



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE- JJA)

CIVIL APPEAL NO.216 OF 2015

BETWEEN

AGRICULTURAL FINANCE CORPORATION.....APPELLANT

VERSUS

BANKING INSURANCE & FINANCE UNION (K).....RESPONDENT

(Appeal from the Judgment of the Employment & Labour Relations

Court at Nairobi (M. Mbaru, J.) Dated 24th February, 2015

in

Cause No. 2113 of 2012)

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the Employment and Labour Relations Court (ELRC) Nairobi (Monica Mbaru, J.) dated the 24th day of February, 2015.

The background to the appeal is that, as at 9th September, 2012, the respondent had a recognition and several collective Bargaining Agreements (CBAs) with the appellant, on the basis of which it filed the claim giving rise to this appeal, on behalf of **Mrs. Charity Wairimu Maina**, (the grievant). The grievant was employed by the appellant on the 12th day of April, 1989, and confirmed on 1st March, 1990. She was thereafter variously deployed in the appellant's branches countrywide. In July, 2004, she was posted to the Nyeri branch where she worked till June 2010, when she was assigned duties of a cashier. On 16th November, 2010, she was sent on forced annual leave. On the 23rd day of December, 2010, and on the 6th day of January, 2011, she received show cause letters respectively, accusing her of misappropriation of various sums of money which had come into her possession in the course of her duties. She replied to both show course letters denying any wrong doing with regard to the accusations then leveled against her. On 16th January, 2011, she was suspended from duty.

Disciplinary proceedings conducted against her in connection with those allegations resulted in her dismissal from the appellant's employment effective 8th day of February, 2011. She unsuccessfully appealed against the said dismissal. Unrelenting, she registered a trade dispute before the Labour Officer; resulting in conciliation proceedings conducted by the Labour Officer, who reversed the respondent's dismissal and substituted it with one of normal termination. The appellant was ordered to pay the grievant Kshs. One million in terms of salary arrears and pension funds, together with two months' salary in lieu of notice, which award the respondent rejected and instead moved to the ELRC Nairobi, to challenge her termination on the grounds that it was unfair.

In its response to the grievant's claim, the appellant admitted that the grievant had been its employee; that due process was followed when terminating her employment with them; that it was justified in terminating her employment with them on the grounds that an Audit conducted by the appellant at its Nyeri branch where she was last deployed as a cashier had unearthed malpractices involving misappropriation of various sums of funds received by her on behalf of the appellant, and in the course of her duty, using identified receipts all of which the respondent admitted were in her hand writing, and for which she failed to account for the money received against those

receipts; that, the disciplinary committee found her culpable as she failed to explain satisfactorily both in the show cause letters and the disciplinary proceedings, how she came to use the two parallel receipt books; and lastly that the termination of the respondent's employment with them was not only lawful but also fair.

After due consideration of the record before her, the learned Judge made findings on liability as follows:-

“40. Without clarity as to how the respondent arrived at the allegations giving reason for the grievant termination, the same becomes invalid and without substance. Where the accountant at Nyeri branch was charged with stealing by servant and the grievant called as a state witness, inference from the same can be drawn that she is a key informant to the criminal trial and not an accomplice as alleged by the respondent witness. Had the grievant been an accomplice, charges in that regard should have by now been leveled against her. This charge should have had its basis on the investigations conducted by the respondent and a report to the police and the audit report that came up with the alleged fraud.

41. Another reason for the termination was that:

That you purported to have collected and handed over the money to the former Branch Accountant but you did not produce any documentary evidence to support your claim.

42. As noted above, without the audit report, the investigations report that the respondent conducted when the grievant was sent on suspension, the court is left without crucial records to impute wrongdoing on the part of the grievant.

44. I therefore find no valid reason for the termination of the grievant under sections 43 and 45 of the Employment Act. The employer did not act in accordance with justice and equity as provided for in section 45(4) (b). The termination was substantively and procedurally unfair.”

Having faulted the process resulting in the appellant's termination of the grievant's employment with them, the learned Judge took note of the fact that the respondent had sought only one relief from the court namely, Reinstatement with no loss of benefits. The Judge did not however proceed to award the same. Instead, she opted for the impugned multiplicity of awards. Justification for the departure from the respondent's own pleading was given as the absence of substantiated reasons for the termination; the procedure applied in the said termination was unfair; the appellant was not also diligent in the handling of the said termination process; the grievant's long clean work record was not taken into consideration by the appellant before the termination; the twelve (12) months compensation provided for under section 49 of the Act would not be sufficient compensation for the loss suffered by the grievant considering that she had lost benefits and entitlement to work up to her retirement age of her sixtieth (60) birthday; that although section 49 of the Act permitted reinstatement, this relief was not available as this provision when considered in the light of section 12(3) of the Industrial Court Act, which permits reinstatement before the lapse of three years would not allow her to grant this relief as the proceedings dragged on leading to the closure of the three year window permitted under the Act. The Judge blamed the appellant for the lapse of that period because in her view, the respondent had moved to court diligently and presented the grievant's claim in court within six (6) months from the date of the onset of the disciplinary process against her. The delay in finalizing the litigation in court before the lapsing of that period was attributed to the appellant on account of its conduct of occasioning numerous adjournments.

The appellant was aggrieved and preferred this appeal raising thirteen (13) grounds of appeal, subsequently compressed into four(4) in the written submissions. These may be paraphrased as follows:-That the learned Judge erred:-

(1) When she denied the appellant a fair hearing in total violation of the principles of natural justice.

(2) When she awarded a multiplicity of awards in total contravention of section 49 of the Employment Act, 2007

(3) When she amended the claim contrary to law and awarded reliefs not prayed for in the claim.

(4) When she ignored admission in the respondent's evidence and proceeded to make an erroneous finding that the respondent's termination was substantially and procedurally unfair.

On the 11th day of October, 2016, the respective parties' advocates took directions before the Deputy Registrar that the appeal be disposed of by way of written submissions, to be filed within forty five (45) days of that date. Only the appellant complied with those directions and filed its written submissions. When the appeal came up for hearing before us on the 13th day of February, 2017, only learned counsel **Mr. John Mutuma** holding brief for **Rashid Ngaira** for the appellant was in attendance. The court being satisfied that the respondent had due notice of both the Deputy Registrars' directions on the filing of written submissions, and that the hearing date for the appeal had been taken by consent, allowed the appellant to prosecute the appeal.

In support of ground 1, the appellant submitted that it tendered evidence through one witness; that it sought an adjournment to call two crucial witnesses; that the learned Judge acceded to that request and gave directions that further hearing dates for the defence be taken at the Registry; that the respondent took an ex parte hearing date for the 21st day of January, 2015 without due notice to the appellant first for the taking of the hearing date at the registry, and second, for the hearing date itself; that thereafter the respondent filed a false return of service stating that the appellant had been served with the hearing notice for the 21st day of January, 2015 and had not attended court for hearing; and on that account urged the court to close the defence case and allow for the filing of submissions, which request the learned Judge acceded to and closed the appellant's defence without their knowledge and participation.

The appellant continued to urge that upon closure of the appellant's defence, the matter was adjourned for mention on the 19th day of February, 2015 to confirm the filing of the submissions; that the appellant came to learn of the mention date of 19th on the previous day of

18th at 4.30pm, but they none-the-less attended the mention date and sought an adjournment to call their remaining crucial witnesses, which request the learned Judge declined to accede. They then sought leave to file submissions, which request was also declined and the learned Judge proceeded to render a judgment in a record four days to the detriment of the appellant's case.

It was also the appellant's submission that the evidence of the two crucial witnesses shut out by the learned Judge, would have assisted the court arrive at a sound and just decision as one of the two witnesses was the Auditor who had unearthed the malpractices that the respondent was involved in; that the learned Judges' decision to shut out evidence from the two crucial witnesses and also to deny the appellant an opportunity to file their submissions amounted to an unfair trial; and therefore a miscarriage of justice to the appellant.

In support of ground 2, the appellant submitted that the learned Judge did not properly appreciate matters she ought to have considered under section 49(3) of the Employment Act, 2007 (the Act), before arriving at the multiplicity of awards in favour of the respondent; that the learned Judge also failed to appreciate that the respondent's dismissal was reversed by the Labour Officer to normal termination with benefits following conciliation procedures in which the respondent participated; that the appellant offered to pay termination dues, but she declined to accept; that the appellant was ready and willing to honour the conciliation award, notwithstanding, the procedural, fair and legally sound termination of the respondent's employment with them.

Turning to ground 3, the appellant submitted that the respondent sought only one relief from the court, namely, reinstatement without loss of benefits. It was therefore erroneous for the learned Judge to award a multiplicity of reliefs not prayed for by the respondent in her statement of claim.

In support of ground 4, the appellant submitted that the learned Judge misapprehended the evidence on the record as she failed to appreciate that, the grievant was emphatic in her testimony on oath that due process was followed before terminating her contract of service with the appellant upto the appellate stage but she was unsuccessful; that she admitted that her handwriting was on the fake receipts as confirmed by the appellant's witness.

This is a first appeal. Our mandate is as donated by Rule 29(1) of the Rules of the Court, namely, to re-appraise the evidence on the record and draw out inferences of fact. Simply put, we are obligated to reconsider the evidence, evaluate it ourselves and draw out our own conclusions, while at the same time bearing in mind that we neither saw nor heard the witnesses testify and that we should give due allowance for that in this respect. Secondly, we are not bound necessarily to follow the trial Judges' findings of fact if it appears to us that she failed to take into account particular circumstances or probability material to the evidence or that the impression based on the demeanor of a witness is inconsistent with the evidence on the record. See **Selle versus Associated Motor Boat Co. Ltd and Others [1968] EA 123**. It was further stated in **Jabane versus Olenja [1986] KLR 881** at page 664, that the court has the power to interfere with such a finding only where we are satisfied that on the basis of the totality of the record before us, that such findings were either based on no evidence or that the Judge is shown demonstrably to have acted on wrong principles in reaching the findings that she did.

We have considered the totality of the record in the light of the above principles and the sole submissions by the appellant. In our view, the following are the issues that fall for our determination.

- (1) Whether the learned Judge's failure to reopen the defence to allow the appellant adduce further evidence after its closure at the instigation of the respondent and also the failure to accord them an opportunity to file written submissions amounted to an unfair hearing.*
- (2) Whether the learned Judge fell into error when she made findings that the respondents' termination from her employment with the appellant was substantively and procedurally unfair.*
- (3) Whether the learned Judge fell into error when she awarded the respondent a multiplicity of awards.*

With regard to issue number 1, it is not in dispute that the trial commenced on 21st July, 2014 when the grievant gave her testimony and she was fully cross-examined and re-examined. The learned Judge then adjourned the matter with the consent of both parties for the hearing of the defence on the 2nd day of October, 2014, on which day the appellant tendered evidence through one witness who was fully cross-examined and re-examined. The appellant then sought an adjournment to call two more witnesses and the Judge accordingly acceded to that request and adjourned further defence hearing to a date to be taken at the Registry. The record indicates that on the 26th November, 2014, **M/s Anyika**, for the respondent took an ex parte hearing date before the Deputy Registrar for the hearing on the 21st day of January, 2015. The Deputy Registrar gave directions that a hearing notice do issue to the appellant.

On the scheduled hearing date of 21st January, 2015, only counsel for the respondent attended court and informed the learned Judge that the hearing date had been taken ex parte but a hearing notice had been served upon the appellant and a return of service filed, and on that account invited the learned Judge to close the defence case and allow time for submissions, which request the learned Judge acceded to in the following terms:

“Court:

Noting the Respondent is absent though served, then it is apparent they do not wish to offer their defence. Case marked as closed.

Claimant to put in writing (sic) submission. Mention 19/2/2015 to confirm and allocate Judgment date.”

The hearing notice together with its attendant return of service alluded to by the respondent's counsel and on the basis of which the court acted to close the defence have not been exhibited on the record. There is therefore nothing on the record to counter the appellant's assertion that they were never served with any notice for the fixing of a mutual hearing date at the Registry. Neither were they subsequently served

with a notice for the hearing of the matter on the 21st day of January, 2015; and that if any return of service existed to that effect, then the same was false.

After noting as above, the Judge fixed the matter for mention on the 19th day of February, 2015. The appellant confirms receiving a mention notice for the 19th dated 17th February, 2015 and served on them on the day of 18th February, 2015 at 4.30pm; and whose copy is exhibited on the record. In obedience to the said notice, the appellant's advocate attended court and as borne out by the record, the respondent confirmed the filing of the submissions, while the appellant's counsel sought leave to call their remaining witnesses to which request the Judge reacted as follows:-

“Court

The court gave directions on 21/1/2015 with regard to closing of the case and directed parties to file submissions. These directions are clear and not ambiguous.

Judgment to be delivered on 24/2/2015 at 10.00am. I will have the file in my chamber.”

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In the light of what transpired on the record as above, our simple task is to determine whether the conduct of the Judge as demonstrated above amounted to a denial of a fair hearing to the appellant. In the absence of any exhibition of a return of service together with an attendant mention notice to demonstrate that the appellant had indeed been invited to take a mutual hearing date for 21st January, 2015, but failed to do so; and second, that they had been duly served with a notice for the hearing on the 21st day of January, 2015 but failed to honour that invitation, there is no way the appellant can be faulted on its complaint that they were subjected to an unfair hearing. The complaint is therefore well founded. However, since there is no invitation for us to remit the matter back to the High Court, we proceed to determine the appeal on the basis of the record before us.

With regard to issue number 2, the material provisions of the Act the appellant was obligated to observe were sections **43, 44, 45** and **47**. Section **43** obligated the appellant to prove the reason or reasons for the termination of the respondent's employment with them. The appellant was also required to ensure that the reason (s) for the respondent's termination were infact the matters that it genuinely believed to exist and which are the cause of its termination of the respondent services with them.

The reason the appellant gave for the termination of the respondent's employment with them was gross misconduct, which falls under section **44(4) (c)** of the Act. Under this provision, an employee is deemed to be guilty of gross misconduct where he/she willfully neglects to perform any work which it was his/her duty to perform; or if he/she carelessly and improperly performs any work which from its nature it was his/her duty under the contract to have performed carefully and properly. Under section **45** of the Act; a termination of an employee is deemed to be unfair if the employer fails to prove that the reason (s) for the termination was valid; that the reason (s) for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. Further, under section 45(5), of the Act, fair processing of an employees' termination includes a right to be accorded an internal appellate process. Under section 47 of the same Act, resorting to and exhausting internal dispute resolution mechanisms is not a bar to having recourse to a court of law for redressing the same grievance.

Although the respondent had initially been dismissed by the appellant from its employment, the said dismissal was subsequently converted to one of normal termination by the Labour Officer following conciliation procedures. We therefore find it unnecessary to interrogate the compliance or otherwise of section **41** of the Act which provided for the process the appellant was obligated to apply before dismissing the respondent from its employment.

The learned Judge faulted the process of termination of the appellant's employment, on two grounds; first because in her view, the matters complained of by the appellant and which formed the appellants' disciplinary proceedings against the respondent were better handled through the criminal process, where in her view thorough investigations would have been carried out before deciding on either a prosecution or otherwise; and, second it was because, there was no supportive documentary proof on how the respondent was linked to the alleged financial malpractices.

With regard to the first reason, it is our view that there is nothing in the provisions of law assessed above that could have prevented the appellant from making an election either to opt for the criminal process as it did with regard to the Accountant who was also allegedly involved in the same malpractices, resulting in this appeal; or, the internal dispute resolution mechanism that the respondent was subjected to. All that the appellant was obligated to do after opting to subject the respondent to the internal dispute resolution mechanism as opposed to a prosecution, was for the appellant to observe strictly the legal procedures outlined above.

On the record, it was correctly submitted by the appellant that strict compliance with those prerequisites was met as the respondent admitted so, through her averments in the statement of claim and her testimony on oath that she had indeed been assigned the duties of a cashier from which the issue of the alleged malpractices arose; that she was suspended and given two show cause letters to which she responded. She was then taken through the disciplinary process upto the appellate stage, which she lost. She then availed herself of the conciliation procedures before the Labour Officer, whose verdict she declined to accept and finally filed her claim before court. All the above outlined procedural steps undertaken by the appellant and as fortified by the respondent's own admission, were well within the parameters of the minimum legal prerequisites governing the process an employer is obligated to invoke and apply when terminating an employee's employment with them, as already highlighted above. As for the second reason, we find this too has been well countered by the appellant's explanation that the relevant evidence intended by them to demonstrate that there were financial malpractices in which the respondent was involved was among the evidence that the learned Judge shut out when she wrongly exercised her discretion to decline the appellant's request for her to reopen their defence and admit that evidence, especially that of the Auditor who carried out the Audit and unearthed the malpractices. It is therefore our

finding that on the basis of our above reasoning which is based on the record as it was before the learned Judge and now before us, there was no basis for her finding that the appellant's termination of the respondent's employment with them was substantively and procedurally unfair.

Turning to issue, number, 3 it was correctly submitted by the appellant and also as appreciated by the learned Judge that the respondent sought only one relief from the court, namely, Reinstatement with no loss of benefits. The learned Judge however allowed a multiplicity of awards, and granted relief for reasons already highlighted above.

The position in law with regard to pleadings and the role of the court with regard thereto has long been crystallized by a long line of decisions of the court. See **Gandy versus Caspar Air Charters Limited [1956] 23 EA CA, 139** for the holding *inter alia* that:-

“The object of pleadings is of course to secure that both parties shall know what are the points in issue between them;

so that each may have full information of the case he had to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given”[emphasis added]

And also the case of **Odd Jobs versus Mubia [1970] EA 476**, for the observation by law, JA, that:

“ Courts may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue had in fact been left to the Court for decision ”

In sum, issues for determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings and such issue as the parties framed for the Court's determination. The pleadings be amended, parties are confined to their pleadings.

In the light of the above principles, we make no hesitation in finding that the learned Judge fell into error when she awarded reliefs not prayed for, and also contrary to the evidence tendered by the respondent. We agree with the appellant's submission that the learned Judge had no mandate to abdicate her role as an impartial arbiter and descend into the arena of litigation. The amendment of the claim *suo motu* in favour of the respondent was prejudicial to the appellant.

The upshot of the above reasoning and assessment is that, we find merit in this appeal. The same is allowed. The findings of the learned Judge dated the 24th February, 2015 are hereby set aside and substituted with an order dismissing the respondents claim against the appellant, but affirming the conciliation award by the Labour Officer.

(2) The appellant will have costs of the appeal and the court below.

Dated and Delivered at Nairobi this 16th Day of February, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

Deputy Registrar