REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO 73 OF 2017

STEEL MAKERS LIMITED .....APPELLANT

VERSUS

JACKSON MAKAU KASWII .....RESPONDENT

(Being an *Appeal from the Judgment of the Employment and Labour Court at Mombasa (Makau, J.) dated 28th July, 2017*

in

***E&LRCCNo. 382 of 2016*)**

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JUDGMENT OF THE COURT

[1] Jackson Makau Kaswii (respondent) filed a claim seeking compensation for unfair termination of his services as an employee of Steel Makers Ltd, (appellant). The respondent's claim was that he was employed by the appellant on January 2011 as a mechanic at a daily salary of Ksh.569. He worked at the appellant's Mombasa branch until 8th February, 2016 when his services were terminated without notice and payment of terminal dues for the duration served. The respondent sought to be paid a total of Ksh.294,742 made up of one month's payment in lieu of notice, leave for 5 years, 7 years' service pay calculated for 15 days for each year.

[2] The appellant on its part admitted the respondent was employed as a casual helper earning daily wages at the end of each working day. His duties were to help the head mechanic with other tasks assigned and on the 8th February, 2016 he was not at his duty station, and when ordered to go back to his duties by the supervisor, the respondent refused and walked away from the place of work and never returned. According to the appellant, the supervisor was not authorized to hire or fire an employee; thus in this case the supervisor reported the incident to the management but by this time the claimant had already left the appellant's premises on his own volition and did not return. The appellant's position was that had the respondent returned the following day, he would have been given a warning and continued with the work but this was not possible as he absconded duty.

[3] The suit was disposed of by way of written submissions; upon considering the same, the learned trial Judge, (O.N. Makau) identified the key issues for determination as whether the claimant was unfairly terminated by the respondent, whether he was entitled to the reliefs sought and finally who should bear the costs. After analysing the evidence the Judge found the termination was unfair. This is because under Section 47(5) of the Employment and Labour Relations Act, the burden of proving unfair termination lies with the employee who alleges to have been terminated. The Judge found in this case the supervisor admitted having had an altercation with the respondent on 8th February, 2016 and as a result the respondent walked away from work. On that basis the Judge stated as follows in his own words;

> ***"On a balance of probability, I find that the claimant was terminated by the supervisor on 8/2/2016. He had reported to work on that day ready to work but he was terminated after disagreement with the supervisor. Under section 47(5), the burden of proof shifts to the respondent to justify the termination.***
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> ***Under section 45(2) of the Act, termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the respondent never took effort to prove the reason for the termination or the fairness of the procedure followed before terminating the claimant's services. Instead defence witness spent all his effort explaining that the claimant deserted work after he rudely refused to take instructions. The failure by the respondent to prove a valid and fair reason for terminating the services of the claimant and the***

failure to prove that a fair procedure was followed, has rendered the termination unfair within the meaning of section 45 of the Act".

[4] For those reasons the respondent was awarded Ksh.14,794 being one month's salary *in lieu* of notice; Ksh.88,764 being six months' salary as compensation for unfair termination and 5 years leave at the rate of 21 days' pay per year being Ksh 59,9745 making a total of Ksh 163,303 plus costs and interest. This is the award that triggered the instant appeal that is predicated on some 5 grounds of appeal to wit; that the Judge erred in law and in fact by finding that the respondent had on a balance of probability established he was wrongfully terminated under Section 47(5) of the Act merely by making an allegation in the memorandum of claim; ignoring the response by the appellant that categorically denied terminating the employment. The learned Judge's award was also challenged for reasons that there was no evidence to support them and finally for disregarding the appellant's response to the claim and the witness statement to the effect that the respondent, at his own volition and for reasons best known to himself, walked away from his employment instead of taking lawful instructions and he deserted work.

[5] This appeal was ventilated through written submissions, both **Mr Awenya** and **Mr Wandera** learned counsel for the appellant and respondent respectively relied on their written submissions, save that Mr. Awenya clarified that although judgment was delivered on 28th July, 2017, the notice of appeal was filed on 14th July, 2017 after 16 days. Counsel urged us to find there were two Sundays in between and that the 7th and 8th August, 2017 were both public holidays therefore there was no delay. Moreover the respondent did not file an application under Rule 84 of the Court of Appeal Rules to strike it out. Counsel for the appellant elaborated on the grounds of appeal by stating that the respondent failed to prove his case on a balance of probability. Counsel invited us to find an allegation merely contained in a memorandum of claim which was denied by the appellant and a very detailed account of how the respondent defied lawful authority and walked away from the place of work was given by the appellant's supervisor one Yunis Daud; there was no rebuttal by the respondent thus his case could not meet the threshold of proof on a balance of probabilities. Counsel pointed at a statement purportedly filed in support of the respondent's claim which was written by Patrick Kioko Maingi, a total stranger to the proceedings. The only evidence which was before the learned trial Judge was the memorandum of claim that was completely denied by the appellants.

[6] On the part of the respondent Mr Wandera insisted that the notice of appeal was filed late although he did not file an application within 30 days as provided under Rule 84 to strike it out. In the written submissions, it is clarified that parties agreed to have the matter disposed of by way of written submissions and the pleadings as well as documentary evidence and witness statements. In regard to the statement written by one Patrick Kioko Maingi, counsel submitted that it was nonetheless signed by the respondent and the stranger's name was a typing error. On unfair dismissal, counsel stated that under Section 41 of the Act, before an employee's services are terminated he ought to be given a hearing in the presence of a witness of his choice or a Trade Union official after the employee is notified and given the complaints against him beforehand. This procedure was not followed, thus counsel argued and cited many decisions from the Employment and Labour Relations Court that have underscored the centrality of a hearing as a prerequisite to any decision to terminate the services of an employee such as:

1. George Onyango Akuti vs G4S Security MSA ELRC No 107 of 2013

2. Wilfred Bukacha Opwaka v Ready Consultancy Co Ltd [2012] eKLR

3. Josephat Nyakundi Omweri v K-REP Bank Ltd [2015] eKLR

Counsel urged us to dismiss the appeal as the appellant did not show that it made any efforts to reach the respondent, even after he allegedly left in a huff to give him a hearing or to pay his terminal dues. The fact that the appellant ignored the demand letter dated 10th May, 2016 clearly demonstrated they had no intention of compensating the respondent for the many years he worked with them.

[7] Having regard to the grounds of appeal, the evidence before the trial court, the entire record of appeal and submissions filed herein only two issues fall for our determination that is;-

(a) Whether the respondent proved his case to the required standard while noting the parties only relied on the pleadings being the memorandum of claim which was strenuously denied and a defective witness statement.

(b) Whether the respondent was entitled to the awards under the three headings being, notice, damages for six months and leave for five years.

[8] This is a first appeal and that being so, we are mandated to reconsider the entire evidence before the trial court and give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify. (See the case of **Selle vs. Associated Motor Boat Company *(*1968) E.A. 123** at page **126**, where the Court of Appeal held:-

"…….. this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…" *See* ***Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425".***

On the first issue, we note at the outset that the trial was perfunctorily conducted as no evidence was called especially on the contested issue of whether the respondent was summarily dismissed or he defied lawful authority and walked away and did not return to his place of work. It was necessary for the court to establish this aspect as this is what the respondent stated in his memorandum of claim;

"The claimant avers that on 8th February, 2016, he was terminated from his service without prior notice or payment of his terminal and contractual benefits for the long service to the company"

This is what the appellant stated in rebuttal;

> ***"That the 2nd respondent avers that on Monday 8th February, 2016 the claimant reported on duty in the morning at 8.00 a.m. as usual and at around 9.00 a.m. his duty supervisor one Yunis Daud went looking for him at his work station to assign him more work to do but he was not found at his work station. On looking around the supervisor found the claimant washing his work uniform (apron/overall) instead of working… The supervisor requested him to go back to his work station and take up the work assignments he was being given but the claimant refused and instead walked away for work in huff never to return"***

[9] The above was repeated in the witness statement by the said Yunis Daud whereas the claimant's claim was supported by a statement written by a stranger by the name Patrick Kioko Maingi although signed by the claimant. The legitimate question that is being asked by the appellant is how the Judge was able to conclude that the claimant proved his case especially on the contested issue of unfair termination on a balance of probabilities merely by looking at the pleadings. It is trite that a determination as to whether a termination is lawful, is guided by the provisions of **Section 43(1)** of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section **45(2) (c)** requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required. In this case the employer contended that the respondent defied lawful authority and left his place of work.

[10] Going by the evidence that was before the learned Judge, we are afraid it was not possible for the Judge to establish that the respondent had proven on a balance of probability that he was unfairly terminated. This is because the appellant denied that the respondent was terminated and contended that upon being reprimanded by his supervisor for not being at his appointed place of duty, he walked away in a huff and never returned. The appellant went on to state that had the respondent returned to work, he would have just received a warning for defying his supervisor. Where it was the word of the respondent against the appellant, we think there was a dispute on whether the respondent was unfairly terminated which could only be resolved by way of viva voce evidence. This is because the respondent alleged unfair termination and the appellant denied that it terminated him.

[11] As matters stood it was difficult in our view for the learned trial Judge to conclude as he did without an advantage of watching the demeanour of the two conflicting witnesses and to conclude as he did as follows;

> ***"In this case the respondent never took effort to prove the reason for the termination or the fairness of the procedure followed before termination the claimant's services. Instead defence witness spent all his effort explaining that the claimant deserted work after he rudely refused to take instructions. The failure by the respondent to prove a valid and fair reason for terminating the services of the claimant and the failure to prove that a fair procedure was followed, has rendered the termination unfair within the meaning of section 45 of the Act"***

[12] Needless for us to state that the claim by the respondent as pleaded asserting certain facts which were denied by the appellant, under Sections 107-109 of the Evidence Act, a party who asserts or alleges that certain facts exist has a legal burden to prove those claims. As the set of facts were denied, the burden shifted to the respondent to adduce evidence, absent of which, the learned Judge could not determine which set of facts to believe merely by looking at the pleadings and witness statements (not forgetting the respondent's witness statement was defective). For the aforesaid reasons we agree with the appellant that the learned Judge fell in error by awarding six months' salary as damages for unfair termination. We disallow the award of Ksh.88,764 being six months' salary awarded as compensation for wrongful termination.

[13] On the issue of terminal benefits, the appellant admitted the respondent was an employee, and if he had come back to work, he would have continued with his employment. In that case we find the other awards are justified, that is Ksh.14,794 being one month salary *in lieu* of notice and leave for 5 years at the rate of 21 days per year being Ksh.59,745.

[14] **In conclusion, this appeal partially succeeds. We set aside the award of Ksh.88,764 but uphold the award for the total sum of Ksh.74,539. This being a dispute between an employer and employee and bearing in mind the appeal was partially successful, we order each party to bear their own costs of this appeal as we do not wish to set them against each any more.**

Dated and delivered at Mombasa this 7th day of June, 2018.

ALNASHIR VISRAM

…….....

JUDGE OF APPEAL

W. KARANJA

…….....

JUDGE OF APPEAL

M. K KOOME

…….....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR