



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & GATEMBU, JJA)

CIVIL APPEAL NO. 127 OF 2013

BETWEEN

THE YOUTH AGENDA..... APPELLANT

AND

RITA KIJALA SHAKO..... RESPONDENT

(Appeal from the Judgment of the Industrial Court of Kenya

at Nairobi (E. K. Mukunya, J.) dated 24th February, 2012

and consequential decree issued on 16th March, 2012

in

Industrial Court Cause No. 583 of 2010)

JUDGMENT OF THE COURT

1. The appellant, Youth Agenda, a civil society organization engaged in the promotion of positive participation of the youth in governance and development in Africa, employed the respondent, Rita Kijala Shako, as its chief executive officer under a contract of service (the contract of service) dated 28th November 2008 for a period of 2 years commencing on 5th January 2009. The responsibilities of the respondent as the chief officer were set out in a job description incorporated into the contract and included the overall strategic leadership of the appellant in the implementation of the appellant's mandate; operational and financial management; human resource management and other administrative functions.

2. Among other things, the contract of service provided that confirmation of employment would be made after successful completion of a 6 months probation period; that the respondent's gross salary would be Kshs. 200,000.00 per month; that during the contract period, the "employment may be terminated by either party giving three month's written notice (such notice to expire on any day of any month) or by paying three month's full salary in lieu thereof"; and that any material breach of the contract by one party gives the other party the right to sue for damages.

3. All appears to have gone well in the employment relationship between the parties until December 2009. On 22nd December 2009, the appellant wrote a letter to the respondent to inform her that it was “*in the process of reorganizing operations at the secretariat and profiling the staff for job compatibility*” and that in that regard, the respondent had “*been reassigned to undertake new responsibilities of which details will be discussed with you in early January 2010.*” The letter went on to inform the respondent that another person had in the meantime been appointed as the Chief Executive Officer to whom the respondent was “*required to hand over all organization assets in your custody including any pending jobs and communications.*” The appellant concluded the letter by informing the respondent “*the Board will advise you on your new contractual terms once you accept the offer of your new responsibilities.*”

4. That letter was apparently delivered to the respondent “*after the closure of the office for Christmas break*” as indicated in the respondent’s email response thereto sent on 5th January 2010 to one Jackson Mwalulu who appears to have been a board member of the appellant in which she wrote, “*to enable me substantively reply to you, kindly let me have the precise contractual terms of my “reassigned responsibilities”.*”

5. The appellant does not appear to have responded to the respondent’s email of 5th January 2010. After the Christmas break, the respondent reported to work on Monday 11th January 2010 as scheduled but could not gain access to what had hitherto been her office as she found the locks to that office had been changed. On the same day, she sent an email under the subject “Change of Locks to the office of the CEO” to the officer in charge of administration, one Wanja and copied the same to said Jackson Mwalulu. She stated:

“Dear Wanja,

I hope this email finds you well.

I reported to work this morning in accordance with the scheduled re-opening of the office after the Christmas break.

The locks of my office have been changed. There are a number of sensitive documents in the CEO’S office and would like to know whether you are taking responsibility for them.

Kindly clarify the matter urgently as the officer in charge of office administration.

Rita.” [Emphasis]

The response to that email came from the said Jackson Mwalulu who on the same date wrote:

“Hi Rita;

Your email to Wanja this morning and which you copy to the board members is noted. The board is in the process of reassigning you new mandate to YAA as the letter to you clearly stated. We shall communicate with you soonest possible on this one. Meanwhile, you do not need to access the ceo’s office until and unless you are handing over to the acting ceo or the board since you are no longer the organisation’s ceo.

J. Mwalulu, for the board.” [Emphasis]

6. On 15th January 2010, the appellant wrote a letter to the respondent, under the hand of Jackson Mwalulu, in which it alluded to its earlier letter dated 22nd December 2009 and informed the respondent that “*after elaborate deliberations*” the appellant considered it prudent to offer her “*the position of assistant program officer in charge of library, archiving and policy documentation*” in which position she was expected to “*work closely*” with the office of the appellant’s “*acting chief executive officer for guidance*” and be “*subject to monthly evaluations by the board.*” It is hardly surprising that the

respondent declined to accept the new position. In her email to the appellant sent on 22nd January 2010, she stated that *“I will not be accepting the proposed position of assistant programme officer in charge of Library, archiving and policy document.”*

7. On 28th January 2010, the appellant wrote to the respondent under the subject *“Termination of contract for service”* and asserted that the respondent had been reassigned new duties through a letter dated 22nd December 2009 by the board and that *“it has come to the notice of the board that you have absconded from duties and the board has decided to terminate your contract effective from the 23rd December 2009.”*

8. A subsequent letter dated 26th February 2010 addressed to the respondent by the appellant under the subject *“Termination of contract for service”* referred to a meeting held between the respondent and a director of the appellant, one Caroline Oduor, and informed the respondent that *“it is with deep regret that I have to confirm that your services with the Youth Agenda has been terminated. Your services as stated in your termination letter dated 28th January are no longer required.”* By the same letter, the appellant informed the respondent that:

“Your salary for the month of January 2010 shall be payable to you immediately. Once again I regret the delay in your salary for the month of January 2010. As regards your 3 months' salary in lieu of notice, the same shall be payable to you in three (3) equal monthly installments beginning end of March- until end of June as was discussed and agreed between you and Ms. Caroline Oduor.”

The respondent confirmed receipt of that letter with remarks *“without prejudice”* on 4th March 2010.

9. Aggrieved, the respondent lodged a claim before the Industrial Court seeking judgment for: a declaration that the appellant had without any valid reason, justifiable or lawful cause, fundamentally breached the contract of service; a declaration that the appellant's letters to the respondent dated 28th January 2010, and 26th February 2010 amount to unlawful, illegal, unfair wrongful termination of the contract of service and is a constructive dismissal of the respondent; award for general damages for unfair, wrongful and or summary dismissal; special damages of Kshs. 3,600,000.00 (comprising of Kshs. 2,400,000.00 being 12 months salary for the unexpired term of the 2 year contract of service; Kshs. 600,000.00 being 3 months salary in lieu of notice; and Kshs. 600,000.00 being 3 months full maternity leave); general and exemplary damages as a result of the appellant's alleged fraudulent misrepresentation by the appellant to the respondent's bankers; and costs and interest.

10. The appellant denied the respondent's claim and asserted that the respondents performance as CEO was after evaluation found to be unsatisfactory; that although the 6 month probation period had lapsed by the time of her evaluation, she should be deemed to have accepted an extension of her probation period; that her claim is not maintainable under Section 45 of the Employment Act; that the appellant was at liberty to reorganize its secretariat and to create the position of Assistant Program Officer in charge of Library; that the need to create the position was informed by the result of an evaluation of the respondent's performance as the chief executive officer; that the decision to terminate her employment was made after the respondent declined to accept the offer for the new position and *“to abscond any duties thereon”*; that the termination of employment was done lawfully and fairly in accordance with the law; that prior to the expiry of the aggregate 12 months period when the respondent's job as chief executive officer was taken away, the only entitlement the respondent had was to be given 7 days pay in lieu of notice by reason of Section 42(3) and 42(4) of the Employment Act; that there was no constructive dismissal of the respondent and the appellant had no option but to terminate her employment when she declined the offer for a new position. The appellant maintained that the respondent's employment as chief executive officer commenced on 4th January 2009 and ceased on 22nd December 2009 prior to confirmation of her contract as chief executive officer; and that that period is deemed as probation period within which period the appellant was at liberty to re-assign duties to her as recognized by section 42 of the Employment Act; that the respondent had no right to institute the claim in view of Section 45(3) of the Employment Act as she had not been in continuous employment for a period of 13 months.

11. A trial followed after which the learned trial Judge delivered the impugned judgment on 24th February 2012 in which he found that the termination of the respondent's employment was unfair and unlawful. The court awarded her Kshs. 2,377,672.60 made up of 10 months salary as compensation (at the rate of Kshs. 200,000.00 per month) and the conceded amount of Kshs. 377,672.60. Dissatisfied, the appellant lodge this appeal.

The appeal and submissions by counsel

12. In its memorandum of appeal, the appellant complains that the learned Judge erred in finding that the respondent had established a claim for unfair termination within the provisions of Sections 45 and 47 of the Employment Act; that the Judge erred in awarding the respondent "double compensation" under Sections 41 and 36 of the Employment Act; that the award for compensation in addition to an award of three months' salary in lieu of notice was in error; and that the damages awarded were inordinately high.

13. Amplifying on those grounds, learned counsel for the appellant Ms. K. M. Nyambura submitted that the respondent had not been in the appellants employment for more than 13 months prior to termination; that under Section 45 of the Employment Act, the respondent's claim for unfair termination was therefore not sustainable; that the Judge erred in construing payment made to the respondent subsequent to January 2010 as salary payment when in fact it was payment in lieu of notice; that the respondent had never been confirmed in employment and remained on probation throughout her employment; that it was therefore within the appellant's right to reassign her after evaluating her performance as the chief executive officer; and that it was therefore within the appellant's right to terminate her employment after she declined the re-assignment.

14. According to counsel, the respondent was in employment for less than one year and payment of 3 months salary in lieu of notice was adequate redress; that in determining the award that an employee is entitled to there is need for proportionality and fairness. In that regard, counsel referred to the decision in the case in **D.K. Njagi Marete vs. Teachers Service Commission [2013] eKLR.**

15. Counsel concluded by stating that the learned Judge failed to take into account circumstances leading up to the respondent's termination contrary to Section 49(4) of the Employment Act. Those circumstances include the fact that the respondent contributed to her termination; that the respondent appreciated that she was still under probation as she would not otherwise have agreed to participate in the evaluation of her performance as the chief executive officer. Counsel referred the Court to the ELRC decision in **Mary Saru Mwandawiro vs. Kenya Ports Authority [2016] eKLR.**

16. Opposing the appeal, learned counsel for the respondent Mr. T. T. Naeku submitted that respondent's claim for unfair termination was competent as she had worked for 13 months by the time of termination; that the second termination letter superseded the first one thereby validating her claim for unfair termination under Section 45(3) of the Employment Act; that there was no effective payment in lieu of notice as payment in that regard has to be tendered at the time of termination. In support of that argument, counsel referred to a decision of the Supreme Court of Nigeria in the case of **Chukwuman vs. Shell Petroleum Development Co. Nig. Ltd (1993) 4 NWLR (Pt.289) 512.**

17. As regards the appellant's assertion that it was within its right to re-assign the respondent to a different position upon undertaking an evaluation of her performance as CEO, counsel submitted that the appellant did not rebut the respondent's assertion that she was discriminated against and treated unfairly and unjustly without lawful cause; that the appellant did not lead any evidence to show that a job re-evaluation was carried out in respect of all members of staff at the appellant's organization and neither was evidence adduced by the appellant to show when the purported job reevaluation was sanctioned as no minutes of the board were produced. Counsel urged that re-assignment from the position of CEO to that of assistant program officer in charge of Library was tantamount to unfair constructive dismissal. In that regard, counsel relied on the English case of **Land Securities Trillium Limited vs. Ms J Thornley [2005] UK EAT 0603-04-2006 (20 June 2005).**

18. Regarding the appellant's argument that the respondent's probation period should be deemed as

having been extended as the respondent was not confirmed as the CEO, counsel submitted that after expiry of six (6) months as provided in the contract of service, there was no extension of the probation period and the respondent is therefore deemed to have been confirmed in employment as the CEO. Counsel argued that the award given by the trial court is justified as the appellant failed to comply with Sections 43 and 45 of the Employment Act in not explaining the reasons that resulted in her termination.

Analysis and determination

19. On a first appeal such as this, it is our duty to review the evidence and to draw our own conclusions bearing in mind that we do not have the benefit that accrued to the trial court of hearing and observing the witnesses as they testified. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123**]. With that in mind, the issues for determination in this appeal are whether the appellant established valid reasons for terminating the respondent's employment; whether the decision to terminate the respondent's employment was arrived at fairly; and what, if any, the appropriate remedies should be. In addressing those issues, we must consider the evidence that was placed before the trial court.

20. The respondent testified on her own behalf stating that she worked for the appellant as its CEO until 18th December 2009 when the offices closed for the Christmas break; that she was then invited for a meeting on 21st December 2009 by a member of the board of the appellant but the meeting did not materialize; that on 22nd December 2009 the appellant sent her a letter, to which we have already referred, informing her that she had been redeployed to an unknown position; that despite seeking clarification from the appellant none was forthcoming; that on reporting back to the office after the Christmas break on 11th January 2010 she found she had been locked out and could not access the her office; that on 15th January 2010 while at home she was invited to attend a meeting; that before the meeting she was handed a letter containing allegations against her; and that on requesting for time to respond to the allegations, she was given a letter dated 15th January 2010 redeploying her to a non existent position of "*Assistant Programme Officer in charge of Library Archiving and Policy Documentation*".

21. The respondent went on to say that she declined to accept the proposed position by her email sent on 22nd January 2010 whilst at the same time responding to the allegations that had been made against her; that on 28th January 2010 she received a letter terminating her employment; that she was wrongly accused of absconding from work; that her employment was terminated without reason; that she was offered payment of 3 months salary in lieu notice a portion of which had been paid.

22. The respondent maintained that her termination was in breach of the contract; that in accordance with the contract of service, she had completed her probation period of 6 months; that she neither applied for nor did she accept the position of Assistant Programme Officer in charge of Library that was offered to her; and that she suffered loss of income from February 2010 and sought the reliefs as set out in her claim.

23. Susan Wanjiru Kariuki testified on behalf of the appellant. She stated that she was appointed as the chief executive officer of the appellant on 22nd December 2009 following the termination of the respondent from that position; that prior to that date she served as the respondent's deputy; that after 22nd December 2009 the respondent was re-assigned to a position, that was yet to be created, namely the position of Assistant Programme Officer in charge of Library after a review of her performance as the chief executive officer; that the respondent declined to accept the position and the appellant therefore terminated the respondent's employment on 28th January 2010.

24. The appellant's witness further stated that there were negotiations regarding payment of 3 months salary in lieu of notice as the respondent's terminal benefits; that the respondent received a letter in that regard dated 4th March 2010 and was paid Kshs. 86,490.00 as part payment of the of the 3 months salary in lieu of notice and subsequently two other payments were made leaving a balance of Kshs. 377,372 that was outstanding at the time of the trial. According to the witness the process of termination was proper

and urged the court to dismiss the respondent's claim.

25. Based on our review of the evidence, there can be no doubt that by the time the appellant's offices were closing for the Christmas break in 2009, the appellant had resolved that the appellant was no longer going to serve as its chief executive officer. This is clear from the appellant's letter to the respondent dated 22nd December 2009, by which the appellant informed the respondent that she had "*been reassigned to undertake new responsibilities of which details will be discussed with you in early January 2010*" coupled with the fact that her deputy, Susan Wanjiru Kariuki was appointed to replace her as the chief executive officer on 23rd December 2009.

26. The appellant does not appear to have had the courage, at the time, to inform the respondent that she had been fired as the chief executive officer as at 22nd December 2009. Instead, and seemingly to placate the respondent, the appellant offered the respondent a non-existent position where she would have been required to seek guidance from her erstwhile deputy and report to the board on a monthly basis.

27. Indeed, it was not until the respondent declined the offer for the non-existent position that the appellant felt emboldened to inform the respondent, by its letter to her dated 28th January 2010, that she had been fired and her contract of service terminated, retroactively, "*effective from the 23rd December 2009.*"

28. In the foregoing circumstances, the respondent was no doubt justified in her complaint that her employment was unfairly terminated. She was not given reasons why her employment was terminated. The closest the appellant got to do so was to suggest that the secretariat was undergoing reorganization. The position that she held under her contract of service was assigned to another person while she was to be reassigned to a position that was yet to be created. She was kept in abeyance and locked out of the office of chief executive officer on resumption of duty on 11th January 2010 before being offered that position that she had never applied and that had no relation with the work for which she had been employed. She was not under any obligation to accept that position. The circumstances and the manner in which she was treated by the appellant are not dissimilar to those in the English case of **Land Securities Trillium Limited vs. Ms J Thornley** (above) in which the doctrine unfair constructive dismissal was applied save that in the present case the respondent did not resign but was terminated by the appellant in terms the appellant's letter dated 28th January 2010.

29. Under Section 41(1) of the Employment Act, an employer is required, before terminating the employment of an employee on grounds of misconduct or poor performance, to explain to the employee the reason for which the employer is considering termination and the employee is entitled to have another employee present during the explanation. Under Section 41(1) of the Employment Act, before terminating the employment of an employee or summarily dismissing an employee on the grounds of misconduct or poor performance, the employer is required to hear and consider any representations that the employee may make.

30. Furthermore, under Section 43 of the Employment Act, in any claim arising out of termination of a contract, the employer is required to prove the reason or reasons for the termination and where the employer fails to do so, the termination is deemed to have been unfair.

31. The reasons given by the appellant for terminating the employment of the respondent oscillated from poor performance to absconding from duty. The appellant proved none of these and neither was due process followed, as the respondent was not accorded a hearing. The attempt by the appellant to seek protection under Section 42 that exempts the requirements for reasons and a hearing during a probation period cannot hold as the probation period of 6 months under the contract had lapsed by the time the respondent's employment was terminated.

32. Section 45(1) of the Employment Act forbids an employer from terminating the employment of an employee unfairly. Termination is unfair when the employer fails to prove that the reasons for termination are valid. Section 41(1) of the Employment Act provides that such reasons are to be availed to the

employee prior to termination. Under section 47(5) of the Employment Act, the burden of proving that unfair termination of employment or wrongful dismissal has occurred rests with the employee while the burden of justifying the grounds for the termination or wrongful dismissal rests on employer. In our view, while the respondent established that unfair termination had occurred, the appellant did not discharge its burden of proof to establish that it had valid reasons for terminating the respondent's employment. The learned Judge was therefore right in our view in concluding that the termination was unfair.

33. There is, however the question whether the claim for unfair termination is sustainable on account of the argument that the respondent's employment was for less than 13 months. Section 45(3) of the Employment Act, 2007 provides that:

“An employee who has been continuously employed by his employer for a period of not less than thirteen months immediately before date of termination shall have the right to complain that he has been unfairly terminated.”

34. The respondent's employment with the appellant as the chief executive officer commenced on 5th January 2009. It was terminated on 28th January 2010 although the appellant purported relate the termination back to 22nd December 2009. In effect, the period between 5th January 2009 and 28th January 2010 is short of 13 months. The learned Judge took the view that salary payment made to the respondent in February 2010 indicated that she was still in employment. That was not entirely accurate based on the evidence. Based on the appellant's letter to the respondent dated 26th February 2010, the appellant apologized for the delay in payment of January salary and proposed the manner of payment of 3 months salary in lieu of notice. There is no evidence that the respondent was in employment in February 2010 or that she received a salary for any period subsequent to January 2010. But that is not the end of the matter. Clause 6 of the contract of service under the title “Breach of Contract” provided that

“6. Breach of Contract Any material breach of this contract by one party gives the other party the right to sue for damages, and to be awarded reasonable legal fees and costs and disbursements incurred or on appeal...”

35. Under the terms of the contract of service, therefore, the parties reserved the right of action on the basis of which the respondent was entitled to sustain her claim for unfair termination. There is nothing in Section 45(3) of the Act that prevents parties entering into a contract with more favourable terms for the employee than those set out in the Act. Based on the express terms of the contract of service therefore the respondent was within her contractual rights to pursue her claim for unfair termination.

36. Turning to the reliefs, learned Judge held that the respondent was entitled to “**compensation for wrongful loss of employment**” as she had “**established a case for unfair and unlawful termination.**” The Judge awarded her 10 months salary as such compensation “**which amounts to shs 2,000,000/.**” He also awarded her the balance of Shs. 377,762/60 that was conceded by the appellant as outstanding with respect to 3 months salary in lieu of notice.

37. It is not clear from the judgment the basis upon which the learned Judge considered an award for compensation based on 10 months as appropriate. While the remedies awardable under Section 49(1) include payment of the equivalent of a number of months salary not exceeding 12 months, Section 49(4) of the Act sets out matters that should be considered or taken into account when considering remedies. The factors to be taken into account include the employees length of service with the employer, the expectation of the employee as to the length of time for which the employment might have continued but for the termination, opportunities available to the employee for securing comparable or suitable employment with another employee, any compensation in respect of termination of employment paid by the employer and received by the employee.

38. As this Court stated in **Hema Hospital vs. Wilson Makongo Marwa [2015] eKLR**, the power to award the remedies provided for under Section 49 of the Act is discretionary. Like all discretions, it must be exercised judiciously. The Court also stated in that case that it is imperative for a court awarding reliefs under Section 49 to give reasons or factors it has taken into consideration. In that case, the

employee, a medical doctor, had worked for the employer for just over 6 years. The Court considered an award of three months salary as compensation for wrongful dismissal as reasonable compensation.

39. In **Mary Saru Mwandawiro vs. Kenya Ports Authority [2016] eKLR**, the Employment and Labour Relations Court awarded an employee who had worked for the employer for 30 years the equivalent of 8 months salary as compensation for unfair termination.

40. The respondent in the present case had worked for the appellant for just over one year. The contract of service was for 2 years and had provision for termination by either party giving 3 months written notice or payment of 3 months salary in lieu of notice. Considering these factors, we think the award of the equivalent of 10 months salary as compensation was on the high side and not justified. We appreciate that compensation under Section 49 of the Act is not confined to the wages which the employee would have earned had the employee been given the period of notice to which she was entitled. It may include that and more. Taking into account those factors and the fact that the appellant did not establish a valid reason for terminating the respondent's employment and did not accord her a hearing, we consider that compensation based on the equivalent of 2 months gross salary in addition to three months salary in lieu of notice is reasonable award.

41. We accordingly set aside the award of Kshs. 2,000,000.00 made by the lower court and substitute therewith an award of Kshs. 400,000.00 being the equivalent of 2 months gross salary. The appellant is also liable for the conceded balance of Kshs. 377, 762.60 as ordered by the lower court. The total award in favour of the respondent is therefore Kshs. 777,762.60. The appellant shall pay interest on that amount at court rates from the date of the judgment of the lower court (24th February 2012) until payment in full. The appellant shall pay the respondent's costs in the lower court. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 22nd day of September, 2017.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR