IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G. B. M. KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 113 OF 2014

BETWEEN

MOI TEACHING & REFERRAL HOSPITAL..... APPELLANT

AND

HOSEA CHERUIYOT MARU .....RESPONDENT

(Being an appeal from a judgment of the Industrial Court of Kenya at Nakuru (Ongaya, J.) dated 22nd March, 2013 in ***Industrial Cause No. 2 of 2012***

Formerly Nairobi Industrial Cause No. 1302 of 2011*)*

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JUDGMENT OF THE COURT

The appellant (the then respondent) was sued by the respondent (the then claimant) vide a statement of claim dated 26th July, 2011. In the statement of claim the respondent averred that he was employed by the appellant on 20th March, 2003; that on the 29th June, 2007 he was unlawfully terminated by the appellant; that he appealed against the dismissal but his appeal did not find favour with the appellant. He sought the following orders:-

> "**1. The termination of the plaintiff/claimant be declared unlawful and illegal from the very beginning.**
>
> **2. Upon such declaration the defendant be ordered to reinstate the plaintiff/claimant under section 15 of the Labour Institution Act No. 12 of 2007 to his job, or equally suitable job, without loss of any salary or allowances from the date of the purported summary dismissal i.e. on 29th day of June 2007.**
>
> **3. That the defendant be ordered to pay the plaintiff/claimant all allowances, privileges, benefits including promotions and any other legal dues lost during the period of dismissal as soon as possible or as per the courts directions.**
>
> **4. The defendant do pay the plaintiff/claimant full costs incurred over this claim/suit".**

In a statement of defence dated 30th August, 2011 the appellant maintained **"…that it had every justification in dismissing…"** the respondent.

The trial was conducted by Ongaya, J. who in a judgment dated 22nd March, 2013 found in favour of the respondent. The appellant was aggrieved by the outcome of the trial and hence this appeal. In a memorandum of appeal dated 23rd April, 2014 the appellant listed 5 grounds of appeal. These can be summarized as follows:- that the trial court erred in awarding the respondent Ksh.2,801,333/- which award is tantamount to payment for work not done; that the said sum of Ksh.2, 801,333/-exceeded the 12 months gross wage contrary to **section 49(1)(c)** of the Employment Act; that the trial court erred in ordering reinstatement inspite of the fact that 3 years had lapsed since termination and finally, that the claimant's suit was time barred.

On 22nd June, 2017 the appeal came before us for plenary hearing. Mr. Muriuki and Mr. Andambi learned counsel for the appellant and respondent respectively wholly relied on their submissions filed on 24th April, 2017 and 15th May, 2017 respectively. The appellant further relied on its list of authorities filed on 24th April, 2017.

In the written submissions the appellant contended that on or about 26th June, 2007 the respondent led other employees in an unlawful strike and protests, consequence upon which he was lawfully terminated. The appellant further contended that the claimants suit was time barred as the cause of action arose on 29th June, 2001 (the claimant's suit having been filed on 26th July, 2011), that S.90 of the Employment Act requires that suit be filed within 3 years; that this being a point of law, it could be raised at any stage; that an employee cannot be reinstated on expiry of 3 years of the dismissal (S.12 (3) (vii) of the Industrial Court Act; that the award of Ksh.2,801,333/- was tantamount to payment for work not done and that the said award (if at all) exceeded the 12 months gross wage allowed under S.49(1) (c).

In opposing the appeal, the respondent in his written submissions contended that the Employment Act came into force on 2nd June, 2008; that the respondents cause of action arose on 29th June, 2007 and hence S.90 of Employment Act was inapplicable; that the limitation period was 6 years as the claim was based on contract of employment and not 3 years; that the reinstatement (in spite of the lapse of 3 years) was a relief permissible under S.12(3)(viii) in exercise of the court's discretionary power; that the award of Ksh.2,801,331/- was for the period between 29th June, 2007, the date of dismissal and 22nd March, 2013 which was the date of the judgment (a total of 69 months) and that this was justified as the dismissal was unlawful and finally that the court was entitled to award damages exceeding the 12 months gross wage.

We have considered the record, the appellant's and respondent's written submissions, the authorities cited as well as the law. This is a first appeal before us. As a first appellate court we remind ourselves of our primary role of re-analyzing and re-evaluating the evidence tendered in the trial. However, in re-analyzing and re-evaluating the evidence, we should always bear in mind that we did not have the benefit of hearing and observing the demeanour of the witnesses. In the celebrated case of **Selle v Associates Motor Boat Company [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."***

We also remind ourselves that this Court will not be in haste to interfere with a finding of fact by a trial court, unless such a finding is based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he/she did. See **EPHANTUS MWANGI & ANOTHER V. DUNCAN MWANGI [1982-99] 1 KAR 278.**

The undisputed facts of this appeal are that the respondent was employed by the appellant on 20th March, 2003. It is also not in dispute that the respondent was dismissed vide a letter dated 29th June, 2007. What is in contention however, is whether the termination was unlawful. In his testimony in court the respondent told the trial court that he did not take part in the strike held on 26th June, 2007 by virtue of the fact that he held a managerial position. The above notwithstanding, he received a letter of dismissal on 28th June, 2007. He appealed against the dismissal vide his letter of 4th July, 2007. He got a response vide a letter dated 27th July, 2009 which upheld his dismissal.

Anne Chemwashi, the then Human Resource and Training Manager testified on behalf of the appellant. It was her evidence that the respondent had been served with two warning letters of 18th December, 2006 and 25th May, 2007. It was her further testimony that on 26th June, 2007 the respondent took part in an illegal strike which caused the appellant to fire him. She however, admitted in cross examination that the respondent was not given a hearing before the dismissal. The trial court considered the above evidence and came to the conclusion, rightly so in our view, that the termination was unlawful. This is because the appellant does not deny that the respondent was not given an opportunity to be heard before the dismissal.

Having come to the above conclusion, the next issue for our determination is whether the respondent was entitled to the orders sought. The trial court did order reinstatement of the respondent into the appellant's employment. S12 (3) (vii) of the Industrial Court Act (now called Employment and Labour Relations Act) provided as follows:

> "(**3) in exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders:-**
>
> **i. …**
>
> **ii. …**
>
> **iii. …**
>
> **iv. …**
>
> **v. …**
>
> **vi. …**
>
> **vii. An order for reinstatement of an employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or…."**

From the record, it is clear that the respondent was dismissed on 29th June, 2007 whilst the impugned judgment was delivered on 22nd March, 2013. Clearly therefore, more than 5 years and 8 months had lapsed from the date of dismissal. The period of 3 years having lapsed it is our view that it was erroneous for the trial judge to have ordered reinstatement.

The other ground of appeal was that the learned judge erred in awarding a sum of Ksh.2,801,333 as arrears for unpaid salary. Again, it is not in dispute that from the date of termination that is 29th June, 2007, the respondent did not work for the appellant. **S. 49(1)** of the Employment Act provides for payment of compensation not exceeding an equivalent of 12 months gross salary as an alternative remedy

to reinstatement available to an employee whose services have been wrongly terminated. (see **KENYA AIRWAYS LIMITED VS. AVIATION AND ALLIED WORKERS UNION & 30 OTHERS [2014] eKLR**. We too, think that the payment of arrears for the 69 months that the respondent did not work was unjustified. We find that her entitlement is as set out in S.49 of the Employment Act, and we award 12 months gross salary as damages.

One more issue deserves our mention. It was urged by the appellant that the claimant's suit was time barred. The appellant contended that the respondent's suit was time barred and that this being a point of law it could be raised at any stage. We do not wish to belabor this point save to state that the Employment Act came into operation on 2nd June, 2008. The respondent was dismissed on 28th June, 2007. We are in agreement with the respondent's submissions that the Employment Act and in particular **Section 90** which provides that a suit be filed within 3 years from the date of the cause of action is inapplicable as the Act cannot be applied retrospectively. This ground of appeal fails.

The sum total of the above is that this appeal succeeds partially. The order for reinstatement is set aside, the respondent is to be paid a gross salary for 12 months and not Ksh. 2,801,331.00 as salary arrears.

Given the fact that this appeal partially succeeds, we direct that each party shall bear its own costs. It is so ordered.

Dated and delivered at Nakuru this 27th day of September, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

.....…….

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR