



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 138 OF 2014

THE WRIGLEY COMPANY (E.A) LIMITED.....APPELLANT

VERSUS

BAKERY CONFECTIONERY FOOD MANUFACTURING

& ALLIED WORKERS UNION (KENYA).....RESPONDENT

(Being an Appeal from the judgment and decree of the Industrial

Court of Kenya at Nairobi (Mathews N. Nduma, J.) dated 10th

December, 2013 in Industrial Court Cause No. 247(N) of 2009)

JUDGMENT OF THE COURT

In a Memorandum of Claim filed at the then Industrial Court of Kenya at Nairobi the respondent Bakery, Confectionery, Food Manufacturing & Allied Workers Union (K) as claimant filed a claim against the appellant The Wrigley Company (EA) Limited. It was stated in the main that the respondent was a registered trade union mandated under the Labour Relations Act 2007 to represent the industrial interests of all the employees engaged or employed in food manufacturing and other related industries. It was further claimed that during the period 1st September, 1992 to 31st August, 1994 the terms and conditions of employment Francis Ogutu, amongst other employees of the appellant were collectively negotiated by the respondent with the appellant in a collective agreement and that by clause 31 of the Collective Agreement which related to retirement it was provided that:

“an employee who attains the retirement age of 55 years but 60 years for compulsory retirement, may retire or be retired.....”

It was further contended in the Memorandum of Claim that in breach of the said clause the appellant had served Francis Ogutu (we shall conveniently refer to him hereafter as the “grievant” which is what he is called in Memorandum of Claim) with a notice of intended retirement on 8th March 2009, and that the notice was in breach of the said Collective Agreement and also in breach of an Industrial Cause Award in Cause No. 116 of 2009 issued on 17th November, 2005 which provided as follows:

“The Court upholds the demand of the Claimant and awards inclusion of a clause in the collective agreement that an employee may voluntarily retire at 55 years but must compulsorily

retire at 60 years”.

It was further stated that in April 2009 the grievant through the respondent reported a trade dispute touching on the intended retirement to the relevant Minister and that the dispute had been accepted and was awaiting processes of dispute resolution envisaged in that industry. The respondent feared that the appellant would in the meantime retire the said grievant and it was prayed that the appellant be restrained by orders of injunction from compulsorily retiring the said grievant pending the determination of the said dispute. There was also a prayer for a declaration that the appellant was bound to act in terms of the Collective Agreement and abide the Award of Industrial Cause No. 116 of 2004. There was an alternative prayer for damages for wrongful and premature compulsory retirement. Contemporaneous with the Memorandum of Claim was a Notice of Motion brought under various provisions of law asking for temporary orders to stop the appellant from retiring the said grievant pending hearing and determination of the claim.

The claim was denied through a Memorandum in Response and various affidavits filed on behalf of the appellant.

The issue whether retirement of an employee of the appellant was at the age of 55 or 60 years became contentious and was referred to the Industrial Court for interpretation. Justice Isaac E.K. Mukunya of that court sitting with two members on being asked to interpret the clause on retirement ordered the parties in the Collective Agreement to include a clause to the effect that an employee may voluntarily retire at 55 years but must compulsorily retire at 60 years.

The matter should have ended there.

The appellant was however not satisfied with that interpretation by the Industrial Court and applied for further interpretation arguing that the interpretation given by that court violated provisions of the Retirement Benefits Authority Act No. 3 of 1999. This ended up being an application for review but the Industrial Court did not find any merit in the application and dismissed it. The Appellant being dissatisfied with those findings moved to the Judicial Review Division of the High Court in HC Misc. Appl. No.720 of 2006 and applied for orders of Certiorari and Mandamus whose effect was to challenge the Award in Industrial Court Cause No. 116 of 2004 and interpretation thereof by the Industrial Court. Anyara Emukule J, heard the petition and by an order made on 28th November 2006 granted leave to the appellant to apply for judicial review and obtain orders of certiorari and orders of mandamus to move into the High Court and have the said award quashed. Leave granted was to operate as a stay for a 120 days from the date of issue and it was further ordered that any other or further proceedings arising or connected to the same Industrial Court Award in Cause 116 of 2006 and or further proceedings arising from or connected to interpretation of the said award be stayed.

