THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, G.B.M KARIUKI & MWILU, JJ.A)

CIVIL APPEAL NO. 134 OF 2012

BETWEEN

DAVID N. NYAMU ……...…...…….……... APPELLANT

AND

INSURANCE TRAINING AND EDUCATION

REGISTERED TRUSTEES.....…….....……1ST RESPONDENT

J.K. NDUNGU…….....…..…..……2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Honourable Mr. Justice J. W. Mwera) dated 4th July, 2011

in

HCCC NO. 1177 OF 2006

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JUDGMENT OF THE COURT

1. By a plaint filed on 9th November 2006, the appellant, David N. Nyamu filed before the High Court a suit against the respondents, Insurance Training and Education Registered Trustees and J. K. Ndungu, seeking special damages amounting to Shs.33,273,721 (being salaries, medical cover, pension fund,annual leave entitlement, unpaid medical claims and excess handing over hours). The appellant also sought general damages in respect of reasonable notice, wrongful dismissal, embarrassment, humiliation, loss of earnings and unlawful retrenchment together with costs of the suit and interest.

2. The appellant was initially employed as the 1st respondent's Finance Controller through a letter of appointment dated 30th January 1997. He had worked for over 10 years until his termination by way of letter dated 31st August 2006 addressed to the appellant by the 2nd respondent. At the time of termination, the appellant had 5 years and 11months to work before attaining the designated retirement age of 55 years. The appellant contested the termination terming it, *inter alia*, illegal, unilateral, *ultra vires*, contrary to the rules of natural justice, un-procedural and in breach of the employment contract.

3. The respondents filed their defence and counterclaim on 8th December 2007 in which they disputed any breach on their part arguing that the termination was not only lawful and justified but also that the appellant was paid all the dues he was entitled to. The respondents counterclaimed from the appellant a sum of Shs.1,916,389.28 comprising loan, salary advances and car loan guaranteed by the 1st defendant together with interest and costs of the suit.

4. The suit proceeded to full trial where there were oral testimonies, written submissions and documents adduced in evidence for the trial court's consideration. In his judgment delivered on 4th November, 2011, the learned Honourable Mwera J. dismissed the suit with costs whilst upholding the counterclaim with costs and interest against the appellant.

5. The appellant, dissatisfied with the judgment of the High Court lodged the appeal now before us and filed a record of appeal on 27th June 2012. The 15 grounds of appeal set out in the memorandum of appeal were grouped into three broad categories namely:-

a) What was the nature of the contract of employment and how was it terminable;

b) Whether the termination of employment was unlawful and /or wrongful.

c) Whether the respondent was entitled to the reliefs sought.

The appellant also filed skeleton submissions through the firm of **Nyachae**

- **Ashitiva Advocates**, represented at the hearing by **Mr. Sifuma Daniel Sitati** and **Ashitiva Benson Mandale**, learned counsel who highlighted the submissions. The respondents filed their supplementary record of appeal on 11th August 2015 and written submissions through the firm of **Ndungu Njoroge & Kwach Advocates**, on whose behalf **Mr. James K. Thuku** learned counsel appeared at the hearing of the appeal.

6. It is the appellant's position as canvassed through his Advocates, Mr. Sitati and Mr. Ashitiva separately that his termination from the 1st respondent's employment was unfair and un-procedural. The appellant relies on the employment contract which he submits did not give the option of termination by notice or payment in lieu thereof by the employer. The appellant also argued that by the 1st respondent's letter sending the appellant on compulsory leave pending review of the situation, the appellant expected to be given a hearing on the findings and contents of what was being reviewed. He was therefore shocked when he was instead terminated on account of the 1st respondent undergoing major restructuring, a situation the appellant construed to amount to redundancy. The appellant was therefore terminated without any reason and the appellant faulted the trial judge's reasoning and decision on the appellant's case.

7. In opposing the appeal, Mr. Thuku faulted the appellant's position in seeking to construe the employment contract as a fixed term contract running until the appellant's 55th birthday. Learned counsel argued that the appellant was not entitled to special damages as sought and was rightly sent on leave, the time for taking such leave being the prerogative of the employer. Special damages sought by the appellant for the period up to his 55th birthday were speculative, added counsel, as there was no guarantee the appellant would have worked till he reached 55 years, the appellant being entitled to terminate the contract earlier. Counsel further submitted that the appellant was entitled only to notice of termination or payment in lieu thereof and such payment having been made, the appellant did not have any further recourse. The issue of redundancy did not arise in the circumstances. The respondents therefore urged us to dismiss the appeal.

8. The appellant's cause of action arose from a letter of termination dated 31st August, 2006. As held by this court in **Gerald Muli Killu v Barclays Bank of Kenya [2016] eKLR**, the appellant's cause of action, having accrued before the coming into force of the **Employment Act No. 11 of 2007** on 2nd June 2008, was governed by the repealed **Employment Act Cap 22*6*** and the repealed **Trade Disputes Act**

Cap 234 of the Laws of Kenya through the saving provisions in the new laws that replaced them. We adopt this position and proceed on that basis.

9. Rule 29(1) of this court's rules allows us, on any appeal from a decision of the High Court in the exercise of its original jurisdiction, to re-appraise the evidence and draw inferences of fact. Accordingly, this being a first appeal, we are required to appraise and evaluate the trial judge's interpretation of the Constitution and statutory provisions, the application of these laws to the undisputed and established facts and the evaluation of the reasonableness of the conclusions of the learned judge.

10. On the nature of the contract of employment and how it was terminable, we note that the employment relationship was governed by the letter of appointment dated 30th January 1997, which stipulated the terms and conditions of service. **Clause 2** of the said letter stipulated that the appellant would first be placed on probation for six months after which he would be advised "***whether or not (he has been) accepted as a member of permanent staff"***. **Clause 6 (c)** of the said letter of appointment indicated that the appellant would be entitled to pension and mortgage benefits on completion of the probation period. **Clause 8** indicated the then normal retirement age of 55 years.

11. The appellant clearly construed the contract to be one of fixed term. He traversed the legal spheres taking us to the United Kingdom when he referred us to the case of **British Broadcasting Corporation v Kelly-Phillips [1997] UKEAT 1397_96_2506** to assert his position. **Section 2** of the **repealed Employment Act** defined a "***contract of service***" to mean *"an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for any period of time*." Whereas the employer and employee are at liberty to enter into a contract for any duration including that of a fixed term, we do not find that to be the position in the instant case.

12. The trial judge held the contract not to be one of fixed term owing to the existence of termination clauses either during probation, summary dismissal and more importantly relating to resignation or termination of employment. We agree with the trial judge to the extent that the contract was not that of a fixed term nature because for it to be a fixed term one, the contract would be expected to have clear commencement and termination dates. There is no doubt that the appellant had worked for more than six months and was placed on a pension scheme and his pension benefits were remitted to him at the termination of employment. This meant that the provisions relating to probation ceased to apply to him. We instead find that the contract was that of a permanent and pensionable nature which is expected to run to retirement pending any premature termination. We also add that fixed term contracts are not devoid of termination options before the expiry of the term. The option to terminate a contract prematurely cannot on its own qualify the present contract as a fixed term contract.

13. As for termination of contract, **clause 7** of the contract provides:

> ***"If, following the satisfactory completion of the probationary period and your confirmation as permanent staff, you wish to leave the service of the Trust, you are required to give the Trust 30 days notice of your intention to terminate your service failing which you will be liable to pay the Trust 30 days salary in lieu of such notice pro rata for the period by which the notice falls short of 30 days."***

The appellant maintained that this provision did not allow the 1st respondent the option to terminate the contract as it did to the appellant. The appellant relied on the English Case of **Gascol Conversions Ltd v Mercer [1974] EWCA Civ 11** to assert that employment is only governed by the contract of employment where the contract is written. However, we do not agree with this contention in the wake of statutory provisions in place in Kenya. This court has previously decided on many occasions that the provisions of **section 14(5)** of the **repealed Employment Act** provide a reciprocal right to terminate an employment contract albeit on reasonable notice. In determining what amounts to reasonable notice, the courts have taken into account several factors and circumstances including the position held by the employee. This was so in the case of **Kyobe v East African Airways**, **[1972] EA403** and **East African Airways v Knight** [**1975] EA165**, cited by the appellant. These decisions and the principles contained in them have been followed and applied in cases such as **Alfred J. Githinji v Mumias Sugar Company Ltd**, **[1995-**

1998] 1 EA81, **Rift Valley Textiles Ltd. v Edward Onyango Oganda**, **Civil Appeal No. 27 of 1992**, **Central Bank of Kenya Ltd. V. Nkabu [2002] KLR 149**, cited by the respondent.

14. In **Barclays Bank of Kenya Ltd v Joseph Mwaura Njau [2006] eKLR,** an argument that, where notice period is not provided, the court must deem the notice to be one month was rejected by the court as such an interpretation would be unnecessarily restrictive and might well encourage employers not to provide for any period of notice in employment contracts so that irrespective of the circumstances surrounding any employee, the period of notice would and must be one month. The respondents argue that they were entitled to give the appellant one month notice. We find that this period was reasonable in the circumstances.

15. The next question for our consideration is whether the termination of the appellant's employment was unlawful and/ or wrongful. Prior to his termination, the respondent was sent on compulsory leave with immediate effect vide a letter dated 14th July 2006. The letter partly provided:-

> "***You will be advised in due course of the next course of action after the matter has been reviewed further by the College of Insurance Management Board."*** (Emphasis ours)

The letter neither indicated the reasons for the decision of the Board to send the appellant on such leave nor specified the duration of such leave. It only emerged through the internal memo dated 17th July 2006 that the appellant had proceeded on two weeks leave.

16. The appellant's employment was later terminated by a letter dated 31st August 2006 (erroneously dated 2001). This termination letter contained the following statements:

> ***"As you are aware this Trust and the College of Insurance are undergoing major restructuring. As part of this review, it has been found necessary to dispense with your services."***(Emphasis ours)

Such contents of the letter would lead to a reasonable inference that the appellant was being terminated as a result of the restructuring. From the foregoing and this letter of termination not having made reference to the compulsory leave and the outcome of the review that was referred to at the time of the appellant being sent on compulsory leave, the appellant was at a loss and sought clarification through his Advocates' letter dated 21st September 2006 as to whether he had been declared redundant and retrenched. In its response letter dated 2nd November 2006, the 1st respondent reiterated that the appellant had been terminated under the terms of contract and not on account of redundancy.

17. It emerged at the trial that whereas there was restructuring of the Board, the same did not affect the appellant, whose job was taken up by a subsequent employee. The respondents argued that the termination was contractual by notice as contemplated under the contract. That may be so but one question that lingers in our mind in light of the respondents' action is why not be clear upfront? If the respondents were set out to terminate the contract by notice, that is what they should have indicated expressly and consistently.

Prior to the enactment of the new labour laws in 2007, employers enjoyed a great latitude to terminate contracts at will, such decisions being upheld by court. This position was pertinently described in **Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR** in the following words:-

> ***"The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts." (***Emphasis ours***)***

18. Introducing factors such as review by the Board, major restructuring then later reverting to termination under the terms of contract which, but for statutory intervention, they had failed to provide in clause 7 of their employment contract only served to inculcate confusion to the appellant as to why he was being terminated. No element of misconduct or poor performance was raised by the respondents as against the appellant. The evidence on record points to the termination of employment being involuntary on the part of the appellant and through no fault of his. **Section 2** of the repealed Trade Disputes Act defines *redundancy* to mean '***the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.'*** (Emphasis ours). The respondent demonstrated that the appellant's office or job was not abolished but was rather taken over by someone else.

19. Section 40(1) of the **repealed Employment Act** entitles an aggrieved employee, such as the appellant herein, to institute a claim to determine any dispute or differences arising and determination of rights and liabilities arising out of a contract of service. From our consideration of evidence on record, we are not satisfied by the respondents' conduct in general in terminating the employment, they let themselves open for challenge right from the drafting of the **clause 7** of the employment contract, sending the appellant on compulsory leave pending further review by the Board, dispensing with the appellant's services as a result of major restructuring only to come back and purport to invoke the contract of service. The 1st respondent may have been entitled to terminate the appellant's contract but the respondents' inconsistency fails to persuade us as to the exact reason for termination of the employment. The path followed by the respondents at the very least obliged them to explain the reasons for their intended termination and where possible undertake the necessary process. For these reasons, we respectfully disagree with the trial judge and hold that the appellant's termination was wrongful and unfair in the circumstances.

20. Having come to the conclusion that the appellant was unfairly terminated, what remedies was he entitled to? The appellant claimed both special and general damages. It is trite law that no general damages were awardable in suits based on termination of employment contracts under the repealed Employment Act (see **Gad David Ojuando v Prof. Nimrob Bwibo & 2 others, Kisumu Civil Appeal No.336 of 2005 (unreported)**). **Section 49** of the **Employment Act** enacted in **2007** introduced remedies for wrongful and unfair termination. However, since the appellant's cause of action arose prior to the enactment of the Employment Act 2007, the remedy of general damages for unfair termination was not available to him.

21. Indeed, apart from pleading general damages, the appellant failed to address us on the basis upon which such damages would be given. On their part, the respondents relied on this court's previous decision in **Sonye v Siaya Teachers Co-operative Savings and Credit [1999] 2 EA (CAK) 310** where the court was emphatic that general damages were not awardable even where there is distress, mental anguish and injured feelings. We therefore decline the prayer for general damages in the circumstances.

22. Having found that the appellant was on a permanent and not a fixed term contract, the appellant's claim for special damages on the basis of the unexpired term of service for the period between his termination and retirement age of 55 years is unsustainable. We are not convinced either that the appellant is not entitled to the salaries, medical insurance claim, pension fund and annual leave entitlement for the term between his termination and attainment of retirement age. As for the special damages relating to excess handing over hours, the trial judge was not satisfied that the same had been sufficiently proved. We see no need to interfere with this finding.

23. We however respectfully differ with the trial judge in disallowing the medical claim of Shs.64,257/= as pleaded. The trial judge took the view that the appellant's presentation of the medical claim forms upon his termination of employment disentitled him from reimbursement. Considering the manner in which the appellant was terminated from employment as we have already discussed above, it can be reasonably inferred that the appellant's actions in not presenting his medical reimbursement claims were not deliberate. It is clear from the exhibits availed that the medical expenses were incurred in the course

of the appellant's employment. It was only expected that the appellant be awarded the reimbursement. In the premises, the appellant having already made his claim for reimbursement, we order that he be awarded the reimbursement in the sum of Shs.64,257/=.

24. As for the counterclaim, the respondent claims a sum of Shs.1,916,389.28 being a loan, salary advances and car loan guaranteed by 1st defendant. The trial judge allowed the counter-claim in the following words:-

> ***"And the counter-claim succeeds with costs and interest."***

The record indicates that the appellant admitted to being indebted to the sum of Shs.1,456,681.28 both in his filed submissions and oral testimony. In the trial judge's words:-

> ***"Then he admitted that he owed Shs.1,456,681.28 at the end of the whole thing. This sounded candid, no doubt."***

The trial judge was satisfied that the appellant's indebtedness had been proved. There was therefore no justification in the trial judge allowing the counter claim in its entirety as noted above. The appellant was categorical that the motor vehicle loan of Shs.459,708/- was payable directly to NIC Bank. This position was confirmed by the respondent's witness who testified that the 1st respondent was a guarantor and they did not claim the amount from the appellant, NIC Bank having not approached the 1st respondent for such payment. Consequently, the respondents' witness, Lydia Ng'ang'a asserted that the respondents' claim from the appellant was for a sum of Shs.1,414,498.35. In our own assessment, the judge should have only allowed the admitted sum of Shs.1,414,498.35 which we hereby allow in the circumstances.

25. In the end, the appeal partially succeeds. Since no general damages were payable by an employer for wrongful and unlawful termination at the time the appellant's cause of action accrued, the appellant's claim in this respect fails. We therefore award the appellant Kshs.64,257/- in unpaid claims for medical expenses, being the only claim proved by the appellant to our satisfaction. As regards the counterclaim, the sum is allowed to the extent of Shs.1,414,498.35. We further order that each party bears its own costs.

Dated and delivered at Nairobi this 17th day of February, 2017.

M. KOOME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR