IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 117 of 2013

BETWEEN

THE NATIONAL SOCIAL SECURITY FUND.....APPELLANT

AND

GRACE K. KAZUNGU.....1st RESPONDENT

DARLINGTON Z. O. KEMONI.....2nd RESPONDENT

(Being an appeal from the judgment of the Industrial Court at Nairobi (Abuodha J.) dated 21st February 2013

in

Industrial Court Cause No. 703 of 2010)

****

JUDGMENT OF THE COURT

1. The respondents, ***Grace K. Kazungu*** and ***Darlington Z. Kemoni***, filed a Claim against the appellant alleging un-procedural and wrongful termination of their contracts of employment.

2. By letter dated 13th April 1993, the 1st respondent, ***Grace K. Kazungu***, was employed by the appellant in the position of Personnel and Administration Manager and commenced work on 1st July 1993. Her contract of employment was terminated on 4th January 2010. At the time of termination, her monthly basic salary was Ksh. 209,606/=; her gross pay was Ksh. 359,606/=.

3. The 2nd respondent, ***Darlington Z. Kemoni*** ,was employed by the appellant in the position of Investment Officer on 20th December 1996 and reported to work in March 1997. At the time of leaving service, his gross salary was Ksh. 252,499/=.

4. The terms and conditions of employment between the appellant and the respondents were governed not only by the contract of employment but also the appellant's Code of Regulations.

5. Clause 5.8. of the Code of Regulations provide as follows:

> ***"(a) An officer attaining the age of 50 may elect to retire any time thereafter or may be required to retire by the Fund at any time thereafter, without assigning any cause.***
>
> ***(b) An officer will normally be required to give six m ont hs' notice of his intention to retire under the 50 year rule and the Fund will normally give a similar period of notice to any officer to whom it is intended to apply this provision.***
>
> ***(c)If the Managing Trustee considers that an officer should be called upon to retire on or after reaching the age of 50, he should advise the officer that his compulsory retirement is under consideration asking him whether he wishes to retire voluntarily or whether he wishes to make any representations of a personal nature against his compulsory retirement. The Managing Trustee will forward such representation, if any, together with his own observations to the appropriate Management Committee for decision."***

6. On 22nd December 2009, the appellant wrote an identical letter to both respondents indicating that the Fund wished to retire them under Rule 5.8 of the Code of Regulations. The respondents were given up to 29th December 2009 to make any representations against the intended retirement. This was a seven day notice instead of a six month notice stipulated for under Regulation 5.8. (b) aforesaid.

7. The respondents replied to the appellant's letter on 28th December 2009 and gave reasons of a personal nature as to why each should not be retired at that point of their employment. Despite their representations, both respondents were retired on 4th January 2010.

8. Aggrieved by their retirement, the respondents filed a Claim before the Industrial Court for wrongful and unfair termination. In their Claim, it is contended the appellant did not provide reasons for their retirement; was discriminatory in their retirement and they did not elect to retire but were forced into retirement; the procedure for retirement under the 50 year rule was not followed with the consequence that the respondents suffered wrongful termination of their contracts of employment.

9. The appellant denied wrongful termination of the respondents' contracts of employment; it conceded that the respondents were subject to its Code of Regulations; it contended that Regulation 5.8 (a) allowed it to retire the respondents without assigning any cause.

10. The appellant averred that the 1st respondent in her response letter dated 28th December 2009 indicated she had no objection to retirement under the 50 year rule so long as she was paid her terminal dues which included payment of salary and allowances upto and including when she would have reached 60 years of age and pension contribution. The appellant conceded that the 2nd respondent made representation that he was not prepared to retire and if the Fund wished to retire him, he should be paid on humanitarian ground his salary up to the age of 60 years. The appellant thus submitted that the respondents 'retirement was not wrongful but by mutual consent of the parties.

11. Upon hearing the parties, the learned judge upheld the respondents claim and entered judgment against the appellant. The judge in holding that the termination of the respondents' contract of employment was wrongful expressed himself as follows:

> ***"….Clause 5.8 (b) of the respondent's Code of Regulations requires an officer and the Fund to give six months' notice of intention to retire. As stated earlier, this did not happen in the case of the claimants. In retiring the claimants, the respondent appeared to have been driven by some unexplained sense of urgency which made it violate its own regulations. It should be instructive that whereas the claimants' cases were considered with such urgency some of their other colleagues for instance Mrs. Edwina Ombado (appendix 14 of the Memorandum of Claim) was being asked to elect either to serve the Fund until she attained sixty years or retire under the fifty year rule. Further, by offering some of the claimants' colleagues' option to continue serving the Fund or retiring under the fifty year rule while depriving the claimants such an election without assigning any reason, the court comes to the conclusion that the respondent acted in a discriminatory manner."***

12. Upon finding the appellant wrongfully terminated the respondents contracts of employment, the judge made the following awards to the respondents:

> ***(1) Grace Kazungu (1st respondent)***
>
> *(a) 7 months' salary as compensation for unfair termination (209,606 X 7) = 1,467,242/=.*
>
> *(b) 60 months' salary as compensation for discrimination. (209,606 X 60) = 12,576,360/=.*
>
> ***(2) Darlington Z. O. Kemoni (2nd respondent)***
>
> *(a) 7months' salary as compensation for unfair termination. (127,499 X 7) = 892,493/=*
>
> *(b) 60 months' salary as compensation for discrimination. (127,499 X 60) = 7,649,940/=.*

13. Aggrieved by the judgment and award, the appellant has lodged the instant appeal citing the following compressed grounds in its memorandum of appeal.

> *"(i) The judge erred in holding and directing that Articles 10 and 22 (1) of the Constitution bound the appellant to uphold human dignity, equality, human rights and non- discrimination upon retirement of the respondents on 4th January 2010 prior to the promulgation of the 2010 Constitution on 27th August 2010*
>
> *(ii) The judge erred in holding that the respondents were entitled to compensation for acts of discrimination founded on Articles 22 (1) and 23 (3) of the Constitution prior to promulgation of the Constitution.*
>
> *(iii) The judge erred in awarding the respondents damages for discrimination when the same had not been pleaded and prayed for.*
>
> *(iv) The judge erred in failing to appreciate the respondents were given opportunity to make representations on retirement pursuant to the 50 year rule and they indicated they had no objection.*
>
> *(v) The judge erred in penalizing the appellant for retiring the respondents which was an action consented to by both parties.*
>
> *(vi) The judge erred in fact by failing to appreciate the appellant had paid the respondents six month basic salary in lieu of notice and court had no obligation to allow claims for six month payment in lieu of notice.*

(vii) The judge erred in holding that the respondents had legitimate expectation to work for the appellant until the mandatory retirement age of 60 years."

14. At the hearing of this appeal, learned counsel Ms. Grace Kanyiri appeared for the appellant while learned counsel Mr. Walubengo holding brief for Mr. Namasake appeared for the respondents. Whereas the appellant filed written submissions and list of authorities, the respondents filed grounds for affirming decision of the trial court.

15. The appellant rehashed background facts to the dispute and urged us to find the trial court erred in its finding that the appellant had un-procedurally and wrongfully discriminated and terminated the respondent's contracts of employment. It was submitted, the judge failed to appreciate the respondents were given an opportunity to make representations under Regulation 5.8 (a) on retirement under the 50 year rule; having expressed no objection to retirement the appellant was penalized for an action taken by mutual consent of the parties. Counsel cited the case of **National Bank of Kenya vs. Hamida Bana& 103 others, Civil Appeal No. 72 of 2017** where it was observed that claimants who had voluntarily accepted terms of retirement could not turn around and allege undue influence or unfair termination. Counsel submitted the Employment Act has no provision on retirement of employees and the trial judge erred in finding that Rule 5.8 of the appellant's Code of Regulations cannot override the provisions of the Employment Act.

16. It was further submitted, the judge erred in finding the appellant had violated Rule 5.8 of the Code of Regulation for failing to give six months' notice despite the appellant having paid the respondents six months' pay in lieu of notice. Whereas the appellant conceded the respondents were entitled to six months payment in lieu of notice and the said sum was paid to them, counsel urged that having paid six months basic salary in lieu of notice, the appellant did not breach Rule 5.8 of the Code of Regulation.

17. On the issue of retroactivity of the 2010 Constitution, it was submitted the learned judge erred in applying ***Articles 10, 22, (1) 23 (3), 232*** and ***236*** of the 2010 Constitution as the said 2010 Constitution is not retroactive.

18. On the amount of damages awarded, the appellant urged the trial judge erred in awarding seven (7) months' salary as compensation for unfair termination because the retirement of the respondents under Regulation 5.8 was by consent and neither wrongful nor unfair.

19. On the 60 months' salary compensation for discrimination awarded by the trial court, the appellant urged us to find that there was no claim for compensation for discrimination in the pleadings; further, discrimination was not proved; the judge granted a relief that was not sought and it is unclear how compensation for discrimination can be equated to 60 months' pay on the remainder of a contractual term of 60 years. Counsel cited the case of **Kenya Ports Authority vs. Silas Obengele, Mombasa Civil Appeal No. 38 of 2005** and **Kenya Revenue Authority vs. Menginya Salim Murgani, Nairobi Civil Appeal No. 108 of 2010** where it was held that no damages are awardable for unlawful termination of contract until the age of retirement. Also cited was the case of **Ethics & Anti-Corruption Commission vs. Nicholas Mwenda Mtwaruchiu & 8 Others, Civil Appeal No. 346 of 2014** where it was stated that a claim for unpaid salary until retirement cannot be maintained in law.

20. The appellant concluded its submissions by urging that the trial judge erred in finding the respondents had a legitimate expectation to work until the mandatory retirement age of 60 years. In support, counsel cited **Kenya Ports Authority vs. Edward Otieno Civil Appeal No. 120 of 1997** where it was expressed that it was unreasonable for the appellants to believe that it was their entitlement and right to be employed during their whole working life and such expectation has no basis in law as employment relationship is contractual and terminable under terms of the same contract.

21. The respondents in opposing the appeal relied on grounds for affirmation of the judgment of the trial court. It was submitted that non-retroactivity of the 2010 Constitution would not alter the decision of the trial court. Counsel submitted the principles of non-discrimination and respect for human rights and human dignity were in existence under the Employment Act well before the promulgation of the 2010 Constitution. It was urged the trial court was justified in awarding damages for discrimination the same having been pleaded at paragraph 7: 2 (b) (vi) of the memorandum of claim and canvassed during the hearing.

22. We have considered the grounds of appeal as well as submissions by counsel and the authorities filed in the matter. Being a first appeal, 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)."**

23. In this appeal two issues are pivotal first, whether from the evidence on record a finding can be made that the appellant wrongfully terminated the contract of employment of the respondents; and if affirmative, second, whether the trial judge erred in awarding the quantum of damages and compensation as he did. At the outset, we affirm that the 2010 Constitution is not retroactive in its application.

24. The answer whether the respondents' contracts of employment were wrongfully terminated is given by Regulation 5.8 (b) of the appellants Code of Regulations. Regulation 5.8. (b) expressly states that either party must give a six (6) month notice of intention to retire under the 50 year rule. The appellant gave the respondents seven (7) days' notice being the period between 22nd December 2009 and 29th December 2009. We take judicial notice that this period includes Christmas vacation and computation of time prima facie may exclude holidays within the period. Be that as it may, a seven day notice is not a six month notice.

25. Whereas the appellant concede it did not give the six month notice, it submitted the termination pursuant to Regulation 5.8 (b) was not wrongful because a six month salary in lieu of notice was paid and that the respondents in their representation did not object to retirement under the 50 year rule; and finally, the retirement was by consent of the parties.

26. We have considered submission by the appellant on the question of wrongful termination. Regulation 5.8 (b) is the governing regulation on retirement under the 50 year rule. Its provisions must be observed to the letter. Payment of salary in lieu of notice cannot cure or waive the obligation to comply with Regulation 5.8 (b). To hold otherwise would mean that a party can flagrantly violate the Regulation and make payment in lieu thereof. This would give one party an upper hand in the employment relationship. The payment of six month salary in lieu of notice does not mean Regulation 5.8. (b) is not peremptory. In light of the requirement of Regulation 5.8 (b) for a six month notice, we uphold the finding by the trial judge that the appellant did not comply with its own regulation and the termination of the respondents was therefore un-procedural and wrongful.

27. Having held the respondents' contracts of employment were wrongfully and un-procedurally terminated, we now consider the remedy available to the respondents. In their Claim, the respondents prayed for an order of reinstatement and in the alternative, compensation for wrongful termination equivalent to 12 months gross remuneration. They also sought payment for the un-expired period of their service until retirement age of 60 years.

28. The trial judge in considering the appropriate remedy for wrongful termination awarded the respondents damages under ***Section 49 (1)*** of the **Employment Act** for unfair termination and further awarded compensation for discrimination founded on ***Article 22 (1)*** of the Constitution**.** The judge observed that in quantifying compensation, the court would take into account that had the claimants been accorded a reasonable opportunity, they may have succeeded in persuading the respondent not to retire them and they would have worked until the retirement age of sixty. In awarding the 60 months' salary compensation, the trial court expressed itself thus:

> **"The first claimant had 72 months to retirement age of sixty. For this reason and taking into account the vagaries of life referred to above, the court awards her 60 months basic salary as compensation for the acts of discrimination by the respondent.**
>
> **With regard to the 2nd claimant, he was 54 years at the time of retirement. He had a legitimate expectation to work till the extended retirement age of sixty years subject to the vagaries of life referred to earlier. For this reason, the court awards him sixty months' salary as reasonable compensation for the respondents acts of discrimination."**

29. The appellant contends the learned judge erred in awarding damages for discrimination yet the same was not prayed for in the memorandum of claim. It is a trite principle of law that a court cannot grant a remedy that has neither been pleaded nor prayed for in the Claim/Plaint. In the instant matter, we have examined the prayers in the respondents' memorandum of claim dated 11th June 2010 filed at the Industrial Court. There is no claim for compensation for discrimination.

30. However, in the case of **Odd Jobs vs. Mubia (1970) EA 476**, it was held that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. In **Vyas Industries Diocese of Meru (1982) KLR 114** it was held a court can also base its decision on an unpleaded issue if on the facts the issue had been left for decision by the court if the advocate for the appellant led evidence and addressed the court on it.

31. On the issue of discrimination, the evidence on record reveals that the respondents' case was considered by NSSF without giving them an equal opportunity as was extended to other employees such as ***Mrs. Edwina Ombado*** to elect either to serve the Fund until the age of 60 years or retire under the 50 year rule. Discrimination in employment occurs when an individual receives unequal treatment based on a trait unrelated to the performance of his/her job. In this matter the appellant did not offer reasonable explanation as to why the respondents were treated differently from ***Mrs. Ewdwan Ombado***.

32. In **Stavu Obo Members vs. South African Airways (Pty) Ltd & Others (JAS 54 (13) 2014 ZALAC 40**, it was held that an employer against whom an allegation of unfair discrimination is made by an employee is required to prove the action complained of was in fact fair.

33. From the record, we are satisfied that the appellant discriminated the respondents. In our view, the sixty months' salary awarded by the trial court is without explanation and justification. Accordingly we set it aside and award each of the respondents six months' salary as compensation for discrimination.

34. The trial court also awarded the respondents seven (7) months' salary compensation for unfair termination. There is no explanation how the judge arrived at seven months. In **CMC Aviation Limited vs. Mohammed Noor [2015] eKLR,** this Court expressed itself as follows:

> **"The trial court did not state why it opted to give the remedy provided under** section49 (1) (c) **that is, twelve = mo nths ' g ro ss sal ary , a nd no t the o ther remedi es 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."**

35. In ***OlPejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR***, this Court in considering whether a maximum award of 12 months' gross salary 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…..." (Emphasis supplied).

36. As already stated, it is not clear how the learned judge arrived at the seven (7) months. There is no analysis of comparable awards made if termination of employment is un-procedural and wrongful. In the absence of justification for the seven-month basic salary compensation, and in the absence of analysis on comparable award, we find the learned judge erred in awarding seven months' basic salary as compensation for unfair termination.

37. We have made a finding that the respondents were un-procedurally and wrongfully terminated from employment. The question is what quantum of damages is appropriate? The law on assessment of damages is well settled and we take it from the case of **Peter M. Kariuki vs. Attorney General [2014] eKLR** where this Court stated in part:-

"The principles which guide an appellate court in this country in an appeal on award of damages are now well settled. In KemfroAfrica 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."

38. 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 think that if 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."

39. In the **Elizabeth Wakanyi Kibe vs.Telkom Kenya Limited [2014] e-KLR,** this Court held that employees have the obligation to move on, and look for fresh employment after termination, and not sit back in the hope of enjoying anticipatory remuneration. Employment remedies must be proportionate, and employees must be discouraged from replicating employment wrongs and multiplying remedies. These principles were observed in the case of **Maria Kagai Ligaga vs. Coca Cola East & Central Africa Industrial Court Cause [Nairobi]Number 611 [N] of 2009.** (See also subsequent ***Civil Appeal*** between **Coca Cola East & Central Africa Limited vs. Maria KagaiLigaga [2015] e-KLR**. It is now settled that employees are expected, under ***Section 49 (1)*** of the **Employment Act**, to reasonably mitigate their losses.

40. In **Christopher Onyango & Others vs. Heritage Insurance Company Limited, Cause No. 781 of 2015,** this Court awarded 10 months' salary as compensation for unfair termination. In **Alois Makau Maluvu vs. Cititrust Kenya Limited & another [2018] eKLR, t**he claimant was awarded six months' salary compensation for unfair termination. In **Moses Ochieng vs. Unilever Kenya Limited [2018] eKLR**, the claimant was awarded compensation of six months' salary for unfair termination. Likewise, in **Daniel Kiplagat Kipkeibut vs. Smep Deposit Taking Micro Finance Limited [2016] eKLR,** the claimant was awarded six months' salary as compensation for unfair dismissal.

41. The comparable jurisprudence from the labour court is to the effect that compensation for wrongful and unfair termination attracts compensation for an average of six months' salary. Taking all factors into account, we hereby award the 1st and 2nd respondents six month gross salary as compensation for wrongful and unfair termination.

42. We note that the respondents had already been paid six months' salary in lieu of notice. Accordingly, the respondents are not entitled to six month salary that would be payable for violation of Regulation 58 (b) of the appellant's Code of Regulation.

43. The upshot of our analysis is that this appeal partially succeeds. The award of damages and compensation by the Employment and Labour Relations Court in the judgment dated 21st February 2013 be and is hereby set aside. The following orders are substituted as damages and compensation to the respondents:

(a) The 1st and 2nd respondents be and are hereby awarded six months' gross salary as compensation for wrongful and

unfair termination.

(i) For the 1st respondent, the total sum awarded is Ksh. 359,606/= X 6 = 2,157,636/=.

(ii) For the 2nd respondent, the total sum awarded is Ksh. 252,499/= X 6 =1,514,994/=.

(b) The 1st and 2nd respondents be and are hereby awarded six months' salary for discrimination computed as follows:

(i) For the 1st respondent, the total sum awarded is Ksh. 359,606/= X 6 = 2,157,636/=.

(ii) For the 2nd respondent, the total sum awarded is Ksh. 252,499/= X 6 =1,514,994/=.

(c) For the avoidance of doubt:

(I) The total sum awarded to the 1st Respondent is Ksh.4,315,272/=/

(II) The total sum awarded to the 2nd Respondent is Ksh.3,029,988/=.

(d) The above sums are subject to statutory deductions and taxes.

(e) Interest on the total sums awarded to be at court rates with effect from 21st February 2013 being the date of the judgment of the trial court.

(f) The appellant shall bear the costs of the suit before the Employment and Labour Relations Court.

(g) Each party is to bear its/her/his own costs in this appeal.

Dated and delivered at Nairobi this 20th day of December, 2018

R. N. NAMBUYE

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR