IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 16 OF 2016

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

AND

ANDREW OCHIENG ODONGO……RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Makau, J.), dated 26th June, 2015

in

E&LR Cause No. 422 of 2014)

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JUDGMENT OF THE COURT

At the time of his dismissal in 2007, the respondent was employed by the appellant at its Kisumu branch as a Mechanical Superintendent Grade HM3. He had served the appellant for 19 years and expected, all things remaining constant, to retire at the age of 55 years in 13 years from the date of dismissal. That did not happen because in March, 2006 he was accused together with a colleague, of making fraudulent payments of Kshs.194,880 for goods that were never supplied. He was initially summarily dismissed. He challenged that decision by lodging an appeal with the appellant, while at the same time he instituted an action in the High Court. We suspect that these two events led the appellant to review its position in so far as its initial decision to summarily dismiss the respondent was concerned. It lifted and substituted it with an interdiction. In the letter conveying this latest decision the respondent was also directed to show cause, within 48 hours upon receipt of the letter, why he should not be dismissed from the appellant's service. In the meantime it was directed that, during the period of the interdiction the respondent would earn half of the salary, not leave his work station without permission of his supervisors and to report to the office of the Personnel & Administration Officer on Monday and Friday of every week at 9 am. After a period of nearly 5 months the appellant once again addressed a letter to the respondent informing him that, having failed to show cause and to go to work for a continuous period of more than 10 days, he had forfeited his employment. He was informed of his right to appeal that decision within 30 days of the date of the letter.

In the original plaint, the respondent sought that his dismissal be declared unlawful; that he be paid terminal or retirement benefits, salary *in lieu* of notice and general damages for wrongful termination. Although the appellant had filed a defence to the claim, owing to its subsequent rescission of the original decision, it amended that defence to plead the fact that the original summary dismissal had been substituted with an interdiction. It also pleaded that the respondent had failed to comply with the terms of the interdiction, leading to forfeiture of his employment. The respondent likewise amended the plaint to explain why he could not comply with the show cause letter. He pleaded that the letter was posted way after the respondent had filed suit and the appellant responded by entering an appearance; that he replied to the letter and asked for the appellant's reconsideration of the matter. In the amendment the respondent also prayed for an award of Kshs.194,685 as an alternative to the earlier claim of Kshs.165,690 for loss of 3 months' salary *in lieu* of notice.

After receiving and considering oral evidence presented by the parties, Makau, J condensed the issues, which in his estimation required determination, into whether or not the termination of the respondent's employment by forfeiture was lawful and, if it was unlawful, whether he was entitled to the reliefs sought.

Noting that the repealed Employment Act, unlike the current Act did not make provision for mandatory procedural fairness before termination of employment, the learned Judge resorted to the appellant's Staff Regulations Revised, 2002. In particular **section G.7 (a)** requires that whenever proceedings are likely to culminate in a dismissal of an employee like the respondent in Grade HM.1 to HM.3, then the employer was required to ask the former to show cause in writing in respect of the charges alleged against him. After receipt of the

response to the show cause letter the Managing Director was required by those regulations to appoint a committee of four members to inquire into the allegations against the employee. At the close of the inquiry the committee must present its report and recommendations to the Managing Director who in turn would present its report to the Board of the appellant. If the committee recommends to the Board a disciplinary action, the Board, after independently considering the report, may impose any of the several punishments permitted in those regulations or the law, including forfeiture of appointment. The learned Judge found that this procedure was violated by the Managing Director, who instead of the Board, issued the decision of forfeiture of appointment. He also found that the show cause letter served no purpose for it was dispatched to the respondent after the date by which he was required to respond and as such it was impracticable to respond to it. For these reasons the learned Judge concluded, on the first issue that the termination of the respondent's employment was unlawful and that the respondent was therefore entitled to the reliefs he had prayed for. However, the learned Judge, in view of the background leading to the respondent's forfeiture of employment, "reduced" the forfeiture to "**early retirement with full benefits including pension under the Staff Regulations".** In addition, the respondent was awarded Kshs.194,685 being three months' salary *in lieu* of notice. The Judge, however found no substance in the prayer for general damages for wrongful termination of employment which he accordingly dismissed.

Aggrieved by the finding on liability and the award, the appellant has brought this appeal and has asked us to find that the learned Judge exceeded his jurisdiction when he determined the question of retirement benefits of the respondent; that he erred in awarding interest on a sum that had not been earned, in awarding quantum in excess of what the law provides; that it was in error that the learned Judge found that forfeiture of appointment was unlawful when it was apparent that the respondent had failed to comply with the terms of the show cause letter; and that he failed to appreciate that it was in the public interest that the respondent's employment be terminated. These grounds formed the basis of the appellant's written submissions in which it reiterated that the termination of the respondent's employment was lawful and that, even if the court found, as it did that it was unlawful, the court could not substitute the termination with early retirement; that the only remedy the court could legitimately award was three months salary *in lieu* of notice. It was submitted also that the learned Judge had no jurisdiction to determine issues relating to pensions and his order that the respondent be paid his **"full benefits including pension**" was in excess of his jurisdiction.

In our view these grounds alone are sufficient to dispose the appeal and no purpose would be served in rehashing all the grounds proffered.

The respondent's reaction to those identified grounds was that under **Article 162 (2)** of the Constitution and **Section 49 (3) (a)** of the Employment Act, it was within the learned Judge's power to order for the termination to be treated as early retirement with full benefits.

The two issues we have ourselves identified for the determination of this appeal are whether it was proper for the learned Judge to order for early retirement of the respondent, and whether he had jurisdiction to determine the question of retirement benefits.

It must be borne in mind as we consider these two questions that the suit giving rise to this appeal was instituted in 2006 before the coming into force of the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011 but the hearing and determination took place between 2012 and 2015. We are of the view therefore that the dispute was governed by the repealed Employment Act as the current labour laws cannot be applied retrospectively. We are guided in arriving at this by the Supreme Court decision in the case of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others** Civil Application No. 2 of 2011 in which the principle of retrospectivity of a statute was explained this way:

> **"(61) As for non-criminal legislation, the general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."**

We find no express intention in the Employment Act, 2007 and the Employment and Labour Relations Court Act, 2011, for their retrospective application. As a matter of fact the Fifth Schedule paragraph 2 (4) of the Labour Relations Act expressly provides, *inter alia* that any trade dispute that arose before the commencement of the Act and any summary dismissal that took place before the commencement of the Act would be determined in accordance with the provisions of the repealed Trade Disputes Act.

In his action the respondent insisted that the termination of his employment was unlawful and that, as a result he was entitled to a declaration that that was so; that he was also entitled to **"loss of terminal benefits for 32 years and/or early retirement benefits as per Staff Regulations and circulars together with entitlement under the Pensions Scheme Fund (employers contribution)"**, Kshs.165,690 being 3 months' salary *in lieu* of notice (or Kshs.194,685), general damages for wrongful termination, costs and interest.

The allegations against the respondent that he was involved in a fictitious and fraudulent purchase of a wire-reinforced hose for a mobile crane for which payment of Kshs.194,880 was made, remain mere allegations as he never got a chance to rebut them. He filed the suit giving rise to this appeal on 31st August, 2006 after he was summarily dismissed on 30th March, 2006. He appealed against the dismissal, and in allowing the appeal, the appellant lifted the summary dismissal and in its place reinstated the respondent and thereupon interdicted him on certain conditions. The conditions included a directive requiring the respondent to report to his work station two times in a week. He was also asked to show cause why disciplinary action should not be taken against him. In his testimony the respondent conceded that he found no point in complying with the terms of the show cause letter because it was impractical, the letter having been posted on 19th September, 2006 long after his summary dismissal and a few days after the suit had been filed and the appellant entered an appearance. As a result, on 4th January, 2007 the appellant issued a letter to the respondent informing him of the forfeiture of his appointment pursuant to **section G. 14 (a)** of the appellant's Revised Staff Regulations on the ground that he absented himself from work without authority for a continuous period of more than ten days.

The Revised Staff Regulations is not part of the record before us with the result that we cannot tell the precise terms of **section G. 14 (a)** and the effect of forfeiture of appointment or the circumstances under which an employment can be forfeited. But in common parlance and this context forfeiture would simply mean the same thing as dismissal without benefits. That is the sense in which we understand spirit of the letter of 5th January, 2007 conveying to the respondent the forfeiture of his appointment.

Under the repealed Employment Act, it was a justifiable and lawful ground for an employer to summarily dismiss an employee if, among other grounds the employee, without leave or other lawful cause, absents himself from his or her place of his work or if, during working hours, being intoxicated, an employee rendered himself unwilling or incapable properly to perform his work or if an employee knowingly failed, or refused, to obey a lawful and proper command issued by his employer or a person placed in authority over him by his employer, or if an employee committed, or on reasonable and sufficient grounds was suspected of having committed a criminal offence against his employer or his employer's property.

It was alleged that the respondent, without authority or other lawful cause, absented himself from his place of work for a period in excess of ten days. It will be recalled from what we have said earlier that by the time the respondent received the show cause letter he had been summarily dismissed and had filed suit to challenge that dismissal. The respondent also asserted, without being contradicted that the show cause letter never reached him in time to respond.

With respect, we find no fault in the conclusion the learned Judge reached, that it was **"obvious that things were not done right"** by the appellant from the initial summary dismissal to finally interdict the respondent. For our part we think it was illogical for the appellant, having taken nearly one month from 25th August, 2006, when the letter was written, to 19th September, 2006 when it was posted to have the respondent to comply with its terms. Of course having been summarily dismissed the respondent could not have reported to his supervisor twice a week nor was he expected to respond to the show cause letter within 48 hours when the letter itself took nearly one month to reach him. There was, therefore a plausible explanation for his failure to go to work for more than ten days.

Secondly, although we reiterate that the Revised Staff Regulations is not part of the record, the learned Judge before whom a copy of the Regulations was presented, explained the procedure elucidated in those regulations for terminating employment of a staff in the respondent's category. We have seen on record the letters exchanged prior to the termination of the respondent's employment. It is clear that, pursuant to those regulations a committee was appointed to inquire into the alleged fraud. It submitted its report dated 6th February, 2006 in which the respondent was found culpable and condemned to pay to the appellant 50% of Kshs.186,725. The basis of this figure is not clear because the amount allegedly paid was Kshs. 194,880. That apart the report also found that the respondent was a liability to the appellant and recommended his summary dismissal. The decision of the committee was later challenged by the respondent on many fronts. As a result of that challenge, the appellant withdrew its first letter of dismissal and replaced it with one of interdiction upon reinstatement. But when the appellant purported to dismiss the respondent the second time around by forfeiture of appointment, the procedure under its regulations which it had attempted to comply with in the first instance was ignored and side-stepped.

For these two reasons we find that the summary dismissal or forfeiture of appointment was wrongful and unlawful. Having so found and bearing in mind our conclusion earlier that the law to be applied in this dispute was the repealed Employment Act and the Trade Dispute Act (also repealed), it follows that the only remedies available at the time to the respondent are those provided for under the two repealed statutes. Under **Section 16** of the Employment Act;

> **"Either of the parties to a contract of service to which paragraph (ii) or (iii) of sub-section (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection."**

Before the introduction of far-reaching reforms in the employment and labour relations sphere by the enactment of the Employment Act, 2007, the courts applying **Section 16** aforesaid were unanimous that the remedy for termination of employment was the payment to the dismissed employee of the wages or salary which would have been earned by him in respect of the period of notice required to be given under the contract of employment. This Court in **Rift Valley Textile Limited v. Ogada** (1992) LLR 308 (CAK), while setting aside the judgment of the High Court, where the learned Judge had awarded twelve months gross salary as general damages and a further three months salary *in lieu* of notice, said:

> **"We have no doubt whatsoever that the law did not entitle the judge to do any of those things. The contract of employment between the appellant and the respondent specifically provided for a notice period and it is also provided for what was to be done if either party was unable to comply with the said notice period namely to pay the other party for the notice period. In our view even though the respondent's dismissal was unlawful he had been paid under and in accordance with the terms of his contract with the appellant."**

In addition to the payment in *lieu of notice*, **Section 15** of the repealed **Trade Disputes Act** provided that, for wrongful dismissal, the court may order for reinstatement or an award of compensation that shall not exceed twelve months of monetary wages. Of course following the repeal of the **Employment Act** and the **Trade Disputes Act, Section 49 (1) and (3)** of the **Employment Act**, 2007 **Act** has introduced enhanced remedies to an employee whose Employment is wrongfully terminated.

The respondent's letter of appointment dated 10th November, 1992 was explicit that he would be entitled to three months notice or one months' salary *in lieu* of notice. We are however cognizant of the fact that the 1992 letter must have been superseded as the respondent climbed through the ranks over the years and must have been entitled to more notice or salary *in lieu* thereof. Indeed in the appellant's amended defence it was admitted that the respondent was entitled to three months' salary *in lieu* of notice. According to **Marco Mulwa Ngolia**, a Human Resource officer who testified on behalf of the appellant, at the time of his dismissal the respondent's monthly earnings included a salary of Kshs. 64,895 and a house allowance of Kshs.25,960. The witness also confirmed that the respondent was entitled to three months salary in lieu of notice. Three months salary at the rate of Kshs.64,895 would translate to Kshs.194,685, the sum applied for by the respondent in the amended plaint and awarded by the learned Judge.

The respondent also prayed for loss of benefit for 32 years and/or early retirement benefits in accordance with the Revised Staff Regulations together with entitlement under the Pension Scheme Fund (employer contribution). We do not understand the first limb of the prayer but we have no doubt that in terms of the provisions of the two repealed statutes that remedy is not applicable. Regarding pensions, we make

reference to two letters. The letter offering the respondent appointment as a technician trainee dated 25th June, 1987 alluded to the fact that he would be eligible for a non- contributory pension on successful completion of the probationary period. The second letter dated 10th November, 1992 appointed the respondent as a pensionable employee and informed him that he would only be eligible for pension benefits upon attaining the retirement age of 55 years or on the abolition of the office or on compulsory retirement or on medical grounds or termination of employment in the public interest, among other grounds.

Because the respondent's employment was irregularly and unlawfully terminated, he would be entitled to pension benefits in accordance with the terms of the retirement scheme in which he was a member. No evidence was presented as to the respondent's retirement benefits as at the time of his dismissal. He can only be paid in accordance with the scheme. The learned Judge, however, erred in converting the forfeiture of employment to early retirement. No law supported that course.

In the result we come to the conclusion that save for the foregoing, this appeal is bereft of substance and is accordingly dismissed with costs to the respondent.

Dated and delivered at Malindi this 25th day of May, 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 REGISTAR