**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: WAKI, NAMBUYE & KIAGE JJ.A]**

**CIVIL APPEAL NUMBER 298 OF 2015**

**BETWEEN**

**PUNCHLINES LIMITED.....APPELLANT**

**AND**

**JOSEPH MUGO KIBARIA.....1ST RESPONDENT**

**BONIFACE KILONZO KISILU.....2ND RESPONDENT**

**MOSES MUINDE JOHN.....3RD RESPONDENT**

**HENRY MUOKI KITILA.....4TH RESPONDENT**

**JACKSON MUTETI MWONGO.....5TH RESPONDENT**

**BENSON WABWILE ONYISIO.....6TH RESPONDENT**

**LINUS OMENTA GESICHA.....7TH RESPONDENT**

**GEORGE ANTONY KABUE.....8TH RESPONDENT**

**MOSES KIKWAU DAVID.....9TH RESPONDENT**

**HENRY MUHANJI LUGANO.....10THRESPONDENT**

**JAMEN ICHULIZA CHADAKA.....11TH RESPONDENT**

***(An appeal from the Judgment of the Employment and Labour Relations Court At Nairobi (Hellen Wasilwa, J) dated 30th July, 2015,***

**in**

**H.C. Cause No. 622 of 2014**

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**JUDGMENT OF THE COURT**

This is an appeal arising from the Judgment of the Employment and Labour Relations Court at Nairobi [ELRC], **Hellen Wasilwa, J.** dated 30th July, 2015.

The background to the appeal is that the respondents were employees of the appellant at the material time when events resulting in this appeal were triggered. On 22nd March, 2014, the appellant's management decided to withdraw the payment of the bus fare token, previously paid to employees who voluntarily opted to work on weekends and public holidays, sparking off protests. On 26th March, 2014, the

respondents reported to work as usual but were turned away by the management and advised to report back to the management on 31st March, 2014, to collect their terminal dues. They did report as advised but were turned away empty handed. They filed the claim resulting in this appeal seeking various reliefs.

The appellant filed a response to the respondents' claim dated 15th May, 2014 admitting that the respondents had been its employees; that it was correct that the management **abolished** the provision of a bus fare token sparking off protests on 22nd March, 2014; that the respondents failed to report for duty on 27th March, 2014, triggering an exchange of correspondence between the respondents' lawyer and the appellant; that the above exchange of correspondence prompted the filing of the respondents' claim to prevent the appellant from completing the disciplinary process then intended against the respondents for absconding duty.

The claim was canvased by way of evidence and submissions. The learned trial Judge after considering the case allowed the respondents' claims against the appellant finding that these fell under a normal termination of employment and on that account, allowed *inter alia* one month's salary in lieu of notice as per the respondents' last pay certificate and an equivalent of 6 months' salary as terminal dues together with an order for costs of the proceedings.

The appellant filed this appeal against those findings raising seven (7) grounds of appeal. In summary, it is the appellant's complaint that the learned trial Judge erred in law:-

> ***(1) In awarding relief to Jamen Ichuliza Chadaka and Jakson Muteti Mwonga who resumed work with the appellant after the respondents had downed tools on 22nd March, 2014.***
>
> ***(2) Without making a conclusive finding as to whether the respondents absconded duty or were dismissed, erroneously proceeded to make a finding for normal termination of employment without assigning any reason(s) for her decision.***
>
> ***(3) In failing to apply the provisions of section 35 of the Employment Act 2007, when awarding relief to the respondents for a normal termination of employment.***
>
> ***(4) In erroneously being influenced by the provisions of section 49 of the Employment Act 2007 in awarding the respondents six (6) months' salary as terminal dues.***

The respondents on the other hand filed a Notice of seven (7) grounds purportedly seeking to affirm the decision of the trial Judge, but which contained a complaint that the trial Judge failed to find that the respondents were unfairly terminated.

The appeal was canvased by way of written submissions, fully adopted by learned counsel for the parties, who elected not to make oral highlights.

With regard to the claims of **Jackson Muteti Mwonga** and **Jamen Ichuliza Chadaka,** the appellant submitted that in light of the uncontroverted evidence on record that the above two respondents were among the four (4) employees who had resumed work with the appellant after the downing of tools by the respondents on 22nd March, 2014, the trial Judge should not have included them in the award for compensation for normal termination of employment alongside the claims of the other respondents who had not resumed duty.

With regard to the trial court's finding that this was a case for normal termination, the appellant submitted that this finding went contrary to the observations made by the Judge that it was not clear whether the respondents absconded duty or were dismissed.

As for the remedies available under normal termination, the appellant contended that the Judge failed to confine the award for compensation to reliefs stipulated for under sections 35 (5) and 36 of the Employment Act, 2007, which in the appellant's view do not include an award for six (6) months' salary as terminal dues.

As for costs, the appellant submitted that in light of the trial Judge's observations that it is the respondents who rushed to court to file a claim in a matter which could have very well been resolved internally, the appellant should not have been condemned to pay costs.

Turning to the respondents' Notice for the grounds to affirm the decision of the trial court, we were urged to dismiss the same as these were nothing but a disguised cross-appeal as the respondents had included in them, a request for this court to fault the trial Judge for the failure to find and award compensation for unfair termination of their employment.

In opposition to the appeal, the respondents submitted that the award made to the 5th and 11th respondents was justified in the absence of an amendment to the pleadings of the parties to exclude the claims of the 5th and 11th respondents; and or alternatively, parties taking an initiative to record a consent order marking the claims of the 5th and 11th respondents as withdrawn before the conclusion of the trial; that the trial Judge ought to have found that the respondents were unfairly dismissed from their employment with the appellant and awarded them appropriate remedies for unfair termination as stipulated by law; that save for item 4 of the award for the six (6) months' pay as terminal dues, the rest of the claims allowed by the trial court were settled by consent of the parties subsequent to the issuance of the decree and were therefore no longer an issue in the appeal; and lastly, that both the trial court and this court are bound by the fairness test when considering the remedies for normal termination under sections 35 (5) and 36 of the Employment Act.

To buttress their submissions, the respondents cited the case of **International Planned Parenthood Federation –vs- Pamela Ebot Arrey Effiom [2016] eKLR,** on the fairness test applicable to remedies available under section 35 of the Act; and **Robai Musinzi versus Safdar Mohammed Khon [2012] e KLR** in support of their submission that the rights conferred under the Employment Act 2007, apply to both

oral and written contracts.

This being a first appeal, our duty is to consider the evidence and evaluate it ourselves and draw out our own conclusions thereon, bearing in mind that we neither saw nor heard the witnesses and that we should make due allowance for that. We are however not necessarily bound to follow the trial Judge's findings of fact if it appears to us that the trial Judge clearly failed to appreciate the facts or misapplied the law to those facts. See **Selle versus Associated Motor Boat Co. [1968] EA 123**.

We have considered the appeal in light of the above mandate, and the rival submissions set out above. In our view, the issues that fall for our determination are as follows:-

(1) Whether there was a basis for the trial Judge to include **Jamen Ichuliza Chadaka and Jackson Muteti Mwonga**, the 5th and 11th respondents in the award made for normal termination.

(2) Whether the reliefs awarded by the trial Judge to the respondents are well founded in law.

With regard to issue number 1, it is our finding that from the record, there was neither an amendment to the respective parties' pleadings; nor a consent order recorded by the parties withdrawing the 5th and 11th respondents' claims as against the appellant. In light of that, the trial Judge cannot be faulted for factoring the 5th and the 11th respondents in the award for normal termination of employment as they were still parties to the litigation at the conclusion of the trial.

Turning to the issue of appropriate remedies, we find no error in the trial court's conclusion that this was a case for normal termination as there was no evidentiary proof that the respondents had either been found to have absconded duty or that they had been dismissed from their employment by the appellant.

Relief for normal termination is stipulated under sections **35 (5)** and **36** of the Act. The Judge should have confined the award to those remedies namely, one month's salary in lieu of notice and service pay for each year worked and whose terms were to be fixed by the court. According to the unrebutted submissions of the respondents, the one month's salary in lieu of notice allowed by the trial court is now a none issue as this has already been settled by consent of the parties subsequent to the extraction and service of the decree upon the appellant. What is left for our consideration is the appellant's complaint against the award of six (6) months' salary as terminal dues.

We have already pointed out what the law provides for under sections 35(5) and 36 of the Act is. No indication was made on the record by the trial Judge to suggest that the six (6) months' salary awarded as terminal dues went for service pay for each year worked. This therefore calls for interference on our part to set aside the erroneous award on this item and substitute it with the correct remedy provided for under the above provision namely, service pay for each year worked and whose terms are to be fixed by the trial court.

As for costs, the substantive law governing an award of costs is enshrined in section 27 of the Civil Procedure Act (CPA). It provides:

***Sec.27(1)"Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by who and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

***(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such"***

The High Court in the **Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013**, had this to say on the issue of costs:-

***"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion …. But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."***

In **Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101,** the author states as follows:-

***"The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs- the court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course".***

The jurisdiction of the court to intervene and interfere with an award of costs made by the court appealed from is donated by Rule 31 of the

rules of the court. It provides:

> ***"31. On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings, to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs".***

In ***Devram Dattan versus Dawda [1949] EACA 35*****,** the predecessor of this court held, *inter alia*, that it is trite law that the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case. Being a judicial discretion, the law demands that it must be exercised judiciously on facts. The question of the sufficiency of the facts on the basis of which the trial Judge is called upon to exercise such discretion is entirely a matter for the Judge himself to decide, and the court of Appeal will not interfere with the exercise of such discretion except within the limits permitted by law.

In ***Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006),*** the court provided guidelines that costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. Second, that where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. For example, where the trial court gives no reason for its decision; or alternatively where the reasons given do not constitute "good reason" within the meaning of the rule. See also cases of **James *Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005), John Kamunya & another versus John Ngunyi Muchiri & 3 others [2015] eKLR***, and ***Robric Limited & another versus Kobil Petroleum Ltd & another, Nairobi CA No. 109 of 2015.***

Applying the above threshold to the appellant's complaint on the award of costs made against it by the trial court, we find no justification in interfering with the trial Judge's order. Moreover, the appellant has substantially satisfied the decree going by the unrebutted respondent's submission that save for item 4 of the award granted by the trial court, the rest of the items in the award allowed by the trial Judge have already been satisfied by consent of the parties as already explained above and are no longer in issue. The respondents are therefore deemed to have substantially succeeded in their claim against the appellant and were rightfully awarded costs. The substitution of the award in item four (4) of six (6) months' pay as terminal dues with service pay for each year worked and whose terms are to be fixed by the trial court is also in favour of the respondents.

In the result, this appeal partially succeeds and we accordingly proceed to make orders in the disposal thereof as follows:

1. Item four (4) of the trial court's award of six (6) months' salary as terminal dues is set aside, and substituted with an order for payment of service pay for each year worked payable to all the respondents and as worked out and fixed by the trial court.

2. The matter is remitted back to the trial court to work out an award for service pay for each year worked payable to each respondent as provided for under section 35 (5) and 36 of the Act.

3. The order on costs as awarded by the trial court is affirmed.

4. The respondents will also have costs of this appeal.

***Dated and delivered at Nairobi this 26th Day of October, 2018.***

**P. N. WAKI**

**……**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**……**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**……**

**JUDGE OF APPEAL**

**I certify that this is a**

**true copy of the original.**

**DEPUTY REGISTRAR**