IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

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

CIVIL APPEAL NO. 117 OF 2014

BETWEEN

UNILEVER TEA KENYA LIMITED.....APPELLANT

AND

JOHN KEMEMIA GITAU.....RESPONDENT

(An Appeal from the Judgment and Decree of the Industrial

Court at Nakuru (Ongaya, J) dated 5th July,2013

in

Industrial Cause No.50 of 2013)

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JUDGMENT OF THE COURT

This appeal is against the judgment of Ongaya, J. delivered on the 5th July, 2013.

A brief background to this appeal is that **JOHN KIMEMIA GITAU** (the respondent herein and the then claimant) filed a memorandum of claim dated 14th February, 2013. **UNILEVER TEA KENYA LIMITED** (the appellant and the then respondent) filed a reply dated 20th March, 2013 to the respondent's memorandum of claim, which response elicited the respondent's reply dated 20th April, 2013. Upon closure of pleadings, the trial was conducted by Ongaya, J. who in a judgment dated 5th July, 2013 found as follows:-

> **"(a)** ***The termination of the claimant's employment by the respondent was unlawful.***
>
> ***(b) The respondent to pay the claimant Ksh.1,307,301.60 by 1.9.2013 failing which interest to run from the date of this judgment till full payment.***
>
> ***(c) The claimant*** *(sic)* ***to deliver to the claimant the certificate of service and the clearance certificate by 1.09.2013.***
>
> ***(d) The respondent to pay the costs of this case.***

The appellant was dissatisfied with the outcome of the trial and hence this appeal. In a memorandum of appeal dated 14th April, 2014 the appellant listed 8 grounds of appeal. These can be summarized as follows:-

(i) That damages under the Employment Act Cap 226 (repealed) are restricted to the notice period set out in the contract of employment;

(ii) That the learned judge erred in finding that there had been a breach of contract as well as non compliance with the appellant's

hand book provisions on the appeal process in disciplinary actions;

(iii) That the learned judge erred in failing to find that the appellant assigned substantive reasons for the respondent's termination.

(iv) That the learned judge applied the Employment Act 2007 as opposed to the Employment Act Cap 226. (repealed)

(v) That the judgment of the trial court was against the applicable law and judicial precedents at the time the cause of action arose.

The appeal came before us for plenary hearing on 29th May, 2017. Mr. Nyakundi learned counsel for the appellant, in urging the appeal argued all the 8 grounds together. He faulted the trial judge for awarding the sum of Ksh.775,080/- being 5 months gross salary for unlawful termination contrary to the applicable law then, to wit, the Employment Act Cap 226; that on the date of termination on 23rd February, 2007 the applicable law was Employment Act, Cap 226 (now repealed) and not the Employment Act, 2007 which had come into force on 2nd June, 2007; that the governing Act (S.16 thereof) provided for termination of employment based on the contract of employment which in the particular circumstances of this case provided for a 3 months' notice. He relied on the authorities of **DIRECTLINE ASSURANCE CO. LTD VS JEREMIAH WACHIRA ICHAURA CA NO 68 OF 2014** and **RIFT VALLEY TEXTILES LIMITED VS EDWARD ONYANGO OGANDA [1994] eKLR** for the proposition that the contract of employment provided for the modalities for termination of employment and further, that the court could not award general damages for breach of contract under the repealed Employment Act.

In opposing the appeal, Mr. Njoroge learned counsel for the respondent contended that the law applicable was S.15 of the Trade Disputes Act Cap 234 of the Laws of Kenya wherein the court could grant compensation for unfair termination. For this proposition, he relied on the authority of the Industrial Court at Mombasa Case No. 186 of 2013 namely- **DR. EZEKIEL NYANGOYA OKEMWA VS KENYA MARINE & FISHERIES RESEARCH INSTITUTE 2016 eKLR** citing the Employment and Labour Relations Court decision of **MAJOR WILFRED KYALLO KANGULYU VS TETRAPAK LIMITED [2014] eKLR** and **KENYA PORTS AUTHORITY VS FESTUS KIPKORIR KIPKOECH [2015] eKLR** to the effect that-

> **"…. by dint of section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya, the court could grant the remedies of compensation to unfair termination or order to reinstate or re-engage employees found to have been unfairly dismissed**."

Further, that the trial judge referred to the award as "**compensation**" in line and exercise of his discretion as enunciated in the Supreme Court authority of **DEYNES MURIITHI & 40 OTHERS VS LAW SOCIETY OF KENYA & ANOTHER [2016] eKLR**.

In a brief rejoinder Mr. Nyakundi submitted that S.15 of the Trade Disputes Act applies to unionisable employees and that a manager is not one such unionisable employee.

We have considered the record, the rival oral submissions, the authorities cited by the appellant and the respondent, as well as the law.

This being a first appeal, we are obliged to re-evaluate and re-assess the evidence and arrive at our own conclusions. In so doing we should not lose sight of the fact that unlike the trial court we did not have the benefit of seeing and/or hearing the witnesses for purposes of assessing their credibility. We are also cognizant that this court will not ordinarily interfere with the findings of a trial court unless those findings are not based on any evidence on record or the court is shown to have acted on wrong principles in arriving at the conclusions it did See **SELLE VS ASSOCIATED MOTOR BOAT CO [1968] EA 123.**

The facts of this case are fairly straightforward. The respondent was employed by the appellant on 1st July, 1986, initially as a Computer Operator Trainee. Over a period of time, he rose through the ranks to become the Assistant Manager, I.T. Whilst in the appellant's employment, the respondent was based in Nairobi until the year 2000 when he was posted to Kericho, a move that the respondent considered unwise due to the tribal clashes of 1992 and 1997. He however, moved to Kericho where he continued to discharge his duties. The respondent testified that in 2005, the appellant invited bidders for sale of its used computers. The invitation was made to the appellant's employees as well as non-employees. He took advantage of the invite by bidding for the items which he subsequently paid for. However, in 2006 he received a notice to show cause letter and he **"...replied to all issues**" inspite of the short notice given to him. He told the trial court that prior to receiving the notice to show cause, he had appeared before an investigating team of Mr. Julius Tale, Mr. Mark Suge, Joseph Kanake and David Osamba and he was questioned on the bid process. He was interrogated on three occasions and on each occasion he was not given sufficient notice. Be that as it may, the response he got after the notice to show cause was a termination letter. He appealed against his termination but all this came to naught. During cross-examination he admitted that he did bid on behalf of one Kiarie and Wanjiru, the former being his relative and the latter, his wife.

M/s Philegona Omolo, the appellant's then Assistant Human Resource Business Partner testified on its behalf. It was her evidence that the respondent participated in a bidding process in his department contrary to the appellant's code of conduct as there was a conflict of interest. During cross examination she admitted that the invitation to bid was made to the employees as well as to non-employees of the appellant. There was also Benjamin Komen who testified on behalf of the appellant. He worked for the appellant as an accountant. It was his testimony that the appellant was engaged in irregularities during the bidding process for the sale of computer accessories.

The trial court considered the evidence of the alleged breach of the appellant's Code of Conduct and rendered itself as follows-

> **"The court has considered the material on record and finds that the claimant did not breach the code. Firstly, the respondent did not cite the specific provisions of the code allegedly breached and the relevant particulars to establish the breach. Secondly, the preliminary report was categorical that the tender applications were not registered as they were received. In the opinion of the court, it would be difficult to pin down the claimant on wrong-doing in absence of such crucial record that was vital to establish whether the bidders included the claimant's relative and wife as alleged. Finally, it is not disputed that the tender process was open to all staff without exceptions and the court holds that where all persons involved**

in decision making are interested parties and that fact is known, there cannot be offensive conflict of interest; such situation being one of the exceptions to the rule against conflict of interest in decision making."

The trial Court proceeded to make the following findings:

"1. The court finds that the claimant is not entitled to the NSSF and NHIF deductions as prayed for because the same being statutory deductions the respondent is liable to deduct and remit to the relevant agencies.

2. The respondent did not dispute the claim for 13 leave days for 2006-2007 and the court finds that the claimant is entitled to Ksh.67,173.60 as prayed for.

3. Three months pay in lieu of termination notice is not disputed and the court finds that the claimant is entitled to Ksh.465,048/- as prayed for.

4. The claimant is not entitled to salary reduction as claimed because the court has found that the policies on urban differential and rural supplement applied as agreed between the parties.

5. The claimant has prayed for loss of future earnings in view of the expectation to retire at the age of 60 years. The Claimant submitted that he was at the time of the hearing engaged in business and he had been jobless for 1-2 years before he commenced the personal business. The court has noted the claimant's efforts to mitigate the sudden unlawful termination of his employment and considers that Ksh.775,080/- being five gross monthly salaries will meet the ends of justice as a reasonable pay for the unlawful termination leading to the claimant's joblessness for about 2 years. In making this finding, the court has considered that the claimant was also entitled to terminal dues by way of the contributed pension dues that partly served to mitigate his joblessness consequential to the termination.

6. The court finds that the claim for general and exemplary damages is not justified and the same is declined.

7. The claimant is entitled to the certificate of service and clearance certificate as the rights of the parties as regards the house in dispute shall be resolved by the court in the pending case and is now outside the authority of the respondent's human resource department".

As to the applicable law, the trial court found that applicable law was the Employment Act Chapter 226 of the Laws of Kenya. The court rendered itself as follows:-

"The parties were in agreement in their submissions that the applicable law was the Employment Act, chapter 226 Laws of Kenya. (now repealed) The court finds as much."

Accordingly the Court entered judgment for the respondent and found that:-

(a) The termination of the claimant's employment by the respondent was unlawful.

(b) The respondent to pay the claimant Ksh.1,307,301.60 by 1.9.2013 failing which interest to run from the date of this judgment will full payment.

(c) The claimant to deliver to the claimant the certificate of service and the clearance certificate by 1.09.2013.

(d) The respondent to pay the costs of the case.

As stated above, the parties admitted that the applicable law was the Employment Act Cap 226 of the Laws of Kenya. The court agreed with the appellant and the respondent as to the applicable law. It is also not in dispute that the respondent was terminated by the appellant on 23rd February, 2007. The Employment Act, 2007 came into force on 2nd July, 2007. It is therefore; abundantly clear that at the time of termination the applicable law was the Employment Act, Chapter 226 of the Laws of Kenya. S.16 thereof 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, Chapter 266 of the Laws of Kenya were amplified in the case of **DIRECTLINE ASSURANCE CO. LTD VS JEREMIAH WACHIRA ICHAURA** (supra) where this court considered the issue of whether general damages are payable in a contract of Employment, such as the contract between the appellant and the respondent. This is what the court said-

"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 of the employee would incur during the stipulated period of the termination clause or notice ..." see also Central Bank of Kenya vs Nkabu (supra)

We are not persuaded that given the clear provisions of the then S.16 of the Employment Act the court could order for payment of damages. Again the decisions of the then Industrial Court and the Employment and Labour Relations Court cited by the respondent that tend to suggest that damages are payable in a contract of employment governed by the repealed Employment Act are not binding on us.

We believe that we have said enough to show that this appeal has merit. Accordingly the appeal is allowed to the extent that the award of Ksh.775,080/- as damages for unlawful termination is hereby set aside. Costs of this appeal to the appellant.

Dated and delivered at Nakuru this 1st day of November, 2017.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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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