IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 127 OF 2016

BETWEEN

NEC CORPORATION.....APPELLANT

AND

SAMUEL GITAU NJENGA.....RESPONDENT

(Being an appeal and Cross appeal from part of the Judgment and

Decree of the Employment and Labour Relations Court

*at Nairobi (**Nzioki wa Makau, J**.) delivered*

on 12th March, 2015

in

ELRC No. 1708 of 2011)

****

JUDGMENT OF THE COURT

[**1**] This is an appeal against the judgment of the Employment and Labour Relations Court (ELRC) delivered by **Nzioki wa Makau, J** awarding the respondent Shs. 3,358,992/- for discrimination while in employment. The respondent has also filed a cross-appeal against the same judgment dismissing his other claims in the memorandum of claim including arrears of bonus and compensation for unfair termination of employment on account of redundancy.

[**2**] The appellant is a Japanese Multinational Corporation providing information technology and network solutions to business enterprises, communication service providers and government, with its head quarters in Japan. At the time of filing the suit it had five regions, North America, Latin America, Asia, Greater China and Africa. It has a branch office in Nairobi. According to the written statement of the respondent filed in the claim, the Nairobi office does not have mandate to enter into any contract and all expenses of Nairobi office are remitted monthly from the headquarters in Japan.

[**3**] By a contract of employment dated 18th September, 1997 between the appellant and Hisashi Ikazaki, the appellant's Chief Representative in Nairobi, the respondent was employed as Sale Engineer with effect from 1st September, 1997 on the terms contained in the letter. According to respondent's evidence, he started with monthly gross salary of Shs. 61,500/-. By the contract, the appellant agreed to pay the respondent bonus "**twice of the basic wage at the end of each year and to provide a car at company's expense**". After the commencement of the employment, the respondent made written proposal for better terms but the proposals were never accepted by the headquarters. In 2009, the respondent was promoted to Chief Engineer and entered into a new contract which took effect on 1st April 2009 which was to last up to 31st March 2010. The new contract enhanced the respondent's salary to Kshs. 209,259/72 per month and other benefits.

However, it did not provide for payment of bonus or a company car. The contract provided for a **retirement fee** equivalent to accumulated sum per month salary (present salary) to each year from initial to final year of employment. The appellant also formulated company regulations for Nairobi Office dated April 2009 to regulate the terms of employment of its employees. Clause 8.2 of the Regulations provides

for bonus payment thus:

> ***"In order to reward EMPLOYEE for his/her contribution to COMPANY, COMPANY MAY GRANT a bonus once a year in the month of December, taking into consideration performance, attendance, conducts and capability etc of EMPLOYEE as well as the results of business of COMPANY.***
>
> ***However, COMPANY may not grant a bonus due to aforementioned factors."***

Clause 4.6 of the Regulations provides for severance payment in the event of resignation, retirement and termination thus:

> ***"EMPLOYEE shall be entitled to severance payment/retirement fee equivalent to accumulated sum per month basic salary for each year from initial to final year of employment."***

[**4**] By a letter dated 23rd February, 2011, the appellant communicated to the respondent thus:

> ***"Due to re-organization of our office business, NEC Corporation (the Company) has decided that the duties falling within your job description shall not be undertaken by the Nairobi Branch Office with effect from 1st April 2011. Arising from the foregoing, your services will no longer be required by the company. For that reason, the company intends to terminate your employment on account of redundancy on 31st March 2011."***

The company offered to pay severance pay at the rate of one month's basic salary for each completed year of service, salary and allowances for February and March 2011 and accrued leave. The schedule setting out the calculation of severance pay and other terminal dues was attached.

The letter required the respondent to surrender company property in his possession including company car, laptop, PC and mobile phones. By a letter dated 28th February, 2011 the company informed the Provincial Labour Officer, Nairobi area, of the decision to terminate the respondent's employment on account of redundancy. By a letter dated 25th February, 2011, the respondent required the appellant to pay severance compensation at over six times of the stipulated rate in addition to terminal benefits, arrears of bonus, amongst other claims. When his request for amicable settlement of terminal dues was not headed the respondent filed a memorandum of claim.

[**5**] By the claim, the respondent averred, *inter alia*, that termination of his employment was unfair and without justification; that the appellant did not act with justice and equity; and that in termination of the employment the appellant directly and indirectly discriminated against the respondent. The appellant enumerated four instances of discrimination – paying salary which was not in conformity with "NEC global Scheme of Service" which should have been Shs. 290,250 with subsequent annual increments of 10-11%; giving; Japanese staff five promotions in the span of 14 years while he got none; computing severance pay which did not include 3 years fully paid leave that retiring Japanese are entitled to; and failing to replace the old company car The respondent further averred that he was entitled to arrears of salary based on the salary Shs. 290,250 per month which should have been paid to him; arrears of bonus which he calculated and tabulated; retirement benefits of Shs. 2,929,636.00 (209,259.72x14); and additional severance pay and monetary compensation for the old company car provided. Those are the reliefs that he sought in the claim. The claim was supported by his statement and oral evidence at the trial.

The appellant filed a memorandum of defence, and a statement of Tsuyoshi Furukawa – the Chief Representative of the Nairobi Branch which was adopted at the trial.

[**6**] The court rejected the claim for unfair termination on the ground that the respondent did not prove that the redundancy was a sham. The court said;

> ***"The claimant was declared redundant and from the accounts the claimant and the respondent notification of this was made to labour office and the concerned individual. The claimant was not able to prove that his redundancy was a sham. The officials who were employed by the respondent undertake different tasks".***

The court rejected the claim for arrears of bonuses on the ground that it was statutorily time barred. The claim for compensation for the car was also rejected on the ground that provision of car was not part of the contract.

As for compensation for discrimination, the court said:

> ***"Whereas the claimant alleges systematic discrimination, he failed to prove the prevalence of the discrimination. Since there is at least one instance, the claimant is entitled to recover for the discrimination suffered."***

The one incident referred to according to the finding of the court was in the email dated 8th February 2008 which according to the learned judge showed that during the appellant's conference held in South Africa, all Japanese employees were accommodated at Sandton Sun, a 5-star hotel while the rest of the staff were accommodated at Holiday Inn – a 4-star facility. The learned judge made a finding that the hosting of Japanese staff in superior accommodation and the other staff in less prestigious accommodation offended the law and on that basis entered judgment for the respondent for Shs.3,358,992.00.

[**7**] The appellant assails the finding of discrimination and the award on the grounds, amongst others, that discrimination in hotel accommodation was not pleaded; that the allegations of discrimination in hotel accommodation were inadmissible and unproved; that the respondent suffered no detriment in being put up in a 4 star hotel on one occasion of his 14 years service; and that the award was arbitrary and without any basis.

Extensive submissions have been made in support of the appeal. The respondent in his written submissions supports the finding of the court and the award and submitted, *inter alia*, that the respondent provided *prima facie* evidence of discrimination; that the burden of proving that discrimination did not occur was on the appellant; and that the appellant failed to discharge the burden of proof.

[**8**] It is a constitutional right of every person not to be discriminated against and **Article 27(5)** of the Constitution prohibits a person from directly or indirectly discriminating another person on grounds, *inter alia*, of race, colour and sex. **Section 5(3)** of the **Employment Act** (**Act**) prohibits discrimination in employment on grounds of, *inter alia*, race, colour and nationality and in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters. By **S. 5(5)** of the Act, an employer is required to pay his employee equal remuneration for work of equal value.

Section 5(4) specifies actions by an employer which do not amount to discrimination including employing a citizen in accordance with the national employment policy. Contravention by the employer of the provisions of section 5 is an offence (S.5(6)). Neither the Constitution of Kenya, 2010 nor the Act defines discrimination. The repealed Constitution of Kenya in section 82(3) defined "discriminatory" as meaning:

> ***"…affording different treatment to different person attributable wholly or mainly to their respective descriptions by race…***
>
> ***Whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."***

In **Mohammed Fugicha v Methodist Church of Kenya & 3 Others [2016] eKLR** this Court restated the principle of relative equality, namely, to treat equally what are equal and unequally what are an unequal.

[**9**] The respondent's claim was that he had suffered discrimination in his employment by denial of appropriate remuneration, promotion, terminal benefits and serviceable car. It was not part of his claim as pleaded that he had generally suffered discrimination in hotel accommodations. Indeed, his reference to discrimination, as his statement and evidence showed, was intended to foreshadow or augment his claim that he had suffered general discrimination in his employment. It was no intended to be, and was never made a special claim requiring special consideration and compensation. This is illustrated by para 31 of his statement where he states:

> ***"THAT, discrimination is NEC's hushed policy for instance, whenever we attended official meetings in South Africa, Japanese and Caucasian employees (irrespective of rank) would be booked in a luxurious Five Star Hotel, while Black African employees would be booked in a low budget travelers inn."***

He attached an email dated 28th February, 2008 addressed to those who were to attend the meeting including himself attaching the flight list and promising to send confirmation of hotels. He also annexed a schedule of hotel bookings. In his evidence he referred to the two documents, and stated;

> ***"We were to attend meeting in South Africa on 7th February 2008. Holiday Inn was booked for the Africans whereas Southern Sun was reserved for Japanese. Sandton Sun is a 5 Star Hotel and Holiday Inn is a 3 star hotel. The Japanese staff some of whom were junior got 5 star."***

On cross-examination he stated;

> ***"I attended seminars locally and abroad. There is no other document to show racial discrimination. I was not concerned about discrimination."***

The schedule of hotel booking contains 22 names. The hotel booking for persons named No. 1-5 is blurred and one cannot tell in which hotel each was booked. The name of the respondent is not among the list of 22. He did not say unambiguously that he was accommodated in Holiday Inn. The respondent did not also explain the schedule. The court was left to infer from the names only, the race and seniority of the persons in the schedule.

The training, travel and accommodation were not one of the terms of employment to justify any complaint of discrimination in the employment arising from the manner in which they were managed. It seems to us that they were meant to achieve motivation and competence of the staff solely for the appellant's business. Furthermore, the respondent did not show that he personally suffered loss or detriment.

[**10**] The appellant relied on **Flanney v Halifax Estate Agencies [2000] 1 All ER 373**, a decision of English Court of Appeal on the duty of the Court to give reasons for its decision where the Court held in part;

> ***"where a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on law or facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The duty to give reasons was a function of due process and therefore, of justice. Its rationale was, first, that parties should not be left in doubt as to the reasons why they had won or lost, particularly, since without reasons, the losing party would not know***

whether the court had misdirected itself and thus whether he might have any cause for appeal. Second, a requirement to give reasons concentrated the mind, and the resulting decision was therefore more likely to be soundly based on evidence."

[**11**] In employment matters, **section 5(3)** and **5(6)** of the Act respectively prohibits discrimination in employment and creates a statutory offence for breach without providing for compensation for such breach. The Employment Act only provides for statutory remedies for breach of a contract of service without giving the court additional powers to award compensation for conduct of an employer unrelated to breach of the terms of contract of service. It is true that section 12(3) of the Industrial Court Act gives the court power to award compensation and damages in circumstances contemplated under the Act or any written law.

In **GMV v Bank of Africa Kenya Limited [2013] eKLR** on which the respondent relied to support compensation for discrimination, the employees cause of action was based on the ground that the termination of employment was on the ground of pregnancy and therefore discriminatory under section 5(3) and 46 of the Act. The Industrial Court , (as it was then named) so found and enhanced the remedy of 12 months gross salary stipulated in section 49(1)(c) of the Act to Shs. 3,000,000. However, the court said in part at para 99 with which we agree:

"the court does not think however that violation of every conceivable contractual statutory and constitutional right deserves a separate award of damages."

That case is distinguishable from this case as the termination of employment in this case was based on redundancy – a legitimate ground and not on a discriminatory ground. Further, unlike the present case, seasons for the award were given.

Whereas ELRC has jurisdiction to determine constitutional issues arising out or incidental to employment dispute nevertheless, where the discrimination alleged is not directly related to the termination of contract of service or incidental to the contract of service and is a standalone claim like in this case, where discrimination alleged is in hotel accommodation, the appropriate forum is the High Court sitting as a constitutional court to determine a breach of constitutional right in accordance with the procedure stipulated in **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and award appropriate damages which are large.

In the light of the foregoing, if the ELRC is to assume jurisdiction in such matters and is destined to make a large compensatory award for enforcement of a constitutional right against discrimination, then in accordance with due process, it should disclose the rationale for its decision.

In this case, a determination of a weighty constitutional issue was made and a large award given without providing the reasons. In the absence of reasons, the contention by the appellant that the award was arbitrary cannot be assailed.

[**12**] In summary, it is evident that the claim for discrimination in hotel accommodation in South Africa on 7th February 2008 was not part of the respondent's claim; that it was not pleaded; that it was not in reality a discrimination in employment according to the terms of contract or contracts of service; that it was not substantiated; that the respondent suffered no personal detriment and that the award was arbitrary and without any justification. For those reasons, the appeal is allowed.

[**13**] Turning to the cross-appeal, the respondent has appealed on the grounds that the learned Judge failed to properly analyze the facts, circumstances and principles of law; that the learned Judge misdirected himself in failing to find that the rest of the claim was pleaded and proved; and in holding that part of the claim was time barred. The respondent's counsel filed written submissions. The cross-appeal is opposed on the grounds in the appellant's written submissions.

[**14**] The claim for unfair termination of employment on account of redundancy was rejected on the ground that the redundancy was a sham. The court found that the appellant's officials, who were recruited after the respondent left undertake different tasks. The respondent stated in his evidence that the reasons given to declare him redundant were not genuine as three people employed after he left were performing the same services. He further stated:

"The issue I have is that I do not think the redundancy was genuine."

Tsuyoshi Furukawa, stated at para 12 of the statement:

"The decision to terminate the claimant's contract on the grounds of redundancy arose after a decision was made in the head office in Japan to reorganize the branch office by transferring some functions and operations from Nairobi branch office to the head office in NEC South Africa. In effect, the claimant's duties as set out in his job description would not be carried out from branch office. The broadcasting function and the afis project required detailed technical management and solutions which would be provided from Japan or South Africa. The claimant's services were therefore no longer required."

In his evidence, he stated in cross-examination:

"At the time of redundancy the broadcast Automatic Finger Index System in East African region was not good. As a company we had come to judgment we would not continue to have dedicated employees for such. In South Africa we have big demand of AFIS and we have staff and merged certain functions in South Africa. The function was transferred from Nairobi Office to South Africa on broadcast and AFIS."

He admitted that the company hired two employees but explained that their job description was different – one was doing sales and the other one was an Engineer. He annexed the contracts of employment and the organisation structure of the Nairobi Branch before and after the

employment of the respondent was terminated. All these show that the three employees, not two, were assigned different jobs and the job that was previously assigned to the respondent, AFIS & Broadcasting was left vacant.

[**15**] By section 43(1) of the Act, an employer is required to prove the reasons for termination but S.43 (2) provides that the reasons for termination, are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services. By section 45 of the Act, termination of employment of the respondent would be unfair if, *inter alia*, the reason for termination is not based on operational requirement of the employer and if the termination was not in accordance with fair procedure. Further, by section 47(5) of the Act, the burden of proving unfair termination is on the employee while the burden of justifying the grounds for termination rests on the employer.

The employer has complied with the conditions stipulated in Section 40(1) of the Act for lawful termination of employment on account of redundancy and the respondent has not complained that fair procedure was not employed. From the evidence, the employer has justified the grounds for termination on account of redundancy and this ground of cross-appeal fails.

[**16**] The claim for enhanced salary in conformity with the "***NEC Global Scheme of Service***" and loss of promotion was not proved. The employer denied that such a global scheme existed. The respondent did not produce any document to verify that such a scheme existed. He merely said in his evidence that the words "***global scheme***" was used by **Ikazaki**. He also admitted that the enhanced terms were not incorporated in all the contracts he signed. He did not refer to any specific case where a Japanese employee with the same qualification and doing the same job as him had been offered a higher salary or promoted repeatedly for five times as he claimed. Nor did he claim that the terms of contract are not in accordance with national employment policy. It is clear that his claim was outside the terms of contract and was properly rejected.

[**17**] The claim for arrears of bonus was rejected on the ground that it was time barred by virtue of section 90 of the Act which provides:

> ***"Notwithstanding the provisions of section 4(1) of the Limitations of Actions Act (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the Act, neglect or default complained of or in case of continuing injury or damage within twelve months next after the cessation thereof."***

The respondent's counsel submitted that the court erred in computing time from the year of employment rather than from the date that the respondent was declared redundant. He cited several authorities including the majority judgment of this Court in **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** for the proposition that time starts running from the time of termination. The appellant's counsel submitted that the period 1997 to 2008 is outside the limitation period without citing any authority.

This was a continuing employment until it was terminated on 31st March, 2011. Correspondences show that the respondent had continuously claimed bonus and arrears of bonus but apparently there was no approval from Japan. By an email dated 28th March 2011, the Nairobi Branch informed the employees including the respondent that the company had secured approval to pay bonuses for 2010. If the appellant's contention is taken to its logical conclusion, it means that the employer cannot demand the surrender of a car which was assigned to the respondent as a term of contract in 1998. This would lead to absurdity. In our view, all accounts and liabilities between employer and employee are settled at the termination of contract. Filing suits by employees to demand benefits withheld by an employer while the employment subsists would not promote workable good labour relations.

In our view, the respondent claim for arrears of contractual benefits arising from employment could be brought within three years of termination of employment. The appellant's claim brought within three years of termination is not time barred.

[**18**] The contract of employment dated 18th July 1976 entitled the respondent bonus at twice the basic wage payable at the end of each year. The payment of bonus was not conditional. There was no evidence that the benefit was varied before the new contract was entered into in 2009. That contract did not have provision for payment of bonus.

However, the company's regulations which are part of the terms of service retained it at the discretion of the employer and without pegging it to monthly salary. The respondent has computed the arrears at Shs.1,877,514 up to year 2010. We are satisfied that the respondent is entitled to arrears up to year 2008. The arrears of Shs.167,406 and 209,260 (total 376,666) for 2009 and 2010 respectively are discounted, leaving a total of 1,500,848 (1,877,514 less 376,666).

[**19**] The respondent throughout the period of employment enjoyed the benefit of a company car which was maintained by the employer. His claim that it should have been replaced in January 2004 was baseless.

[**20**] The respondent also claimed that he was entitled to shs.2,929,636.00 as a retirement benefit which is distinct from severance pay. The learned judge did not specifically deal with that claim but did not grant it. The appellant submits that the claim for retirement benefits in addition to his redundancy dues amounts to double payment and is therefore unjust enrichment. Had the contract been terminated by notice by the employer, summary dismissal or by retirement at the age of 60 years, he would have been entitled to retirement benefits at the rate of one month's basic salary for each year served as stipulated in clause 46 of the company's Regulations 2009. However, the employment was terminated on account of redundancy which, as section 40 of the Act provides, entitles him to severance pay at the rate of not less than 15 days for each year of completed service. The contract (Clause 4.6) has enhanced that to one month's basic salary for each year served. The respondent is not entitled to more than what the statute has provided. Thus, he is only entitled to severance pay as stipulated in the termination letter dated 28th February, 2011. The quantum of severance pay is not in dispute.

The claim for retirement benefits in addition to severance pay was made in misapprehension of the law and is rejected.

[**21**] The appeal has wholly succeeded. The cross-appeal has partially succeeded. In the circumstances of this case, it is just that each party meets its/his own costs of the appeal.

[**22**] In the premises, the appeal is allowed and the judgment of the trial court awarding the respondent shs. 3,358,992 on grounds of discrimination is set aside. The cross appeal is allowed and judgment is entered for the respondent for Shs. 1,500,848 with interest at court rates from the date of judgment of the trial court. There shall be no orders as to costs.

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

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR