IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 237 OF 2015

BETWEEN

CHARLES OPATA…………………………...................……APPELLANT

VERSUS

NORFOLK HOTEL ………………….............…………RESPONDENT

(Appeal from the judgment and/or decree of the High Court of Kenya at Nairobi (Ang'awa J.) dated 11th November, 2011

in

Nairobi High Court Civil Appeal No. 959 of 2004)

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JUDGMENT OF THE COURT

This is a second appeal by Charles Opata (appellant) who has relentlessly pursued his claim of unlawful termination from employment by Norfolk Hotel (respondent) from the year 2003. The appellant's claim was filed before the Chief Magistrate's Court at Milimani. Upon hearing the matter, E.N. Maina (as she then was) dismissed the claim. The background facts are fairly straight forward because they were largely not contested. That is on 15th October, 1993 the appellant was employed by the respondent as a cloakroom attendant with a starting salary of Ksh 1,848/= per month. The appellant served the respondent for nearly 10 years, however on or about 5th February, 2003, he was summarily dismissed. His salary at the time of dismissal was about Ksh 14,050/=.

The dismissal of the appellant was caused by a complaint made on the night of 4th February, 2003 against the appellant by a hotel customer who had alleged that the appellant had tried to act as a pimp and seduced the customers' wife to provide indecent services to another hotel guest. It is not quite clear when the complaint was made, but what is discernable from the evidence of Ali Mohamed Kaehey who gave evidence on behalf of the respondent, was that he received a complaint from a hotel guest through a telephone call. According to Mohammed, a complaint on telephone by a Mr Christenson stated that he was having a drink with his "*wife*" one evening at the Norfolk hotel when the appellant approached the wife and asked whether she would mind giving services to another hotel guest.

Following this complaint, the appellant was questioned about the incident, he denied having made the

alleged inappropriate approaches to the hotel guest but confirmed he knew the customers' wife who was his friend. Due to the fact that this hotel guest persisted in his complaints that his '*wife'* was traumatized and he needed a written apology from the hotel, the respondents were satisfied the alleged conduct by the appellant constituted gross misconduct in that the behaviour lowered the dignity and standing of a hotel that dwelt with high end local and overseas clientele with many international awards to boot. It was for the aforesaid reason that the appellant's services were summarily terminated.

Dissatisfied by the said turn of events, the appellant filed a claim before the Chief Magistrate's Court which was dismissed. The appellant was seeking for;-

- Three months salary in lieu of notice- Ksh 14,050/= x 3 = Kshs 42,150/=.
- 1/3 of the appellant's monthly salary and house allowance for nine years Kshs 468.33 x 9 = Ksh 42,149/=
- Appellants service charge from 1st to 5th February 2003- Kshs 1000/=.
- 9 years leave earned upto and including 5th February 2003- Kshs 4,215/=.
- Total = Kshs 91,856.40/=.

The respondent filed a statement of defence denying allegations of wrong doing but admitting the appellant was summarily dismissed from employment for gross misconduct. The respondent justified the summary dismissal of the appellant which they contend had exposed the hotel to a legal suit by the affected guests who had threatened to make a report to the police (although no report was ever made). Thus the appellant was not entitled to any salary in lieu of notice as his dismissal was lawful. The matter was fully tried with the appellant giving evidence and calling one witness while the respondents' general manager gave evidence on behalf of the employer. As aforestated, the appellant's suit was dismissed.

His appeal before the High Court was similarly unsuccessful hence this second appeal which will turn on only points of law as the two courts below are expected to have exhaustively determined the facts unless it is apparent that, looking at the entire evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision bad in law. The appellants appeal is predicated on four grounds of appeal to wit;-

> **(a)** **<u>THAT</u>** the Hon. Judge erred in law and misdirected herself by misinterpreting the law and failing to consider and find that the provisions of **Section 17 (c)** and **(g)** of the Employment Act invoked by the respondent in justifying the termination of the appellant's employment was inapplicable in the circumstances of the appellant's case and therefore confirmed malice on the part of the respondent as against the appellant for which the honourable court ought to have found that the appellant's termination from employment was wrongful.
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> **(b)** **<u>THAT</u>** the honourable judge erred in law by failing to constitutionally exercise the honourable court's appellate jurisdiction in entirely looking at and assessing all the material issues placed before her for consideration, by digressing and dealing with irreverent issues that were not material to the determination of the appeal before her and thereby failing to address the very material issues raised in the appeal more particularly the grounds of appeal which were the very important issues in contention that required her consideration and determination.
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> **(c)** **<u>THAT</u>** the honorourable judge erred in law by laying emphasis, making reference to and relying on court decisions that were not material and relevant and had no bearing to the issues that were in contest and were for determination before her.
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> **(d)** **<u>THAT</u>** the honourable Judge therefore erred in law by arriving at an erroneous decision in the circumstances o the matter before her, having failed to consider all that was expected of her, as in law, envisaged.

Counsel for both parties filed written submissions and list of authorities to support their respective positions. Mr. Sumba, learned counsel for the appellant elaborated the above grounds of appeal by stating that the reasons given in support of terminating the appellant summarily did not meet the threshold

of the provisions of **Section 17 (c)** and **(g)** of the Employment Act which was cited in the dismissal letter. The appellant had diligently served the respondent for close to 10 years and had never received even a letter of warning; a drastic action as summary dismissal was not warranted. The learned trial magistrate was faulted for failure to make a conclusive finding as to whether the appellant committed the act of misconduct, as the complainant never testified; even the person who was allegedly seduced never raised a complaint. There was no written communication or even a complaint noted in the daily occurrence book.

Counsel for the appellant pointed out that the letter of dismissal was dated 5th February, 2003 while the complaint was made on the previous day, the speed at which the appellant was terminated lends credence to the appellant's contention that there were no investigations that were carried out or proceedings to give the appellant a hearing before termination. Further, according to counsel, the appellant's termination was not at all supported by the provisions of **17 (c)** and **(g);** the Employment Act which deals with wilful neglect of duty or commission of a criminal offence by an employee; a proper procedure that is envisaged by the law, an employee should be served with a written complaint; there was a collective bargaining agreement that was operational, it was nonetheless ignored by the respondent in this matter; the rules of natural justice that require an employee be heard were also flaunted by the respondent.

The High Court Judge was faulted for failing to re-evaluate and to analyse the entire case, instead she merely agreed with the trial magistrate; had the learned Judge re-evaluated the entire case, it would have become obvious to her the case against the appellant did not warrant summary dismissal as there was no complaint; the person who alleged to have been seduced to meet a hotel guest did not file a complaint; the complaint was received from a third party and to make matters worse, he did not file a written complaint and none was even recorded in the daily occurrence book; moreover the hotel guest for whom the appellant was accused of making advances on behalf also remained unknown; therefore the two courts below erred by finding the appellant committed a serious offence bordering on criminality. Counsel for the appellant urged us to allow the appeal.

This appeal was opposed; Mr Gachuhi, learned counsel for the appellant started by reminding us of the provisions of **Rule 29 (1)** of the Court of Appeal Rules that restrict us to matters of law this being a second appeal. He supported the decisions of the courts below which concurred on both law and facts that the appellant was found guilty of misconduct; the appellant went round the hotel seducing guests of the hotel which was un acceptable conduct; investigations were carried out where the appellant denied having seduced the guests but on a balance of probability the two courts below believed the evidence of the respondent that the appellant was guilty of gross misconduct. While relying on the written submissions and list of authorities filed on behalf of the respondent, counsel urged us to dismiss the appeal.

This being a second appeal, the jurisdiction of this Court is limited to points of law, matters of facts having been thrust out by the two court below except where it is demonstrated that the two courts arrived at an erroneous conclusion that is legally perverse. See **Mary Njoki v John Kinyanjui Mutheru [1985] eKLR** :-

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484."Also the case of;-S. M. v E. N. B. [2015] eKLR:-**
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> **"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."**

In the premises the issues of law that fall for determination which are germane and cut across the four grounds of appeal is whether the summary dismissal of the appellant was lawful and whether the learned Judge of the High Court failed in her legal duty to re-evaluate and re analyse the entire record and judgement of the trial court in order to arrive at an independent consideration of the whole matter.

This case was filed in March 2003, before the current Employment Act was reviewed, it is regrettable that a party seeking a determination of an employment dispute can be in court pursuing a claim of terminal benefits for fifteen years, hopefully with the specialized Court, Employment Labour Relations Court and the general principles of expeditious and affordable access to justice that are guiding principles in the administration of justice as underscored in the Constitution and other statutes this inordinate delay will be a thing of the past. Be that as it may, we have to determine in this appeal whether the appellant's dismissal from employment based on the allegations that he had acted as a pimp and attempted to seduce the respondent's guest to offer in appropriate sex services to another guest of the hotel. We think it is common ground, if the appellant was found to have done so, the acts would amount to gross misconduct and consequently warranting a summary dismissal.

The determinate issue here is whether the evidence on record proved on a balance of probabilities that the appellant was guilty of gross misconduct. This is what the learned Judge of the High Court posited in a pertinent paragraph of the said judgement;

> **"The dismissal of the appellant employee was made summarily. The law provides that an employer has a right to summary dismissal. This means that the dismissal is given without notice. The dismissal "may be an express or an implied term of contract.**
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> **The terms of contract for the employee was express, namely, that summary dismissal was provided for within his contract. The terms of a contract must be looked into within the contractual definition of a conduct leading to such dismissal.**
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> **The employee contract stated *"serious misconduct"*. This was not defined and can be interpreted to mean as provided in the above book:**
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>> **"It is likely that the summary nature of the dismissal can be justified as a reprieve to actions which breach an important term of the contract in such a way as to undermine the employment relationship…**
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> **In this appeal, the reputation of the employer to its business required to be guarded. The employer found the incident as serious to warrant summary dismissal. This action was upheld by the trial magistrate. I would uphold the findings of the trial magistrate and find that the summary dismissal was lawful. On the issue of the** (sic) **"issue of entitlement of benefits", the employee was offered his dues between 1st to 5th February 2003 being the salary allowances, service charge and 9 years leave totalling to Ksh 7,556/70 above. "I believe that this entitlement should be paid to him. As to the claim for 3 months' salary in lieu of notice and for the 1/3 of the salary and allowance for 9 years amounting to Ksh 42,150/= and Ksh 42,149/70 respectively that this be disallowed as per the findings of the trial magistrate. The appeal is hereby dismissed with costs to the employer respondent in this appeal. Costs in the subordinate court to be to the employer/original defendant."**

The above constitutes the key findings by the learned Judge, which, with tremendous respect is not an analysis or re-evaluation of the central issue, that was, whether the reason for termination constituted a gross misconduct or

whether the Judge was satisfied that the allegation was proved on a balance of probability that the appellant did seduce a hotel guest which was against the hotel regulations. (See the case of **<u>Selle vs. Associated Motor Boat Company</u> (1968) E.A. 123 at page 126**, where the Court of Appeal held:-

> **"…….. this Court must reconsider the evidence, evaluate itself and draw its own**

conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…" See **Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425".**

The above authority gives guidelines on the role of a 1st appellate court. In the instant case, the learned Judge took considerable amount of time to define what constituted misconduct, without examining whether the appellant committed the alleged offence by examining the evidence that was before the trial magistrate; instead the Judge's opinion only considered the evidence of the respondent as it was held the reputation of the respondent and its business required to be guarded. This was clearly a misdirection which ultimately led the Judge to an erroneous conclusion that *"The employer found the incident as serious to warrant summary dismissal. The action was upheld by the trial magistrate."* The Court as mandated by law as a 1st appellate court was supposed to look at the evidence of the appellant against that of the respondent and subject it to the required test of whether the appellant proved on a balance of probability he was unfairly dismissed. If the learned Judge had done so, we have no doubt she would have discovered the allegations made against the appellant were not supported by any evidence. This is for the simple reason that the person who was allegedly seduced is not the one who complained; the person did not write a complaint; she did not complain to the respondent or to the police nor did she record the incident in the occurrence book. This is born out of the evidence in cross-examination by the respondent's witness one Ali Mohammed Kadhey, to quote him verbatim;-

"I questioned the Health Club Manager and Security Officer. They did not record anything. Nobody said they had heard what Opata had said to the lady. He had worked for Norfolk for 9 years almost 10 years. There was no warning letter in his file. The gravity of the offence warranted summary dismissal… summary letter says he was dismissed under S. 17

(a) of the Employment Act. Pimping is, in my view, a criminal offence. I did not lodge any complaint to the police. I did not think it was necessary. He neglected to perform his duty. If he pimped that was not his duty. Plaintiff investigations took 2 days. We met on the afternoon of 4-2. This letter is dated 5th. The incident occurred on the night of 4th. I did not ask the lady to explain in writing what had happened. We did not write apology letter. The union was involved - its representatives were present at the meeting. They appealed and asked if I could terminate (sic) **his services. I refused"**

It is evident the complaint was raised by the husband of the victim on telephone which was made on the 4th of February 2003. Arising from this complaint, the appellant's career of almost 10 years became a cropper. The dismissal letter was issued the following day on the 5th February 2003. In our view, the allegations made against the appellant were not proved; they were made by a third party in a manner that could not be verified. It was necessary for the complainant who was aggrieved to make a complaint of how she was inappropriately approached by the appellant. With respect, the evidence by the trial court was slovenly dwelt with by the learned Judge of the High Court thereby giving rise to many questions that were asked by the appellant which have no answers; for instance, given the speed at which the appellant was terminated, was there an opportunity to conduct investigations for the respondent to verify the allegations at least from the complainant; why was the complainant or even the husband who made the complaint not called to testify; why was the complaint not recorded with the hotel supervisor or security officer when it occurred? The appellant's employment was based on a contract; summary dismissal was not justified by the kind of allegation that was so casually made and handled as we have analysed herein above. The termination of the appellant was not according to the contract or the collective bargaining agreement. It was unreasonable and at best capricious and did not meet the threshold of the provisions of **Section 17** of the then Employment Act.

The appellant was definitely entitled to notice in accordance with the terms of the contract of employment and the prevailing collective bargaining agreement. Due to the way the appellant was summarily dismissed for unsupported allegations, he has lived for the last 15 years with a bitter taste in his mouth; no wonder he has been relentless in the pursuit of what he perceived to be an injustice. We dare say his quest for justice has now been met. For the aforesaid reasons, we find merit in this appeal, which we allow and

set aside the judgment of the High Court and substitute thereto with an order allowing the appellant's claim of terminal dues of Ksh 91,856.40/= with costs and interest from the date of judgment of the trial court. We nonetheless decline to award damages for unfair termination as this matter was determined under the old provisions of **Section 16** of the old Employment Act which allowed an employer or an employee the liberty to terminate a contract of employment without notice upon payment to the other party for the period of notice required under the contract. We however award costs to the appellant in respect of the two courts below and for this appeal.

Dated and delivered at Nairobi this 16th Day of June, 2017.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

……………........…...

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR