



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 107 OF 2016

BETWEEN

ORTHODOX DEVELOPMENT SAVINGS AND

CREDIT LIMITED.....APPELLANT

AND

HARRIET K. MUTESHI.....RESPONDENT

(An appeal from the judgment of the Employment and Labour

Relations Court at Nairobi (Abuodha, J.) dated 10th July, 2015

in

JUDGMENT OF THE COURT

1. **Harriet K. Muteshi** (the respondent) was initially employed by **Orthodox Development Savings & Credit Society Ltd.** (the appellant) as a Public Relations and Marketing officer and later re-designated as a Loans Officer. Subsequently, on 10th September, 2011 she was promoted to a FOSA Manager. It was while she held this position that the appellant discovered anomalies and deteriorating performance within the organization. It appears that at one point the respondent was put to task to give an explanation on the same which she did by a letter dated 20th September, 2012.

2. However, that was not the end of the matter because a year later the appellant constituted a taskforce to look into the anomalies and poor performance that had persisted. Upon conclusion of its mandate the taskforce prepared a report outlining the anomalies it had unearthed and its recommendations. The report was tabled before the appellant's Board of Directors meeting held on 17th August, 2013. The recommendations which included the transfer of employees who had been adversely named to different departments and immediate recovery of the money lost were adopted by the Board. Towards that end, the appellant vide a letter dated 19th August, 2013 informed the respondent of the Board's decision to transfer her to the loans department as a loans officer and in addition to surcharge her for the loss of Kshs.166,344 which arose on account of overdrawn customer accounts. The amount was to be recovered through monthly deductions of Kshs.20,000 from her salary for a period of five months.

3. The respondent was not happy and registered her grievance with the appellant by a letter dated 22nd August, 2013. In that letter she gave an explanation on the cause of the overdrawn accounts and maintained that the loss was not attributable to her. In September, 2013 the respondent noticed that the amount in question had been deducted from her salary. This affected her personal budget, and she needed time to plan the way forward. So, she applied for her annual leave, but the same was disallowed. It is at this point that she felt pushed to the wall and had no other choice but to tender her resignation letter dated 5th October, 2013.

4. In response, the appellant by a letter dated 14th October, 2013 asked her to respond to several issues relating to overdrawn accounts during her tenure as the FOSA manager. The respondent in an undated letter reiterated the explanation she had given earlier in the letter protesting her demotion and deductions of the amount in issue. She also demanded payment of all her terminal dues.

5. When the appellant did not accept those demands, the respondent filed suit at the Employment and Labour Relations Court (ELRC) claiming that her services had been unfairly and constructively terminated. She sought damages for the unfair termination as well as terminal

dues.

6. In its defence the appellant denied that the respondent had been unfairly or constructively terminated stating that she had out of her own free will tendered her resignation. As the matters stood there was an outstanding balance of Kshs.126,344 in respect of the amount which was to be recovered from the respondent.

7. Upon considering the evidence before him the learned Judge (Aboudha, J.) in a judgment dated 10th July, 2015 found that the procedure followed by the appellant was above board right from the investigation of the claims against the respondent up to finding her culpable for the loss occasioned to the respondent due to the overdrawn accounts. He also found that the appellant was entitled to make reasonable deductions from the respondent's salary to recover the amount lost. What he had an issue with is that the deduction of Kshs.20,000 was beyond the prescribed ceiling under **Section 19(3)** of the **Employment Act** which stipulates:-

“Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two-thirds of such wages or such additional or other amount as may be prescribed by the Minister either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry”. *Emphasis added.*

8. It was on that basis that he expressed himself as follows:-

“On a salary of Kshs.48,158 the claimant (respondent herein) had a lifestyle which revolved around it. It was therefore incumbent upon the respondent to take into consideration this fact in order to come up with a reasonable deduction from the claimant's salary. The amount alleged to have been lost was Kshs.166,344 and could have been liquidated by the claimant by reasonable instalments which did not have to significantly reduce her income from a net of Kshs.34,357 to a paltry 14,357 per month. To this extent the court finds that the respondent's conduct was not only in breach of the Employment Act but amounted to fundamental breach of the contract of employment with the claimant for which she was justified to resign on account of constructive dismissal.”

9. It is that decision that has provoked the appeal and cross appeal before us. The appeal is premised on the grounds that the learned Judge erred in law and fact by-

i. Finding on one hand, that the appellant was entitled to make deductions on the respondent's salary and on the other hand, turning around to penalize the appellant for such deductions.

ii. Finding that the appellant's conduct amounted to constructive termination of the respondent's services.

The respondent in her cross appeal basically challenged the finding by the learned Judge to the effect that the appellant was entitled to make deductions on her salary.

10. Mr. Oonge, appeared for the appellant while Mr. Wambugu appeared for the respondent. Both counsel adopted the written submissions filed on behalf of the respective parties.

11. The appellant faulted the learned Judge for holding that the deductions in issue were beyond the prescribed limit yet the same was neither pleaded by the respondent nor did it arise during the hearing. As such, it was never given an opportunity to respond or submit on the same. Nevertheless, the learned Judge having found that the appellant had exceeded the prescribed limit by 3% erred in deeming the same as a fundamental breach of the contract of employment. As far as the appellant was concerned, its actions did not amount to constructive termination.

12. On her part, the respondent contended that the learned Judge failed to take into account that she was never part of the taskforce that made the recommendations in question as well as the explanation she gave in regard to the anomalies. All in all, she was not culpable for the resultant loss thus there was no basis for deductions being made on her salary. According to her, the taskforce recommended further investigation to be carried out which was never done. She was also not given an opportunity to be heard before the Board adopted the taskforce's report.

13. We have considered the record, submissions by counsel and the law. This being a first appeal we have re-evaluated the record of appeal as per the provisions of **Rule 29 (1)** of the **Court of Appeal Rules** in order to arrive at our own conclusions in the matter. As always, we shall not lightly differ with the findings of fact made by the trial court which had the advantage of seeing and hearing the witnesses but we will not hesitate to do so if in our assessment, the findings were made without any evidential basis or through an error in principle.

14. In light of the evidence which we have endeavored to set out herein above we see no reason to interfere with the learned Judge's finding that the procedure and disciplinary measures adopted by the appellant were beyond reproach. From the record it is clear that the appellant adhered to due procedure as outlined under **Section 41** of the **Employment Act** prior to implementing its disciplinary measures. In our view, the submission to the effect that the respondent was not part of the taskforce which carried out the investigations and came up with the recommendations which were later adopted by the appellant lacks merit. From her own evidence at the trial court the respondent admitted that she was part of the taskforce and was aware of its findings.

15. What is in issue is whether the deductions in question on the respondent's salary gave rise to constructive termination of her services. The learned Judge appreciated and rightly so, that the appellant having found the respondent culpable for the loss occasioned to it was entitled to make deductions on her salary pursuant **Section 19** of the **Employment Act** to recover the loss. However, where we part company with the

learned Judge is on his finding that the deduction in question exceeded more than 2/3 of the respondent's salary. This issue as pointed out on behalf of the appellant was neither pleaded nor arose during the course of the trial. As such, the parties and in particular the appellant was denied an opportunity to make representations on the same.

16. It is trite that issues for determination by a court flow from the pleadings. A court cannot make pronouncement on issues not raised in the pleadings filed by parties and to do so would be tantamount to acting outside its mandate.

This was observed by this Court in ***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others*** [2014] eKLR-

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

17. Besides, the learned Judge having found that the appellant was entitled to recover the lost amount from the respondent's salary, the deductions could not amount to constructive dismissal was articulated by Lord Denning MR in ***Western Excavating (ECC) Ltd. vs. Sharp*** [1978] ICR 222 or [1978] QB 761, as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.”

We find that it was the respondent who resigned from employment.

18. In the end, we find that the appeal has merit and is allowed with costs. Consequently, the cross appeal is devoid of merit and is dismissed with costs. We hereby set aside the learned Judge's judgment dated 10th July, to the extent that it found that the appellant had constructively dismissed the respondent and the award of damages assessed thereunder. We substitute the same with an order dismissing the respondent's suit with costs.

Dated and delivered at Nairobi this 2nd day of February, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR