



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL NO. 345 “B” OF 2014**

**BETWEEN**

**D. P. BACHHETA ..... APPELLANT**

**VERSUS**

**THE GOVERNMENT OF THE**

**UNITED STATES OF AMERICA ..... RESPONDENT**

***(Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Milimani), (R. E. Ougo, J.) dated 18/03/2014***

**in**

**CC NO. 4973 OF 1992)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. The appellant, Dharam Pal Bacheta, was employed by the United States Agency for International Development (USAID), an agency of the respondent, as a warehouse man in 1965. He remained in that employment for over 26 years until 10<sup>th</sup> April 1992 when his employment was terminated. At that point, he held a position designated as General Service Specialist and was earning a monthly salary of Kshs. 66,816.36.

2. On 17<sup>th</sup> September 1992, the appellant filed a suit against the respondent in the High Court at Nairobi seeking an award of Kshs. 729,634.35 and general damages to which he claimed he was entitled on the basis of his employment having been terminated on account of redundancy. He subsequently amended his claim to incorporate a claim for “*general damages for wrongful termination of the said employment.*”

3. In its defence, the respondent pleaded that the appellant’s employment was “*terminated for cause for false and deliberate misrepresentation made by the [appellant] in the course of an official investigation.*” The respondent asserted that the appellant was paid all sums due to him on termination and that “*no award of general damages can be made for termination of employment.*”

Prior to the hearing of the suit, the respondent conceded that the summary dismissal was not justified. On

24<sup>th</sup> September 2001, the parties entered into a consent under which judgment was entered for the appellant on liability. Therefore, the question that remained for the trial court was to determine the nature of relief or remedy to award the appellant.

5. After hearing the appellant who testified on his own behalf and the respondent's human resource specialist, Lucy Segero, and after considering the submissions by learned counsel for the parties, and having observed that the appellant had abandoned his claim on severance pay and that "*no evidence was adduced for his claim of Kshs. 729,634.35*", the learned Judge awarded the appellant "*a salary in lieu of one month's notice.*"

6. On the claim for general damages, the court held that "*there can be no general damages in respect of suits based on a termination of employment.*" The learned Judge also held that the Employment Act, 2007 and the Constitution of Kenya, 2010, on the basis of which the appellant sought to recover damages, did not apply.

7. Aggrieved, the appellant lodged the present appeal. In his memorandum of appeal, the appellant complained that the trial Judge fell into error by failing to apply the provisions of the Constitution of Kenya, 2010 and the Employment Act, 2007; that the Judge did not give sufficient consideration to the appellant's submissions; and that the Judge erred in failing to award interest on the decretal amount.

8. During the hearing of the appeal, learned counsel, Mr. C. Muturi Kigano, representing the appellant, abandoned the complaints that the trial Judge fell into error by failing to apply the provisions of the Constitution and the Employment Act. He urged us to disregard his written submissions filed on 30<sup>th</sup> September 2016 in which he had expounded on those complaints and urged us to instead consider the appellant's submissions filed on 17<sup>th</sup> November 2016.

9. In his submissions filed on 17<sup>th</sup> November 2016, Mr. Kigano, urged that the appellant should have been awarded damages, including aggravated and exemplary damages considering: that the appellant's employment was terminated at the age of 49 years after rendering distinguished service to the respondent for 27 years; that the respondent conceded that the summary dismissal of the appellant was not justified; that the appellant would have retired at the age of 60 years and had a balance of 11 years to work; that the manual on terms of employment did not provide for unjustified or unfair dismissal; that the respondent refused to provide the appellant with a testimonial, with the result that the appellant was unable to secure other employment; that the appellant lost the earned right to immigrate to the USA; and that the appellant had a distinguished career with the respondent as demonstrated by the accolades, commendations and awards that he received from his employer in the course of his career.

10. In support of the claim that the appellant should have been awarded "*damages to compensate him for the unfinished 11 years*", counsel referred us to the case of **Michie Gitau vs. NSSF Board of Trustees, HCCC No. 3264 of 1993; Southern Highlands Tobacco Union Limited vs. David McQueen [1960] EA 490; East African Airways vs. Knight [1975] EA 165; CPC Industrial Products (Kenya) Limited vs. Omweri Angima, C.A No. 97 of 1992.**

11. Alternatively, Mr. Kigano argued, in the absence of any constitutional, statutory, contractual or common law remedies available to the appellant, equity should come to the aid of the appellant as equity will suffer no wrong to go without a remedy; that the appellant should not be denied severance pay and compensation simply because his situation was not provided for under the contract.

12. Concluding his submissions, counsel complained that the Judge exercised her discretion unreasonably when she failed to award the appellant "full interest" and instead awarded 1/3 interest.

13. On his part, learned Senior Counsel, Mr. K. A. Fraser, representing the respondent, relied on the respondent's written submissions filed on 3<sup>rd</sup> November 2016, which he highlighted. He submitted that the appellant had, in his submissions filed before the High Court on 8<sup>th</sup> November 2013, abandoned his claim for redundancy and instead put forward a claim for Kshs. 39,021,864.00 for general damages under

the Constitution of Kenya, 2010 and the Employment Act, 2007. In that regard, the appellant claimed Kshs.801,792.00 the equivalent of 12 months' pay under Section 49(1)(c) of the Employment Act, 2007; general damages/service pay hinged on Section 35(5) of the Employment Act, 2007 (or alternatively based on case law<sup>[1]</sup>) quantified at Kshs. 8,819,712.00 computed on the basis that the appellant would have worked for another 11 years before attaining the age of retirement; Kshs. 23,520,288.00 termed as aggravated/exemplary damages; and Kshs.5, 880,072.00 for inflation.

14. Senior counsel submitted that as the appellant's contract was determined on 10<sup>th</sup> April 1992, his rights could only be determined on the basis of the law that was in force at the time and the Constitution of Kenya, 2010 and, the Employment Act, 2007 did not apply. In that regard, counsel referred us to numerous decisions of the High Court and of the Employment and Labour Relations Court and those of its predecessor, the Industrial Court, as well as the decision of this Court in **Mary Wakhabubi Wafula vs. British Airways PLC [2015] eKLR.**

15. According to counsel, the law on wrongful or unjustified termination of employment in Kenya under the old Employment Act applicable to this case was that the measure of damages is the period of notice which the employee would otherwise have been entitled to and that there can be no general damages in respect of suits based on termination of employment contracts. In that regard, counsel cited the decisions in **Ombanya vs. Gailey & Roberts Ltd [1974] E A 522**, and **Kenya Ports Authority vs. Edward Otieno-Civil Appeal no. 120 of 1997**, among others.

16. He submitted that the decision of the High Court in **Michie Gitau vs. NSSF Board of Trustees** (above) relied upon by the appellant was overruled by the Court of Appeal decisions in **Central Bank of Kenya vs. Nkabu [2002] 1 E A 34**; **Kenya Airways Corporation Limited vs. Tobias Ong'any Auma and 5 others [2007] 2KLR 24**.

17. Based on the applicable law, counsel urged, the learned trial Judge correctly held that no general damages or aggravated damages or inflation are recoverable and correctly limited the award of damages to the equivalent of one month's salary, having correctly found that his employment was terminable by 30 days notice.

18. As regards the award of interest, counsel submitted that the Judge properly exercised the court's discretion under Section 26 of the Civil Procedure Act and there is no basis for this Court to interfere with a valid and proper exercise of discretion by the trial Judge.

### **Determination**

19. We have considered the appeal and the submissions by learned counsel. In the case of **Mary Wakhabubi Wafula vs. British Airways PLC [2015] eKLR**, cited by counsel for the respondent, this Court held that the remedies available to an employee whose employment was wrongfully terminated before the enactment of the Constitution of Kenya, 2010 "***were the remedies recognized by the legal regime that existed when the contract of employment was terminated.***" Given that legal position, the concession by Mr. Muturi before us that the Constitution of Kenya, 2010 and the Employment Act, 2007 that came into force many years after the appellant's termination on 10<sup>th</sup> April 1992 do not apply to the appellant's claim, is well founded. Accordingly, the appellant's complaints under grounds 1, 2, and 3 of the five grounds in his memorandum of appeal do not have any merit and are rejected.

20. Under ground 4 of the memorandum of appeal, the appellant complains that the learned Judge did not give due consideration to his submissions while in ground 5 he complains that he should have been awarded interest on the decretal sum from the date of filing suit. Although ground 4 is inarticulate, the question for determination that emerged from the submissions is whether the trial Judge erred in awarding the appellant the equivalent of one month's salary, and in rejecting the claims for general damages, aggravated damages and inflation.

21. In effect, and flowing from the determination of this Court in **Mary Wakhabubi Wafula vs. British Airways PLC** (above) what were the recognized remedies during the legal regime that existed when the

appellant's contract of employment was terminated?

22. In **Central Bank of Kenya vs. Nkabu**, (above) this Court held that the trial court erred by computing damages beyond the notice period notwithstanding the absence of a provision conferring the right to terminate the employment of an employee on permanent and pensionable terms by giving notice. The Court held that even assuming that the respondent's dismissal in that case was wrongful, ***“he was only entitled to damages equivalent to the salary he would have earned for the period of the notice.”***

23. In **Kenya Airways Corporation Ltd vs. Auma & 5 others** (above), this Court framed the question: ***“Is an employee whose services have been terminated entitled to general damages?”*** In answer to that question, the Court stated:

***“This Court in Kenya Ports Authority vs. Edward Otieno-Civil Appeal No. 120 of 1997 (unreported) drawing support from the case of Addis v Gramophone Company [1909] AC 488 emphatically stated that there can be no general damages in respect of suits based on a termination of employment contracts.”***

24. In **C.P.C Industrial Products (Kenya) Limited vs. Omweri Angima-Civil Appeal No. 197 of 1992**, this Court declined to upset an award of *“general damages equivalent to 15 months' gross salary”* made by the High Court. Though upholding *“the principle that damages will be limited to the period of notice”*, the Court nonetheless affirmed that award on the basis that the trial court had found that the employer had acted *“maliciously and callously.”* That decision stood, in our view, on the peculiar circumstances of that case and is not representative of the general legal principle. We are therefore fully in agreement with the trial court when it expressed itself in these terms:

***“The plaintiff [appellant] also claims for general damages for wrongful termination and argues that if he had continued to work for the defendant [respondent] he would have retired at the age of 60 year. The [appellant] as (sic) pleaded general damages for wrongful dismissal. This court holds the view that there can be no general damages in respect of suits based on a termination of employment.”***

25. In view of the conclusion we have reached, ground 4 of the memorandum of appeal therefore fails.

26. Turning to the second question whether the learned trial Judge erred in limiting the award of interest to *“1/3 of the 22 years the suit has been pending in court”*, it is common ground that the award of interest under Section 26 of the Civil Procedure Act involves an exercise of judicial discretion. We can only interfere with the exercise of discretion in limited circumstances. In **Mbogo and Another vs. Shah [1968] EA 93** this Court stated:

***“...that this Court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

27. The trial court carefully considered the history of the litigation before concluding that it would be unconscionable to award interest from 1992. The appellant has not demonstrated that the court took into account irrelevant considerations or failed to take into account relevant considerations in reaching that decision. Neither has the appellant demonstrated that the decision is plainly wrong. There is therefore no merit in ground 5 of the memorandum of appeal.

28. The result is that the appeal fails. It is dismissed in its entirety with costs to the respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of April, 2017.**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

.....

***DEPUTY REGISTRAR***

\_\_\_\_\_

[1] Michie Gitau vs. NSSF Board of Trustees, HCCC No. 3264 of 1993.