



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, SICHALE & KANTAI. JJA

CIVIL APPEAL NO. 25 OF 2014

BETWEEN

ELIZABETH OMORO.....APPELLANT

VERSUS

NAIROBI BOTTLERS LIMITED.....RESPONDENT

(Appeal from the Judgment and award of the Industrial Court at Nairobi (Mbaru, J) Dated 22nd November, 2013.

in

Industrial Court Cause No. 2493 of 2012)

JUDGMENT OF THE COURT

The Appellant **Elizabeth Omoro** (the appellant) was employed by the Respondent **Nairobi Bottlers Limited** (the respondent) as a Procurement Manager on permanent and pensionable terms. It was in the course of the discharge of her duties as such employee that she handled both the initiation and the execution of the respondent's contract with **Messers Skyy Space Media Limited (Sky)**, which entailed **Skyy** obtaining licences from local Authorities on behalf of the respondent. No issue arose from the respondent with regard to its approval for the initiation of the said contract. Issues only arose from the manner the contract was executed. The defence witness **RW1, Mr. Nicholas Macharia Kamunyi (Kamunyi)** while on a routine scrutiny of documents in the Finance department noticed discrepancies in the disbursements of payments approved by the appellant as against the receipts of services rendered by **Skyy**, some of which

were allegedly photocopies. This anomaly was brought to the attention of the appellant and **M/S Skyy**. A joint reconciliation exercise convened by **Mr. Kamunyi** failed to resolve the anomaly, resulting in the initiation of the disciplinary proceedings against the appellant. The appellant was given an opportunity to defend herself with regard to the detected anomalies, first before her immediate supervisor, and second, before the disciplinary inquiry panel. Both forums declined to accept the appellant's explanation resulting in the termination of her services with the respondent. Her efforts to appeal the resultant decision bore no fruits as she was not facilitated by the respondent to exercise that statutory right.

She was aggrieved and filed a memorandum of claim dated the 13th day of December, 2012 in the Industrial Court as it was then known, now the Employment and Labour Relations Court (ELRC), seeking various reliefs. The claim was resisted by the respondent's defence and response to the appellant's claim dated the 21st day of February, 2013, to which the appellant joined issue in her reply to defence and response dated the 1st day of March, 2013. The merit disposal of the said competing interests is what resulted in the impugned judgment of the **Hon. Lady Justice Monica Mbaru** delivered on the 22nd day of November, 2013.

The appellant is now before us on a first appeal raising five (5) grounds of appeal. Her complaints are that there was no evidence to justify the learned Judge's finding that there were valid reasons for the respondent's termination of her employment with them; the award arrived at by the learned Judge was unreasonably too low; the learned Judge misapplied the principles of natural justice when she failed to find that the termination process was wrongful as her appellate process was deliberately thwarted by the respondent and lastly, when she failed to find that the disciplinary process was actuated by malice.

On the existence of valid reasons for the termination of the appellant's employment with the respondent, learned counsel **Miss Marienga Tessy** submitted that none existed as the appellant had demonstrated through supportive evidence that she did not act arbitrarily but employed due diligence in the execution of the contract with **Skyy**, by strictly observing the tenets of procurement. Second, she had also demonstrated that the said termination was riddled with malice and arbitrariness on account of the respondent's failure to furnish the appellant with the reasons for termination; failure to furnish her with the Forensic Audit report which in her view were the basis on which the respondents disciplinary proceedings against the appellant were anchored. In learned counsels' view, all these factors went to negate the element of a fair administrative action. The disciplinary process did not therefore meet the threshold set by **sections 43 (1) and 45** of the Employment and Labour Relations Act (ELRA). Third, that the principles of natural justice and fair administrative action were flouted as the respondent's business code of conduct ordinarily employed in its previous disciplinary proceedings against its staff was not applied during the disciplinary proceedings against the appellant. Neither was she facilitated to process and pursue her undoubted statutory right of appeal. Fourth, that the remedy awarded to the appellant for an unfair termination process did not meet the threshold set in **section 12** as read with **sections 49 and 50** of the ELRA.

To buttress her submissions, learned counsel **Miss Marienga** cited the case of **International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom [2016] eKLR** for the principles of what does or does not amount to unfair termination of employment; **Ken Freight (EA) Limited versus Benson K. Nguti [2016] eKLR** in which this Court upheld an award of twelve (12) months compensation for unlawful termination; **Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga [2015] eKLR** in which this Court reiterated the principle on the circumstances under which this Court will interfere with the exercise of Judicial discretion by the Superior Court. Lastly, the case of **Bamburi Cement Limited versus William Kilonzi [2016] eKLR** for the reiteration of the principle that in deciding which remedy to award an employee who has been wrongfully dismissed, the Court exercises a Judicial discretion as guided by the principles contained in **section 49(4)** of the ELRA.

Learned counsel **Miss Matasi Sylvia** opposed the appeal on the grounds that the respondent rightly invoked **section 35(1) (c)** of the Employment Act, 2007 to initiate the disciplinary proceedings that resulted in the termination of the appellant's employment with them as the appellant's employment with the respondent though permanent and pensionable, it was not fixed. Neither was it for life or until retirement. That the respondent also acted within the threshold set by **section 43 & 45** of the ELRA as it accorded sufficient facilitation for her to prepare her response both to her supervisor and the disciplinary inquiry panel. The respondent demonstrated sufficiently through evidence tendered that there was impropriety, misrepresentation, and the failure to undertake due diligence on the part of the appellant when executing the contract with **Skyy**, thereby willfully and recklessly exposing the respondent to financial loss. In this regard, the respondent's initiation of the disciplinary proceedings against the appellant was therefore legitimate.

To buttress her submissions, learned counsel relied on a legal text of **John Bowers on Practical**

Approach to Employment Law 7th Edition at **page 97** for the proposition that an employee must account to his employer for all monies and property received during the course of his employment, and can be disciplined in the event of dishonesty; and the case of **Daniel N. Ngunia versus KGGCU Limited CA No. 281 of 1998** in which this Court upheld an appellant's dismissal from his employment on account of serious gross misconduct.

Learned counsel for the respondent submitted further that allegations of malice in the initiation of the disciplinary proceedings against the appellant attributed to the respondent was wanting as the appellant was made fully aware of the charges levelled against her through her immediate supervisor, the Human Resource Manager and also through the disciplinary proceedings. Counsel conceded that the Forensic Audit report was never availed to the appellant as requested for by her (the appellant), but in her view, that default neither prejudiced the appellant's defence during the disciplinary proceedings or her appellate rights as it involved other numerous aspects of the respondents' operations which had nothing to do with the contract with **Skyy**. Further that, the delay in furnishing the minutes of the disciplinary proceedings though inordinate was not prejudicial to the appellant's appellate process as she was fully aware of the reasons for her termination and she could therefore have initiated the appellate process without the said minutes. And lastly that the disciplinary process employed against the appellant was free and fair as it was conducted in accordance with the rules of natural justice and the tenets of the ELRA.

On the appropriateness or otherwise of the remedy awarded by the trial Court, learned counsel submitted that the remedy awarded to the appellant by the trial Court was appropriate, just and fair as the learned trial judge took into consideration the appellant's admission that the respondent incurred losses in connection with the manner the contract with **Skyy** was executed under her supervision. She therefore breached her duty as a Procurement Manager with delegated responsibilities, and her loyalty to the respondent in her capacity as an employee. In the circumstances, the respondent was entitled to relieve her of her employment with them after losing faith in her as a dependable employee, argued learned counsel.

To buttress the submissions on this aspect of the appeal, learned counsel cited the case of **Mbogo versus Shah [1969] EA93** on principles that guide an appellate Court in determining whether to interfere or otherwise with the exercise of the discretion of the trial court; and, the case of **East African Airways versus Knight [1975] EA 165** for the holding *inter alia* that a permanent and pensionable employment does not mean for life or until retirement

This being a first appeal, our duty, was appropriately put in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123**, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

This court further stated in **Jabane vs. Olenja [1986] KLR 664**, thus

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88)1KAR 870.”

In determining the competing interests before her, the learned trial Judge analysed the record before her and then drew out four issues for determination namely:

- (1) *Whether the reason for the termination was valid.*
- (2) *Whether there was a fair reason to justify the termination.*
- (3) *Whether natural justice is underpinned in employment contracts, and*
- (4) *Lastly, whether there are any remedies available to the claimant.*

With regard to the validity and fairness of the reasons for termination, the learned Judge made observations that the respondent had complied with the legal prerequisites with regard to the termination of the appellant's employment with them as it carried out investigations, followed up by a reconciliation exercise under **Mr. Kamunyi** and participated in by the appellant and a Director of **Skyy**. The said reconciliation exercise failed to reconcile disbursements of funds approved by the appellant as against receipts submitted by **Skyy** for services rendered. That these anomalies were brought to the attention of the appellant who acknowledged that indeed these were brought to her attention, first, through her supervisor to whom she gave an explanation. The supervisor found the explanation given by the appellant unsatisfactory, and on that account recommended the initiation of the disciplinary proceedings through the disciplinary inquiry panel. The appellant admitted to have appeared and defended herself before the said panel in the presence of a colleague of her own choice.

On account of all the above, the learned Judge made findings as follows:-

“41” I therefore find the claimants rights were not violated this far. Before the suspension, there was a meeting between the claimant, her supervisor and the human resource manager. The reason for suspension were discussed to the point that she was advised to resign which she refused to do and was thus put on suspension. She cannot therefore say she was not aware of the reason for her suspension.”

With regard to the issue as to whether principles of natural justice underpin employment contracts, the learned Judge reiterated the above observations and made findings that the procedure employed by the respondent in the termination of the appellant's employment with them as outlined above met the threshold in **Sections 41 (2) and 45 (5)** of the ELRA. The respondent had also considered the appellant's emphatic assertion that before the initiation of the said disciplinary proceeding, she had been a good performer in the discharge of her duties as a procurement manager for over 8 years with a clean record and had also previously successfully handled contracts of amounts larger than that which was involved in the contract with **Skyy**. Against the above observations, the learned Judge reiterated her earlier findings that the respondent had valid reasons for terminating the appellant's employment with them, but faulted the process of termination, terming it unfair, on account of the respondents failure to state the reasons for termination in the letter of termination and, second, for the failure to facilitate the appellant to exercise her undoubted statutory right of appeal entrenched in **section 35** of the Act.

Turning to the issue of an appropriate remedy, with the exception of an award of one month's salary in lieu of notice, the rest of the appellant's claims were discounted for the reasons that one month's salary in lieu of notice and leave days due and not taken had been paid for by the respondent before the close of the trial; loss of salary until retirement was discounted because there was a binding contract between the appellant and the respondent which contained an inbuilt provision for the termination of the said contract by either party for good cause upon notice of one month before retirement. The respondent had therefore exercised its right under the said contract and for valid reasons as already set out above. The claims for house, medical and telephone allowances were discounted for being work benefits which could not survive beyond the notice period. Remedies claimed on account of alleged malice, harassment or any other illegal acts against the appellant were discounted for their non disclosure by the content of the record before her

We have given due consideration to the above findings in the light of the totality of the record, the rival submissions and case law cited by either side. In our view, only two issues arise for our determination namely:

- (1) Whether the reasons given by the respondents' termination of the appellant's employment with them were valid; and,*
- (2) Whether the remedy awarded to the appellant by the trial court for an unfair termination process was appropriate in the circumstances of this appeal.*

From the submissions of learned counsel **Miss Marienga**, the appellant took issue with the learned Judge's finding that there were valid reasons for the respondents' termination of her employment with them, because she had tendered supportive evidence to disprove allegations levelled against her of impropriety in the execution of the respondent's contract with **Skyy**, which formed the basis for the charges she faced, first before her supervisor, and second, during the disciplinary inquiry panel proceedings all of which according to her sufficiently demonstrated that every step she took towards the execution of the said contract had supportive proof of both consultations and authorizations by the persons who were legitimately involved in the execution of the said contract. In her view, this is what accounted for the respondent's witnesses failure to establish any financial loss arising from the execution of the said contract, on the one hand and the failure to avail the Forensic Audit report by **Deloitte & Touche** on the other hand.

The respondent's rebuttal of the above assertion was through the testimonies of **RW1 Nicholas Macharia Kamunyi (Kamunyi)** and **RW2 Winnie Pertet (Pertet)**. Both witnesses asserted that impropriety arose from the fact that when issues of non-payment for council licences arose, **Kamunyi** carried out inquiries and then took up the issue with the appellant as the officer tasked with the execution of the respondents' contract with **Skyy**. Both scrutinized the relevant documentation involved in the said transaction. These revealed that funds had been disbursed towards the payment for the said services. **Kamunyi** thereafter facilitated a reconciliation exercise, with the participation of the appellant and a Director of **Skyy**, in the course of which, anomalies in the execution of the said contract arose. These were on account of the failure of the funds approved by the appellant and disbursed for services allegedly rendered by **Skyy** to tally with the receipts for services rendered as tendered by **Skyy**. There was also alleged failure to follow the laid down procedures for making disbursements, some of which were unauthorized; while others were effected against photocopies of receipts. The alleged performance bond guarantee that ought to have been executed by **Skyy** in favour of the respondent was also nonexistent as the same had been founded on alleged unauthentic documents. The estimates **Mr. Kamunyi** gave of approximately 5.6 million as the financial loss suffered by the respondent from the execution of the said contract was the shortfall of what could not be accounted for from the total funds disbursed towards the execution of the said contract as per the reconciliation exercise.

As for the failure to avail the Forensic Audit report by **Deloitte & Touche**, both **Mr. Kamunyi** and **Pertet** stated that the respondent was justified in withholding the said report and such withholding was not prejudicial to the appellant as the said Audit was not confined to the **Skyy** contract alone, but covered the respondent's entire establishment. Second, that as at the time the disciplinary proceedings were undertaken and concluded against the appellant, the Forensic Audit was still ongoing as it ended around August of that year. Third, that the disciplinary proceedings against the appellant were based solely on the failure to reconcile disbursements approved by the appellant against receipts for services allegedly rendered to the respondent arising from the contract with **Skyy**.

Bearing the totality of the above in mind, it is our finding and as correctly found by the learned Judge, that the appellant's obligation in the discharge of her employment duties with the respondent was to execute functions assigned to her by her employer in accordance with the laid down procedures and also to safeguard the interests of the respondent in the course of overseeing the execution of the contract with **Skyy**. From the record, there is no dispute that she consulted widely and obtained approvals for the initiation of the said contract, in respect of which the respondent raised no issues. What the respondent raised issue with were disbursements approved by her as against the receipts surrendered for services

rendered on behalf of the respondent by **Skyy**, which in **Mr. Kamunyi's** view, did not tally. **Mr. Kamunyi** was firm that they went over all the documentation tendered by the appellant for funds approved by her and disbursed towards the execution of the said contract with **Skyy** in which **Skyy** participated through its director, but they failed to tally. **Mr. Kamunyi** was also emphatic that some payments were on the strength of photocopies of receipts. While others were effected in contravention of the laid down procedures. All the above factors is what **Mr. Kamunyi** termed impropriety.

Oxford Concise English Dictionary defines "impropriety" among others as "an instance of improper conduct" or "incorrectness". That definition fits what has been described above as impropriety. Nowhere in the appellant's submission has she contended that **Mr. Kamunyi** fabricated the evidence on the reconciliation exercise, and lack of tallying between disbursements made with the approval of the appellant towards payment for services allegedly rendered by **Skyy**, against active receipts issued for those services by **Skyy**. Taking the totality of all the above, it is our finding that the finding of the learned Judge that impropriety had been established hence her conclusion that valid reasons for the respondent's termination of the appellant's employment with them was based on sound evidence. We accordingly affirm the said finding.

Turning to the finding of existence of an unfair process of termination, we have no doubt in our minds that the learned Judge reached the correct conclusion on this, as the respondent has not contested the failure to specify the reasons for termination in the letter of termination served on to the appellant, on the one hand, and the failure to facilitate the appellant's exercise of her statutory right of appeal underpinned under **section 35** of the Act on the other hand, a position conceded by learned **counsel Matasi**. On this account we affirm the learned Judge's finding that the process for termination was unfair.

Turning to the second issue, having found that the process of termination of the appellants' employment with the respondent was unfair, she was definitely entitled to a remedy. The learned Judge only allowed one month's salary in lieu of notice. The position in law is that determination of an appropriate remedy for an employee who has been wrongfully terminated is a matter of judicial discretion by the Court, with the only caveat being that such discretion should be exercised judiciously with a reason and not on whim or caprice. See the case of

International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom (Supra) and Bamburi Cement Limited versus Kilonzi (Supra).

In **International Planned Parenthood case** (supra) this Court upheld an award of ten (10) months' salary as compensation for wrongful loss of employment in addition to three months' salary in lieu of notice. In upholding the decision of the trial Court, this Court made observations that **section 15** of the Labour Institutions Act donates power to the Industrial Court to pay compensation to an employee to a maximum of twelve months in instances where such a court finds that either the dismissal or termination of such employees from his/her employment was unfair; that **section 50** of the same Act requires the court to be guided by the provisions of **section 49** of the Employment Act, 2007 in determining damages; and also that it is clear that the first two remedies falling under **section 49(1)** of notice pay and twelve months pay can be awarded concurrently.

In **Kenfreight (EA) Limited versus Benson K. Nguti [2016]** eKLR this Court upheld the trial Courts' award of twelve (12) months compensation for unlawful termination and in doing so reiterated the principle that an award of a remedy under the Employment Act 2007 is a matter of the exercise of Judicial discretion which, can only be interfered with or reversed on appeal if it is demonstrated that the Judge misdirected himself on the law or that he misapprehended the facts and thereby arrived at a wrong decision. In the appeal under review, the primary consideration for upholding the period allowed for compensation was primarily the length of the period served by the employee and the likely inability to access fresh employment on account of the factors highlighted before the trial Court.

In the case of **Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga** (supra) this Court upheld an award of nine months compensation because the Employment Act permits the trial court to award compensation upto a maximum of twelve (12) months' salary. Second, that the appellant in the

said appeal had not demonstrated that the trial Court had abused the exercise of its discretion.

Not to be lost sight of are the principles that guide the exercise of that discretion as set out in **section 49(4)**, namely:

(a) The wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer.

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) Any expenses reasonably incurred by the employee as a consequence of the termination;

(k) Any conduct of the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(l) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.

The learned trial Judge took all the above into consideration when she arrived at the award of one month's salary in lieu of notice as the appropriate remedy. We have revisited the said award in the light of the totality of the record and both the learned Judges' reasoning before arriving at the said award and our own reasoning as set out above. In deciding either way, we have to bear in mind the cardinal principle for doing so as expounded in **Mbogo versus Shah** (supra). Bearing the totality of the above in mind, it is our view that sound reasons exist for us to interfere with the learned trial Judge's exercise of discretion in awarding the appellant only one month's salary in lieu of notice. Our reasons for such interference are that, the trial Judge failed to appreciate the provisions of **section 49(1)** of the ELRA which donates power to the Court to award both the value of the notice in addition to compensation. Second, she also failed to note that besides the incident arising from the execution of the respondents' contract with **Skyy**, the appellant had previously effectively and efficiently handled transactions involving bigger amounts of money than the **Skyy** contract. Third, she also failed to appreciate that had the appellant been facilitated to exercise her undoubted statutory right of appeal, the respondent may have had a second opportunity to reconsider her position. Fourth, she also failed to appreciate that although the employer suffered financial loss, there was no evidence that the appellant had personally benefited from the said financial loss. Not even suspicion that she may have so benefited was entertained. This was therefore a case of pure mismanagement or failure to act with due diligence as was put by the learned Judge.

In the result, we are minded to affirm the heads of claims discounted by the trial court as the discounting of these was well founded both on evidence and the law. We also affirm the award of one month's salary

in lieu of notice as awarded by the trial court. In addition to the value of the notice, we allow four months' salary as compensation for the unfair process of termination, which works out to Kshs. $445,716.43 \times 4 = 1,782,865.72$ which we allow.

2. The amount will carry interests at Court rates from the date of judgment in the superior Court till payment in full.

3. The appellant will have costs both on appeal and the court below.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S.OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR