



**IN THE COURT OF APPEAL**

**AT MOMBASA**

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

**CIVIL APPEAL NO. 64 OF 2017**

**BETWEEN**

**FLORA PRINTERS.....APPELLANT**

**AND**

**ABDULKADER M. MUSANI.....RESPONDENT**

*(An appeal from the judgment of the Employment and Labour Relations Court*

*at Mombasa (Makau, J.) dated 25<sup>th</sup> November, 2016)*

*in*

*Cause No. 246 of 2016.)*

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**JUDGMENT OF THE COURT**

1. Sometime in December 2015, **Flora Printers** (the appellant), advertised a vacancy for the position of Chief Accountant. **Abdulkader M. Musani** (the respondent), was amongst the applicants who had applied for the same. Subsequently, the appellant by a letter dated 16<sup>th</sup> December, 2015 offered the respondent the position in question which he accepted by executing the said letter. Some of the terms of his employment were that he was to earn a monthly salary of Kshs.140,000 and report for duty on 16<sup>th</sup> January, 2016.

2. This turn of events prompted the respondent to give notice of termination of his employment with his then employer. Meanwhile, the appellant got wind that the respondent had been previously employed by Nyati Auto Parts in a similar position but had also been terminated on grounds of misappropriation of funds. This fact had not been disclosed to the appellant who then had a change of mind. Accordingly, Molin Sanghau, a partner in the appellant's firm, informed the respondent through a 'WhatsApp' message that the appellant did not wish to proceed with the offer and also indicated that a formal letter to that effect would issue.

3. Nonetheless, the letter in question never came and the respondent reported for duty on the scheduled date. He was turned away and barred from commencing work. In his view, the appellant had acted maliciously for no apparent reason. Consequently, the respondent filed suit in the Employment and Labour Relations Court (ELRC) on the grounds that the appellant had breached the employment contract and in the alternative, terminated his services unfairly. He was convinced that since he had not been served with any notice of termination he was still the appellant's employee and entitled to the benefits under the contract. He sought the following orders:

***a) A declaration that the claimant (the respondent herein) is still the respondent's employee and therefore entitled to his monthly salary of Kshs.140,000.***

***b) Payment of all the salary arrears.***

***c) In the alternative, 3 months' salary in lieu of notice and 12 months' salary for unfair termination all aggregating to Kshs.2,100,000.***

4. In its defence, the appellant averred that the respondent had conveniently left out crucial details of his employment history with the aim of misleading it. Had the appellant been aware of those facts, it would not have employed the respondent. The contract had been revoked prior

to the date he was to commence work. As such, he was not entitled to any salary or the prayers sought.

5. Upon weighing the evidence tendered by the parties, the trial court (**Makau, J.**) in a judgment dated 25<sup>th</sup> November, 2016 found that the respondent was on a probationary period of 3 months which had been terminated prior to its expiry. In as much as the termination could not be faulted, he found that it was done without giving notice or payment in lieu of notice. In the absence of an agreed termination notice of the probationary contract, the ELRC had the discretion of determining the same. Deeming 3 months' salary as sufficient pay in lieu of notice, the learned Judge went on to grant the respondent a sum of Kshs.420,000 together with costs and interest.

6. It is that decision that the appellant is challenging on the grounds that the learned Judge erred in law and fact by:-

*i. Failing to find that the appellant had not terminated but rescinded the contract on the grounds of misrepresentation of material facts.*

*ii. Holding that the ELRC had discretion of determining a reasonable notice period for termination of a probationary contract where there was no provision therein.*

*iii. Awarding the respondent 3 months' salary.*

7. Miss Onyango, learned counsel for the appellant, submitted that misrepresentation of the respondent's employment history prevented the appellant from making an informed choice. Honesty and integrity were integral to the position offered to the respondent. Therefore, the resulting contract was void *ab initio* and did not bind the appellant. In that regard, counsel relied on this Court's decision in ***Securicor Courier (K) Ltd vs. Benson David Onyango & Another [2008] eKLR***. She added that there was no contract to begin with hence the issue of termination or breach of contract did not arise. In any event, the respondent had not commenced working.

8. While admitting that the contract did not stipulate the notice period for termination of a probationary contract, Miss Onyango argued that the learned Judge erred in implying from a letter of appointment a notice period of 3 months. In her opinion, the learned Judge ought to have applied the minimum period of 7 days' notice as stipulated under **Section 42(2)** of the **Employment Act**. She took issue with the learned Judge's finding that the respondent had suffered losses yet there was no evidence to support the same. Miss Onyango also faulted the learned Judge for awarding the respondent costs because she believed that he was the author of his misfortune.

9. Making reference to this Court's decision in ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR***, Mr. Wafula, learned counsel for the respondent, contended that the appellant could not turn around and state that the contract had been rescinded having pleaded that it had terminated the same. A party is bound by its pleadings. Supporting the learned Judge's decision, he submitted that the award was in line with the contract which provided for a probationary period of 3 months. According to him, loss had been established by the fact that the respondent had left his previous employment on the basis of his appointment by the appellant. It was trite that costs follow the event, thus the respondent was rightfully entitled to costs.

10. It seems to us that while Mr. Wafula correctly restated our role as a first appellate court he erroneously called upon us to interfere with the learned Judge's finding to the effect that termination was not unfair. Without going into details of those submissions it is common ground that jurisdiction of this Court to determine an appeal is invoked by filing of Notice of Appeal against the decision in issue. In this case the respondent has not filed any Notice of cross appeal against the impugned decision. Equally, the appellant has not challenged the said finding. For those reasons that line of submission fails.

11. We have considered the record, submissions by counsel and the law. Being a first appeal we take cognizance that we are called upon to re-evaluate the facts before the trial court and make our own conclusion. This Court in ***J. S. M. vs. E. N. B. [2015] eKLR*** aptly put our role as a first appellate as follows:-

***"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."***

12. It is not in dispute that the parties entered into a contract of employment on 16<sup>th</sup> December, 2015. Similarly, it is common ground that Clause 5 thereof provided that the respondent was on probation. In particular, the clause read:

***"As with all positions under, there is a 3 month probationary period after which time the employment will either be confirmed on terminated."***

13. Therefore, like the learned Judge, we find that the provisions of **Section 42** of the **Employment Act** applied in this particular circumstance. The said provision stipulates in part:-

**"42**

**(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.**

**(2) ...**

(3) ...

**(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice."**

14. It follows that whether the contract was determined through termination or rescission as suggested by the appellant, notice of such termination or rescission or payment in lieu of such notice was required to be given by the appellant. We concur with the learned Judge that in the absence of an agreed period of notice in the contract the ELRC has discretion to imply a reasonable notice.

15. Having expressed ourselves as herein above, was the period implied by the learned Judge reasonable? In answering the aforementioned question we have to bear in mind that **Section 42(4)** of the **Employment Act** provides for the minimum period of 7 days' notice which can be enhanced by the parties or the ELRC. Our position is fortified by **Section 26(2)** of the **Employment Act** which provides that:-

**"Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."**

16. This Court while discussing the import of the aforementioned provision in **Kenya Tea Growers Association vs Kenya Plantation & Agricultural Workers Union - Civil Appeal No. 207 of 2017 (unreported)** in its own words stated:

**"We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the EA and Wages Order but also empowers the ELRC to issue such favourable terms."**

17. In our view, taking into account the circumstances of this case we, unlike the trial Judge, find that one month notice was reasonable as opposed to three months' notice. Equally, we find that the award of three months' salary in lieu of notice was unreasonable and hereby interfere with the same. We are guided by the sentiments of this Court in **Peter M. Kariuki vs. Attorney General [2014] eKLR:-**

**"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."**

18. The upshot of the foregoing is that the appeal succeeds in part. We hereby set aside the ELRC decision with regard to the payment of the 3 months' salary of Kshs.420,000 in lieu of notice and substitute it with payment of one month salary of Kshs.140,000. The appeal having succeeded partially we direct each party to bear its costs.

19. Last but not least, we see no reason to interfere with the award of costs by the ELRC in favour of the respondent. For the simple reason that the respondent succeeded in the ELRC albeit to the extent of the payment in lieu of notice.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of May 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**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**