



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, SICHALE & KANTAL, J.J.A)

CIVIL APPEAL NO. 180 OF 2017

BETWEEN

KIAMBAA DAIRY FARMERS CO-OPERATIVE

SOCIETY LIMITED.....APPELLANT

AND

RHODA NJERI.....1ST RESPONDENT

CHARLES KIMANI NJOROGE.....2ND RESPONDENT

JAMES MUTUA KIVINDYO.....3RD RESPONDENT

DUNCAN NJOROGE KIMANI.....4TH RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Ongaya, J.) dated 23rd September 2016

in

ELRC Cause No. 5 OF 2015

Consolidated with

ELRC Cause No. 6, 7 and 71 of 2015)

JUDGMENT OF KIAGE, JA

The main issue for our determination In this appeal is whether the Employment and Labour Relations Court at Nyeri (Ongaya, J.) was justified in awarding the four respondents herein, who were the claimants in that court, compensatory damages equivalent to 12 months of their respective gross pay on account of their summary dismissal, which the learned Judge found to be unlawful and unfair.

The four were dismissed from the positions they held in the customer service and stores, credit, and information technology departments of **Kiambaa Dairy Farmers Co-operative Society Ltd**, (the appellant) on suspicion of involvement in the authorship of an anonymous letter sent to the appellant’s manager on 29th April 2014. That letter followed a staff redeployment effected by the respondent in order to curb wastage and theft. The appellant first suspended the four and subsequently terminated their employment with effect from 30th April 2014. Prior to the dismissal, they had been invited to appear and make representations before the Board Committee of the respondent, which they did.

Following their termination, the respondents filed separate statements of claim against the appellant. These were later consolidated by consent of the parties and it was also agreed that **Charles Kimani Njoro** would testify on behalf of them all which he did. The appellant’s manager, **Daniel Kinyanjui Njenga** testified on its behalf whereafter the learned Judge, after considering the submissions of the parties, rendered the impugned judgment granting final orders as follows;

“(a) The declaration that the dismissal of the claimant from employment was unlawful and unfair.

(b) The declaration that the claimant is entitled to payment of terminal dues and compensatory damages as pleaded.

(c) The order for the respondent to pay the claimant due terminal benefits and compensatory damages totaling to, for 1st claimant Kshs. 403,205.00; 2nd claimant Kshs. 538,097.00; 3rd claimant Kshs. 362,705; and 4th claimant Kshs. 356,914.00; the respondent to pay by 01.12.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

(d) The respondent to pay each claimant’s costs of the suit and the counterclaim.”

The counterclaim referred to, and which the learned Judge dismissed, was by the appellant in which it sought against the respondents the sum of **Kshs. 2,000,000** which an internal audit, conducted after the respondents dismissal, revealed they had siphoned from the appellant.

Aggrieved by that judgment, the appellant filed a memorandum of appeal complaining that the learned Judge erred in some five respects. Its learned counsel abandoned all but ground 3, which is to the effect that the learned Judge awarded damages that were excessive considering the circumstances of the termination of the respondent’s employment.

Mr. Gachomo took issue with the learned Judge for not appreciating that compensatory damages under **section 49** of the Employment Act are discretionary and are capped at the equivalent of 12 months gross pay which is the maximum. He criticized the learned Judge for failing to consider the several factors set out in **section 49(i)(iv)** thus arriving at an award that was excessive and punitive considering that the appellant had paid to the respondents all their dues together with one month’s pay in lieu of notice. Counsel urged us to adjust the quantum downwards. He did not, however, indicate the proper amount that would be just in his estimate and also failed to cite any authorities on the subject, for which we roundly upbraided him. It is in our expectation that counsel appearing before this Court must make thorough preparation and be able to support their contentions and pleas with case law on the subject. We deprecate the habit that seems to be emerging norm of counsel failing to apply themselves with industry in research before coming before this Court. We shall not condone such a lowering of advocacy standards.

Opposing the appeal, **Mr. Ndano**, the respondents’ learned counsel supported the decision of the learned Judge on the basis that the manner of the respondent’s dismissal without prior warning letters, “without following due process” and in the absence of proof that they had been involved in misappropriation of the appellant’s funds merited the full 12-month gross pay compensation. He, too, did not cite any authorities and attracted our censure.

Compensatory damages, the quantum of which is the sole issue in this appeal, lie in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and then on narrow, well-settled principles. In **PETER M. KARIUKI vs. ATTORNEY GENERAL [2014] eKLR** this Court expressed itself thus on the subject;

“The principles which guide an appellate court in this country in an appeal on award of damages are now well settled. In Kemfro Africa Ltd vs Lubia & Another, (No. 2) 1987 KLR 30, Kneller, JA identified the principles as follows:

‘The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.’

Later in Johnson Evan Gicheru vs. Andrew Morton & Another, CA No. 314 of 2000, this Court reiterated the same principles in the following words:

‘It is trite that this Court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.’

See also **Butt vs Khan, (1981) KLR 349 and Standard Ltd vs Kagia t/a Kagia & Company Advocates (2010) 2KLR 55).**

“The challenge, in our view is not limited to assessment of damages in personal injuries claims alone; it extends to all assessment of general damages that are essentially at large. In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See Jabane vs Olenja, (1986) KLR 1.”

See also **BARCLAYS BANK OF KENYA LTD & ANOR vs. GLADYS MUTHONI & 20 OTHERS [2018] eKLR.**

Regarding damages for breach of the employment contract usually by wrongful or unfair termination of an employee's employment, statute law does recognize that compensatory damages are, in appropriate cases, payable. These are, however, not entirely at large as Parliament has in its wisdom, and for the most sensible reasons, imposed a limit of how much an employee wrongfully dismissed may be paid. This is in recognition that, as Rika, J stated in **ABRAHAM GUMBA vs. KENYA MEDICAL SUPPLIES AUTHORITY [2014]** and approved by this Court in **BARCLAYS BANK** case (supra);

“The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. This has been historical justification of capping compensatory damages since the era of the Trade Disputes Act Cap 234 the Laws of Kenya, to a maximum of 12 month's salary. The Industrial Court traditionally functioned in the manner of the English Employment Tribunal, and in addition to capped compensatory awards, or as alternative to such awards, could order for reinstatement or re-engagement of the Employee. The Civil Courts on the other hand had no capping on the amount of damages they could award for breach of the contract of employment, but were conversely deprived of the power of reinstatement or re-engagement. The rationale for capping was explained in the House of Lords cases of Eastwood & Another vs. Magnox Electric PLC; McCabe vs. Cornwall County Council & Others [2004] UKHL 35, where the Court stated:

‘in fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of the Employers and the Employees, and the socio-economic interests of the country as a whole, can best be balanced in cases of unfair termination. It is not for the Courts to extend further a common law implied term, when this could depart significantly from the balance set by legislature. To treat the legislature as creating the floor, and not the ceiling, would do just thatit would be inconsistent with the purpose Parliament sought to achieve by imposing compensatory awards payable in respect of unfair dismissal.’

This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping.”

I agree with that reasoning and state categorically that the compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and, even where appropriate, there must be an assessment with the range of zero to twelve months in mind. To my mind, this means, as it must, that the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Awards of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal.

The Employment Act at **section 49** gives mandatory guidance on the matters that the court, by dint of **section 50**, should consider before deciding on the quantum of damages, tied to the employee's gross wages and capped at a maximum of twelve months. It is a long and elaborate list and this Court in **OL PAJETA RANCHING LTD vs. DAVID WANJAU MUHORO [2017]** eKLR summarized them and expressed their compulsive character as matters for the court's consideration as follows;

“Was the award of Kshs. 3,489,084 representing the respondent's 12 months gross salary as compensation for unfair termination justifiable? Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include and which the learned Judge invoked, payment equivalent or a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination paid by the employer and received by the employee.”

Much as the trial court does have a discretion in the quantum of damages to award for unfair termination of employment, those statutory considerations constitute the guiding principles and parameters within which such discretion is to be exercised. It behoves a court to undertake a deliberate and visible-on-the record consideration of the various matters. Absent evidence that the matters requiring consideration were so considered or, put another way, unless a proper basis is laid in the judgment, the trial court's decision lies exposed to the charge of being capricious and whimsical inviting our intervention and interference.

That is exactly what this Court emphatically laid out as the law in **OL PAJETA** (supra), which I firmly reiterate;

“The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 month's pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations which then invites our intervention.”

See also **CMC AVIATION LIMITED vs. MOHAMMED NOOR [2015]** eKLR.

The learned Judge was equally remiss in the instant case. There is absolutely no justification for the maximum 12 month gross pay that he awarded to each of the respondents. He simply plucked it from the air and that, with respect, is a capricious exercise of discretion and a reversible error. I note and it is common ground that the appellant did invite the respondents to respond to the allegations against them in writing or orally, and to appear before the Board Committee in person. The appearance may not have been fully satisfactory and the respondents may be justified in seeing it as more of an 'interrogation,' but opportunity was afforded. It is also admitted that the respondents were each paid one month's pay in lieu of notice. It was stated by their witness that one of them at least was already engaged in business following the dismissal and there was no evidence of any extra hardship they were put through. I see nothing in the conduct of the appellant that would invite the maximum penalty in damages as was ordered by the learned Judge and which was both unjustified and plainly excessive.

I am left with no option but to interfere with the award of damages which I would from what was ordered to the equivalent of **two** months gross pay for each respondent.

The appellant having partly succeeded in this appeal we order that it shall be paid by the respondents half the costs of this appeal.

[As Sichale and Kantai JJ.A agree, it is so ordered.]

Dated and delivered at Nyeri this 11TH day of October, 2018.

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF KANTAL JA

I have had the advantage of reading in draft the judgment of my brother Kiage, JA. I fully agree with the reasoning and findings made.

The only ground of appeal argued before us related to the award of damages which the appellant thought was excessive considering the circumstances leading to termination of the respondent's employment.

Section 49 of the **Employment Act** enumerates the factors and principles to be considered by a Labour Officer in recommending to an employer payment of wages where termination of employment or summary dismissal is found to be unjustified. The period of notice an employee would be entitled under the contract of employment is a relevant factor as are other factors. The maximum compensation that is allowed by the statute is 12 months wages or salary of the employee at the time of dismissal.

In the case before the trial judge it was shown that due administrative processes that ensured that the respondents' rights were respected were adhered to. There was fair hearing but in the end the appellant decided to terminate the respondents' employment by paying to them all their salaries up to the date of dismissal. The respondents were further paid the equivalent of one month salary in lieu of notice. I observe that the learned judge in the judgment appealed from did not enumerate which factors the appellant breached in the process of terminating the respondents' employment. He awarded the respondents the maximum compensation allowed by the statute without assigning any reason why the respondents, who had been accorded a fair hearing before dismissal, were entitled to the maximum compensation allowed by the statute. Although the law allowed him to do so I think the judge was duty bound to lay a basis on why he used his discretion the way he did. A maximum award should, in my respectful opinion, only be made where it is shown that an employer has abused an employee's fair hearing rights or where the employer has treated the matter in a capricious manner where an employee's rights are flouted with abandon. A trial court should, where it is shown, as in the instant case, that the employer has not disregarded the law, desist from making maximum awards.

I know that an appeal court should not lightly interfere with the discretion of a trial court. But where it is shown that the discretion has not been exercised in a proper manner the trial court should be reversed.

I am in full agreement with the judgment of my learned brother and the final orders will be as proposed by him.

Dated and delivered at Nyeri this 11th day of October, 2018.

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

JUDGMENT OF SICHALE, JA

I have had the advantage of reading Kiage, JA's judgment in draft. I am in agreement with the findings and conclusions therein and I have nothing useful to add.

Dated and delivered this 11th day of October, 2018.

F. SICHALE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR