



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 213 OF 2015

BETWEEN

PREMIER CONSTRUCTION LIMITED APPELLANT

AND

JOSEPHAT BWIRE LUKALE 1ST RESPONDENT

JUSTUS KIMWELI CHEGE 2ND RESPONDENT

GEORGE OTIENO ODERA 3RD RESPONDENT

LAWRENCE OOKO ODUOL 4TH RESPONDENT

EPHRAEM ADAMA MUTUNDU 5TH RESPONDENT

PATRICK ALUSHULA ATETA 6TH RESPONDENT

(Being an appeal from the Judgment of the Employment & Labour Relations Court at Nairobi (Nzioka wa Makau, J.) dated 27th February, 2015

in

E. & L.R.C. Cause No. 313 of 2014)

JUDGMENT OF THE COURT

The respondents were employees of the appellant until 24th June, 2013, when the appellant's factory, where they worked burnt down. Naturally as a result of the accident the respondents, along with all the other employees were paid their salaries for the month of June, 2013 and asked to stay away as the appellant, in the meantime sought compensation from the insurance in order to rebuild the factory. They were assured of their jobs once the company resumed its operations.

According to the respondents the appellant resumed operations on 1st October, 2013 and while it invited and re-engaged some of its former workers, no such invitation was extended to the respondents who in

the end were not reinstated as they had been promised. On 4th March, 2014 they filed a statement of claim in the Employment and Labour Relations Court against the appellant. They sought judgment and tabulated what each one of them imagined they were entitled to. From that tabulation the respondents sought judgment for “**monthly salary**” without details of what it represented. We have noted that the salaries for the month of June, 2013 were paid when the respondents were sent away after the fire accident. In addition to this, the respondents prayed for “**one month salary notice**”, again without details. We can only presume that they intended to apply for one month's salaries *in lieu* of notice. Finally they applied for 12 months salaries for wrongful termination and annual leave represented by a month's salary of each respondent. The total claim for each respondent ranged between Kshs. 285,000 being the highest and Kshs.210,000 on the other end.

In reply the respondent denied any wrongdoing and instead blamed the respondents for refusing, despite being requested by both the appellant and the labour officer, to resume work after the factory was reopened; that for that reason the action was filed prematurely as the appellant had engaged the Labour officer to convince the respondents to go back to work; that at that stage the respondents were not entitled to any relief; and that the suit was scandalous, vexatious, frivolous and did not disclose any reasonable cause of action, but amounted to an abuse of the court process.

The claim was canvassed by written submissions which were not highlighted. In those submissions it was common ground that the only reason why the respondents left the appellant's employment was a fire accident; and that when the factory eventually reopened most of the employees were reinstated. The point of departure, however, was whether the respondents absconded as contended by the appellant, or were technically dismissed as alleged by the respondents. The appellant insisted that up to the time they filed the submissions, they were still committed to re-engaging the respondents.

The respondents for their part, in their not very articulate submissions, argued that it was discriminatory for the appellant to re-engage some workers and leave out others.

Rendering his judgment, having weighed the foregoing submissions, **Nzioki wa Makau, J.** was of the opinion that, although there was no explicit action by the appellant to terminate the respondents' services, the fact that the appellant invited some employees back and re-engaged them but did not do so with the respondents amounted to constructive summary dismissal. He was concerned that the respondents were not informed that the appellant had resumed operations. The learned Judge relied on the provisions of **section 49** of the Employment Act, (the Act) and in an uncharacteristic approach reproduced the entire section running into two pages to demonstrate a point which would have been sufficiently explained by a few specific provisions. From those provisions he came to the conclusion that the termination of the respondents' employment was unjustified, wrongful and contrary to the law, for which reason they were entitled to compensation in terms of **section 50** as read with **section 49**. He entered judgment in favour of the respondents with no orders as to costs and awarded to each of the respondents one month salary *in lieu* of notice and ten (10) months compensation, subject to statutory deductions. The learned Judge, however dismissed the claims for leave pay.

In this appeal the appellant has challenged both the liability and the award on five (5) grounds which were argued globally in the written submissions. The appellant complains that the learned Judge shifted the burden of proof on the alleged termination to the appellant, yet according to **section 47(5)** of the Act it was the respondents' burden to demonstrate that their dismissal was wrongful; that the learned Judge, in error based his decision on constructive termination when no such a ground was pleaded; that it was improper to conclude, from the facts presented to the learned Judge, that there was proof of termination when in fact there was evidence that the appellant had pleaded with the respondents to resume work in vain. In the circumstances, the appellant submitted that the finding that the respondents' services were terminated was made prematurely even as the appellant together with the labour officer were negotiating with the respondents to return to work; and that indeed it was the respondents who were in breach of the contract of employment.

The respondents, who once again in this appeal did not have the services of an advocate relied on one of them, the 1st respondent to present their written submissions, the effect of which was that the appellant

used unorthodox and back door tactics to dismiss them by selectively recalling some of the workers; that the appellant went ahead and filled up their positions without offering them an opportunity to decide.

Since it is not contested that the respondents were employed by the appellant in various capacities, as machine operators and carpenters and that they stopped working for appellant on 24th June, 2013 when the factory burnt down, the only issue for determination presented at the trial as is the case in this appeal is whether, in the circumstances explained by both sides the respondents' employment was unfairly terminated.

Section 45 (1) of the Employment Act, No. 11 of 2007, provides generally that;

“(1) No employer shall terminate the employment of an employee unfairly”.

Since it was the respondents who went to court alleging that their employment had been unfairly terminated, by virtue of the provisions of **section 47(5)** of the Act they were duty bound to bring evidence in proof of that allegation.

Section 47 (5) provides;

“(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 for the termination of employment or wrongful dismissal shall rest on the employer.”

What constitutes unfair termination is also explained in section 45(4) as follows;

“(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee”

Taking all these together and bearing in mind that the reasons for termination which are outlawed in **section 46** relate to a pregnancy or the going on leave or the membership of a trade union, and so forth, are inapplicable in the situation in this appeal, we are of the view that the respondents have failed to discharge the burden of proving, first, that they were dismissed and secondly that there was no justification for it.

It was their case that after the factory resumed operations **“more than half of the employees”** were reinstated while they were left out. Not even one name was supplied as an example of those who were reinstated. But of greater significance is the fact that the appellant has maintained that it never terminated the respondents' contract of employment and that it had indeed been pleading with them to return to work without success. From the time the factory was closed nothing demonstrates their intention and resolve to re-engage the respondents like their handwritten letter by the Director, of 26th August, 2013 to the District Labour Officer, Industrial Area, Nairobi, in which the appellant reaffirmed that all the employees would be called to resume work as soon as the repairs to the factory were complete. The appellant also informed the labour officer that it was aware that some of the respondents had in the meantime been offered jobs and were in fact working elsewhere; and that as soon as the factory **“was up and running (sic) am sure they will all come back to us”**.

This letter and the averments in the appellant's pleadings as well as submissions before the trial court, to the effect that it was ready and available to re-absorb the respondents was a demonstration of good faith, and leaves no doubt in our mind that the learned Judge failed to consider these factors, by erroneously declaring that the respondents' employment was unfairly terminated.

The learned Judge's conclusion that the termination was constructive was not supported by evidence or even raised in arguments before him. The concept of constructive termination of employment or dismissal, although not provided for under the Employment Act has been accepted, if the recent decisions of the courts in Kenya is any guide. The decision of Lord Denning MR, in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 summarized the consideration before applying the concept thus;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.”

It means therefore that constructive termination or dismissal will be imputed only where the employer is in breach of some fundamental term of the contract of employment that makes it untenable for the employee to remain in the employment of the employer compelling the former to resign in response to that breach. This principle has recently been applied by the Employment and Labour Relations Court in, among other cases **Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd** Cause No. 64 of 2012, **Emmanuel Mutisya Solomon V Agility Logistics**, Cause No.1418 of 2011 and **Benuel Mariera V Awanad Enterprises Limited** Msa. Cause No 191 of 2013.

None of the grounds laid down by these decisions regarding the concept of constructive termination has been proved in the circumstances of the appeal.

The appellant cannot be accused of failure to act in accordance with justice and equity. It was never suggested that it was responsible for the fire that caused the factory to be closed down. At no time did the respondents go to the factory upon learning that it was open and they were turned away or locked out. We are of the view that the respondents made a conscious election to stay away, perhaps because at the time the factory opened after nearly four (4) months they had found employment opportunities elsewhere but would nonetheless, in the nature of human beings, wish also to benefit from any windfall from this gamble.

In conclusion the appeal has considerable merit and accordingly we allow it. We make no orders as to costs. The judgment and decree of the Employment and Labour Relations Court dated 27th February, 2015, is set aside.

In *lieu* thereof we order the dismissal of the respondents' claim dated 4th March, 2014 with no orders as to costs as well.

Dated and delivered at Nairobi this 24th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR