



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B. M. KARIUKI, & SICHALE, JJA)

CIVIL APPEAL NO. 37 OF 2010

BETWEEN

JACQUELINE KIARAHO.....APPELLANT

AND

CO-OPERATIVE BANK OF KENYA.....RESPONDENT

(Being an appeal from the Judgment and decree of the

High Court of Kenya at Nairobi (J.M. Khamoni, J.)

dated 3rd August, 2008)

in

H.C. CIVIL CASE NO.2158 OF 2001)

JUDGMENT OF THE COURT

The appellant **JACQUELINE KIARAHO** filed an appeal against the judgment of J.M. Khamoni delivered on the 8th August, 2008. The **CO-OPERATIVE BANK OF KENYA LTD** was named as the respondent.

A brief background to this appeal is that on the 26th October, 2009 the appellant (the then plaintiff) filed suit against the respondent (the then defendant) vide an amended plaint dated 9th February, 2001 and filed on 9th May, 2001. In the amended plaint the appellant averred that she was an employee of the respondent with effect from 24th April, 1996 until 24th October, 2000 when she was summarily dismissed without just cause and without being heard. In an amended defence filed on 14th May, 2001 dated 11th May, 2001 the respondent admitted having terminated the appellant from its employment. However, it was the respondent's averment that the termination was lawful and justifiable.

The dispute between the two was heard by Khamoni, J. who in a judgment dated 8th August, 2008 dismissed the appellant's suit. The appellant was dissatisfied with the said outcome and filed this appeal.

In the appellant's memorandum of appeal dated 1st March, 2010 the appellant listed 5 grounds of appeal. These can be summarized as follows:

- I. The learned Judge failed to determine whether the appellant's dismissal was unlawful.
- II. The learned Judge failed to find that the appellant's dismissal was unlawful and actuated by malice.
- III. The learned Judge erred in finding that the appellant's dismissal was unlawful.
- IV. the learned Judge erred by finding that there was no evidence that the appellant had not been paid her terminal dues and a month's salary in lieu of notice.

The appeal came before us for plenary hearing on 16th February, 2017. Miss Ouma learned counsel for the appellant in urging the appeal urged us to find that the appellant dismissal was unlawful and was actuated by malice; that the appellant was summarily dismissed without being given a hearing and that no reasons were given for her dismissal.

In opposing the appeal, Mr. Mayande contended that contrary to the appellant's assertions, the appellant's termination was lawful. Further, that the respondent was not obliged to give the appellant reasons for termination as long as the dismissal was as per the contract of employment.

We have considered the record, the submissions of counsel, relevant authorities as well as the law. As this is a first appeal we remind ourselves of our primary role of re-analyzing and re-evaluating the evidence tendered in the trial court. In so doing we should never lose sight of the fact that we never had the benefit of hearing and observing the demeanour of the witnesses. In the celebrated case of **SELLE VS ASSOCIATED MOTOR BOAT CO.** [1968] EA 123 it was held:

“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 are 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Mohamed Sholan (1955), 22 E.A.C.A 270”.

The facts of this case are fairly straightforward. The respondent offered the appellant a letter of appointment on 22nd April, 1996 appointing her as a Customer Service Officer. Upon completion of her probationary period, the respondent vide a letter dated 13th November, 1996 confirmed the appellant on permanent terms of employment with effect from 25th October, 1996. On 26th January, 1999 the appellant was promoted to the position of Supervisory Grade I. Again this promotion was on probationary terms. On 23rd August, 1999 the respondent confirmed the appellant's promotion and the confirmation of the elevated position was to take effect from 1st July, 1999. To that extent, all was well between the appellant and the respondent.

However, on 22nd August, 2000 the respondent wrote to the appellant and informed her that her **“...services were no longer required as a result of the ongoing restructuring process in the bank.”** The appellant appealed against the retrenchment vide her letter dated 29th August, 2000. Following the appellant's appeal, a special committee was constituted to hear her appeal. The special committee met on 4th September, 2000 and the appellant was given an opportunity to argue her appeal. Upon consideration of the appellant's appeal, the committee recommended that the appellant be reinstated. Following the committee's recommendation the appellant was reinstated and she was informed of the reinstatement vide

a letter dated 25th September, 2000. The letter which was addressed to the appellant stated:-

“RE TRANSFER TO MARKETING & PUBLIC RELATIONS DEPARTMENT

Your letter dated 29th August, 2000 refers.

I refer to your appearance before a committee on 4th September, 2000 and your presentation at the time. After lengthy deliberation, it has been decided that the Bank’s letter to you dated 22nd August, 2000 should be withdrawn and that you should be given a chance to prove your worth.

In this regard you are hereby transferred to Marketing & Public Relations Department. You will be required to deal in product development, analysis and management of individual products, amongst other duties that will be assigned to you by the head of department.

Through a copy of this letter, the Chief Manager – Marketing and Public Relations is requested to provide you with a job description, set specific targets and arrange to provide monthly performance reports to the responsible General Manager, who will in turn compile quarterly reports for my attention.

Signed

E.K. MUREITHI, M.B.S.

MANAGING DIRECTOR.”

As to whether the appellant received this letter before 3rd October, 2000 is contentious. However, on 3rd October, 2000 the appellant wrote to the respondent thus:-

“RE: RETRENCHMENT

Mr. Erastus Murithi

The Managing Director

The Co-operative Bank

NAIROBI.

3RD October, 2000

Dear Sir,

RE RETRENCHMENT

I wish to thank you most sincerely for your kindness and great consideration that made the Bank listen to my case and reinstate me from retrenchment.

However, after having received my retrenchment letter, and subsequent appearance before the committee that deliberated my case, I am not confident that I shall perform my duties diligently and with the same vigour as before.

After careful consideration with my family, I humbly request you to grant me the retrenchment option.

I am grateful for the invaluable experience that I have gained from the Bank in my various stations, where I enjoyed working.

Thank you and may God bless you.

Yours faithfully,

Jacqueline Kiaraho,

Marketing.”

Upon receipt of the appellant's letter of 3rd October, 2000 the respondent dismissed the appellant vide its letter of 24th October, 2000. In the letter of dismissal the appellant informed the appellant as follows:-

“DISMISSAL

We refer to the Managing Director's letter to you dated 25th September 2000 and your response dated 3rd October, 2000 and note that you have refused to obey lawful and proper instructions contained in the letter of 25th September, 2000 referred to above.

Consequently, you are hereby dismissed from the service of the Bank in accordance with provisions of Appendix 14 of the Staff Manual with effect from the date of this letter.

In accordance with special conditions in the Bank's letter of offer to you for a house loan, we hereby demand full and immediate repayment of the total amount outstanding on the loan account together with the interest accrued, which to date is as indicated below:

House loan	: Kshs.2,665,937.00
Interest Charge	: Kshs.4,383.00

Kshs.2,670,320.00

Take note that the outstanding loan will attract interest at prevailing commercial rates of interest with effect from the date of this letter until the same is repaid in full.

You should hand over any Bank inventory and/or documents, which may still be under your control, together with the staff identification card, issued to you to the Ag Chief Manager – Marketing & Public Relations immediately on receipt of this letter.

Any monies due to you less liabilities owed by you to the Bank will be calculated and applied as appropriate as soon as possible. Please have the attached Form HRD/2 completed and return it to this office as soon as possible.

Signed

MRS. W. WELTON

CHIEF MANAGER

HUMAN RESOURCS DEV.”

It is this letter that provoked the appellant to file suit, the subject of this appeal. In the trial court, the

appellant contended that her dismissal was without a justifiable cause and that she was not heard before the termination, she testified that as a result of the termination she had been unable to secure employment; that she had 24 years of service left (as she was then 31 years old) before getting to the retirement age of 55 years and that had she worked up to the age of 55 years, she would have been entitled to 30 years of pension. Her claim therefore was for

“(a) General damages:

(b) Permanent injunction restraining the defendant, its agents, servants or auctioneers from advertising and/or selling the plaintiff’s property known as Nairobi/Block 112/51 recalling the amount due in her Co-operative Credit Card and from converting the Plaintiff’s Staff Loans to Commercial Loans pending determination of this suit;

(c) Special damages of Ksh.42,946,176/- together with interest thereon at the rate of 30% from the date of filing till payment in full;

(d) An order that the Defendant does pay to the plaintiff a retrenchment package particulars to be provided at the hearing hereof.

(e) Costs of the suit;

(f) Interest on (a) and (d) hereinabove at Court Rates;

(g) Any other or further relief as this Honourable Court may deem fit”.

The respondent denied the appellants assertions and maintained that in the letter of offer dated 22nd April, 1996 the respondent was entitled **“... to terminate employment on payment of one month’s notice.”**

It was the appellant’s case that she did not receive the letter of 25th September, 2000 reinstating her and transferring her to the Marketing and Public Relations Department and that her letter of 3rd October, 2000 intimating her resignation was done without the benefit of knowing that she had been reinstated. She however testified that in mid-September whilst at home she was called and told her appeal had been successful and that she was asked to report to one Mr. Marube. She told the trial court that upon her reporting in this new department she felt unwelcomed and she was not given any work. She said she spent her days lazing around and sometime spent time with the security guards. This prompted her to write the resignation letter of 3rd October, 2000. The appellant contended that she received the letter of reinstatement after receiving the letter of summary dismissal which accused her of failing to comply with the terms of the letter of reinstatement of 25th September, 2000. She maintained that she knew of her new department through oral communication and not vide the letter of 25th September, 2000.

The Learned trial judge considered the rival positions and concluded that:-

“... the defendant’s letter of summary dismissal dated 24th October 2000 was written in reaction to the plaintiff’s letter for resignation under retrenchment.”

We too are of a similar view. The appellant’s version that she knew of her reinstatement and posting to a new department through oral communication is unconvincing. In her letter dated 3rd October, 2000 she thanked the respondent for **“listening”** to her and for reinstating her **“... from retrenchment”**. In our view this reaction could only be after receipt of the letter of 25th September, 2000 which informed her of her new place of work and the reinstatement. On receipt of the appellant’s letter of 25th September, 2000, the respondent dismissed the appellant vide its letter of 24th October, 2000.

The next issue for our determination was the appellants entitlement upon summary dismissal. Suffice to state that the governing Act at the time of the appellant’s dismissal was the Employment Act, Chapter

226 of the Laws of Kenya as the Employment Act 2007 came into force on 2nd July, 2007, long after the appellant had been dismissed. S. 16 of the Employment Act provided as follows:-

“ either of the parties to a contract of service.... may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him as the case may be, in respect of the period of notice required to be given under the corresponding provision or the subsection.”

The provisions of S.16 of the Employment Act were amplified in the case of **DIRECTLINE ASSURANCE CO. LTD VS JEREMIAH WACHIRA ICHAURA CA NO 68 OF 2014** wherein this Court considered the issue of whether general damages are payable on a contract of employment, such as the one between the appellant and the respondent and held:-

“We now turn to consider whether the respondent was lawfully entitled to an award of damages in the sum of Ksh.4,200,000/- as general damages. Both parties concede that the applicable law to the dispute was Cap 226. The general rule then was that the court could not award general damages for breach of contract and or employment terms. This was succinctly summed up in the case of Securicor Courier (K) Ltd v Benson David Onyango & Ann, Civil Appeal No. 323 of 2002 (ur) as follows:

„as general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract...?”

Further in the case of Joseph IleliKikumbi v Central Bank of Kenya (supra) it was held-

“The law with respect to the quantum of damages payable to an employee who is wrongfully dismissed is now well settled in this jurisdiction. When the contract of service contains a termination clause, the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause regardless of the nature of the Employment following the unlawful termination of such service contract. There is then breach of contract and the measure of compensation or indemnity or general damages or special damages is the loss the employee would incur during the stipulated period of the termination clause or notice ...”

By parity of reasoning and in view of a long line of decisions emanating from this Court, the appellant was not entitled to general damages and neither was she entitled to special damages and/or a retrenchment package. Her employment had been terminated on ground of redundancy. She successfully appealed against termination on that ground.

As the second termination was not on ground of redundancy she was not entitled to any claim based on termination on the ground of redundancy. She could not eat her cake and have it. We find that her entitlement was one month salary in lieu of notice as per her letter of employment, the respondent having dismissed her summarily vide its letter of 24th October, 2010. In our view, the learned trial judge rightly concluded that the appellant's entitlement was as per the contract of service which in this case was one month salary in lieu of notice. See also **SHIMBA TOURS SERVICES LIMITED VS. WILSON MISE KIGARA CA 135 OF 1988**

In view of the foregoing, we find no merits in this appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 28th day of July, 2017.

E.M. GITHINJI

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR