



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, JJA)

CIVIL APPEAL NO. 29 OF 2016

BETWEEN

JAMES K. KAMAU.....APPELLANT

AND

THE NAIROBI CITY COUNCIL.....RESPONDENT

(Appeal from the judgment and decree of the Employment and Labour Relations Court Nairobi (Abuodha, J.) delivered on 6th March 2015)

in

ELRC Case No. 117 of 2013)

JUDGMENT OF THE COURT

Despite having succeeded in his claim for wrongful dismissal in the Employment and Labour Relations Court (ELRC), **the appellant, James K. Kamau** is dissatisfied with the total award of Kshs. 288,570 comprising one month's salary of Kshs. 12,000, rest days of Kshs. 204,570 six months' salary for unfair termination of services of Kshs. 72,000.

As a consequence, the appellant has appealed against that decision on grounds that;

- i) The learned judge having found that the termination was unlawful ought to have ordered the reinstatement of the appellant into the service before attainment of age 60 years;*
- ii) the learned judge erred in law and in fact in failing to award him economic compensation for lost years of service computed in the appellant's written submissions based on the decision of Hon. Justice Rika;*
- iii) that the learned judge erred in law and in fact in failing to consider and adopt the submissions and authorities annexed thereto of the appellant computing the correct award of compensation to the claimant;*
- iv) that the learned judge erred in law and in fact in not awarding the appellant reasonable dues for the years served;*
- v) that the learned judge erred in law and in fact terminal dues for the years served computed in the claimant's written submissions at current rate of salary earned by his cadre;*
- vi) that the learned judge erred in law and in fact in failing to discount of the award made on salary, a percentage of the award made on salary for accelerated payment as he merely relied on Kshs. 12,000 per month at the time of dismissal and not considering that there are salary adjustments upwards through annual increments of promotion.*

As a brief background to the appeal, the appellant was employed by the respondent sometime on 2nd November 1979 where he served in

various capacities up to 7th July 2006 when he was dismissed from service. The reasons proffered by the respondent for his dismissal were that he had absconded from duty, and that he had vied for a civic position during some elections.

As a result of interventions from the appellant's Union, two meetings were held with the respondent's Joint Staff Committee which resolved that the appellant be reinstated. But despite the resolutions this was not done.

An alleged letter from the Ministry of Local Government was to subsequently seal his fate by upholding his dismissal.

As a consequence, the appellant filed the Memorandum of Claim seeking an award for;

i) One month's salary	Kshs.	12,000
ii) Rest days (358 days)	Kshs.	204,570
iii) Severance pay (12,000 x15 x23 years)	Kshs.	138,000
iv) 12 months' salary for unfair termination of services	Kshs.	144,000
Total	Kshs.	498,500

Together with interest costs of the suit and any other relief the court may deem just.

In a response, the respondent denied that the appellant was its employee, and went on to raise a preliminary objection to the effect that the claim was time barred as it was filed beyond the limitation period specified in **section 90** of the **Employment Act 2007**.

Marete, J. dismissed the preliminary objection by concluding that the application did not meet the threshold requirements of a preliminary objection since there were facts that required to be disclosed before a decision in the dispute could be rendered.

On his part in determining the appellant's claim, Abuodha, J. found that on the basis of the evidence that was before the court, the appellant's services were unjustifiably terminated and awarded the sums claimed together with compensation of six months' salary.

It is this decision that has provoked this appeal on the grounds that we have already set out above.

The appellant who appeared in person filed written submissions which he highlighted before us, the main submission being that the learned judge failed to make an order of reinstatement, and also failed to take into account the additional claims set out in the appellant's submissions.

Though served with a hearing notice, there was no appearance from the respondent. Accordingly, we have carefully considered the pleadings, the appellant's submissions and the evidence before the trial court and are of the view that the main issues for our consideration are:

- i) whether the appellant ought to have been reinstated; and
- ii) whether the appellant should be awarded the sums set out in the written submissions as follows;

a) Lost salary for 16 years Kshs. 12,111 P. M

b) Leave allowance for 16 years Kshs. 4500 P.M

c) Withheld salary for June, 2003 Kshs. 12,000/=

d) Kshs. 498,500/= as particularized in paragraph 5 of claim

e) Interest and costs of the suit.

f) Unpaid provident fund Kshs. 98,907.31 from 1979 to 2001

g) Unpaid provident fund for march, 2002 amount deducted Kshs, 13,251.55

January 2002 to February, 2002 – Kshs 675.55 x 2 = Kshs 1,350.35

April 2002 to April 2003 = 675.55x13 = Kshs 8782.15 Total Provident Fund =Kshs. 131,073.51

Grand total = Kshs. 3,038,996.51

This is a first appeal and it is our duty to re-evaluate the evidence and come to our own conclusion on the facts, but we must remain cognizant of the fact that we have not seen or heard the witnesses that were before the trial court. See Mwanasokoni vs Kenya Bus Limited [1985] KLR 931.

Turning to the issue of whether the ELRC ought to have ordered his reinstatement, **section 49 (3)** of the **Employment Act, 2007** provides that it may be recommended that the employer (a) reinstates the employee and treats the employee in all respects as if the employee's employment had not been terminated; or (b) re-engages the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

Under **sub clause (4)**, such recommendation should take into account various circumstances set out in the provision, but for the purposes of this case, we consider the relevant conditions as being whether there was a basis for claimant's prayer to be reinstated, and if it was practicable to make an order of reinstatement or re-engagement.

We will begin by observing that, though the question of reinstatement was expressed in the minutes of 9th June 2009 and 8th June 2010 of the Joint Staff Committee, there is no express wish for an order of reinstatement in the appellant's pleadings. Without such a prayer in the pleadings, there was no basis upon which the learned judge would have unilaterally conclude that the appellant wished to be reinstated, and we find that the learned judge cannot therefore be faulted for omitting to make such an order. Furthermore, it is to be observed that the appellant was dismissed on 7th July 2006. The trial court's decision was made on 6th March 2016, which would have been a lapse of 9 years since the appellant's employment was terminated. Considering that the appellant was a Market askari (security officer), a position that would be simple enough to fill, we consider that a lapse of 9 years would have long since rendered this position unavailable to the appellant. We would add that, the appellant did inform us in Court that, on 20th June 2018 he would be celebrating 60 years. And when we take judicial notice of the fact that, save for constitutional appointees, the retirement age in public service is 60 years, with his imminent retirement, we do not consider reinstatement to be a practicable or appropriate remedy in the circumstances.

On the next issue, the appellant's complaint is that the learned judge failed to take into account the sums enumerated in the submissions filed on 16th January 2015.

In his Memorandum of Claim, the appellant specifically claimed for one month's salary of Kshs. 12,000, rest days of Kshs. 204,570, six months' salary for unfair termination of services of Kshs. 72,000. Having found that the appellant was unjustifiably dismissed, save for reducing the claim for compensation, which the appellant did not question, and overlooking the claim for severance pay, which we shall address below, the learned judge awarded all other sums claimed by the appellant.

Citing with approval, Sir Jack Jacob's article published in [1960] Current Legal problems, entitled "The Present Importance of Pleadings." the Malawi Supreme Court of Appeal in the case of Malawi Railways Ltd vs Nyasulu [1998] MWSA 3, states in respect of pleadings that;

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...."

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

The Nigerian Supreme Court in the case of Adetoun Oladeji (NIG) Ltd vs Nigeria Breweries Plc S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, thus;

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

The authorities from our courts on this issue are no different. In the case of Galaxy Paints Co. Ltd V Falcon Guards Ltd (2000) EA 885 it was held that;

"The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy V Caspair (1956) EACA 139 and Fernandes V People Newspapers Ltd (1972) EA 63."

It is clear from the above cited authorities, that a party is bound by their pleadings, and that the issues for determination by the court arise from the pleadings. A court is not entitled to determine issues that have not been placed before it for determination.

The submissions were filed after the close of the proceedings, and did not form part of the appellant's case. The learned judge was under no obligation to independently interrogate the submissions in order to award the sums indicated as additional claims. The sums therein were neither pleaded, nor canvassed during the proceedings. No evidence was led in their support, and the respondent would not have an opportunity to rebut such claims. We consider the sums claimed in the submissions to have been an afterthought, and the court was under no obligation to deliberate upon or make any determination upon them. They were matters that the court rightly disregarded.

On severance pay, a claim under this head would be governed by, **section 16A** of the **Employment Act**, which stipulates thus;

“(1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with

—

(a)...

(b)...

(c)...

(d) ...

(e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service as severance pay.”

The appellant's claim was based on the wrongfully termination of his employment. The trial court found that on the basis of the evidence, his employment was in fact wrongfully terminated. The termination of his employment had nothing to do with a declaration of redundancy, and therefore the claim for severance pay cannot be held to arise.

In sum, the appeal is without merit, and is dismissed with costs to the respondent.

It is so ordered.

Dated and delivered at Nairobi this 11th day of May 2018.

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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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