



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 309 OF 2016

BETWEEN

KENYA UNION OF COMMERCIAL FOOD ALLIED WORKERS ... APPELLANT

AND

BRITISH AMERICA TOBACCO KENYA LIMITED RESPONDENT

*(An appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi
(Wasilwa, J.) dated 22nd June, 2016 in Cause No. 143 of 2007*

JUDGMENT OF THE COURT

1. The appeal before us revolves around settlement of terms of an award issued by of the Employment and Labour Relations Court (ELRC) on 3rd October, 2008. The authority to settle terms of a decree or an order by the court is derived from **Order 21 Rule 8(4)** of the **Civil Procedure Rules** which stipulates:-

“On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.”

The essence of settling terms is to ensure that the resulting decree reflects the terms of the judgment/award/ruling in question.

2. By a letter dated 21st September, 2006 **British American Tobacco Kenya Limited** (the respondent) declared six of its unionized employees redundant effective from 1st October, 2006 on account of restructuring its operations. As per Clause 31 of the Collective Bargaining Agreement (CBA) negotiated between the respondent and the employees union, **Kenya Union of Commercial Food and Allied Workers** (the appellant), the respondent offered the following as the final dues:-

1. Salary up to and including 30th September, 2006.

2. One month’s basic salary plus two months’ salary in lieu of notice.

3. 4 day’s pay calculated on basic salary for each completed month of service with the

company.

4. Leave pay applicable on outstanding leave earned but not taken up to 30th September, 2006.

3. The said employees were not pleased and they engaged the appellant who made several attempts to settle the issue with the respondent without success. Pursuant to **Section 4** of the **Trade Disputes Act** (repealed), on 20th December, 2006 the appellant reported the issue as a trade dispute to the Minister for labour who appointed an investigator to investigate the issue. Upon conclusion of the investigations the Minister prepared a report wherein he recommended additional compensation to the employees over and above the redundancy terms for what he termed as unprocedural redundancy. It seems that the respondent was not agreeable with those recommendations. This precipitated the appellant to refer the issue to the ELRC (Cause No. 143 of 2007) on the basis that the redundancy was unjustified and unprocedural for non-compliance with the law. Obviously, the respondent in its defence maintained it had followed the provisions of the law to the letter. The trial court (Kosgei, J.) vide an award dated 3rd October, 2008 found that the respondent had not followed the proper procedure in declaring the employees redundant. In that, he had failed to inform the appellant and the labour officer of the reasons and extent of the redundancy. Ultimately, he issued the following orders:-

i. The respondent immediately put into effect the process of reinstatement of the grievants and each of them to their original job and position as at the date of their termination, without loss of their full salaries and all other benefits and allowances, privileges and continuity of service. Sic

ii. In the event that a particular grievant no longer wishes to work for the respondent, the respondent do pay to such employee the following terminal dues:

a. All outstanding wages, leave pay and allowances as provided for in the CBA agreement between the parties.

b. Pay in lieu of notice in accordance with the parties CBA.

c. Severance pay in accordance with Clause 31 of the CBA between the parties.

d. Twelve (12) months wages by way of compensation for unlawful loss of employment.

iii. The foregoing payments be effected within thirty (30) days from the date of the award.

Five of the employees opted for reinstatement while the other took the compensation.

4. Aggrieved with the foregoing decision, the respondent sought leave to apply for the judicial review remedy of *certiorari* to quash the decision in **JR No. 632 of 2008**. The leave granted also operated as stay of the orders set out herein above. According to the respondent, the learned Judge (Kosgei, J.) acted *ultravires* by ordering reinstatement and granting exemplary and punitive damages. However, the court disagreed with the respondent and dismissed the judicial review proceedings on 30th April, 2015.

5. Meanwhile, the parties had recorded a consent on 22nd May, 2012 before Warsame, J. (as he then was) to the effect that the respondent do pay the undisputed terminal dues it had set out in the respective letters of redundancy. By then it had dawned on the employees who had earlier on opted for reinstatement that it might not have been the best option after all and they reconsidered compensation. The respondent did pay out the said terminal dues and even managed to convince some of those employees to accept 12 months' salary as final settlement of the dispute. The remaining three namely, Benson Mwangi Macharia, Robert Machira and Joseph Nyaga Mati contended they were entitled to payment of all salaries and allowances which they would have earned if they had stayed in employment till retirement age. The long and short of it is that parties were unable to agree on the terms of the decree in respect of the award dated 3rd October, 2008. It is then that the Registrar of the ELRC placed the matter before the learned Judge (Wasilwa, J.) for settlement of the terms therein. Each party made submissions in respect of the positions they held.

6. The learned Judge (Waswila, J.) in a judgment dated 22nd June, 2016 expressed herself thus:-

“From the above provisions payment of anticipatory wages is not an option. Though the Claimants were not reinstated, the only remedies they are entitled to would be to award them actual pecuniary loss or 12 months wages. In this case then, the claim as submitted by Claimants for salaries since 2006 to April 2015 is not viable. I will award the Claimants as follows:...”

7. It is that judgment that is the subject of this appeal which has been filed on behalf of one of the employees, that is, Benson Mwangi Macharia. It is premised on 22 grounds which were rather longwinded and contained arguments. The grounds can be aptly summarized:-

The learned Judge erred in law and fact by-

a. Reviewing and interpreting the award whilst there was no such application before her thus arriving at the wrong conclusion.

b. Arriving at an erroneous computation of the compensation payable contrary to the award

c. Failing to consider the CBA in computing the compensation payable.

d. Failing to award interest from the date of the award.

e. Holding that the parties had recorded a consent on 22nd May, 2012 before Warsame, J.

8. At the hearing, the appeal was disposed by way of written submissions and oral highlights. Mr. Atela, the appellant's secretary general appeared for the appellant while Mr. Kahura appeared for the respondent.

9. Mr. Atela faulted the learned Judge for adjudicating on an issue which he believed was not before her by reviewing the award in question. None of the parties had made an application for review or interpretation of the award. As far as the appellant was concerned, all that was required was for the Registrar of the court to draw the decree in terms of the award. Moreover, the minute the trial court ordered Benson's reinstatement he was deemed to have been in continuous service from the date of the redundancy, that is, 1st October, 2006, up to the date of his retirement in the year 2015. As such, he was entitled to salary and benefits relating to that period. In holding otherwise, the learned Judge denied him his rightful wages. He urged us to allow the appeal on those grounds.

10. Mr. Kahura argued that the learned Judge did not review the award but simply computed the compensation payable in terms of the award. The learned Judge's jurisdiction was set in motion when the parties could not agree on the terms of the decree and the Registrar placed the matter before her. Citing the case of ***Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR***, he urged that under **Order 21 Rule 8(4)** of the **Civil Procedure Rules** the learned Judge was required to settle the terms of the award which she correctly did. There is no requirement for a formal application before a court can exercise its jurisdiction thereunder. Besides, the duty is placed on the learned Judge to compute the compensation under the award and not the Registrar. In that regard, the court was referred to ***Telkom Kenya Limited vs. John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR***.

11. We understood the appellant to argue that the learned Judge erred in her computation by failing to appreciate that the amount which was paid under the consent order was net pay after tax of Kshs. 492,764.67 had been deducted. The learned Judge ought to have used the gross amount in calculating the outstanding amount due to the employee. In the end, the learned Judge awarded the employee more than he was entitled to. All we are prepared to say in respect of this line of submission is that the respondent never appealed against the decision in issue herein and therefore it cannot raise such a ground in its submissions. Equally, we have no jurisdiction to consider the same in the absence of an appeal by the respondent.

12. Moving on Mr. Kahura supported the findings of the learned Judge that the appellant was not entitled to anticipatory wages. In addition, interest was neither pleaded nor awarded by the trial court. He urged us to dismiss the appeal.

13. In settling the terms of a decree or order, a court is required to make it clear what exactly the judgment or as in this case the award meant. The need for the court to clarify the meaning of the judgment arises when the parties to the case are unable to agree on the meaning of the said judgment.

Ochieng, J. in *Bio-Medical Laboratories Limited vs. Attorney General [2015] eKLR* in his own words stated:-

“When a Judge is settling the terms of a Decree or Order, his role does not extend to a re-evaluation of the evidence and submissions which led the trial court to arrive at its decision.”

We agree and adopt those sentiments with approval.

14. To begin with we are at a loss as to why the appellant maintains that there was no consent order recorded before Warsame, J. (as he then was). The record bears witness that such a consent was recorded and it is on that basis that on 26th June, 2012 the respondent forwarded a sum of Kshs.1,753,640 which was accepted by the appellant as payment for the redundancy dues to Benson Mwangi Macharia under the CBA.

15. Having looked at the award in question and taking into account the role of a court in settling terms, we concur with the findings of the learned Judge and in particular with the computation of the compensation due to Benson

Mwangi Macharia as follows:-

“Benson Macharia

Salary was 97,392/=

1. So pay in lieu of notice = 97,392/=

2. Clause 31 of Collective Bargaining Agreement for severance pay will be:

- **1 month basic pay = 97,392/=**
- **(4) days pay of basic pay including house allowance for each completed month of service = 48 days salary for each year worked = 48 x 3246.4 = 155,827.2 x 11.6 years = 1,807,595.52/=**

3. 12 months' salary = 97,392 x 12 = 1,168,704/=

4. Leave due 15.9 days = 51,617.76

Total = 3,222,701.28/=

Less what was paid = 1,753,140.23/=

Balance = 1,469,561.05/=

16. There was no provision for anticipatory salaries and allowances under the award. There were only two options, reinstatement or compensation for the uprocedural redundancy. Having opted for compensation Benson's entitlement could only be in terms of the award.

17. Last but not least, an award of interest is in the discretion of the Court, which discretion must be

exercised judiciously. It is settled that before an appellate court can interfere with such discretion it must be established that the learned Judge did not exercise it properly. See ***Mbogo & Another v Shah [1968] EA 93***. In this case, the trial Judge (Kosgei, J.) did not grant interest in the award and it followed that the learned Judge (Wasilwa, J.) could not introduce or issue the same.

18. In the result and for reasons we have endeavoured to give above this appeal is absolutely without merit and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 15th day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR