IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: MURGOR, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 203 OF 2016

BETWEEN

KENYA RAILWAYS CORPORATION.....APPELLANT

AND

GIDEON K. MUTINDI & 2 OTHERS.....RESPONDENTS

(Being an appeal from the judgement/Decree of the Industrial Court at Nakuru (Ongaya, J.) dated 26th September, 2014 *in* **Industrial Cause No. 91 of 2013 Formerly NAKURU HCCC No. 327 of 2001**)

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JUDGMENT OF THE COURT

GIDEON K. MUTINDI, ARTHUR OMONDI WAITA and **DEBUSSY N. ONCHIRI** the respondents herein and the then plaintiffs filed suit by way of plaint dated 19th September 2001. **KENYA RAILWAYS CORPORATION,** the appellant herein was named as the defendant. The respondents' cause of action was premised on alleged unlawful termination said to have occurred on or about 31st January 2001. The respondents sought the following reliefs:-

> ***"a) A declaration that the purported termination of the plaintiffs with the Defendant is unlawful and wrongful.***
>
> ***b).Payment of the plaintiffs retirement benefits, years of service benefits, salary, House allowance, medical allowance and or leave allowance and annual increments from the date of termination of employment up to the commencement of retirement period as follows:***
>
> **(i) 1st plaintiff…….Ksh.5,386,100.00**
>
> **(ii) 2nd plaintiff……...Ksh.3,217,650.00**
>
> **(iii) 3rd plaintiff……..Ksh.7,097,487.60**
>
> **Total……...Ksh.15,701,237.60**
>
> **c) General damages for unlawful termination of the plaintiffs' services.**
>
> **d) Costs of this suit and interest thereon at court rate and V.A.T.**
>
> **e) Any other relief that this honourable court may deem fit to grant.**

In a statement of defence dated 23rd November 2001 the appellant denied that it unlawfully terminated the respondents and further *"… that this suit does not lie vide section 83 and 87 of the Kenya Railways Act."*

The trial thereof was conducted partially by **Musinga, Ag. J**. (as he then was). On 19th November 2013 by consent of the parties the suit was transferred to the Industrial Court where it proceeded before Ongaya, J. In a judgment delivered on 26th September 2014 the learned Judge found in favour of the respondents and directed that:-

> "1) **The defendant to pay the 1st plaintiff Ksh.1,769,780.00, 2nd plaintiff Ksh.992,400.00, and the 3rd plaintiff Ksh.2,144,146.20 by 1.11.2014 and failing, interest to be payable at court rates from the date of Judgment till full payment.**
>
> **2. The defendant to pay the plaintiffs' costs of the suit**."

The appellant was aggrieved by the said outcome and duly filed a Notice of Appeal dated 2nd October, 2014 and a Memorandum of Appeal dated 23rd August 2016 and listed 5 grounds of appeal which formed the core of the appellant's written submissions dated 4th July 2018. In its written submissions the appellant contended that the respondents were guilty of misappropriating the appellant's finances; that the learned trial judge erred in failing to find that the respondents were given a fair hearing; erred in finding that the irregular payments were approved by the relevant authorities; erred in failing to give sufficient consideration to the audit inspection report and finally, the appellant contended that the awards were manifestly excessive and unfair in the circumstances of the case.

On 17th July 2008 the appeal came before us for plenary hearing. **Miss Getenga** learned counsel who appeared for the appellant, wholly relied on the appellant's submissions and its list of authorities both filed on 5th July, 2018.

In opposing appeal, **Mr. Gekong'a** learned counsel for the respondents urged us to find that the alleged misappropriation of funds by the respondents was not established and that the audit report relied upon by the appellant was unsigned; that no criminal charges were preferred against the respondents and finally that the trio were unfairly terminated. Learned counsel supported the award of compensation something missing of upto the age of 55 years. He however, had no authority to back his assertion of the respondents' entitlement of compensation up to the age of 55 years.

The appeal before us is a first appeal, hence our duty is to re-analyze and re-assess the evidence and the record and reach our own independent findings and conclusions. In so doing however, we remind ourselves that unlike the trial Judge, we did not have the benefit of seeing and/or hearing the witnesses and we should respect the findings of fact by the trial Judge unless those findings are not backed by evidence or the findings are perverse - see **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A 123**.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

The undisputed facts of this case are that the respondents were the appellant's employees and the three worked in the Finance Department of the appellant. It is also not disputed that they were all terminated on 31st January 2001. During cross-examination on 17th January 2014 the 1st respondent told the trial court that the standard letter of employment provided that the relationship of employer/employee could be terminated by giving 3 months' notice or 1 month's salary in lieu of notice. The 3 respondents were dismissed for allegedly making fraudulent claims by way of overtime and subsistence allowances. An Audit report dated 23rd December 1997 was the basis for the termination. The respondents contended that the report was unsigned and that it was prepared by incompetent person/s. The audit report was prepared by auditors from the Traffic Department of the appellant. It was alleged that the 1st and 3rd respondents were involved in claims which were submitted through the 2nd respondent who recommended them for payment. The Audit Report found that these claims were fraudulent and hence the respondents were found guilty of gross misconduct. The report concluded that:

> **"From the facts adduced above, it is clear that Mr. Onchiri misused the opportunity of being a clerk in charge at the Regional Accountant to overpay and enrich himself unlawfully from Railways funds. Such an employee is a real liability rather than an asset to Kenya Railways. This staff was employed on 5.3.90 and has less than 10 years service. Keeping such a person in Railways is a big risk because he might one day disappear with an unexplainable money or property. Consequently, it is recommended that Mr. Onchiri be dismissed from the services of this Corporation with loss of all privileges as a lesson to him and others who are doing the same thing**.
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> **Mr. Gedion Mutindi C/No.37171 who is a clerk in the same office was found to have paid himself overtime of 787 hours amounting to Ksh.30,157.95 in the year of 1996. In addition, he also paid himself a total of Ksh.6,580.00 in terms of subsistence allowance. In 1997 Mr. Mutindi paid himself overtime to the tune of 917 hours amounting to Ksh.36,086.00 and subsistence allowance amounting to Ksh.16,586. All these expenditures were incurred without authority recommendations.**
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> **Mr. Arthur Omondi Watts C.No. 36356 being in-charge of accounts section failed to control staff under him and in respect to payment of overtime and subsistence allowance. It may be deemed that Mr. Omondi conspired with the staff and have jointly defrauded Kenya Railways over Ksh.520,000.00 through false payment of overtime and subsistence allowance. Mr. Omondi should be interdicted and disciplinary action should be instituted with a view of dismissing him from the services of the Corporation. The rest of the staff who have been named above willfully defrauded the Corporation money as enumerated earlier in this report. In this regard, it is strongly recommended that all staff be interdicted and disciplinary action be instituted against them. Straight forward cases like that one of Mr. Debussy Onchiri C.No. 38332 and Mr. Gedion Mulindi C. No. 37171 should be finalized without any delay. The two mentioned staff in this paragraph should be dismissed with loss of all privileges without any further investigations.**
>
> **It is also recommended that an auditor should be sent to ….Regional Accountant's Section and audit all payments pertaining to these staff for the last two years."**

The appellant vide letters dated 11th February 1998 informed the respondents of the allegations against them. In his evidence the 1st

respondent stated:

> "**On 11th February, 1998 a charge sheet of misconduct was given to me….it advised me to prepare a defence within 72 hours which I did and prepared**."

The 2nd and 3rd respondents also responded to the accusations levelled against them. The 2nd respondent made a response by his letter dated 23rd February 1998 whilst the 3rd respondent responded vide a letter dated 22nd February 1998.

The appellant justified the audit report prepared by auditors from the Traffic Department on the basis of impartiality as all the 3 respondents worked in the Finance Department and it was deemed inappropriate for the Finance Department to look into the allegations of the 3 respondents who were from the Finance Department. In our view there was nothing wrong with auditors from the Traffic Department being asked to look into the allegations of misappropriation of funds by the 3 respondents and the report cannot on that basis be deemed "***an illegal bad report***" as contended by the 1st respondent in his evidence.

It is also our considered view that the 3 respondents were served with notices to show cause in respect of allegations of financial impropriety, which was sufficient for purposes of informing them of allegations levelled against them and hence there was due process. In ***Republic vs Immigration Appeal Tribunal ex-parte Jones [1988] IWLR 477***, it was held:

> "**the hearing does not necessarily have to be oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made…."**

In our view, the show cause notices served upon the respondents provided them with sufficient opportunity to state their case and hence there was due process as a hearing does not have to be oral in all cases. Further, the fact that the respondents and the appellant had a contract that provided for termination, it meant that either party could walk out of the contract even without assigning reasons as long as they complied with the terms of the contract.

In **KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGANI [2010] eKLR** this court stated:

> "**The superior court, in our view, ought to have examined the code of conduct… indeed, a contracting party does not have to rely on misconduct in order to terminate a contract of service and a party can terminate such a contract without giving any reason! In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice. It follows therefore that the concept of the destruction of the respondent's career and the subsequent arbitrary application of the tort of misfeasance in public office just because the appellant was a parastatal had, with respect, no basis in fact or law because whatever powers the appellant was exercising in dismissing the respondent stemmed from a contract of service between it and its employee and did not with respect spring from the statutory power conferred on the appellant by the statute creating, which is, the Kenya Revenue Authority Act. In our view for the purposes of entering into contract of employment a parastatal is just like any other employer and there cannot be any legal basis for creating a distinction between contracts of service entered into by private companies with their employees and those entered into between parastatals and their employees."**

Further section 44 of the Employment Act 2007 provided that:-

> "**Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term."**

The above position of the law was codified in Regulation G12 (a) of the appellant's Personnel Regulations 1988 which provided the circumstances under which termination of service on grounds of public interest could be justified. It provided:-

> "**If it is considered, having regard to every report available with regard to an employee, that it is desirable in the public interest that the service of such employee should be terminated on grounds which cannot suitably be dealt with by the procedures laid down in any provisions of this section of the Regulations, the employee will be notified in writing of the specific complaints by reason of which the termination of his service is contemplated together with the substance of any report or part thereof that is detrimental to him. If after the employee has been given the opportunity of showing cause why his services should not be terminated, it is still considered that his service should be so terminated, action will be taken to terminate his service or recommend to the appropriate authority that it be terminated as the case may be.**"

The upshot of the above is that an employer had an upper hand in terminating the services of an employee. All an employer needed to do was to issue a notice or pay salary in lieu of notice in terminating the services of an employee once it had lost confidence in such an employee. The position may not be the same today with the promulgation of 2010 Constitution and the resultant Labour Law Statutes. Having been on contract that provided for an exit clause, either party was free to disengage from the other as long as the terms of the contract were adhered to. In view of this recognition, the respondents cannot be heard to be saying they were entitled to be in the appellant's employment until the age of 55 years. It was therefore wrong for the trial court to have ordered payment of all lost gross salaries upto the age of 55 years.

On gratuity, the respondents were members of a provident fund, namely the Kenya Railways Staff Retirement Benefit Scheme. **S. 35(5)** and **35(6)** of the Employment Act (now repealed) provided as follows:

> **"35 Termination of notice:-**
>
> **(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.**
>
> ***(6) This section shall not apply where an employee is a member of—***
>
> **(a) A registered pension or provident fund scheme under the Retirement Benefits Act;**
>
> **(b) A gratuity or service pay scheme established under a collective agreement;**
>
> **(c) Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and**
>
> **(d) The National Social Security Fund."**

It is clear that the respondents having been members of a Provident Fund namely Kenya Railways Staff Retirement Benefits Scheme, were not entitled to gratuity. Indeed, the uncontroverted evidence of NEMUEL ADEMBA, the then Human Resource Officer of the appellant was that the respondents had been put on the pension list and they were drawing their pension. To pay them pension as well as gratuity would amount to double payment.

The upshot of the above is that we find this appeal to be meritorious. It is hereby allowed and the judgment/decree dated 26th September 2014 at the ELR Court is hereby set aside. Each party to bear his/its own costs.

Dated and delivered at Nakuru this 18th day of October, 2018.

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR