REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NYERI

(CORAM, WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 63 OF 2015

BETWEEN

JHPIEGO KENYA ……. APPELLANT

VERSUS

DUNCAN MWIRIGI ARITHI …… RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour

Relations Court Nyeri (Ongaya, J.) dated 31st July, 2015 in E. L. R C. CAUSE NO. 153 of 2014)

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JUDGMENT OF THE COURT

1. The appellant **Jhpiego Kenya** (hereinafter the ***'employer'***) is an affiliate of John Hopkins University and describes its mission as '***building global and local partnerships to enhance the quality of healthcare services for women and families around the world***.' It challenges an award of Sh. 401,080 made by the Employment and Labour Relations Court (ELRC) **(Ongaya J.)** sitting at Nyeri in favour of **Duncan Mwirigi Arithi** (hereinafter the 'employee') for wrongful termination of services. The employer was represented before us as it was before the ELRC by learned counsel **Mr. Muturi Kamande** instructed by M/S Muturi Kamande & Company Advocates, while the employee was represented in both courts by learned counsel **Mr. Waweru Macharia** instructed by M/S Waweru Macharia & Company Advocates.

2. The background to the dispute is this:

On 16th June 2008, the employee was employed as a Driver/Office Assistant- Aphia II Eastern, based in Embu and earning a monthly salary of Sh. 50,135. His duty, amongst others, was to provide logistical/transport/office support for the Aphia II Eastern office, and he would report directly to the Office manager Aphia II Eastern who was his boss. At some point, he appears to have been posted to work in Nyeri at the employer's 'APHIA plus KAMILI' offices. For a period of five years the employee worked diligently and had a clean record until he received a letter of suspension dated 16th May 2013.

3. The letter stated as follows:-

RE: SUSPENSION

"Several staff from APHIA plus KAMILI, Nyeri office have complained of your lack of cooperation while out on field activities and the use of vulgar and derogatory language at workplace. These are very serious accusations and which are in contravention of our policies, values and norms.

This matter is being investigated to establish the truth of the matter. While the investigations are going on, you are hereby put on suspension with effect from today 16th May, 2013 until further notice.

You also are asked to report to Nyeri office on Monday 20th May, 2013 at 11.00 a.m. to meet the HR Director who will be investigating these complaints

Sincerely,

Dr. Isaac Malonza

County Director"

4. One week later he received a letter of summary dismissal stating thus:-

27th May, 2013

Duncan Arithi

APHIA plus KAMILI

Nyeri Office

Dear Duncan,

Re: Summary Dismissal

We refer to our letter dated 16th May, 2013 on your suspension following accusation of use of vulgar and derogatory language at workplace.

Following the investigation on the matter and after talking with witnesses, we have established that you committed this gross misconduct. This is to inform you that you are hereby summarily dismissed with effect from today, 27th May 2013 owing to your use of vulgar and abusive language directed to your fellow colleagues. This is in accordance to section 44 of the Employment Act with clause 12 of Jhpiego Kenya HR policies.

You are asked to ensure that you formally clear from Jhpiego by returning all the assets in your possession to the office Manager, Nyeri office. You will thereafter contact the Human Resource Director for your formal clearance from Jhpiego.

Sincerely,

Dr. Isaac Malonza

County Director"

5. The employee was paid his terminal dues and made to sign a document discharging the employer from any liability arising from the dismissal. But he still went to court on 21st November 2014 and filed his

claim contending that the dismissal was unfair and/or unlawful. He gave particulars of the unlawfulness and unfairness. He claimed payment of severance pay and Sh. 601, 620 being 12 months compensation for unlawful/unfair dismissal. The employer filed a response insisting that the dismissal was justified under ***Section 44*** of the ***Employment Act*** and the provisions of the **'Employment Policies Employees Manual'** which the employee had signed upon his employment.

6. The matter was orally heard before **Ongaya J.** and agreed documents were filed without producing the originals. Only the employee testified on his own behalf but the employer called two of the workers at the centre of the dispute and the Human Resource Director (HRD) who investigated the matter at the disciplinary stage.

7. The single incident that precipitated the employee's dismissal arose on 8th May 2013. The documentary and oral evidence shows that a team of four staff members were visiting *Njoki-ini* Dispensary together with one Ministry of Health staff on that day. These were **Jane Karimi Gitonga** (Jane), **Shirley Muthoni Miriti** (Shirley), **Gloria Tundi** (Gloria), and **Patrick Muriuki** (Muriuki). The employee was facilitating their transport on completion of their task to ferry them to the next station. As they boarded the vehicle led by Muriuki, the employee was just finishing a telephone discussion with his sister and was angry with her for threatening to ditch her husband and leave the children. She wanted money from him. He uttered the word ***'Mukenye'*** in *Ki-Meru* language whose meaning the employee says is *'a young girl'*. However the word was overheard by Jane and Shirley who understood *Ki-Meru* and say it meant *'uncircumcised girl'* and was therefore abusive. According to Jane, the employee was in a hurry to go back to Nairobi and was annoyed because he had to take them to two other facilities before leaving. That is why he directed the words: *"why are you girls annoyed with me*" to the three women using the Meru word *"mukenye"*.

8. According to Shirley, however, the employee boarded the vehicle last and started speaking to Muriuki in *Kimeru* asking him*: "mukenye uju athurira mbi? (why is this uncircumsized girl annoyed with me?).* The plural for *"mukenye"* is *"mikenye"* but he used the singular addressing it to Gloria who was Luhya. Shirley then explained to Gloria what *"mukenye"* meant and that it was abusive. They reported the matter to their boss Dr. Macharia who guided them to say the employee insulted all of them.

9. It was Dr. Macharia who reported the incident to the Director of Human Resources & Administration **Mr. Simon Mbugua** (Simon), who was the only other witness for the employer. The report was that the employee had insulted his colleagues at some field activity and so Simon suspended the employee as he carried out investigations. He accepted the statements from Jane, Shirley and Gloria and rejected the employee's assertion that the contentious Meru word was used in reference to his sister. No other evidence was considered before the employee was summarily dismissed for using abusive language. Simon said nothing about the employee being accompanied by a person of his choice at the disciplinary proceedings.

10. He also said nothing about the evidence that was before him in form of an email from Muriuki dated 10th May 2013. It was a culmination of a chain of emails initiated by Dr. Macharia on 9th May 2013 seeking clearer details of the oral report made to him by Shirley and Gloria the previous day. Gloria responded with copies to all those who witnessed the incident including Muriuki. Muriuki then responded as follows:

> ***"Hi,***
>
> ***Just to clarify that the driver had been having an argument with his sister on phone earlier before he entered the vehicle at Njoiki-ini Disp. He uttered those words venting his anger to the sister and not the staff in the vehicle. At that moment I could not talk to anyone as Shirley responded to the driver's words with a lot of anger. The driver tried to explain that he was not directing the statement towards them but they could not listen. My perception was that it was an angry man speaking his mind but he did not meant(sic) it to the program officers."***

11. That was exculpatory evidence but it was not considered at the disciplinary stage. It was consistent

with the employee's explanation both at the disciplinary process and before the ELRC. When cross examined, Simon at first asserted that Muriuki was interviewed and that he corroborated the story of Shirley and Gloria , only to somersault and admit thus:

> ***" I did not consider the statement of Muriuki. Muriuki was not our staff. He was from a partner organization working on the same project. His account was not necessary".***

Simon also confirmed that the employee's immediate boss or supervisor was one Mildred Obadha who was not present at the scene of the incident. Neither Gloria, Muriuki, nor the Ministry of Health officer who were present at the scene were called to testify in court.

12. Upon evaluating the evidence on record, the trial court made the following findings, in summary:-

- **The employee was not barred from instituting suit for unfair termination despite having executed an exit and discharge of liability agreement.**
- **The employee was not entitled to severance pay because there was no evidence on the claim and it had been abandoned.**
- **The abusive words were uttered but the evidence given by the employer's witnesses was conflicting and not believable while the evidence of the employee was consistent and believable that he did not direct the abusive words to the ladies in the team.**
- **Section 44(4)(d) of the Employment Act would only apply if the abusive or insulting language was directed at the employer or a person placed in authority over the employee. The words here were not so directed and therefore the termination was unfair for want of a genuine or valid reason as envisaged in Section 43 of the Act.**
- **The employee was not entitled to 12 months' compensation because he contributed to his termination by mixing his private communication and anger with his work leading to the misunderstandings that led to his termination.**
- **Eight (8) months' salary of Sh. 401,080 would meet the ends of justice in the circumstances.**

13. Only some of those findings are challenged in the 12-ground memorandum of appeal. Indeed, learned counsel Mr. Kamande reduced the issues to four after abandoning ground 9, urging ground 1 on its own and combining grounds 2,6 &7; grounds 3, 4 & 5; and grounds 8,10 & 11. There was no cross appeal.

14. On the 1st ground, counsel attacked the admission of email evidence authored by one Patrick Muriuki who was not called as a witness. He conceded that the parties had recorded a consent to have the documents filed and an order was made that the parties will rely on the documents without producing the originals. In his view, however, that consent did not dispense with the law on calling makers of documents to face cross examination. In this case, he observed, Muriuki's email was the weightiest and only evidence relied on by the trial court to tilt the case against the employer.

15. On grounds 3,4 & 5, counsel attacked the shifting of the burden of proof contending that the court placed the burden of calling Muriuki as a witness on the employer, while he should have been called by the employee who was relying on him. He also submitted that the trial court erred in finding that the employee was denied an opportunity to appear with a person of his choice at the disciplinary proceedings.

16. The last submission on grounds 8, 10 & 11 was on the finding of unfairness in the dismissal of the employee. In counsel's view, the trial court altered the nature of the case before making the finding. On the evidence, he contended, it was proved that the abusive words were uttered and were directed at the lady members and the suit should therefore have been dismissed. There was no room for the trial court to award 8 months compensation instead of dismissing or allowing the case depending on the evidence, urged counsel. In sum, the award had no legal or factual basis.

17. In response to the submissions on admissibility of the contentious email and shifting of the burden of proof, Mr. Macharia observed that all the documents, including the emails, were admitted in evidence and marked as *Exhibits 1* to *11* in court, by consent of the parties . There was no objection raised and no demand made for summoning Muriuki for cross examination. In his view, the complaint raised was an

afterthought and the trial court was at liberty to evaluate Muriuki's email. Referring to ***Section 3*** of the ***Employment Act*** and ***Rule 24(3)*** of the ***Industrial Court Rules***, he submitted that the Employment Act was unique and was not bound by the rules of evidence. At all events, he added, ***Section 78A*** of the ***Evidence Act*** provides for admissibility of electronic evidence.

18. Turning to the burden of proof, counsel submitted that the burden is always on the employer under ***Sections 42, 49,*** and ***50*** of the ***Employment Act*** to prove justification for dismissal. The onus was therefore on the employer in this case to show that the employee was accompanied by a person of his choice at the disciplinary hearing. It was also the employer's duty to prove that its case lay within ***Section 44(4)(d)*** of the ***Employment Act*** which was the basis for dismissal of the employee. But they did not show the person in authority over the employee who was insulted or prove by an organogram that the ladies were in authority over the employee. The email from Muriuki, he observed, emanated from the employer and the employer knew it was exculpatory but did not call Muriuki. In all the circumstances the impugned judgment was unassailable. Mr. Macharia cited the case of ***Kenya Airways Ltd vs. Aviation & Allied Workers Union Kenya & 3 others [2014]eKLR*** to support his submissions.

19. We have gone into some detail over the factual matrix because it is our duty to do so on a first appeal in order to arrive at our own conclusions. That power is also donated under ***Rule 29(1)(a)*** of the ***Court of Appeal Rules, 2010***. Generally, however, the first appellate court will not lightly differ from the findings of fact of a trial court which had the benefit of seeing and hearing all the witnesses and assessing their credibility through their demeanor. It will only interfere if the findings are based on no evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did. See ***Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278***.

20. The issues that commend themselves for determination and which learned counsel ably argued are four as follows:-

- ***Whether the electronic email evidence of Muriuki was admissible in evidence and if so, whether it was properly evaluated.***
- ***Whether the abusive words were directed at the lady officers or the employee's sister.***
- ***Whether the dismissal of the employee was lawful and fair.***
- ***Whether the damages awarded to the employee had any basis in fact or in law.***

21. The answer to the first issue is dependent on the law applicable to the dispute which we must now examine. We are aware that employment and labour related legislation has changed drastically before and after the promulgation of the Constitution in the year 2010. The Constitution not only focused on labour relations in ***Article 41*** but also made the general rules of international law and the treaties and conventions ratified by Kenya as part of the law of Kenya. The ***Evidence Act*** has also changed with the times, especially with regard to electronic and digital evidence which is now admissible under ***Section 78A*** (introduced by Act No. 19 of 2014) providing as follows:

> ***"78A. Admissibility of electronic and digital evidence.***
>
> ***(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.***
>
> ***(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form;***
>
> ***(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be to –***
>
> > ***(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;***
> >
> > ***(b) the reliability of the manner in which the integrity of the electronic and digital evidence***

was maintained;

(c) the manner in which the originator of the electronic and digital evidence was identified; and

(d) any other relevant factor.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy of or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

22.***Section 2*** of the ***Evidence Act*** provides for its application in these words:-

"(1) This Act shall apply <u>to all judicial proceedings</u> in or <u>before any court</u> other than a Kadhi's court, but not to proceedings before an arbitrator.

(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court. (Emphasis added)."

23. The ***Industrial Court Act 2011,*** and before it, the ***Trade Disputes Act, Cap 234,*** which are now both repealed had provisions declaring that the Industrial Court was not strictly bound by the rules of evidence. Nevertheless, as stated in the case of ***<u>Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR,</u>*** per Githinji JA:

"That however does not warrant the court to act on conjecture and misapplication of the law".

24. The ***Employment Act, No 11 of 2007*** (as revised in 2012) ***(hereinafter 'the Act')*** which repealed **Cap 226,** declared in **Section 92** thereof that its provisions were "in addition to, and not in substitution for or in derogation of, the provisions of any other Act." Furthermore, the Rules made by the Chief Justice pursuant to **Section 27(1)** of the ***Employment and Labour Relations Court Act*** do not oust the application of the rules of evidence, and indeed contain many of them.

25. It is our view, upon consideration of all the relevant laws above, that the rules of evidence as stated in **Section 78A** of the ***Evidence Act*** applied in this case to admit the electronic and digital email in issue. The email was a document generated by the employer to assist in its internal investigations and was subsequently produced before the trial court with the consent of both parties without having to prove it. The intention, in our view, was to avoid calling the author of the email and an invitation to the trial court to evaluate the contents of the email. We find no error made when the trial court accepted that invitation. At all events, it was in the power of the employer to call Muriuki for cross examination if it doubted the factual statements contained in his email. We answer the first issue in the affirmative.

26. As to where the abusive words were directed, which is the second issue, we agree with the trial court that the evidence of the employee which was supported by Muriuki's email was more credible than the contradictory evidence of the three witnesses called by the employer. It is not clear whether, from the employer's evidence, the words were directed at all the women or one of them who did not understand *Ki-Meru* language. The disclosure that they were subsequently directed on what to say by Dr. Macharia opens the evidence to embellishment and therefore of little probative value. The trial court was a better judge of the credibility of the witnesses who appeared before it and we have no reason to fault its assessment. The abusive words were directed at the employee's sister and we so find.

27. The third issue was the fairness or otherwise of the summary dismissal. The Employment Act in ***Section 3(6)*** provides the ***"minimum terms and conditions of employment of an employee"*** **and declares null and void any agreement to *"relinguish, vary or amend"* the terms. As regards**

termination of employment, ***Section 43*** **casts the onus on the employer 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".***

28. ***Section 45*** states in part as follows:

> *"**(1) No employer shall terminate the employment of an employee unfairly.***
>
> ***(2) A termination of employment by an employer is unfair if the employer fails to prove –***
>
> ***(a) that the reason for the termination is valid***
>
> ***(b) that the reason for the termination is a 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."***

29. In an attempt to show procedural propriety, the employer held disciplinary proceedings but did not, as found by the trial court, prove that the employee was accompanied by a person of his choice as provided under Section 41 of the Act. We find no reason to fault that finding as there was no evidence tendered on it by the employer.

30. The dismissal was expressly predicated on **Section44(4)(d)** of the Act, that is, summary dismissal:

> ***"where the employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer".***

It matters not that there were wider terms of employment in the contract of service. They would be null and void if they fell foul of the minimum provisions of the Act. See Section 3(6) of the Act, supra. There was no assertion that the insulting words were used against the employer. The onus was on the employer to prove that they were uttered towards a person in authority over the employee. But the evidence adduced by the employer was that the employee's supervisor or boss was not at the scene and no attempt was made to show what authority, if any, the lady officers who overheard the insulting words had over the employee. We cannot, in the circumstances fault the trial court for making the finding that the summary dismissal was not only procedurally, but substantively, unfair in terms of Section 43 of the Act. The third issue is also answered in the affirmative.

31. Finally, the remedy. The remedy of payment of "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" is a lawful remedy under **Section 49(1)(c)** of the Act. It is a discretionary remedy and the trial court gave reasons for deciding to reduce it to 8 months. This Court may only interfere with the exercise of the discretion of the trial court on settled principles which we take from the case of ***Butt vs. Khan [1981] KLR 349,*** thus:

> ***"……..An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low…."***

There is no reason to interfere and we hold and find that the damages awarded had a

proper basis in fact and in law.

32. Having so found on the issues raised, it only remains to pronounce that this appeal is not meritorious and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nyeri this 1st day of March, 2017.

P.W. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR