IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 82 OF 2017

BETWEEN

KENYA PORTS AUTHORITY ..... APPELLANT

AND

SALOME LILIAN ETENY ..... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 30th June, 2017

in

Cause No. 402 of 2015)

****

JUDGMENT OF THE COURT

1. **Salome Lilian Etenyi** (the respondent) was initially engaged by **Kenya Ports Authority** (the appellant) as a Clerical Assistant in the year 1988 and subsequently promoted on 13th May, 2003 to the position of a Senior Clerical Assistant. It seems sometime in the year 2005 an attempt to fraudulently remove about 8 containers from the Port was unearthed. Consequently, a Committee of Inquiry was established by the appellant to investigate several officers, including the respondent, who were believed to have been participants therein. Upon the conclusion of that inquiry which took place from 26th April, 2005 to 18th May, 2005 the Committee recommended the respondent's interdiction pending further investigations. As a result, by a letter dated 30th June, 2005 the respondent was not only interdicted but was also required to show cause why she should not be dismissed from employment which she did by a letter dated 8th July, 2005.

2. Meanwhile, the respondent and other suspects were arrested, arraigned in court and charged with several offences connected with the said incident before the Chief Magistrate's Court at Mombasa in Criminal Case No. 1198 of 2006. It is pursuant to those charges that the appellant suspended the respondent vide a letter dated 22nd June, 2006. Ultimately, following the Committee of Inquiry's recommendation the respondent's services were terminated by a letter dated 9th November, 2006.

3. As expected, the respondent lodged an appeal against her termination on 20th November, 2006 but the same was rejected. Thereafter, on 7th October, 2008 the respondent was acquitted of all the charges against her. It seems she tried once again to convince the appellant to reconsider its decision in light of the acquittal without success.

4. Be that as it may, about a year later during a Joint Industrial Council (JIC) meeting, it was agreed that an Appeals Committee comprising of the appellant's and Dockworkers Union representatives be set up to review appeals made by former unionisable staff who had been terminated for various reasons. The Appeals Committee's mandate also included giving a report of its findings and recommendations to the appellant's management for consideration. In the end, after reviewing about 31 cases, the Appeals Committee on 13th March, 2013 recommended reinstatement of 15 employees who included the respondent.

5. Out of the 15, the appellant only reinstated 11 employees. The respondent was amongst the 4 employees who had been left out. According to the appellant, the Appeals Committee's recommendations were not binding upon it. In particular, the said Committee recommended the respondent's reinstatement based on the fact that she had been acquitted. Her acquittal alone was not sufficient to entitle her to reinstatement. Besides, the evidence tendered during the disciplinary hearing clearly indicated that she was involved in the incident in question.

6. Convinced that there was no basis for the appellant to decline her reinstatement, the respondent filed suit in the Employment and Labour Relations Court (ELRC), in which she challenged her indictment, suspension and termination as being unfair. She also believed that the appellant's decision not to reinstate her was discriminatory. As a result, she sought:

> ***a) Reinstatement together with:***
>
> ***b) Half salary during the period of interdiction – Kshs. 193,228***
>
> ***c) Salary withheld during the period of suspension- Kshs. 131,702***
>
> ***d) Salary from date of dismissal – Kshs. 6,930,252***
>
> ***e) Interest on b) to d)***
>
> ***In the alternative to reinstatement:***
>
> ***a) Half salary during the period of interdiction – Kshs. 193,228***
>
> ***b) Salary withheld during the period of suspension- Kshs. 131,702***
>
> ***c) Salary from date of dismissal – Kshs. 6,930,252***
>
> ***d) Salary in lieu of 3 months' notice – Kshs. 86,520***
>
> ***e) General damages of 12 months' salary for unlawful and unfair dismissal –Kshs. 8,025,210***
>
> ***f) Interest on a) to e) above.***

7. The trial court (Rika, J.) agreed with the respondent and in his own words expressed:

> ***" … There is nothing showing why the recommendation of the JIC, to have the claimant reinstated was not acceptable to management, while it was acceptable and fully implemented with respect to other 11 employees similarly situated.***
>
> ***The respondent would have to demonstrate clear grounds justifying application of different standards to the Claimant, in relation to her co-employees, for its refusal to reinstate the claimant to be sustained. Dissimilar treatment, after the joint and painstaking work of the JIC cannot be justified… it is a serious and objective report. It was guided by the respondent's human resource manual, labour laws, industrial relations machinery and disciplinary handbook, 2008.***
>
> ***It ought to have been implemented, and if not, clear reasons given by the management why it could not... The court has not found any clear reasons why the report was not implemented with regard to the claimant."***

8. By a judgment dated 30th June, 2017 the learned Judge issued the following orders:

> ***a) Declaration that the termination was unfair.***
>
> ***b) The respondent shall reinstate the claimant from the date of this judgment, and treat the claimant, in all respects, as if the claimant's employment had not been terminated.***
>
> ***c) In effect, the respondent shall in addition to reinstating the claimant to the payroll, and assigning her duties, pay the claimant back-salaries and allowances from the date of dismissal to the date of reinstatement.***

9. It is that decision that has provoked this first appeal based on the grounds that the learned Judge erred in law and fact by-

> ***i. Finding that the respondent's termination was unfair.***
>
> ***ii. Finding that the respondent's acquittal entitled her to reinstatement.***
>
> ***iii. Finding that the JIC report should be binding on the appellant's management.***
>
> ***iv. Failing to find that the respondent's suit was time barred.***
>
> ***v. Ordering the respondent's reinstatement despite having been dismissed for more than three years.***
>
> ***vi. Ordering payment of back salaries and allowances from the date of dismissal to the date of reinstatement.***

10. At the hearing of the appeal, the appellant was represented by learned counsel, Mr. Kyandih while the respondent was represented by learned counsel, Mr. Alera. Counsel relied entirely on the written submissions filed on behalf of the respective parties, and opted not to make any oral highlights.

11. It was submitted on behalf of the appellant, that whenever a court is faced with the question of whether a termination was fair, such a court is called upon to look at substantive justification as well as procedural fairness. As far as the appellant was concerned, the disciplinary action against the respondent accorded with the tenets of justice and fairness, that is, she was given a fair hearing even though at the material time, the appellant was not required to do so since the current ***Employment Act*** had not come into force. Under the ***Employment Act, Chapter 226 (repealed)*** employment was at the will of the employer. In totality, the respondent's termination was fair.

12. The appellant faulted the learned Judge for being persuaded that the respondent's acquittal was a sufficient ground for reinstatement. To that extent reliance was placed on the persuasive decision of the ELRC in ***Raphael Juma vs. Armed Forces Canteen Organization [2014] eKLR***. Similarly, the learned Judge erred in holding that the JIC report was binding on the appellant in that respect.

13. Contending that the respondent's suit was time barred, the appellant referred to ***Section 66*** of the ***Kenya Ports Authority Act*** which stipulates that an action against the appellant ought to be instituted within 12months. Moreover, ***Section 90*** of the ***Employment Act***, delineates the time frame as 3 years. In this case, it was not in dispute that the respondent's services were terminated on 9 th November, 2006 and she filed suit at the ELRC on 17th June, 2015.

14. The learned Judge was also criticized for ordering the reinstatement of the respondent who had been dismissed over nine years earlier. Finally, in attacking the back pay of salaries and allowances granted to the respondent, the appellant argued that the learned Judge misapprehended the provisions of ***Section 18(4)*** of the ***Employment Act***. Under the said provisions, the remedies available to the respondent were the allowances and benefits due to her at the time of dismissal. Therefore, three months' salary in lieu of notice was sufficient as per the terms of the contract of employment.

15. In opposing the appeal, the respondent argued that the learned Judge never made any reference to the manner in which the respondent's services were terminated since it was not an issue for determination. Equally, the learned Judge did not make any finding with regard to the effect of the respondent's acquittal. Furthermore, the learned Judge did not order reinstatement of the respondent on the ground that she had been acquitted of the criminal charges.

16. As per the respondent, the learned Judge did not err in holding that parties must take alternative dispute resolution mechanisms seriously. Under ***Article 159(2) (d)*** of the ***Constitution*** and ***Section 15(1)*** of the ***ELRC Act***, the ELRC is mandated to promote alternative dispute resolution mechanisms. Accordingly, the learned Judge was within the law in finding that JIC recommendations were binding and any deviation therefrom ought to be with reasonable explanation. In any event, the purpose of the formation of the Appeals Committee was to arrive at an amicable settlement acceptable by the appellant and the union. It followed that the recommendations therein would be recognized by the parties thereto. The respondent reiterated that the appellant declined to reinstate her without any valid reason. The different treatment of the respondent amounted to discrimination hence there was no reason for this Court to interfere with the learned Judge's decision.

17. The respondent added that time begun running with respect to her cause of action when the appellant approved the JIC recommendation by reinstating some of the employees in May, 2014. Consequently, her suit was not time barred. The very formation of the Appeals Committee to review the cases in question gave new lease of life to those cases. As a result, the appellant was estopped from pleading time limitation. In support of that line of argument, the respondent relied on this Court's decision in ***Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR***.

18. Last but not least, the respondent submitted that the quantum of damages issued by the learned Judge were in conformity with ***Section 49 (3)*** of the ***Employment Act*** which provides that:-

> ***"Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to –***
>
> ***(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or***
>
> ***(b) re-engage 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.***

19. We have considered the record, submissions by counsel and the law. This being a first appeal, we are cognizant that our primary role is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. See ***Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2EA 212***.

20. The determination of whether the respondent's suit was legally time barred is essential as it could bring this matter to an end. It is common ground that the cause of action arose on 9th November, 2006 when the respondent was dismissed from employment. It is also not in dispute that the cause of action arose prior to the enactment of the ***Employment Act, 2007***, thus in computing whether the suit was time barred, the applicable law is ***Section 4 (1) (a)*** of the ***Limitation of Actions Act*** which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. Was the respondent's suit time barred?

21. It is instructive to take note of the provisions of ***Limitation of Actions Act*** at ***Section 39*** :

> ***"39.***

(1) A period of limitation does not run if –

a) there is a contract not to plead limitation; or

b) <u>that the person attempting to plead limitation is estopped from so doing.</u>

(2) For the purposes of subsection (1), "estopped" includes estopped by equitable or promissory estoppel." *[Emphasis added]*

22. Taking the above provisions and the circumstances of this matter into consideration, we find that in as much as time begun to run after the respondent's termination on 9th November, 2006 the appellant was estopped by its conduct from pleading limitation. We say so, because the appellant in conjunction with the Dockworkers Union established the JIC Appeals Committee to review appeals which had been filed by employees who had been terminated by the appellant. By this time the 6 years' time limit had lapsed with respect to those terminations. As such, the appellant's conduct was such that it agreed to overlook the limitation period. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See ***Seascapes Limited vs. Development Finance Company of Kenya Limited- Civil Appeal No. 247 of 2002***. With that in mind, we find that the respondent's suit was properly before the ELRC.

23. Our reading of the impugned judgment, reveals that the learned Judge's focus was on the appellant's conduct following the Appeals Committee's recommendation. We believe the learned Judge did not err in not looking at the process prior to the said review by the Appeals Committee. Whether the procedure or reason for termination of the respondent's services then was fair had been overtaken by the fresh review by the said Committee.

24. Our understanding is that the learned Judge did not hold that the Appeals Committee's recommendations were binding. Rather, he appreciated that whilst the appellant may reject such recommendations, it ought to have done so on reasonable and fair grounds.

25. We are also unable to find any fault on the part of the learned Judge for he rightly observed that the appellant accorded different treatment to the respondent compared to the other 11 employees who were reinstated. Firstly, Amani Komora, the then appellant's Head of Human Resources, after considering the JIC Appeals Committee's report made the following recommendations to the appellant's General Manager:

"Under the circumstances, it is recommended that each case be considered on its own merit, based on the facts around each case, and decisions made as appropriate.

Separately, taking into account the passage of time, management may consider engaging the Union leadership with a view to settling compensation instead of re-engagement."

There was no evidence that further considerations were made, if any, in respect of the JIC recommendations.

26. Secondly, apart from stating that the respondent's acquittal did not entitle her to reinstatement, the appellant never gave any sufficient explanation as to why it accepted all the other recommendations in respect of the 11 reinstated employees and rejected the recommendation with regard to the respondent. The least the appellant could have done was to give reasons to the respondent as to why she had been treated differently. It is possible there existed good reasons but failure to disclose the same left the respondent to wonder and speculate why the treatment given to the 11 could not have been availed to her. Did this amount to discrimination? The respondent claims she was discriminated against because unlike the 11 others, she was not reinstated to her former job. She was therefore treated differently.

27. In our view, differential treatment does not necessarily amount to discrimination. The term 'discrimination' is not defined under the Employment Act, but a reading of **Section 5 (1) of the Employment Act** would seem to suggest that discrimination is the antithesis of 'equality of opportunity in employment' ***Section*** 5 (3)(a) of the Employment Act clearly spells out the grounds on which discrimination can be based on. These include grounds of *'race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, pregnancy, mental status or HIV status'*. None of these grounds existed in this case and so discrimination was not established. What in our view can be said to have existed was differential treatment and certainly not discrimination as envisaged by Section 5 of the Employment Act. In our view, there was no automatic right for the respondent to be reinstated following the recommendations of the JIC. The Head of Human resources' recommendation was that each case be determined on its own merits. If therefore after considering the merits and the circumstances of the respondent's case the appellant was not persuaded to reinstate her, then the appellant cannot be faulted for treating her differently.

28. Based on the foregoing, did the learned Judge issue appropriate relief? In this case the best person to determine which employee qualified for reinstatement and who did not was the employer who was seized of the peculiar circumstances of each of the employees who were reinstated. In our view, the learned Judge failed to consider all the parameters set out in Section 49(4) of the Employment Act before making the order of reinstatement. We do not think that the order of reinstatement was appropriate in the circumstances. Instead, we believe that 6 months' salary would be appropriate remedy to the respondent.

29. The upshot of the foregoing is that the appeal herein succeeds in part to the extent we have set out herein above. We set aside orders (b) and (c) of the impugned judgment and substitute thereof an order granting the respondent 6 months' salary as compensation for unfair termination. Each party shall bear its own costs of this appeal and of the court below. Orders accordingly.

Dated and delivered at Mombasa this 7th day of June, 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