at 15% of salary = 0.15x31,500x12x4 years–Kshs.226,800/=

TOTAL =Kshs.415,800/=”

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The respondent was also awarded costs of the suit.

13. In her submissions before this Court, **Ms. Muriu**, learned counsel for the appellant, stated that the award of Kshs.189,000/= being 6 months’ salary was too high, in view of the fact that the respondent had worked for just about 4 years; that no reasons were given to justify the award; and that the trial court did not consider that the respondent’s conduct was far from exemplary; and that the court did not take into account the provisions of **sections 45 (5) (b) (c) and (f) of the Employment Act**. She cited this Court’s decision in **CMC CIVIL AVIATION LIMITED V CAPTAIN MOHAMED NOOR [2015] eKLR**.

14. As regards the award of Kshs.226,800/= on account of house allowance, Ms. Muriu submitted that since the respondent had not made any such claim, the award was a judicial overreach which ought to be overturned.

15. Mr. Swaka, learned counsel for the respondent, submitted that the appellant, having violated the provisions of **section 41 (1) of the Employment Act**, the award of 6 months’ salary as compensation for unlawful termination of employment was justified. Counsel further submitted that “*the learned judge was within her ambit in awarding Kshs.226,800/= on account of House Allowance*”, since the respondent had pleaded in *prayer (i)* of his claim for all allowances, which include house allowance, and had also sought “*any other relief that this Honourable Court may deem just and expedient to grant.*” He urged this Court to dismiss the appeal with costs to the respondent.

16. We have carefully considered the entire record of appeal and the submissions by counsel. In this appeal, the appellant does not contest that its termination of the respondent’s services without according him any opportunity to be heard on the grounds of his poor performance amounted to unfair termination of his employment as defined under **section 45 of the Employment Act**. The gravamen of the appeal is twofold; firstly, that the award of 6 months’ salary as compensation for the unfair termination of employment was too high and amounted to arbitrary exercise of the judge’s discretion; and secondly, the learned judge ought not to have awarded the respondent any amount at all on account of house allowance since he had neither made any such claim nor proved that he was entitled to it.

17. On the first ground of appeal, our task as the first appellate court is to consider whether the learned judge exercised her discretion appropriately or if the discretion was exercised injudiciously and ought to be interfered with. In **MBOGO & ANOTHER V SHAH [1968] E.A. 93** at page 96, this Court held as follows:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in so doing arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with, the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of

the discretion and that as a result there has been injustice.”

18. The trial court, having established that the termination of the respondent’s employment was unlawful, it was obliged to award him some compensation; but in so doing, and so as to arrive at a reasonable award, it was by law enjoined to take into consideration several factors as set out under **section 49 (4)** as read with **section 50** of the **Employment Act**. They are as follows:

“(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee’s length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonably incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

19. The learned judge did not state the basis upon which she came to the conclusion that 6 months’ salary was the reasonable compensation for the unlawful dismissal of the respondent.

20. Where it is demonstrated that a trial court has not taken into consideration statutory provisions which the court is obliged to consider before it makes a finding, an appellate court is entitled to interfere with the exercise of the trial court’s discretion.

21. In this matter, we think the learned judge ought to have considered, *inter alia*, the respondent’s length of service; the reasons that led to the termination of his services, including his admitted negligence that led to the loss of a considerable amount of money; that the appellant had treated the respondent fairly leniently in writing off a huge amount of the lost sum; and that the respondent had been paid a sum of Kshs.58,042/= being salary in lieu of notice, prorated leave and the salary for April, 2012.

22. In view of the foregoing, we are inclined to interfere with the arbitrary exercise of the learned judge’s discretion. In our view, the award of 6 months’ salary as compensation for unlawful termination of

services was excessive. We hereby set aside that award and substitute it with an award of 2 months' salary.

23. As regards the award of Kshs.226,800/= being arrears of house allowance, it is *trite law* that parties are bound by their pleadings. The respondent had not made any claim for house allowance. It may therefore be inferred that his monthly salary of Kshs.31,500/= was a consolidated one.

24. We do not agree with the respondent's advocate's submission that since the respondent had prayed for "*any other relief*" which the court deemed "*just and expedient to grant*", the court was right in awarding that unpleaded and unproved claim. It is *trite law* that bears repetition that special damages must be specifically pleaded and strictly proved; see this Court's decision in **SANDE V KENYA CO-OPERATIVE CREAMERIES LIMITED [1992] LLR 314 (CAK)**.

25. In view of the foregoing, we hereby set aside the award of Kshs.226,800/= in its entirety.

26. As regards costs, since the appellant has substantially succeeded in this appeal, and it has been demonstrated that the huge award of 6 months' salary as compensation for unlawful termination of employment was unjustifiable, we order that each party bears its own costs.

27. For avoidance of doubt, the only amount that the appellant shall pay to the respondent as compensation for unlawful termination of employment is **Kshs.73,000/=** being 2 months' salary. It is ordered.

DATED and Delivered at Nairobi this 23rd day of February, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR