



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, UKO & M'INOTI, JJA)

CIVIL APPEAL NO.61 OF 2016

BETWEEN

JOHN CHARO NGUMBAO.....APPELLANT

AND

AMANI TIWI BEACH RESORT.....RESPONDENT

*(Appeal from a part of the award of the Employment & Labour Relations Court at Mombasa, (Rika, J.) dated 19<sup>th</sup> June 2016*

*in*

*ELR CC No. 221 of 2014)*

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**JUDGMENT OF THE COURT**

By a written contract dated 1<sup>st</sup> September 2012, the respondent, *Amani Tiwi Beach Resort* employed the appellant, *John Charo Ngumbao* as an *Executive Sous Chef* for a period of three months, at a monthly net salary of *Kshs 50,000/=*. Other pertinent terms of the contract were that the respondent could terminate the employment without notice in the event of misconduct, insubordination, intoxication while on duty, breach of the terms of the contract of employment, or any acts of commission or omission that *prima facie* amounted to misappropriation, fraud, or breach of trust, on the part of the appellant. The contract was terminable by each party giving 15 days notice in writing or paying 15 days salary in lieu of notice. Specifically *clause 1* regarding the duration of the contract provided as follows:

***“This contract of employment is for the period of three months commencing from 1<sup>st</sup> September 2012 up to 30<sup>th</sup> November 2012. The Management has decided, as a special case to offer this contract, which may not be renewed on expiry of this period.”***

The appellant duly served for the duration of the contract, but when it expired, he continued serving as the respondent’s Executive Sous Chef, but at an enhanced salary of *Kshs 78,418/=* per month. On 15<sup>th</sup> May 2013 the respondent terminated the appellant’s employment in writing, with effect from 22<sup>nd</sup> May 2013. The reason given for the termination was lack of professionalism on the part of the appellant. Subsequently the respondent paid the appellant *Kshs 16, 519* being holiday pay and *Kshs 61,834* for May 2013 salary.

Convinced that the termination of his employment was unfair and unlawful, on 5<sup>th</sup> May 2014, the appellant lodged a claim in the *Employment and Labour Relations Court, Mombasa* seeking compensation of *Kshs 1,019,434/=* made up of one month’s salary in lieu of notice, and 12 months’ salary as compensation for unfair or wrongful termination. The appellant contended that the respondent neither gave him the reasons for the termination nor complied with the procedure prescribed by law for termination of employment,

The respondent delivered its response to the claim on 16<sup>th</sup> June 2014 and while admitting the contract of employment, denied that termination of the same was unfair or unlawful. The respondent maintained that it terminated the appellant’s employment summarily in accordance with the contract of employment, for negligent and improper performance of his duties, the particulars of which were given as failing to cut down on costs by serving apples and butter to staff, baking poor quality *focaccia* bread, failing to prepare dishes provided for in the menu when all the necessary provisions and ingredients were availed, serving cold food, poor presentation and late serving of meals, and allowing laxity by waiters under his supervision. The respondent added that it had given the appellant both verbal and written warning in that regard, but the appellant denied having received any warnings including the letter of termination.

*Rika J.* heard the claim with each party calling one witness. By the impugned award, he found that the appellant’s contract of employment

after the expiry of the written contract was oral and a standalone contract rather than an extension of the first contract; that the only clear term of the second contract was the salary; that the respondent had valid grounds to justify summary dismissal of the appellant under **section 44(4)** of the **Employment Act (the Act)**; but however the respondent had failed to afford the appellant the procedural fairness that he was entitled to under **section 41** of the Act. For that procedural violation, the learned judge awarded the appellant compensation of **Kshs 78,418/=**, equivalent to one month's salary but made no order on costs.

That is the award that is challenged in this appeal on three grounds namely that the learned judge erred by holding that there were valid grounds for the appellant's termination; by refusing to award the appellant compensation of 12 months' salary for unfair or wrongful termination; and by declining to award the appellant costs.

**Mr. Kenga**, learned counsel submitted that after working for more than three months under the new contract, the appellant automatically became a permanent employee of the respondent and that his employment was terminated without any reasons, warning, notice or a right to a hearing.

It was the appellant's contention that the termination of his employment was not justified and that the reasons given by the respondent for the termination were not valid. He contended that no reasonable employer would have terminated an employee's employment on the grounds advanced by the respondent. Relying on the judgment of this Court in **Iyego Farmers Co-operative Society v Kenya Union of Commercial Food & Allied Workers, CA No. 12 of 2015**, the appellant submitted that the relevant question was whether the reasons for dismissal were valid.

Regarding whether he was given the reasons for his dismissal, the appellant submitted that the learned judge erred in evaluation of the relevant evidence and in concluding that the appellant had received warnings through emails and also the letter of termination. In his view, the evidence adduced by the respondent's witness to that effect was of low probative value because the witness was not conversant with the dispute, having been employed by the respondent after termination of the appellant's employment. It was his contention that he never received the warning emails and the letter of termination and the respondent could have prepared the same after the termination of his employment. In support of that view, it was argued that in pre-litigation correspondence the respondent had agreed to pay the appellant one month's salary in lieu of notice. The appellant also claimed that the respondent had admitted in its reply to the claim that the appellant was entitled to 15 days' notice and was bound by its pleadings. It was the appellant's further contention that he was denied an opportunity to be heard as required by the Act before termination of his employment.

As regards compensation, the appellant relied on **section 35(1)(c)** of the Act and urged that he was entitled to 28 days' notice before termination of his employment. He also contended that the learned judge erred by awarding him only one month's pay as compensation instead of the 12 months that he had prayed for. We were urged to interfere with the award because it was manifestly low and unreasonable; the trial court had taken into account irrelevant factors such as the fact that the appellant had worked for 5 months only; and it had failed to take into account relevant factors such as the inability of the appellant to get a lucrative job.

On the failure to award costs, the appellant submitted that although award of costs was in the discretion of the court, nevertheless costs also follow the event. He relied on the judgment of this Court in **Elizabeth Wakanyi Kibe v. Telkom Kenya Ltd, CA No. 25A of 2013** to argue that in the circumstances of this case he was entitled to costs.

The respondent opposed the appeal through its learned counsel, **Mr. Busieka**, who started on a false premise, as we shall demonstrate shortly, by arguing on the authority of **Rift Valley Railways (K) Ltd v. Kiya Kalakhe Boru, CA No 47 of 2014** that an appeal to this Court from the Employment and Labour Court is restricted to points of law only. The respondent submitted that the learned judge did not err by holding that there were valid grounds for the dismissal of the appellant and that this Court is precluded from considering that question of fact. On the appellant's contention that the respondent had contrived the emails and the letter of termination, we were urged to find that there was no such evidence on record.

Regarding compensation, the respondent submitted on the authority of **Section 49(1)(c)** of the Act and the judgments of this Court in **Bamburi Cement Ltd v. William Kilonzi, CA No. 62 of 2015** and **Rift Valley Railways (K) Ltd v. Kiya Kalakhe Boru**, (supra) that in determining what remedy to award the Court exercises discretion and is required to take into account several factors including the circumstances of the termination, the extent to which the employee contributed to termination and the employee's length of service with the employer. In the circumstances of this appeal, the appellant urged, the award of one month's salary was proper, judicious and did not warrant interference by this Court. It was emphasized that this Court will not interfere with an award by the trial court unless the award is made injudiciously by reason of consideration of extraneous matter, failure to consider relevant matters or making a manifestly high or low award. In this appeal, it was contended no grounds had been established to vitiate the award.

We have carefully considered the record, the judgment, the grounds of appeal, submissions by learned counsel, the authorities cited and the law. We shall first dispense with the respondent's contention that appeals to this Court from the Employment and Labour Relations Court are restricted to questions of law. That certainly was the position before 8<sup>th</sup> December 2014, when the **Statute Law (Miscellaneous) Amendments (Act No. 18 of 2014)** came into force. That Act, which changed the name of the **Industrial Court** to the Employment and Labour Relations Court also repealed **section 17(2)** of the **Industrial Court Act** which restricted appeals to this Court to matters of law only. Accordingly since that date appeals to this Court from the Employment and Labour Relations Court are no longer confined to issues of law only. (See **Lamathe Hygiene Food v. Wesley Patrick Simasi Wafula & 8 Others, CA No. 42 of 2015**). It is possible therefore that the appeal in **Rift Valley Railways (K) Ltd v. Kiya Kalakhe Boru**, (supra) was heard before the amendment came into force, though the decision was rendered on 26<sup>th</sup> February 2015.

As this is a first appeal, we are entitled to re-evaluate the evidence before the trial judge and come to our own conclusion. On findings of fact, we are obliged to defer to the conclusions of the learned judge who had the advantage, which we do not have, of hearing and seeing the witnesses as they testified. We can only interfere if the findings are based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88] 1 KAR 278**).

We agree with the learned judge that the first contract was a stand-alone contract, which expired on 30th November 2012 and in terms of clause 1, it was the *express* intention of the parties that it shall not be renewed upon expiry. Accordingly the second contract, which was terminated by the letter of 15<sup>th</sup> May 2013 was independent of the first contract and there is no basis for imputing into it terms of the first contract.

The appellant's first complaint is the finding that there were valid grounds to justify his summary dismissal. The grounds on which the respondent justified summary dismissal were that the appellant failed to cut down on costs by serving expensive and luxuries items such as apples and butter to staff, baked poor quality of the Italian bread called *focaccia*, failed to prepare dishes provided for in the menu when all the necessary provisions and ingredients were availed, served meals late and food that was cold and poorly presented and allowed laxity on the part of waiters under his supervision.

By dint of **section 43** of the Act, the reasons for termination of employment are the matters that the employer genuinely believed to exist at the time of the termination and which caused him to terminate the employee. Specifically **section 43(1)** places the onus on the employer to prove the reasons for the termination. If the employer fails to prove those reasons, the termination is deemed to be unfair.

The respondent contended that it had raised the issues it complained about in writing with the appellant, which the appellant disputed. The witness who testified on behalf of the respondent, as correctly urged by the appellant, was employed after the appellant's termination and therefore led evidence based on the respondent's records. She produced 3 emails addressed to the appellant by the respondent's **General Manager, Imtyaz Mirza** raising the complaints. We do not understand the respondent's witness to say that the letters were sent to the appellant as e-mails, otherwise that would not have been possible without the appellant's forwarding email address. What we understand the witness to say is that the General Manager composed the letters of complaint as emails, printed them in *word programme* and handed them physically to the appellant. The learned judge had the advantage of seeing and hearing the appellant and the respondent's witness testify, and he believed the respondent's version of the story. In other words, he found the respondent's story more credible than the appellant's bare denial of having received the letters of complaint and the termination letter. That is not a finding that we can casually interfere with absent satisfaction that the learned judge misapprehended the evidence or ignored any other material factor. (See *Susan Munyi v. Keshar Shiani CA. No. 38 of 2002*).

We do not think much turns on the pre-litigation correspondence between the parties because the respondent's position kept changing as the appellant made more demands. As regarding the pleadings in which the respondent is alleged to have admitted that the appellant was entitled to 15 days notice, we have perused the same and find that they do not constitute an admission as alleged by the appellant but are really a reproduction of the provisions of the first contract.

Accordingly we uphold the finding by the learned judge that there were genuine grounds justifying the appellant's summary dismissal, but the respondent erred by failing to comply with the provisions of **section 41** of the Act. In *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union, CA No 188 of 2014*, this Court stated:

***“Further, section 41 requires the employer, before terminating an employee’s employment on grounds of misconduct or poor performance to explain to the employee in a language that he understands, the reason for the intended termination and the employee is entitled to have a fellow employee or a union representative of his choice present during the explanation. In addition before summarily dismissing the employee, the employer is obliged to hear and consider any representation that the employee or his representative may have.”***

Turning to the question of compensation, the learned judge found that even though the respondent was entitled to summarily dismiss the appellant, it did not comply with the procedural requirement of **section 41**, which rendered the dismissal unlawful and entitled the appellant to compensation to that extent. **Section 49** of the Act sets out the remedies for wrongful dismissal and unfair termination. Among those remedies include an order to pay the employee the wages he would have earned had he been given the notice period prescribed by the Act or the contract of service or payment of the employee's salary or wages up to a maximum of 12 months.

In *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (supra)*, this Court explained the nature of the power vested in the trial court when determining the appropriate remedy to award:

***“Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies...are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee’s length of service with the employer, the employee’s reasonable expectation of the length of time the employment was to last but for the termination, the employee’s opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations.”***

Once it is established that the power of the trial court to award compensation is discretionary, then we must recall the principles that guide this Court in determining whether to interfere with an award by a trial court in the exercise of its discretion. In *United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898, Madan J.A (as he then was)* expounded the principles as follows:

***“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in***

***the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”***

The learned judge awarded the appellant one month’s salary compensation for the unlawful termination of his employment arising from failure to follow the prescribed procedure. The appellant thinks he was entitled to the maximum compensation of 12 months’ salary. We are not able to agree that the learned judge erred in his choice of remedy. In arriving at the award, he considered, among others, the fact that the appellant was guilty of gross misconduct, which would have justified summary dismissal if only the respondent had followed the prescribed procedure. Accordingly he had in mind the extent to which the appellant had contributed to his termination. He also bore in mind the fact that the appellant had worked for a relatively short duration of five months. He weighed the appellant’s wish to be compensated with 12 months’ salary and found it to be disproportionate to the economic injury inflicted on him by denial of procedural justice. We cannot interfere merely because we could have awarded a higher figure if we were sitting as the trial court.

The last question is one of costs. We shall not be labour that costs are in the discretion of the court, depending on the circumstances of each case. Under section 12 (4) of the Labour and Employment Court Act and rule 29 of the Employment & Labour Relations Court (Procedure Rules), 2016 the court is required to make such orders on costs as it considers just in the circumstances. That must put paid to the appellant’s argument that costs must invariably follow the event. The appellant did not substantively succeed in his claim; he only succeeded partly due to the respondent’s procedural lapses. It was within the discretion of the learned judge to make an order that each party should bear its own costs. In Devram Dattan v. Dawda [1949] EACA 35 it was held,

***“It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts....If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.”*** (Emphasis added).

We are satisfied that this appeal has no merit. We dismiss the same and direct each party to bear its own costs. It is so ordered.

Dated and delivered at Mombasa this 11<sup>th</sup> 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 REGISTRAR**