IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MAKHANDIA & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 234 OF 2013

BETWEEN

FREIGHT IN TIME LIMITED.....APPELLANT

AND

ROSEBELL WAMBUI MUNENE.....RESPONDENT

(Being an appeal from the award and decree of the Employment and Labour Relations Court at Nairobi, (Rika, J.), dated 12th February, 2013

In

Nairobi Industrial Cause No. 1199 of 2012

****

JUDGMENT OF THE COURT

1. There are two companies known as Freight In Time Limited. One is incorporated in the Republic of Kenya, the other is incorporated in the Republic of Rwanda. The respondent, Rosebell Wambui Muthee, was employed by Freight In Time Limited. It is contested whether it is the Kenyan or Rwandan company that employed the respondent. The letter of offer of employment dated 12th August 2008 is signed by Mr. Jignesh Desai who is described himself as the Group Financial Controller. Under the contract, the respondent was engaged and employed in the position of Accountant at Freight In Time Limited – Rwanda, at a gross monthly salary of Rwandese Francs Five hundred thousand only.

2. The offer of employment which was accepted by the respondent stated that upon completion of a three-month probation period, the employment relationship could be terminated by either party giving the other not less than two months' notice in writing.

3. On 1st March 2011, the respondent received a notice of termination of employment with effect from 1st April 2011. In the notice, it was stated that:

> ***"We are currently re-organizing our business in Rwanda and our Kigali Office will take a different role from what it has in the past five years. In this regard, the entire branch will be reconstituted afresh. This has unfortunately left us with surplus staff and or roles and regrettably your position is affected. In line with your employment offer letter, we wish to and hereby give you notice to terminate your services with effect from 1st April 2011…."***

4. On 13th July 2011, the respondent lodged a claim before the Industrial Court at Nairobi in Cause No. 1199 of 2011. In the Cause, the respondent claimed that:

> *(a) Termination of her employment was unlawful and in breach of the terms of the contract of employment, the Employment Act and the Kenya Constitution.*
>
> *(b) The appellant had failed to pay her terminal dues and damages for unlawful termination.*
>
> *(c) There was no payment of two months' salary in lieu of notice equivalent to Ksh.100, 000/=.*

(d) She was entitled to annual leave of Ksh.50, 000/=.

(e) *She was entitled to twelve (12) months' gross pay compensation for unlawful dismissal totaling Ksh.856, 896/=.*

5. In Reply to the Claim, the appellant denied jurisdiction of the trial court asserting that the dispute involved employment conditions in Rwanda and not in Kenya; that the appellant never entered into any contract of employment with the respondent; that the respondent was exclusively employment by Freight In Time Limited of Rwanda which is neither a branch nor subsidiary of the appellant company; that the appellant is neither in breach any contract of employment nor has failed to pay the respondent any terminal dues because the appellant has never employed the respondent.

6. Upon hearing the parties, the trial court made an award and entered judgment for the respondent in the sum of Ksh.1,006,895/= plus costs and interest thereon. In making the award, the trial court held that the termination of the respondent's contract of employment was unfair; that the appellant was to pay the respondent a total of Ksh.956,896/= in compensation and terminal benefits within 30 days of the award.

7. Aggrieved by the award, the appellant has lodged the instant appeal citing the following abridged grounds in its memorandum:

(i) The learned judge erred in attributing to the appellant the miscarriage of the respondent's pregnancy without any credible evidence.

(ii) The judge erred in failing to uphold that the respondent's termination was on the basis of redundancy upon closure of the appellant's Rwandan office.

(iii) The judge erred in failing to uphold that there was no evidence to establish any victimization, discrimination and or unfair treatment during the respondent's pregnancy.

(iv) The judge erred in making an award of 12 months' compensation at Ksh.856,895/= whereas there was no basis to make the award in view of the evidence presented before the court.

(v) The judge erred in making an award of one-month basic salary of Ksh.50,000/= in lieu of notice and a further one-month salary of Ksh.50,000/= for annual leave.

(vi) The judge erred in making the award without considering and or applying legal principles applicable to the respondent's claim.

8. At the hearing of this appeal, Learned Counsel Mr. Kennedy O. Arum appeared for the appellant and Learned Counsel Mr. B. N. Kimani appeared for the respondent. Both counsel made oral submission as neither party had filed written submissions in the appeal.

9. In support of the appeal, counsel for the appellant submitted that jurisdiction is central to this appeal; that the jurisdiction of the trial court was denied in the Statement of Reply; the trial court erred in failing to appreciate and apply the principle of separate corporate personality; that the respondent was employed by Freight In Time Rwanda Limited which was a separate legal entity from the appellant company which is Freight In Time Kenya Limited. Counsel submitted that the duty station of the respondent and the place performance of the contract of employment was in the Republic of Rwanda; that the respondent's salary was delineated in Rwandese Francs and consequently, the contract of employment was enforceable by courts in Rwanda and not by Kenyan courts. To this extent, the trial court had no jurisdiction over the claim in the suit.

10. On the merits of the appeal, the appellant submitted that based on the evidence on record, there was no legal basis for the court to award twelve (12) months' gross salary compensation for the respondent; there was no evidence proving wrongful or unfair termination of the respondent's contract of employment; that above all, there was no evidence linking the appellant to the miscarriage of pregnancy by the respondent where she lost her baby.

11. In opposing the appeal, counsel for the respondent submitted that the issue of jurisdiction was never raised as ground in the memorandum of appeal and consequently, this Court should not consider the appellant's submissions on the jurisdiction question. Counsel further submitted that the trial judge was satisfied that the Rwandan company was a branch of the Kenyan company and the trial court properly had jurisdiction to hear and determine the respondent's claim.

12. Submitting on the merits of the appeal, we were urged to find that there was proof that the respondent's contract of employment was terminated due to her pregnancy; that the trial court found the respondent a truthful and credible witness; there was no proof that the contract of employment was terminated due to redundancy; that the procedure for termination on account of redundancy is well provided for by law; that in the instant matter, the appellant did not follow the laid down procedure for termination due to redundancy and consequently, the trial court did not err in finding that the respondent's termination was unfair. On quantum of award, counsel submitted that the trial court did not err in awarding one-month salary towards annual leave and a further one-month salary in lieu of notice. It was urged that the burden to prove that the employment contract was not terminated on account of redundancy or to prove that the respondent was not entitled to award towards her annual leave rested with the appellant; that the appellant neither discharged the legal nor the evidential burden of proof.

13. We have considered the grounds of appeal as well as submissions by counsel. This is a first appeal and it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** it was expressed:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."***

14. We first deal with and determine the issue of jurisdiction of the trial court. The appellant contends that the respondent was not it's employee; that there were two separate companies one incorporated in Kenya and the other in Rwanda; that the trial court erred in failing to consider corporate separateness; that due to separate corporate entities, the trial court had no jurisdiction because the contract of employment was to be performed in Rwanda and the respondent's salary was payable in Rwandese Francs. In determining the jurisdictional issue, the trial court expressed:

> ***"The court does not accept this position. Freight In Time Kenya Limited is the parent company to the Rwandese Company. It controlled FIT Rwanda Limited. Rosebell reported to the Group Financial Controller…. She is a Kenyan and so is the Respondent Group Financial Controller who supervised her…...The court finds the connecting factors preponderantly favour the Kenya courts as the proper place for trial. The court is entitled to disregard corporate separation and exercise a prescriptive jurisdiction."***

15. We have considered the appellant's submission on corporate separateness.

We have also analyzed the evidence on record on the issue. Our answer and finding on the jurisdictional issue is given by the appellant in its memorandum of appeal. The appellant asserts in ground 2 of the memorandum that the trial judge erred in failing to uphold that the respondent's termination was on the basis of redundancy upon total closure of the appellant's Rwandan office. (Emphasis supplied). This is an implicit, if not explicit, admission that Freight In Time Rwanda Limited was the appellant's Rwandan office. Further, in his testimony, **DW 1 Mr. Jignesh Ghelabhai Desai,** the Group Financial Controller for Freight In Time Limited testified that the respondent ***"worked for our company in Rwanda – Freight In Time Rwanda"*** and ***"we closed the Rwanda Office."*** Grounded and persuaded by this submission, we find that the trial court did not err in holding that Freight In Time Kenya Limited was the parent company to the Rwandese Company. On our part, we are convinced by the testimony of DW1 and we hereby find and hold that Freight In Time Kenya Limited was the respondent's employer and was properly enjoined and sued in this matter. Accordingly, we are satisfied that the trial court had jurisdiction to hear and determine the claim lodged before it.

16. At this stage, we note that one of the grounds of appeal is that the trial court erred in attributing to the appellant the miscarriage of the respondent's pregnancy without any credible evidence; that the court further erred in failing to uphold that there was no evidence to establish any victimization, discrimination and or unfair treatment during the respondent's pregnancy. We have considered this ground and documents on record relevant to the pregnancy and miscarriage by the respondent. In our considered view, the pregnancy and miscarriage of the respondent is not pivotal to our findings in this appeal. There is no scientific evidence to prove the link between the miscarriage and the termination of the respondent's contract of employment. Accordingly, we are reluctant to delve in the details of pregnancy and miscarriage as this is an invitation to this Court to engage in conjecture and speculation.

17. The next issue for our consideration is whether the trial court erred in finding that there was unfair termination of the respondent's contract of employment. Interwoven with the court's finding is whether the trial court erred in making a total award of Ksh.1, 006,896/= based on the evidence on record. In considering these issues and in determining the quantum of award, the trial court expressed:

> ***"There was no notice given by the respondent to the claimant of its intention to close down Rwanda in re-organization. There was no sufficient notice of termination, stipulated at two months' in the contract of employment. A company that is restructuring does not just wake up in the morning and terminate contracts of serving employees…. This court has held in many decisions that employees are entitled to notification on redundancy, consultation and fair selection criteria and proper notice of termination once selected. …It was not reasonable of the respondent to terminate the claimant's contract on the same day she renewed her application for maternity leave. She was compelled to travel a week before the delivery of her baby. She lost the baby. She had applied for maternity leave earlier in January 2011. There was a delay in***

responding to her notice to proceed on maternity leave. When Jignesh Desai replied on 1st March 2011, the same day the claimant renewed her application, it was to terminate the claimant's contract. She travelled back to Kenya on short notice and lost her baby. The circumstances of termination persuade the court to uphold the evidence of the claimant that she lost her job on account of pregnancy…...The court is not persuaded by the respondent that termination was fair and based on valid reason or reasons as required under Sections 43 and 45 of the Employment Act 2007…. The claimant is entitled to compensation, which the court awards at 12 months' gross salary as prayed at Ksh.856,969/=. Her contract provided for termination through a written notice of two months or two months in lieu of notice. The claimant was given one-month notice of termination after she had renewed her application for maternity leave…. The court awards 1-month basic salary at Ksh.50, 000/=. The employee testified that she is owed 21 days of annual leave. It was for the respondent to avail leave records to the court to show that the claimant had taken her annual leave or sold her days to the respondent. On a balance of probabilities, the claimant is awarded one-month basic salary at Ksh.50, 000/= for annual leave."

18. We have considered the ground of appeal that the trial court erred in making a total award of Ksh.1,006,896/= without considering the evidence on record. Our perusal of the documents and pleadings on record show that the respondent was entitled to a two-month notice of termination or two-month salary in lieu of notice. The Notice of Termination dated 1st March 2011 gave the respondent a one-month notice. This is contrary to the contract of employment which stipulated that a two months' notice is the requisite period. Recognizing and appreciating that the appellant gave the respondent a one-month notice of termination instead of a two-month notice, we are satisfied that the trial court did not err in awarding the respondent a one-month salary of Ksh.50,000/= in lieu of notice. Relating to the award of one-month salary as compensation for the 21 annual leave days, we are satisfied that the respondent led evidence to show that she was entitled to 21 days' annual leave. The appellant did not lead any evidence in rebuttal to dislodge this claim. Accordingly, we are satisfied that the trial court did not err in awarding a one-month salary as compensation towards the 21 annual leave days. We find that there is evidence on record to support the award of one-month salary in lieu of notice and a further one-month salary as compensation towards annual leave. The ground of appeal challenging these awards have no merit.

19. We now consider whether the trial court erred in awarding twelve (12) month salary as compensation for unfair termination of the contract of employment. Upfront we must first determine whether the termination was unfair. The respondent urged that her termination was not fair in accordance with **sections 43** and **45** of the **Employment Act. Section 43(1)** of the Act states as follows:

"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

Under **section 45(2)** an unfair termination occurs when an employer fails to prove –

"(a) that the reason for the termination is valid;

(b) that the reason for the termination is fair reason -

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure."

20. Comparatively, in ***Grace Team Accounting Ltd –v- Brake [2014] NZCA 541***, the New Zealand Court of Appeal confirmed that, in a redundancy situation, the statutory test for whether a dismissal is justified or not should properly include an assessment of an employer's commercial rationale (or business case) for a redundancy, including clear evidence that the goals of the redundancy will be achieved by the restructure.

21. In the instant case, the notice of termination served upon the respondent stated that the appellant was re-organizing its Rwanda office and the said office would be left with surplus staff of which the respondent was to be affected. This is a redundancy statement. There is no evidence on record led by the appellant to prove that indeed there was restructuring in the Rwanda office; there is no evidence on record to demonstrate there was surplus staff at the Rwanda office; there is no evidence on record led by the appellant to demonstrate the selection criteria that led to the respondent being identified as part of the surplus staff. The reason given in the Notice of Termination being a redundancy statement, it was incumbent upon the appellant to demonstrate and prove the redundancy. (See ***Africa Nazarene University –v- David Mutevu & Others (Civil Appeal No.236 of 2015).***

22. Further, ***Section 47 (5)*** of the **Employment Act** provides for procedure to be followed in matters of complaints of unfair termination as follows:

> ***"(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer."***[Emphasis added]

23. In addition, **Section 40 (1)**of the ***Employment Act*** prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely:

> ***"a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;***
>
> ***b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;***
>
> ***c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;***
>
> ***d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;***
>
> ***e. the employer must pay the employee any leave due in cash;***
>
> ***f. the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and***
>
> ***g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service."*** [Emphasis added].

24. In ***Barclays Bank of Kenya Ltd & another –v- Gladys Muthoni & 20 others [2018] eKLR***, this Court expressed:

> ***"39. There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the*** *"the reasons and the extent of the redundancy"* ***but there is no evidence on record sufficient to discharge that burden. It was further contended by the respondents that the Labour Officer was not served with any letter or reasons as required under*** *section 40* ***but the appellants merely made a bare assertion that service was made and reasons given for redundancy. In the absence of proof, we must find that there was no service and therefore the notice was invalid."***

25. In the instant appeal, there is no evidence on record led by the appellant to justify the grounds of termination cited in the notice of termination as restructuring of the Rwanda office; no evidence was led to prove that the appellant followed the procedure for redundancy as stipulated in **Section 40 (1) (b) (c) and (g)** and **Section 45 of the Employment Act**. Further, the appellant led no evidence to justify and prove the alleged redundancy. The requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice, is mandatory. Failure to issue renders the redundancy unlawful. On record, there is no evidence to prove that a separate notice was issued to the Labour Officer. A relevant dictum is discernible in ***Hesbon Ngaruiya Waigi – v- Equatorial Commercial Bank Limited [2013] eKLR*** where the trial court while finding that a contract of employment was unfairly terminated held that the respondent had not demonstrated that there was redundancy despite relying on it as a ground for dismissal. Persuaded by the foregoing, we find that the appellant's termination of the respondent's contract of employment on account of redundancy was unfair due to non-compliance with procedural requirements and failure to justify and prove the redundancy.

26. Having held that the respondent's termination was unfair, what is the reasonable sum for compensation? Was the award of Ksh.856,896/= representing the respondent's twelve (12) months' gross salary justifiable?

27. Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Employment Act. In the instant appeal, the compensation awarded to the respondent under **Section 49(1)(c)** was the maximum awardable. Was the twelve month maximum award explained and justified by the trial court? In ***CMC Aviation Limited –v- Mohammed Noor [2015] eKLR,*** this Court expressed as follows:

> *"40. We now turn to the award of* ***US$108,000*** *being twelve months' gross salary as compensation for unlawful loss of employment. In arriving at that sum, the trial court computed the respondent's monthly salary at US$9,000, although we have already established that the respondent's last salary was US$5,075. We have already set out the remedies for wrongful dismissal and unfair termination*

*as stipulated under **section 49** of the **Act.** The trial court did not state why it opted to give the remedy provided under **section 49 (1) (c)** that is, twelve months' gross salary, and not the other remedies under **section 49 (1) (a) or (b).** The court should have been guided by the provisions of **section 49 (4)** but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did. Although the respondent had prayed for an award of **"damages"** in the sum of US$108,000 for unfair and wrongful termination of employment, it appears to us that in giving that award the trial court was not awarding damages as sought. The court stated that it was twelve months' gross salary which is what **section 49 (1) (c)** provides as one of the remedies for wrongful dismissal. (Emphasis supplied).*

*41. The respondent was serving a two-year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of **sections 41** and **45** of the **Employment Act**, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months' gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation. The trial court awarded that, albeit at a higher rate of US$9000 instead of US$5,075 plus twelve months' salary amounting to US$108,000. We hereby set aside the award of US$9000 as one month's pay in lieu of notice and substitute therefor US$5075. The award of US$108,000 is set aside in its entirety."*

28. In ***OlPejeta Ranching Limited -v - David WanjauMuhoro [2017] eKLR***, this Court in considering whether a maximum award of 12 months' gross salary as compensation is justifiable expressed as follows:

"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 act then invites our intervention. Given that the respondent has received compensation for racial discrimination in terms of salary at his work station, we think that an award of 6 months' gross pay …. would be appropriate." *(Emphasis*

supplied).

29. Persuaded by the reasoning in ***OlPejeta Ranching Limited -v - David Wanjau Muhoro [2017] eKLR***, we find that the trial court erred in law in awarding the maximum 12 months' compensation for unfair dismissal. The law as we understand is that an award which is specifically pleaded must be proved to the satisfaction of the court. Again, for the court to enter judgment in respect of a special sum, it must be based on the evidence on record. It is for this reason we hold the view that the respondent did not offer concrete and clear evidence to show that she was entitled to the sum of 12 months gross salary as pleaded. More importantly, the court was required to give an explanation and a justification for awarding the maximum 12 months gross salary as compensation. This was not done by the trial court. In the absence of explanation or justification for the maximum award, we are inclined to intervene with the award.

30. Accordingly, we set aside the award of 12 months' gross salary compensation and substitute the same with an award of six (6) months' salary compensation at the rate of Ksh.50,000/= per month bringing the total award for unfair termination to Ksh.300,000/= (Three hundred thousand only).

31. The final orders of this Court is that the award/judgment of the trial court dated 12th February 2013 be and is hereby varied to the extent that the twelve (12) months' gross salary compensation for unfair dismissal is set aside and substituted with an award of six (6) months' salary of Ksh.300,000/=. Interest on the Ksh.300,000/= is to run from 12th February 2013 which is the date of award by the trial court. For avoidance of doubt, the award of Ksh.50, 000/= for one-month salary in lieu of notice and a further Ksh.50, 000/= as compensation for annual leave be and are hereby upheld.

The grand total award to the respondent is hereby set and determined to be Ksh.400, 000/= with interest from 12th February 2013. Each party is to bear his/its own costs at the High Court and in this appeal. Orders accordingly

Dated and delivered at NAIROBI This 9th day of November, 2018.

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR