IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 294 OF 2014

BETWEEN

VOLENZO TOM ELIJAH.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(*Being an appeal from the decision of the Industrial Court of Kenya*

at Nairobi (Njagi Marete, J.) delivered on 4th March, 2014

in

Industrial Court Cause No. 1413 of 2010)

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JUDGMENT OF THE COURT

According to the appellant, he was employed by the respondent as a District Project Coordinator, Mount Elgon District within the Western Kenya Community Driven Development and Flood Mitigation Project "*the Project*" under the then Ministry of State for Special Programmes "*the Ministry*." The employment was for a fixed term of eight years effective from 2nd January, 2008 subject to annual renewal if his performance was satisfactory, with a gross monthly salary of Kshs.121,453/=. The remuneration was to be paid partly with the donor funds by International Development

Association "*IDA*" in the sum of Kshs.81,562.50 and the balance of Kshs.39,890.50 was to be paid by the Government of Kenya.

Pursuant to the contract of employment aforesaid the appellant resigned from his previous employment as a District Environment Officer, with the National Environment Management Authority. However on 28th September, 2009, the appellant was suspended from his employment on allegations of misappropriation of project funds. This was followed by yet another letter of suspension dated 2nd February, 2010 informing the appellant that he had been involved in financial impropriety and irregularities and that the suspension took effect from 28th September 2009, during which period he would not be entitled to any salary and or allowances. The letter further invited the appellant to make any representations, within 14 days from the date of the letter, failing which he would be dismissed forthwith from service. The

appellant duly responded to the allegations vide a letter dated 12th February, 2010 denying all the accusations. However, it would appear that the response was unsatisfactory and by a letter dated 28th May, 2010 the respondent dismissed the appellant from its employment.

The appellant contended that his dismissal was illegal, unlawful and or otherwise unprocedural as it was based on unverified and tramped up allegations. It was further irregular and in contravention of the Public Service Code of Regulations. He therefore lodged a claim with the then Industrial Court of Kenya now the Employment and Labour Relations Court in Nairobi on 16th November, 2010 claiming:-

a. ***Kshs.1,015,898/=, salary for the remainder of the contract***

b. ***Kshs.1,093,077/=, unpaid salary from the date of suspension***

c. ***Kshs.182,179/50, accrued leave***

d. ***Kshs.3,641,441/50, Gratuity***

e. ***Kshs.72,000,000/=, general damages for loss of career and loss of expected earnings until retirement age.***

f. ***General damages for breach of contract***

g. ***General damages for mental suffering and anguish.***

The respondent by its memorandum of reply dated 16th April, 2012 denied the claim and maintained that the appellant's termination was lawfully and in good faith. That the appellant was served with a suspension letter, given a chance to show cause and explain the misappropriation of funds in his area and was paid all his entitlements under the contract of employment upon termination. The respondent further averred that the appellant was not a public servant within the meaning of **Article 260** of the **Constitution** having been appointed on a contract of service, remunerable partly by donor funding. The respondent also contended that it was the appellant who was in breach of the contract of employment by his actions, that infact his file had been placed before the then Kenya Anti-Corruption Commission for further investigations and that a report was awaited. Finally, the respondent averred that the project stalled when the donor withdrew its funding as a consequence of the appellants' improprieties.

On 31st May, 2013, the parties agreed before **Njagi Marete, J.** that the claim be canvassed by way of written submissions without calling any evidence. The parties subsequently filed and exchanged their respective written submissions. In a judgment, dated, delivered and signed on 13th March, 2014 the learned judge dismissed the appellant's claim and held that:-

> **"---- the claimant was suspended on grounds of misappropriation of donor project funds and informed that an audit would ensue. He was later informed that the audit report had implicated him in misappropriation of donor funds and he was directed to answer the same within fourteen days. He did but this was found unsatisfactory and therefore termination of the employment contract. The claimant does not rebut this or even contradict the same. The project even died** (sic) **as the donor became unco-operative as a result of this financial impropriety. I therefore find a case of lawful termination of employment and in the circumstances the claim fails---"**

The appellant has challenged that determination in this Court on 10 grounds but which can comfortably be collapsed in to five, namely that the learned judge erred: in dismissing the appellant's claim contrary to the law and facts, in finding that the appellant did not rebut or contradict the allegations of misappropriation of donor funds, in considering that the project stalled and that the donor became unco-operative as a result of the appellant's corrupt activities, in holding that the appellant was fairly terminated and therefore not entitled to any reliefs sought in the claim and finally, by delivering judgment

in open court on 4th March, 2013 and reading only the concluding paragraph of the said judgment yet the judgment was dated and signed on 13th March, 2013.

Before the appeal could be set down for hearing parties appeared before **ole Kantai J.A** for the case management conference on 17th August, 2016. At this conference it was agreed that the appeal be disposed of by way of written submissions. Indeed parties subsequently filed and exchanged their respective written submissions.

When the appeal came before us for hearing on 16th November, 2016, **Mr. Nyamweya** and **Mr. Onyiso**, learned counsel for the appellant and respondent respectively elected to highlight their written submissions. Mr. Nyamweya, submitted that the procedure adopted by the respondent in dismissing the appellant was contrary to regulation 24 of The Public Service Commission Code of regulations. On that basis alone, counsel submitted the appellant's dismissal was unfair. Counsel further submitted that the defence filed by the respondent was a mere denial and that the documents filed by the appellant in support of his claim were never challenged. It was further submitted that in its written submissions the respondent sought to introduce new allegations of impropriety against the appellant. That the judge was carried away with these new allegations which was improper. In any event, counsel submitted, the allegations were answered by the appellant and held no water at all. On the whole, counsel maintained, there was no justification at all for the dismissal of the appellant.

Responding, Mr. Onyiso submitted that the procedure adopted by the respondent in terminating the services of the appellant was in accordance with the regulations. That the respondent acted fairly as it gave the appellant an opportunity to answer to the allegations made against him and when his answer was considered fairly, it was found to be unsatisfactory, hence the dismissal.

The duty of the Court of Appeal in hearing and determining first appeals was set out in the celebrated case of **Selle & Another v Associated Motor Boat Company Ltd. (1968) EA 123.**The predecessor of this Court said:-

> **"--- An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must re-consider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that 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 demeanor of a witness is inconsistent with the evidence in the case generally---"**

The basis for the dismissal of the appellant's claim aforestated is devoid of substance and merit. It appears that the learned Judge did not appreciate the fact that the parties to the claim had agreed to canvass it by way of documents filed in court in support of their case as well as written submissions. They elected to do away with oral evidence. Further no witness statements were filed by either of the parties. It is also obvious that the learned judge did not advert to the appellant's statement of claim, written submissions as well as documents filed by the appellant in support of his claim.

Had he done so he would have found that the appellant's statement of claim contained blow by blow rebuttal of the respondent's allegations of financial impropriety against him. The statement of claim as filed went a long way in rebutting the respondent's accusations, the *reason'dre* for the appellant's dismissal. The tenor of the appellant's case with supporting evidence was that the allegations of misappropriation of donor funds were baseless and trumped up. Indeed in support of this assertion, the appellant provided invoices, payment acknowledgments and miscellaneous receipts in respect of monies spent which were alleged to have been misappropriated by the appellant. Further, among the documents filed by the appellant was a letter dated 12th February, 2010. By this letter the appellant responded to each and every allegation of misappropriation of donor funds leveled against him, and attached thereto again

copies of the invoices and receipts with every payment accounted for. Further, in his extensive written submissions covering 20 or so pages, the appellant went to great lengths to rebut the allegations leveled against him. The appellant also reiterated that the allegations concerning him were indeed forwarded to the then Kenya Anti-Corruption Commission which never pursued him for investigations nor found anything criminally culpable against him. Given all the foregoing, we are at a loss as to how the learned judge could reach the conclusion that the appellant never rebutted or contradicted the allegations made against him. That conclusion must obviously have been reached in error. Having in our view, rebutted the allegations made against him satisfactorily it fell upon the respondent to counter such evidence. The respondent failed to do so and accordingly the rebuttal stood.

It is instructive to note that in the written submissions of the respondent, the respondent made fresh allegations of impropriety against the appellant, which did not flow from the proceedings and or pleadings. These were that the appellant was an independent contractor and not a public officer allegedly because the World Bank and the respondent were sharing in the payment of his salary and that the appellant had failed to hand over. The allegations having been made in the written submissions, and not in the pleading, the appellant was not accorded an opportunity to rebut them. The trial judge therefore misdirected himself in relying on allegations of facts in the respondent's written submissions. These allegations of facts would have required proof. The respondent provided none. How the trial judge arrived at the conclusions he did in which he adopted these allegations as conclusive findings of fact is not clear at. Indeed the judge was so carried away and even went further to claim that the appellant's alleged financial impropriety had led to the donor becoming unco-operative without the scantiest of any evidence at all. The clincher of the judge's misdirection is this statement in his judgment ***"---- This is a sad story and chapter in our donor funded projects. That we take these and other public service assignments lightly and engage in arbitrary and wanton abuse of funds and office is unfathomable and sad---"*** The statement had no basis at all on the facts or evidence presented. Time and again, it has been said that a decision of a court must flow from what is presented before it by the parties through pleadings, evidence and the law. Clearly this is not the case here.

Did the trial judge therefore err in finding that the appellant was fairly terminated? We have no hesitation whatsoever in holding so. The letter dated 28th May, 2010 terminating the appellant's employment stated that the termination was anchored on clause 11 of the employment contract. That clause is in these terms:-

> ***"a) The Government shall be entitled to suspend the services of the officer if the officer will have failed to discharge his duties according to the terms of reference, or any other duties assigned to them from time to time by his supervisors, or has been accused of criminal acts in a court of law, or he/she has of necessity found himself/herself in a situation where the discharge of duties is interfered with;***
>
> *b.* ***if any conditions referred above shall continue for a period of sixty (60) days following such notice of suspension, the Government may at its option, terminate the agreement ---".***

These are therefore the only conditions for suspension and termination that were applicable to the appellant. Given the accusations, the appellant's indiscretions if at all would have fallen in category two, that is to say, if he had been accused of criminal acts in a court of law. There is no evidence that the appellant did not perform his duties according to the terms of reference, or was accused of any criminal acts in any court of law or did he of necessity find himself in a situation where the discharge of his duties were interfered with. In the premises, the respondent did not have any basis to either suspend or terminate the contract of employment. The appellant was suspected of misappropriating funds. When the queries arising out of the audit report were put to him, he responded adequately. It is instructive that despite such serious allegations no further action has been taken against the appellant to date by the respondent or even the Anti-Corruption commission to whom a report was allegedly made.

A wrongful dismissal occurs when an employer dismisses an employee in a way that is in breach of the employment contract. In this case the respondent had no justification to dismiss the appellant from its employment.

Further, **Section 43** of the **Employment Act provides** *inter alia*:-

> *a.* ***In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***
>
> *b.* ***The reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee ---"***

In the circumstances of this case, there was clearly no justification of the respondent's decision to dismiss the appellant from its employment. If anything the respondent appears to have succumbed to the pressure by the World Bank to dismiss the appellant. In its letter to the respondent dated 10th May, 2010, the World Bank in pertinent paragraphs stated:-

> ***"--- The World Bank is ready to work with you on the resumption of project disbursement, but before that happens, the bank would need assurance that the required human capacity is in place to manage the project in the coming years. We would also need to be assured that the projects integrity is restored. In this regard, the bank recommends that the Government of Kenya (GoK) takes the following actions:***
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> ***The Ministry terminates the contracts of all the eleven district staff who have not been exonerated in the validated audit report. These positions are the District Project Coordinators (DPCS) for Teso, Bondo, Vihiga, Bungoma, Mt. Elgon ---. If any of these contracts are near their term, the GoK may also (more simply) choose to renew them ----"***

Is it therefore surprising that hardly eighteen days after receipt of this letter, the respondent terminated the appellant's employment? The pressure from the World Bank on the respondent as contained in the letter aforesaid, in our view defeats the sincerity and or the genuineness of the respondent as the employer, believing that the employee had indeed committed the acts alleged against him. The appellant had been on suspension since 28th September, 2009 with nothing much happening with regard to the allegations. However, upon receipt of the World Bank letter, the respondent moved with unfathomable speed and in full throttle to have the appellant dismissed from employment, considering that no other evidence had been brought to the fore within this period to incriminate the appellant. It is not therefore correct as submitted by the respondent that the appellant was subjected to lawful termination.

We think we have said enough to show that this appeal ought to succeed. Accordingly, this appeal is allowed with the result that the judgment and decree of Njagi Marete, J. dated 13th March, 2014 is set aside and we substitute therefore an order allowing the appellant's claim in terms. Under **section 49** of the **Employment Act** an employee whose termination of Employment is deemed wrongful and unfair is entitled to several remedies which includes;

> ***"1. (a) in a contract of service where no notice of termination had issued; the wages which the employee was entitled under such contractor law;***
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> *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 which the employee would have been entitled to by virtue of the contract;***
>
> *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."***

The remedy that best commends itself to us is 10 months salary as compensation. Further the appellant claimed Kshs.1,093,077/= being the unpaid salary from the date of suspension to the date of termination

as well as Kshs.182,179/50 for accrued leave. The respondent did not specifically dispute the claims meaning therefore that they are justified. We therefore allow them. In the result the appellant is entitled to judgment as follows:

(i)	10 months salary	1,214,530.00
(ii)	Unpaid salary	1,093,077.00
(iii)	Accrued leave	182,179.50
TOTAL		**2,489,786.50**

Plus costs and interests.

Dated and delivered at Nairobi this 3rd day of March,2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR