IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 64 OF 2018

BETWEEN

CHAI TRADING CO. LTD.....APPELLANT

VERSUS

JOSEPH KIMATHI IKIAMBA.....RESPONDENT

(Being an Appeal against the entire decision contained in the

judgment delivered on 15th December, 2017 by O.N. Makau J.,

in Employment and Labour Relations Court at Mombasa

in

Industrial Cause No. 260 of 2016)

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JUDGMENT OF THE COURT

[1] Joseph Kimathi Ikiamba**,** the respondent was employed by Chai Trading Co. Ltd. from April, 2003 rising through the ranks from the humble position of a sweeper to that of a warehouse assistant until the 1st of September, 2015 when his services were terminated. He was earning a monthly salary of Kshs. 60,564.52 per month. The respondent was dissatisfied with termination of his employment therefore, he filed suit seeking a declaration that the termination was unfair; that he was entitled to two months' pay in lieu of notice, leave days, gratuity and compensation for wrongful termination all amounting to Kshs. 1,635,228.

[2] The appellant denied the claim and in their statement of defence, they however, admitted the respondent was employed pursuant to terms and conditions set out in an offer of employment letter dated 31st August, 2006 as a forklift driver grade 11. On allegations of unfair termination, it was contended by the appellant that the respondent was terminated due to negligence in performance of his duties with effect from 1st September, 2015 which was in accordance with the appellant's company standing regulations and labour laws. It was alleged that a huge consignment of tea was stolen from the warehouse when the respondent was the custodian of the keys, and upon investigations it transpired that the respondent was negligent in locking the warehouse or where he kept the keys. On the claim for damages, it was stated that upon complying with the normal clearance procedure, the respondent was entitled to 2 months' salary in lieu of notice, pay for accrued leave on pro-rata basis, gratuity according to the pension fund scheme rules, less any monies he may be owing the appellant.

[3] The matter fell for hearing before O.N. Makau, J. who considered evidence from both sides and found the procedure under **Section 41** of the **Employment Act** that provides for a fair hearing of an employee before termination was partially followed. Therefore, there was partial unfairness because the respondent was not informed of his right to be accompanied by a fellow employee of his choice during the disciplinary hearing. For that reason, the learned Judge awarded the respondent a total of Kshs.908,466.24 stating the following;-

> **"In view of the foregoing finding, I make declaration that the termination of the claimant on 1st September, 2015 was unfair and unjust. Under Section 49 read with Section 50 of the Act, I ward the claimant Kshs.121,128 being two months' salary in lieu of notice plus Kshs.726,768 being 12 months' salary as compensation for unfair termination. In awarding the said compensation I have considered the claimant's long service to the respondent and the fact that no misconduct was proved against him that contributed to the termination.**

The claim for gratuity/pension is granted but with directions that the same shall be calculated and paid to the claimant in line with the rules of the scheme within 45 days from the date hereof.

Finally the claim for leave for 2014/2015 is granted being 30 days' pay. The claim has not been disproved by leave records and I therefore award Kshs. 60,564 as prayed."

[4] The above triggered this appeal that is predicated on the grounds that the learned trial Judge erred in law and fact in, awarding 12 months' salary compensation notwithstanding his finding that the appellant partially followed the statutory procedure; finding that the respondent was not afforded a fair hearing despite being given a notice to show cause and an opportunity to appear before the disciplinary committee and thereafter presenting an appeal; making erroneous interpretation of Statute; failing to find the respondent had misconducted himself and went contrary to the evidence of the appellant's witnesses that sufficiently proved the respondent was guilty of negligence and as a result the appellant lost a huge consignment of tea.

[5] During the plenary hearing of the appeal, Ms. Waihenya, learned counsel for the appellant, relied on her written submissions and made some oral highlights. Counsel submitted that the respondent's employment was lawfully and fairly terminated in accordance with the **Employment Act** and the Company staff regulations; it was also fairly done in accordance with the dictates of the rules of natural justice. According to counsel, it was not disputed that the respondent was given a notice to show cause for reasons that, on 4th May, 2015 while he was in charge of the warehouses and the last person to handle the keys thereto, he caused a breach of security resulting in loss of 792 packages of tea which were valued at over 17 million shillings. Despite the fact that the respondent admitted in his evidence that he had the custody and control of the keys to the warehouse, the learned Judge faulted the appellant for failing to discharge its burden of proof in that they did not call the security guards and/or provide the OB record yet those issues were not denied.

[6] As regards the provisions of **Section 41** of the **Employment Act,** counsel for the appellant, further submitted that the respondent was given a letter dated 15th May, 2015 which outlined the grounds of termination as;-

"You are therefore hereby required to show cause why disciplinary action should not be taken against you for duty negligence namely; failure, refusal and or improperly locking and securing Godown No. 3 and improper custody of the keys thereof and thereby occasioning loss of 792 packages of tea valued at Kshs. 17,903,836.80."

The respondent was also invited to submit a written explanation which he did vide his letter dated 16th May, 2015 and he attended a staff disciplinary committee meeting on 27th August, 2015 whose minutes thereto were adduced in evidence. Counsel for the appellant, pointed out that the respondent was entitled to a fellow employee's presence and his colleague one O. Zani, a security officer was in attendance; the respondent duly presented his case, and the disciplinary committee considered his evidence but found glaring inconsistencies in his explanation thereby finding him culpable for the loss of the tea. The respondent unsuccessfully mounted an appeal before the Appeals committee which clearly demonstrated that he was fully given an opportunity to be heard in accordance with the Statute and the company regulations. On compensation, counsel for the appellant, argued that the respondent was entitled to two months' pay in lieu of notice and leave for the year 2014-2015 all totalling to Kshs.181,692 plus gratuity according to the Pension scheme rules. Counsel urged us to allow the appeal and substitute the impugned judgment with the aforesaid sums.

[7] This appeal was opposed; Mr. Nyange, learned counsel for the respondent, who also relied on his written submissions and made some oral highlights. Counsel supported the judgment of the trial Judge and the finding that there was failure on the part of the appellant to accord the respondent both procedural and substantive fairness. Counsel cited the provisions of **Section 43 (1)** of the **Employment Act** which requires the employer to prove reasons for termination of an employee and failure to do so, the termination is deemed to have been unfair. The respondent was accused of negligence but he defended himself by explaining the process of locking and opening the warehouse which procedure was not contested by the appellant. Since the locking and opening procedure was done in the presence of 2 security guards as witnesses, the same could not have led to the loss. According to counsel, failure by the appellant to call evidence of the security guards who were guarding the premises when the theft occurred meant that they did not prove the allegations of negligence and in turn the reasons for termination were not valid. Moreover, the appellant had not installed an alarm system to enhance their own security and the appellant's finance manager confirmed that the CCTV camera was faulty.

[8] Counsel for the respondent, further submitted that the provisions of **Section 41** of the **Employment Act** were not followed because the respondent was not given an opportunity to call another employee of his choice or a union representative to be present. According to counsel, this lapse became apparent during the cross examination of the appellant's witness who was in charge of human resource. Thus, under **Section 45(2)** of the **Employment Act** the reasons for termination of the respondent were not valid and the termination was properly deemed as unfair also for failure to follow the procedure.

[9] On the award of 12 months' salary for unfair termination counsel urged us to find it was done in exercise of the trial Judge's discretion to award compensation which cannot be interfered with on appeal simply because this Court would have given the whole matter a different dimension. Counsel cited the cases of: **George Gikubu Mbuthia Vs Consolidated Bank of Kenya** Civil Appeal No 72 of 2014 and **Bamburi Cement Ltd Vs William Kilonzi** Civil Appeal No. 62 of 2015 and urged us to dismiss the appeal with costs.

[10] This is a first appeal, it is therefore the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion. This much was appreciated in **S. M. Vs E. N. B. [2015] eKLR** wherein the Court expressed:-

"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

We also agree with counsel for the respondent on the guiding principles in dealing with an appeal involving an exercise of trial Judge's discretion as postulated by this Court's decision in **Mbogo Vs Shah [1968] E.A. 93:**

> **"…..A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice."**

[11] Being guided by the above principles and from the grounds of appeal, the record and the submissions made by both parties, we discern two issues for determination by this Court, that is, whether the termination of the respondent was fair and whether the trial Judge properly exercised his discretion in awarding the respondent 12 months compensation. The facts presented before the trial Judge were largely not disputed and the respondent admitted even in his witness statement that he was the custodian of the godown keys and it was his responsibility to close and open the warehouse in the presence of two security guards. It was not also disputed that the appellant's tea consignment worth over 17 million was stolen in circumstances that pointed negligence in either the way the keys were kept or in the manner in which the place was locked up by the respondent. All in all, it was the respondent who was entrusted with locking of the warehouse; he confirmed the tea was intact when he locked the warehouse and that the keys were in his custody. There was however the question of whether the guards who were on duty were responsible or they aided in the theft as there was no visible breakage and no enhanced CCTV cameras were in the premises.

[12] In determining a claim for unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer **(Section 47(5)** of the **Employment Act).** The respondent maintained that he was not negligent as he properly locked the warehouses in the presence of two security guards and removal of the consignment could only occur if they were moved in 2 semi-trailer trucks. On the other hand, the appellant accused the respondent of negligence but instead of a summary dismissal they opted to terminate his services whereupon he was offered 2 months' salary in lieu of notice, accrued leave and his pension according to the pension fund rules. The respondent was also given an opportunity to respond to the allegations made against him, a hearing was conducted before a disciplinary committee and the respondent even appealed. However the trial Judge found this constituted a partial compliance as the respondent was not informed of his right under **Section 41** of the **Employment Act** to have the presence of a fellow employee of his choice during the proceedings.

[13] It appears to us that the appellant as the employer exercised their right to terminate the employment of the respondent and provided reasons, the only problem that the Judge identified which is the crux of this appeal is whether the appellant fully complied with the procedure which is as follows;-

> **"41. Notification and hearing before termination on grounds of misconduct.**
>
> **1) Subject to section 42 (1) an employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**
>
> **2) Notwithstanding any other provision of this part an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person if any, chosen by the employee within sub-section (1), make."**

[14] The Judge who heard the matter and had the distinct advantage of seeing and hearing the witnesses, found there was partial procedural compliance when the appellant terminated the respondent. In other words, in as much as the appellant as an employer is entitled to terminate an employee on the grounds of misconduct, poor performance or physical incapacity, nonetheless the appellant was obliged to inform the respondent of his right to appear with a fellow employee or a shop steward for the disciplinary proceedings. On our part, we have no reason to question that finding as we find the appellant did not provide any evidence at the trial of the name of the employee or union representative who was present at the disciplinary committee meeting. Doing so by way of submissions in the Court of Appeal does not help appellant's case. Having come to that conclusion therefore, we cannot fault the finding of the Judge that the appellant failed to follow the due process.

[15] The second issue is; the appellant having partially complied with the procedure, whether the award of damages of 12 months' salary that was issued by the learned trial Judge was justified in the circumstances of the matter. The decision on how many months' worth of compensation a litigant ought to get under **Section 49(1)** of the **Employment Act** is in the court's discretion and unless it is demonstrated that there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight of the prevailing circumstances admitted or proved, or has plainly gone wrong the appellate Court will hesitate to interfere with such exercise. The appellant's contention is that the award of 12 months' salary was manifestly high, while the respondent contends that it was within the limits of **Section 49(1)** which provides that:-

> **"Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following-**
>
> > **(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;**
> >
> > **(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of**

notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." (Emphasis added)

[16] Was the award of 12 months' salary proportionate, fair, and legal in view of the fact that the respondent was also awarded 2 months' salary in lieu of notice; the appellant substantially complied with the procedure save for failing to inform the respondent that he had a right to invite a fellow employee or an union official and generally that the appellant suffered great loss due to a lapse in security that was within the docket of the respondent? Unfortunately, the learned Judge did not give reasons why he gave the maximum award. Had the learned Judge taken the foregoing into consideration or given reasons why he gave a maximum award having acknowledged that the appellant had partially complied with the law, perhaps he would have come to the same conclusion as we have, that in the circumstances surrounding this matter, the respondent did not deserve a maximum award. For the aforesaid reasons, we find merit in this appeal. In our own evaluation of the matter, we find the award of 12 months was excessive and substitute thereto with damages equivalent to 3 months' salary. Accordingly we set aside the judgement dated 15th December, 2017 and substitute it thereto with the following orders;-

a) Two months' salary in lieu of notice ……. Kshs. 121,128

b) Leave for the year 2014/2015…… Kshs. 60,564

c) Compensation for wrongful dismissal ….Kshs. 181,692

Total Kshs 363,384

d) Plus pension payable to the respondent according to the rules.

This being a dispute over employment we make no orders as to costs.

Dated and delivered at Mombasa this 8th day of November, 2018

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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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