**REPUBLIC OF KENYA**

**THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM VISRAM, KARANJA & KOOME, JJ.A.)**

**CIVIL APPEAL NO. 57 OF 2016**

**KENYA PORTS AUTHORITY.....APPELLANT**

**Versus-**

**MARY SARU MWANDAWIRO.....RESPONDENT**

***(Being an appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Makau, J.) dated 19th February, 2016***

***in***

***E & L.R.C.C.No. 306 of 2015)***

**JUDGMENT OF THE COURT**

[1] This is an appeal against part of the judgment rendered by the Employment and Labour Relations Court (ELRC) at Mombasa on 19th February, 2016; in which Makau J., awarded the respondent a sum of Kshs.1,768,264.80 plus costs and interest as damages for unfair termination of employment. Contemporaneously with the appeal, a cross appeal was also lodged by the respondent, challenging the said judgment in its entirety.

[2] A brief background of the matter is that Mary Mwandawiro, (the respondent), lodged a claim at the ELRC seeking damages in form of loss of earnings in salaries and allowances for unlawful termination after appellant abolished her position. The respondent was employed by the appellant on 1st March, 1984; she contends that she served diligently over the years until 2002 when the appellant purported to carry out a restructuring of the corporation. Following that restructuring in 2002, the respondent's position was translated to the post of accountant (marine claims). She served as such until the year 2012, when a second restructuring took place, which saw her position further being translated to accountant (claims) grade HM 3 (supernumerary) with a job description of port no. 610-3008. According to her, not only was the latter translation to supernumerary equal to abolition of office, it also meant that the job assigned to her belonged to another employee. Consequently, she lodged an appeal with the appellant's Head of finance against the said translation, but the appeal was rejected.

[3] Meanwhile, a post known as Senior Accountant (claims) was created and the respondent felt that she was better suited for the same, given her superior qualifications and work experience. With this in mind, she lodged a further appeal, this time with the General Manager of finance, asking him to review the proposal on the new post and place her on the new position instead. This appeal was equally rejected. Undeterred, she lodged a third appeal with the Managing Director against the translation and this too was declined.

[4] Following the aforesaid unsuccessful attempts to have her translated to an existing position, the respondent then wrote to the head of Human Resources, requesting the initiation of her retirement on grounds of abolition/re organization of office as per Section B.16 (K) of the appellant's human resource manual. No response to this letter was forthcoming from the appellant. The respondent contended that the appellant's general conduct and failure to respond to her letter constituted an utter disregard of its own objectives as a public corporation, was in contravention of Customer Service Charter, the principles of natural justice and offended Articles 41 (1) and 47 (1) & (2) of the Constitution.

[5] Finally on the 17th September, 2014, the appellant wrote to the respondent, stating that with effect from 1st August, 2014, the respondent was deemed to have forfeited her appointment as per **section 7(g)** of the disciplinary handbook. This declaration of forfeiture was tantamount to summary dismissal. In view of this, the respondent appealed against the declaration of forfeiture and as with all the prior appeals, this too was rejected. Feeling that the forfeiture was unlawful and dissatisfied with the appellant's attitude towards her grievances, the respondent lodged a claim before the ELRC as aforesaid. The gist of the claim being that forfeiture is equal to a dismissal and that in this case, it was not

only discriminatory, but offended the provisions of sections K 7(g) and K 8 of the disciplinary Handbook 2008, section 2 (h) of the Human Resource Manual 2011, sections 41, 43 and 45 of the Employment Act 2005 and Articles 41(1) and 47(1) & (2) of the Constitution of Kenya.

[6] In addition to the above, the respondent contended that the appellant backdated the said declaration of forfeiture of employment, so as to deliberately and unlawfully deprive her of her earnings. At the time of the said forfeiture the respondent was earning a gross salary of Kshs.221,033.10/-. Consequently, she sought the following relief:

> *I. The respondent be ordered to retire the claimant on the ground of abolition/ restructuring of office and pay her Kshs.43,020,686/- for loss of earnings in terms of salaries and allowances;*
>
> *II. General Damages for loss of earnings;*
>
> *III. Damages for discrimination on medical status;*
>
> *IV. A declaration that forfeiture of appointment is (sic) unfair, unlawful and unconstitutional;*
>
> *V. A declaration that termination on the basis of forfeiture of appointment is illegal, unfair and unconstitutional;*
>
> *VI. 12 months gross salary compensation for unfair termination at Kshs.3,036,480;*
>
> *VII. Costs of this claim and interests thereon at court rates;*
>
> *VIII. Any other relief that the court may deem just and fit to grant.*

[7] The claim was opposed and in its memorandum of response, the appellant asserted that the fact that there was a finding the respondent's appeals were without merit did not make their decision contrary to the objectives of restructuring of a public corporation. Further, that the creation of new posts and elevation of workers into those posts or to higher grades was not part of the objective of the restructuring as the respondent seemed to suggest. To the contrary, that the respondent was the author of her own misfortunes, as she serially violated the Human resource manual; was not qualified and deserving of a promotion. The appellant also stated that section B. 16(K) of the HR Manual could only be invoked by the employer and not the employee as the respondent had purported to do; adding that an employee cannot declare herself redundant, for that is the prerogative of the employer.

[8] The appellant further contended that the respondent's attempt to unilaterally declare herself redundant was simply because her application for promotion was denied. Also, her subsequent decision to abscond from work was conscious and deliberate on her part and she cannot blame the appellant for summarily dismissing her. The appellant concluded by denying that the termination was based on discrimination and stated that the procedure to be followed in dismissal as laid down under section K. 7 (g) of its Disciplinary Handbook 2008 was followed, adding that in cases of forfeitures, the concerned employees are usually absent from the work place and in view of this, the onus was upon the respondent to contest the forfeiture if she so wished at the disciplinary proceedings, but she failed to do so. Consequently, the appellant prayed for the dismissal of the claim with costs.

[9] During the hearing of the claim, the respondent testified and the appellant called two witnesses, who all reiterated the parties' respective positions as summarized above. Based on the evidence adduced in court, the pleadings and the parties' submissions, the learned trial Judge rendered the judgment on 19th February, 2016. According to it, the court was satisfied that from the evidence on record the respondent conduct warranted summary dismissal. However, he found that though warranted, the dismissal failed to meet the procedural requirements laid down under section 41 of the Employment Act. In particular, that the respondent was never accorded a fair hearing and for that reason, she was entitled to damages for unfair termination. Consequently, he awarded the respondent 8 months' gross salary; totaling Kshs.1,768,264.80/- as compensation for unfair termination as earlier stated.

[10] Regarding the claim for loss of earnings in terms of salaries and allowances, the court held as the termination was lawful, the respondent was not entitled to that claim. That judgment is the genesis of the instant appeal, which is premised on the following grounds:

> 1 That the learned judge erred in law in deciding that there existed a valid and fair reason to warrant summary dismissal of the respondent and in finding fault with the procedures followed in dismissing her
>
> 2. That the learned trial court was right in finding that 'their (sic) existed a valid and fair reason to warrant summary dismissal of the claimant' but was wrong in entering judgment in favour of the respondent.
>
> 3. The learned trial judge erred in law in holding that the appellant was required under section 41 of the Employment Act to give the employee a personal hearing after reaching a finding that the employee had forfeited.
>
> 4. The learned trial judge erred in law by placing the burden upon the appellant to employ time and resources to search for the respondent who had forfeited so as grant her a personal hearing before being dismissed for forfeiture. Neither the Disciplinary Handbook nor the Employment Act places that burden on an employer.

[11] Reacting to the judgment and the appeal, the respondent lodged a cross appeal based on the following grounds:

> 1. That the trial court erred in law and in fact in that it failed to properly evaluate the evidence when it held that the respondent admitted to have deliberately missed going to work yet the respondent's evidence was that she did not have anyone to report to or a

place to work from as she was rendered supernumerary and denied any place to work from or a person to direct her on the work she was required to do.

2. That the trial court erred in law and in fact in holding that there existed a valid and fair reason to warrant summary dismissal on ground that the respondent admitted to have deliberately missed work yet the respondent evidence did not amount to an admission of that fact.

3. That further, the trial court erred in law and in fact in awarding the respondent 8 months gross salary compensation on the ground that the respondent contributed to her dismissal when the evidence did not justify such a finding.

4. The trial court erred in law and in fact by failing to determine the issue of the letter of forfeiture dated 17th September, 2014 but taking an effect (sic) as from 17th August, 2014 thereby denying the respondent salary for the month of September, 2014 while she had actually rendered her services to the Appellant for the month of September 2014.

5. That the trial court erred in law and in fact in that it failed to properly evaluate the evidence in its determination on the issue of discrimination on medical status by only relying on the forfeiture notice while this was the sole reason why the respondent was rendered supernumerary.

6. That the trial court erred in law and in fact inn that it failed to make a determination on the issue of unpaid bonus and leave allowance for the period between 2012 and 2015 which was an issue before the court for determination. The said failure gravely prejudiced the respondent since the respondent had actually rendered her services to the appellant and was therefore entitled to the said bonus and leave allowance.

7. That the trial court erred in law and in fact in that it failed to make a determination on the issue of the respondent's retirement on the ground of abolition of office under clause B. 16(k) of the Kenya Ports Authority Human Resource Manual which was an issue that was before the court for determination. The failure to determine such a critical issue rendered the said judgment totally unreliable. Indeed, the said failure gravely prejudiced the respondent.

8. That the trial court erred in law and fact in that it failed to award the appellant (sic) retirement benefits which was a prayer consequent to the appellant (sic) being retired on grounds of abolition of office as provided under clause B. 16(k) of the Kenya Ports Authority Human Resource Manual

9. That the trial court failed in law and in fact in dismissing the prayer for future salary on grounds that it was not based on any known law, precedent or custom when in reality, such a prayer was quite reasonable when all the circumstances were taken into account.

10. That the trial court erred in law in that in the circumstances the decision arrived at by the trial court dated 19th February, 2015 was wholly against the weight of the law and the evidence. In the result, the decision arrived at by the trial court fell short of the requirements of the law.

[12] With leave of this Court, both parties filed written submissions in support of their respective positions and they made some oral highlights during the plenary hearing of the appeal. Appearing for the appellant, learned Counsel **Mr. Sangoro** submitted that the 2012 restructuring had the effect of moving the employees either vertically (promotions) or horizontally (similar post). He stated that in the respondent's case, she had desired a promotion and when none was forthcoming, she chose to forfeit her position. Counsel pointed out that the translation to supernumerary had no effect on an employee's terms of employment, their status, grade, job description or salary as those terms remain the same even after the restructuring. Whereas the crux of the respondent's claim was that she had been rendered redundant; to the appellant, the real dispute lay with the forfeiture.

[13] Contrary to the respondent's claim, what the appellant's Board of Directors resolved to do was translate her, not retrench her. Yet that notwithstanding, her case was erroneously hinged on her belief that following the restructuring, she had to either be promoted or declared redundant. It is no wonder therefore, that when her misguided approach failed, she absconded from duty which in turn earned her lawful dismissal. With regard to the procedure for dismissal, counsel submitted that the court erred in holding that the respondent was not afforded a fair hearing. He added that hearing does not have to be oral, as the same can be through affidavit testimony or by proxy that is considered and a decision is made. What is important is that the employee was given an opportunity to be heard.

[14] Having been given such an opportunity in this case, the respondent was never prejudiced, nor was the termination unfair for want of procedure. In any event, counsel contended, the respondent never disputed her forfeiture or demanded to be accorded an oral hearing. In addition, in his view, forfeiture dispenses with the right to hearing particularly where the employee concerned is nowhere to be found after absconding duty. Turning to the case of **Munyu Maina v. Hiram Gathiha Maina [2013] eKLR,** which was cited by the respondent; counsel distinguished it by stating that it is only in exceptional circumstances that this Court can interfere with a trial court's findings on fact. That having forfeited her job, the respondent could not claim to be entitled to be heard. If anything, it was for the respondent to offer an explanation on the circumstances of her forfeiture, which she failed to do.

[15] Addressing the grounds raised in the cross appeal, Counsel contended that the respondent's summary dismissal was warranted as the evidence showed that she had absconded duty severally. With regard to the contention that the respondent had no one to report to, counsel submitted that she ought to have been reporting to her Head of department, the head of Financial Accounting, one Mr. Nyoike, whom the respondent despised and had no respect for hence her contention. Counsel reiterated that the dismissal was in no way capricious or oppressive but was warranted in the circumstances and that due process was followed. On that note, he urged the court to allow the appeal, set aside the impugned judgment and dismiss the cross appeal with costs.

[16] Opposing the appeal, was Mr. Gikandi, learned Counsel for the respondent who argued that the termination was indeed unfair as the respondent was never served with a show cause letter. Without any attempts having been made to trace the respondent, the appellant failed to observe the provisions of the Employment Act and as a result, no disciplinary hearing ever took place. Citing the case of **Nyongesa & 4 others v. Egerton University College [1990] eKLR,** Mr. Gikandi was of the view that the onus lay with the appellant to prove that it had attempted to trace the respondent. Further, that according to the decision in **Munyu Maina v. Hiram Gathiha Maina [2013] eKLR;** where evidence is proffered and the opposing party fails to rebut it, that evidence is taken as conclusive proof of a fact in issue. Since there was nothing to support the assertion that the respondent had missed work for 10 days, the dismissal should have been found to be unjustified. He stated that on that basis, the appeal ought to be dismissed.

[17] Turning to the cross appeal, counsel asserted that the trial court had failed to determine some issues. One such issue was the backdated forfeiture, as a result of which the respondent failed to receive her September, 2014 salary. Another undetermined issue was said to be the respondent's retirement benefits, which though sought were never addressed; adding that since the termination of employment was caused by the restructuring of the corporation, the court ought to have taken it into consideration. Consequently, counsel relied on the case of **Kiarie Wamutu v. Mungai Kiarie & Another [1982] eKLR** to buttress the position that where issues are not addressed, the resulting judgment cannot be relied on. He emphasized that judgment of a court must reflect the court's reasoning on all the issues placed before it.

[18] Lastly, counsel contended that though the respondent had served the appellant for 27 years, once she was translated to supernumerary, she became a 'floating' employee, with no work and no supervisor. In his view, it would have been more economical to retire staff than retaining them without work. Rendering the respondent a supernumerary was discriminative as the appellant's Head of Finance had verbally told her that the reason she was translated was because of working for half a day due to her ill health.

[19] In determining this appeal, we have embraced the ratio stated in the case of ***Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR;*** *in which this Court differently constituted held that*:

> *"The jurisdiction of this Court in this appeal as circumscribed by the Constitution and the Industrial Court Act, requires the appraisal and evaluation of the learned Judge's interpretation of the Constitution and statutory provisions the application of these laws to the undisputed and established facts; and the evaluation of the reasonableness of the conclusions of the learned Judge."*

Nonetheless, we must also bear in mind that unlike the trial court we have neither seen nor heard the witnesses (See **Selle v. Associated Motor Boat Co. Ltd** (1968) EA 123).

[20] Based on the grounds of appeal, the cross appeal and the submissions, the issues that fall for determination are:

a) whether the respondent's dismissal was lawful and fair and;

b) The applicable remedies to the case.

On the first issue, the lawfulness of the dismissal of the respondent cannot be interrogated without considering the letter terminating the respondent's service. According to that letter, the termination was on account of her forfeiture of appointment. The letter read as follows:

> *17th September, 2014*
>
> *Ms. Mary S. Mwandawiro*
>
> *P.O Box 80759- 80100*
>
> *Mombasa*
>
> *RE: FORFEITURE OF APPOINTMENT*
>
> *This is to inform you that you have forfeited your appointment with effect from 1st August, 2014 in accordance with section K. 7 (g) of the Disciplinary Handbook 2008, after having been on unauthorized absence from duty for a continuous period of more than ten days.*
>
> *You may however appeal against this action within the next thirty (30) days from the date of this letter.*
>
> *Please note that any appeal lodged on expiry of this period will not be entertained*
>
> *B.C Basar*
>
> *Principal Human Resources Officer (MS)*
>
> *For: MANAGING DIRECTOR*

[21] While the appellant gave forfeiture as the sole reason for the termination of engagement, the respondent contended that discrimination on account of ill health, and her redundancy as the root causes behind the end of her employment. She stated that the forfeiture was untrue, for not only was her absenteeism not proven, but she was also never given an opportunity to be heard. So that while the appellant claimed

that this was a case of summary dismissal, the respondent contended that it was an unlawful and unfair termination. On summary dismissal, **section 44 (4) (a) of the Employment Act, 2007, states that**

> ***Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—***
>
> (a) ***without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*** (Emphasis added)

[22] In this case, the respondent was accused of absenteeism, an allegation she vehemently denied. However, looking at a letter dated 24th September, 2014, written by the respondent in response to the declaration of forfeiture, she is seen to have stated as follows:

> ***'It is inappropriate to hand me a forfeiture of appointment as a result of unauthorized absence from duty knowing that as a supernumerary staff (not holding any position in the organization structure), I had no duties and I reported to no one. Hence there was no duty to absent myself from and no workplace or boss to report my presence to….***
>
> ***I therefore appeal for the lifting of forfeiture of appointment and that approval be sought from the Board to retire me on the ground of abolition/ reorganization of office.***
>
> ***I should not suffer the consequences of the restructure which failed to address the thorny issue of supernumerary staff by redundancy (golden handshake), early retirements etc***
>
> ***Please respond within seven days.***
>
> ***Yours faithfully,***
>
> ***Mary S. Mwandawiro***

**[23] From the wording and tone of this letter, the respondent admitted having absconded duty and not only that, she apparently believed that her absence had no effect on her engagement. Based on this admission, the contention by Mr. Gikandi that absenteeism was not proven is misplaced. According to the respondent, her justification for not reporting for work was that she had no duties to perform and reported to no one.** In equal measure, the contention that the respondent had been rendered redundant does not lie. It is apparent that the translation never affected the respondent's salary or grade. According to a copy of the January, 2013 payslip, her salary for that month was Kshs.179,116.35, while her salary at the time of termination in August, 2014 was Kshs.221,033.10.

[24] In the circumstances, could she be declared redundant? Under section B.16 (K) of the appellant's Human Resource manual, upon which the respondent relied, it is provided that;

> ***'An employee may be called upon to retire either on abolition of the office he holds or upon the reorganization of the Authority for better efficiency or economy in accordance with relevant Authority provisions as will be issued from time to time. Such action shall be approved by the Board.'***

A reading of that clause indicates that the discretion as to whether or not to retire an employee on account of abolition of office remains with the appellant's Board of Directors. With regard to termination of services, the said section also states that voluntary retirement by an employee is only possible if that employee has attained the age of 50 years. It is thus immediately apparent that the respondent had no basis to declare herself redundant.

[25] Though the appellant alleged that her termination was also wrongful on the basis that she was subjected to differential treatment, what constituted discrimination was never proved. Mr. Gikandi contended that the reason the respondent's position was translated was because of working for half a day due to her ill health. This allegation was based on a verbal communication between the respondent and the appellant's Head of Financial. However, save for the respondent's counsel's submission, there was no evidence tendered to support the claim that she was discriminated against on account of ill health. The Judge cannot be faulted for failing to uphold the allegations of discrimination without evidence. As per the demands of sections 107 and 108 of the Evidence Act, he who alleges must prove.

[26] On the second issue, the learned trial Judge was of the view that the appellant had failed to prove that it accorded the respondent an opportunity to be heard. Under **section 41 (2)** of the **Employment Act** it is required that:

> ***"Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make"***
>
> **It is therefore mandatory that even when an employer feels that the termination is justified, an opportunity must be given for the concerned worker to be heard.**

[27] An employee must be taken through the mandatory process as outlined under **section 41** of the **Employment Act.** That applies in a case for termination as well as in a case that warrants summary dismissal (see, **CMC Aviation Limited v Mohammed Noor [2015] eKLR**) **The**

**burden on the employee is limited to asserting that unfair termination has occurred, leaving the burden to show that the termination was fair on the employer (See Kenfreight (EA) Limited v. Benson K Nguti [2016] eKLR). In this case, though it was alleged that section 7(g) of the HR Handbook 2008 provided a special procedure in cases of forfeiture or that in such cases attendance of the employee is dispensed with, the said hand book was not adduced in evidence to prove that fact. In resolving the aspect of unfair termination, the court stated as follows:**

> ***'Under section 41 of the Employment Act (EA), the employer is required in mandatory (sic) to give a personal hearing to his employee in the presence of another employee of his choice before dismissing him for misconduct under section 44 of the Act. The reason why CW1 was not given a hearing as required by the said law is because CW1 was absent. In this court's view, that was not sufficient reason to deny the claimant a hearing. The respondent knew or had the reason to know both the physical and telephone or email address for the claimant. The same way that the termination letter and the letter of dismissal of her appeal were served on the claimant should have been used to serve a show cause letter and an invitation to disciplinary hearing.'***

**[28] In absence of proof that procedure was followed and that the respondent was given a chance to be heard, the trial Judge cannot be faulted for making the above conclusions.** Consequently, with regard to the remedies available, once the claim on redundancy fails, so does the claim on retirement benefits and future salary. On the same note, the appellant had urged this court to set aside the award of damages given to the respondent by the trial court. However, as we have demonstrated, the summary dismissal although warranted, was unprocedurally done. The 8 months' worth of salary awarded was based on the trial court's discretion. The circumstances in which this court can interfere with an award of damages have been stated time and again; in **Gicheru V Morton and Another (2005) 2 KLR 333** it was held that:

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."***

[29] We find no such circumstances have been shown herein to warrant such interference. In the upshot, both the appeal and the cross appeal are without merit. We order them dismissed and each party to bear their own costs.

**Dated and delivered at Mombasa this 12th day of October, 2017**

**ALNASHIR VISRAM**

**.....**

**JUDGE OF APPEAL**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**M. K. KOOME**

**.....**

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

***DEPUTY REGISTRAR***