It would appear from the record that in the cause of those proceedings before the industrial court that escalated to the Judicial Review Division of the High Court, and whilst the stay granted subsisted the said grievant reached the age of 55 years and was retired by the appellant. That is the concatenation of the events that led to the application for injunction to stop the appellant from retiring the said grievant.

It would appear that the parties did not seriously pursue the motion for injunction and the Claim itself ended up before Mathews Nduma J, who heard the Claim. In a judgment delivered on 10th December 2013, the learned Judge found that the appellant had retired the said grievant when there was an order of the High Court restraining the appellant from retiring him at the age of 55 years pending the hearing and determination of the petition pending in the High Court. The learned judge found that it was unlawful and a violation of the status quo order issued by the High Court for the appellant to proceed to retire the said grievant as it did. In the event the learned judge found that grievant was entitled to apply for injunction to prevent what amounted to an illegality and that the said grievant did not retire voluntarily. The learned judge therefore held that the grievant's services were unlawfully terminated because the termination was not founded on a valid reason in terms of **section 45 (2) (a) of the Employment Act**. Having so found and finding that the grievant lost prospective income for 5 years the learned Judge awarded the said grievant 12 months gross salary as at the time of termination. The learned Judge also awarded general

damages amounting to 8 months salary to mitigate the loss of income for 5 years the grievant was entitled to work prior to retirement. The court found that it would not be reasonable to make an order for reinstatement of the grievant to employment because he had been out of the appellant's employment for 4 years from the date of premature termination. The learned judge took account that grievant was bound to mitigate his losses by engaging himself in gainful activities upon being retired prematurely.

It is those findings that have provoked this appeal where 9 grounds of appeal are taken by the appellant in the Memorandum of Appeal drawn by the appellant's lawyers M/S Obura Mbeche & Company Advocates. These grounds range from an attack of the findings of the learned Judge who is faulted for finding that there was an order of maintenance of status quo issued by the High Court in H.C. Misc. Application No. 720 of 2006 barring the appellant from retiring the grievant; that the learned Judge erred in finding that termination of the grievant's employment was unlawful; that the learned Judge erred in holding that the grievant could only voluntarily retire at 55 years and be compulsorily retired at 60 years; that the learned Judge erred in awarding the grievant 12 months' salary by way of compensation; that the learned Judge was wrong in awarding general damages for alleged wrongful termination of contract and there is also an attack on the learned Judge for awarding costs to the respondent and it is finally said that:

“...the learned Judge erred in Law by failing to fathom or appreciate the legal arguments adduced by the Appellant before him”

For all these we are asked to allow the appeal with costs to the appellant and to make an order setting aside the Orders of the Industrial Court and dismiss the suit that was in that Court subject of this appeal.

The appeal came up for hearing before us on 9th March, 2017 when learned counsel **Mr. Geoffrey Orao Obura** appeared for the appellant while learned counsel **Mr. Daniel Amalemba** appeared for the respondent. Mr. Obura gave a detailed history of the facts of the case leading to the appeal and we are grateful to learned counsel for this. Learned counsel submitted that it was wrong for the learned Judge to hold that orders of stay granted by the High Court in H.C. Misc. Application No. 720 of 2006 amounted to a stay order not to retire the grievant. According to learned counsel the orders of injunction or stay were not a stay on an action by the appellant but was an injunction against certain administrative action – a stay of proceedings in the Industrial Court but the parties, according to counsel, were free to continue action in accordance with Collective Agreement. Learned counsel further submitted that retirement of the grievant was not wrongful dismissal to call for compensation and he faulted the learned Judge for relying on Section 45 of the Employment Act to award compensation for wrongful termination.

Learned counsel also faulted the learned Judge for awarding general damages for a breach of a contract of employment which, according to counsel, the Court had no power to do in law. He cited various case law to support his position but our perusal of those cases shows an interpretation by the Courts of the Employment Act, Chapter 226 of the Laws of Kenya, which has since been repealed. It was not allowed under that Act for a Court to award general damages for breach of a contract of employment but that position has drastically changed under the current employment laws. That submission by learned counsel can therefore not hold and we need not detain ourselves on that issue any further at all.

It was then Mr. Amalemba's turn to respond. He had the grace to commend Mr. Obura for summarizing the facts very well. That was as far as he agreed with learned counsel for the appellant. Learned counsel for the respondent supported the interpretation of Clause 31 of the Collective Agreement by the learned Judge of the Industrial Court to the effect that an employee of the appellant could voluntarily retire on attaining the age of 55 years but must retire or be compulsorily be retired on attaining the age of 60 years. Learned counsel further submitted that by retiring the grievant at the age of 55 years the appellant had violated the stay orders granted by the High Court staying the award of the Industrial Court and the interpretation of the same by that Court. According to learned counsel the Industrial Court (now renamed “Employment and Labour Relations Court”) was empowered by the Employment and Labour Relations Act to award the reliefs that it did and for all these he asked us to dismiss the appeal.

In so far as submissions went Mr. Obura had the last word. According to learned counsel an award of damages envisaged by the Employment and Labour Relations Act was not the same as an award of

general damages and the learned Judge was, according to counsel, wrong to award the damages he gave.

We have considered the whole record, submissions made before us and the law and have taken the following view of the matter of course cognizant of our role as a first appellate court to rehear the case by re-evaluating and analyzing the whole of the evidence before the trial court before making our own independent inferences of fact. We do that knowing that we have not had the advantage the trial Judge had of a first consideration of the evidence and must give respect to the learned Judge's conclusions but are at liberty to depart therefrom if the evidence on the whole compels a different conclusion – see, for the duty of a first appellate Court, Rule 29 of the Court of Appeal Rules and for an enunciation of that duty, the oft-cited celebrated case of **Selle v Associated Motor Boat Company Limited & Others [1968] E.A. 123.**

We have at the commencement of this Judgment set out the text of Clause 31 of the Collective Agreement that has played a very central role in the litigation in the Industrial Court and found itself in the Judicial Division of the High Court and now before us. In the Collective Agreement that commenced on 1st September, 1992 which was for the period up to 31st August, 1994 Clause 31 was poorly worded as follows:

“RETIREMENT

An employee who attains the retirement age of 55 years but 60 years for compulsory retirement, may retire or be retired.”

In the Collective Agreement for the period 1st January, 2001 to 31st December, 2002 the language had changed to:

“RETIREMENT

An employee who attains the retirement age may retire or be retired”

Retirement age was stated in the first version as 55 and 60 years but it was not stated in the latter version. This then led to a dispute on what constituted retirement age. The dispute found itself in the Industrial Court and that Court, upon hearing the parties, made an order that the parties include a clause in the Collective Agreement specifically stating that an employee may voluntarily retire at the age of 55 years but must retire or be compulsorily retired on attaining the age of 60 years. The appellant was dissatisfied with that interpretation and applied for review but that review application did not find favour with the court and was dismissed. The appellant thereafter moved to the High Court asking for judicial review orders which we have discussed in this Judgment and the High Court gave orders of stay of the whole award and the orders interpreting the same and ordered that stay granted operate as a stay for 120 days. The appellant was to then file Motion and move the High Court for orders of certiorari and mandamus but we have not seen any evidence that the appellant did that. In fact it would appear that the appellant sat back enjoying the orders of stay and did not take any further action at all. The order for leave to move into the High Court for judicial review orders which was to operate as a stay of the orders of the Industrial Court was given on 28th November, 2006. By a letter dated 8th March, 2009 addressed to the grievant the appellant informed him, amongst other things, that:

“.....As you are aware, you will reach the official retirement age of 55 years on 8th June, 2009. The company would therefore like to give you a retirement notice of three months with effect from today, 8th March, 2009”

That is the letter that triggered the litigation in the Industrial Court and the plea for injunction by the respondent against the appellant. Matthews N. Nduma, J., in the Judgment appealed here, found that the appellant had breached orders of the High Court which had stayed litigation in the Industrial Court which litigation concerned an interpretation of Clause 31 of a Collective Agreement on when an employee of the appellant was supposed to retire.

The letter by the appellant of 8th March, 2009 informed the grievant that because he was to reach the age of 55 years in 3 months time the appellant had decided that he (the grievant) had reached “official retirement age” of 55 years and must retire. There is evidence that the grievant was retired. This is borne out by Clearance Certificates made on 8th June, 2009 and other documents showing a calculation of the grievant’s entitlements in retirement. The Industrial Court had, in the Award made on 17th November, 2005 ordered the parties to the Collective Agreement to include a clause stating that an employee could voluntarily retire on reaching 55 years but must retire or be retired on reaching 60 years. Those orders were stayed by the High Court in the orders made on 28th November, 2006. In the Judgment appealed from the learned Judge found as fact that the appellant was in breach of the orders of the High Court staying proceedings between the parties when it not only served the grievant with the letter of 8th March, 2009 but proceeded to retire him. The learned Judge found that:

“..... It was unlawful and violation of the status quo order for the Respondent to proceed to retire the Claimant as it did. This being the case, the Claimant was perfectly entitled to file this claim and an application on Certificate of Urgency to injunct the illegality that was about to take place”

Mr. Obura, learned counsel for the appellant, faults the learned Judge for finding that the appellant breached a court order which, according to learned counsel, did not affect Collective Agreement and, according to learned counsel, the parties could proceed to implement Collective Agreement despite the Court Order. This is a difficult argument to follow or sustain. The Industrial Court gave an Award interpreting the Collective Agreement and the appellant challenged that interpretation and when its challenge failed, it successfully moved the High Court for orders that stayed all the Orders of the Industrial Court. Part of that order given on 28th November, 2006 stated:

“4. THAT leave granted under paragraph 2 and 3 above do operate as a stay for 120 days from today of:-

a. Any other or further proceedings arising from or connected to the Industrial Court Award in Clause No. 116 of 2004 dated 17th November, 2005.

b. Any other or further proceedings arising from or connected to the Industrial Court Ruling in Interpretation Application No. 1-116 of 2004 dated 12th October, 2006.”

Although those orders were given to operate as a stay for 120 days there is no evidence that they were set aside at all. It was incumbent upon the appellant to move the High Court for judicial review orders after obtaining leave of that court to do so but there is no evidence that it did so at all. In the premises we can find no merit in the argument by Mr. Obura on that score. The learned Judge correctly held that the appellant acted in breach of a court order when it proceeded to retire the grievant at the age of 55 years when he was entitled, if he chose to, to work until he reached the age of 60 years. The grievant was in effect denied gainful employment for 5 years.

The other complaint raised by the appellant is on award of compensation to the grievant by the learned Judge who found that the grievant was denied an opportunity to continue working until he reached compulsory retirement age of 60 years.

The respondent had in the Memorandum of Claim prayed for damages for wrongful and premature retirement of the grievant equivalent to the earnings for the remainder of the years up to the attainment of 60 years. The learned Judge considered the factors set out in Section 49 of the Employment Act and held that the appellant had terminated the grievant’s employment contrary to law. In the premises the learned Judge found that the grievant was entitled to compensation for unlawful and unfair termination for which the Judge assessed 12 months gross salary. The learned Judge also awarded the grievant 8 months’ salary as general damages for loss of income for 5 years which the grievant would have been entitled to continue working until he reached mandatory retirement age of 60 years. Learned counsel for the appellant submits that the Judge erred in doing this. We do not agree. As we have already stated the repealed Employment Act did not permit a Court to award damages for wrongful termination of employment. The employment

laws now allow trial courts, in appropriate cases, to award damages where an employment contract is unlawfully or wrongfully terminated. The learned Judge after finding fault with the appellant's conduct in wrongfully retiring the grievant when he had not reached retirement age awarded damages that were allowed in law.

The learned Judge called the award "general damages" instead of "compensation" but nothing really turns on this. What was awarded was compensation which the employment laws permit.

We found no merit in this appeal which we now proceed to dismiss with costs to the respondent.

Dated and Delivered at Nairobi this 23rd day of June, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR