IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 42 OF 2015

BETWEEN

LAMATHE HYGIENE FOOD…..……APPELLANT

AND

WESLEY PATRICK SIMASI WAFULA

& 8 OTHERS……RESPONDENT

(Being an appeal against the Judgment of the Employment and Labour Relations Court of Kenya at Mombasa (Makau, J.) dated 13th February, 2015

in

Industrial Court Cause No 46 of 2014)

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JUDGMENT OF THE COURT

On diverse dates between 2002 and 2014, the respondents were employees of the appellant in its restaurant business christened **Wimpy Mombasa** where they served in various capacities. Trouble is said to have begun on 3rd February 2014, following the hiring of a new manager by the name **Solomon Muriuki Johnson** who immediately doubled the respondents' hours of work from single shift to double shift which not only exceeded the daily ceiling of 8 hours set by statute, but was also invoked without any commensurate increase in wages or overtime pay to the respondents. Other grievances included failure by the new manager to give the respondents any leave days, rest days or time off during holidays. The situation came to a head on 6th February, 2014 when the respondents demanded a meeting with the hotel director with a threat that they would down their tools and not resume work unless their demands were met. On learning of the respondents' demands, the director declined to meet them and ordered that should they persist in their actions which he deemed illegal, they would be locked out of the premises. The respondents did not burge, leading to the business being closed down for the remainder of the day. Subsequently, the respondents were summarily dismissed from their employment with new employees being hired in their stead.

Aggrieved by their employer's action, the respondents through their trade union moved to the Employment and Labour Relations Court at Mombasa and lodged a claim for compensation for unfair

dismissal and payment of their accrued employment dues totaling Kshs.870,467/= each made up of underpayment of wages, service pay, payment in lieu of notice, annual leave, public holidays worked, off days, overtime worked and damages for unfair termination of employment. The basis of the claim was that their dismissal was unfair and in breach of the law as there was no valid reason for the termination and neither were they granted a hearing before the drastic action was taken by the appellant.

The appellant denied liability and asserted that the summary dismissal of the respondents was justified, the respondents having engaged in an illegal strike on the day their demand for audience with the director failed to bear fruit, despite their having been informed that he was away for the day. That the respondents having downed their tools without any strike notice, the appellant was constrained to close down the business for the day and hire new staff.

The cause was heard by **Makau, J.,** who in a reserved judgment delivered on 13th February, 2015, allowed the respondents' claim in part, save for the prayers for public holidays and rest days which he dismissed for want of particulars and evidence. The learned Judge consequently awarded them an aggregate sum of Ksh.2,020,519/-.for their accrued emoluments and compensation for unfair dismissal.

Dissatisfied with the outcome, the appellant has now brought this appeal, challenging the aforesaid decision on grounds that the learned Judge erred in finding the respondents' termination of employment was unfair; that the respondents were entitled to overtime payment, notice pay, leave pay and underpayment and awarding them notice pay, leave pay and underpayments and lastly; that the trial court's award of Kshs.2,020,519/- was mathematically incorrect.

With leave of Court, the parties filed their respective written submissions, upon which they relied to urge their positions. According to the appellant, the termination of the respondents' employment was lawful and justified on account of their illegal strike and refusal to work on 6th and 7th February, 2014. The appellant submitted that since the respondents had failed to issue a strike notice in accordance with **Section 76** of the Labour Relations Act, the ensuing strike was unprotected and hence illegal within the meaning of **Section 65** of the Act. That the termination having been fair, the issue of notice pay did not arise and the learned Judge fell into error in awarding the same. On the issue of overtime, the appellant maintains that the respondents never worked any extra hours, since there was never an amalgamation of shifts as alleged. It is the appellant's argument that in any event, the burden of proof lay with the respondents to show the overtime worked, if at all. That this having not been shown, they were disentitled to an award of overtime pay. In addition, that even if overtime had been introduced by the new manager when he allegedly combined the two shifts, the respondents' claim for overtime as from May 2013 was still unsustainable, given that the new manager only came into employment on 6th February 2014. The grounds challenging the award of underpayments, leave pay and the mathematical computation of the award were however abandoned by the appellant in his submissions.

Opposing the appeal, the respondents submitted that the appeal ought to be dismissed at the outset for raising issues of fact contrary to **Section 17(2)** of the Industrial Court Act which restricts appeals from the Industrial Court to matters of law only. The respondents added that the judgment was sound in law and that the termination of their employment was unfair given that they had neither been given a reason for their termination nor been accorded a hearing prior to their dismissal. Lastly, on the issue of overtime, the respondents reiterated that the appellant's new manager had merged two shifts and required them to work continuously through the entire day at no added pay and that the award of overtime was thus justified. On the above premise, the respondents prayed for the dismissal of the instant appeal.

Prior to, appeals to this Court from the Industrial Court (now the Employment and Labour Relations Court) were limited to issues of law only. Indeed, **Section 17** of the then Industrial Court Act No. 20 of 2011 provided *interlia*:-

> **"(1) Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.**

(2) An appeal from a judgment, award, decision, decree or order of the Court shall lie only on matters of law."

(Emphasis added)

However, these provisions have since been amended by the Statute Law (Miscellaneous Amendments) Act **No 18 of 2014** which deleted **Section 17** aforesaid in its entirety. The import of this is that the limitation on jurisdiction of the Court of Appeal in employment and labour matters was removed and the court can hear issues of both fact and law. This being the case, the submission by the respondent that the appeal is incompetent as it was not limited to matters of law only must fail.

Having clarified this Court's jurisdiction on a first appeal, it is our duty now to re-analyze and re-valuate the evidence adduced at the trial court in a bid to reach our own findings and conclusion both on matters of law and fact. In our view, there are essentially two issues for determination in this appeal, viz; whether the termination of the respondent's employment by the appellant was unfair and if so, whether the award by the trial court was justified.

At the trial the respondents called two witnesses. According to **Ali Mohammed Bakuli (CW1),** though he and the rest of the respondents turned up for work on 6th February, 2014, they were emphatic that they would not resume work until they had a meeting with the appellant's director. He reiterated this testimony during his cross examination, when he stated that *'On 6.2.2014 we reported to work but we did not work until we gave our grievances to the director. We spoke to the manager but we did not work because of lack of agreement.'* It is thus not disputed that the respondents downed their tools on the 6th of February, 2014. A further indication of this is found in the respondents' submissions in which they contend that they were only exercising their constitutional right to go on strike as enshrined in **Article 2(d)** *(sic) of the Constitution.* For avoidance of doubt, a strike is defined by **Section 2** of the Employment Act 2007 as:-

> **"the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers' organization of which their employer is a member, to accede to any demand in respect of a trade dispute."**

The respondents' refusal to work thus amounted to a strike. Further, it is also common ground that the meeting with the director never came to pass and that in view of the respondents' refusal to resume work, the management was forced to close down the business for two days.

Article 41 (2)(d) of the Constitution does indeed provide for the right of a worker to go on strike, a position echoed by **Section 79** of the Labour Relations Act which prohibits the employer from victimizing a worker who is exercising his undoubted right to go on strike. Worth remembering however, is that this right is circumscribed. There is a prescribed procedure to be followed before an employee can engage in a lawful strike.

Under **Section 76** of the Labour Relations Act, a person may only participate in a strike or lockout if:-

> **"(a) the trade dispute that forms the subject of the strike or lock-out concerns** terms and conditions of employment or the recognition of a trade union**;**
>
> **(b) the** trade dispute is unresolved after conciliation**-**
>
> **(i) under this Act; or**
>
> **(ii) as specified in a registered collective agreement**
>
> **that provides for the private conciliation of disputes; and**
>
> **(c)** seven days written notice **of the strike or lock-out has been given to the other**

parties and to the Minister by the authorised representative of-

(i) the trade union, in the case of a strike;

(ii) the employer, group of employers of employers'

organisation, in the case of a lock-out." (Emphasis

added)

As can be appreciated the above requirements are in three sequential stages, with the first being to ensure that the trade dispute concerns the terms and conditions of employment or recognition of a trade union (as the case may be). In this case, it is common ground that the root of the dispute was the respondents' working hours and remuneration. Thus it qualifies as a dispute concerning terms and conditions of employment. Having satisfied the first requirement, the second hurdle is whether there was a failed conciliation process. On the evidence on record, the parties never got past this stage as no conciliator was appointed whether under **Section 65** of the Labour Relations Act or the collective bargaining agreement (if any). The last stage is the issuance of a strike notice in writing to the employer and or adverse party. This, as correctly submitted by the Appellant, was never followed through. The totality of this is that the strike envisioned by the respondents failed to meet the threshold required for it to be valid and protected, rendering it unlawful. Infact, according to **Section 80** of the Labour Relations Act, a worker is engaging in an unlawful strike deemed to have breached his contract of employment and liable to disciplinary action.

That being the case, what option was available to the appellant? Under **Section 44(3)** & **(4)(c)** of the Employment Act an employer whose worker has breached the contract of employment and/or willfully neglected to perform his duties under the contract may summarily dismiss such an employee. As observed by this Court in the case of **Maseno University v Universities Academic Staff Union [2015] eKLR**, an employer is entitled to summarily dismiss a worker who engages in an illegal strike and in the process, absconds duty. Indeed, the provisions of **Section 44** of the Employment Act as aforesaid provides for summary dismissal. For clarity, summary dismissal takes place when an employer, for valid reason as provided for under **Section 44** of the Employment Act, terminates the employment of an employee without notice or with less notice than that to which the employee is otherwise entitled by any statutory provision or contractual term. **Section 44** provides *inter alia*:-

"(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) 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) ……..

(b) …….

(c) an employee wilfully neglects to perform any work which it was his duty to perform**, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly…."** (Emphasis provided)

Such was the case here. Upon learning of the respondents' refusal to work, the appellant was compelled to close restaurant for the day after which it opted to terminate the respondents' employment. Having established that the appellant indeed had the right to summarily dismiss the respondents, was this right properly exercised in this case and if not, what are the consequences?

According to the respondents, their dismissal was unlawful for want of three things; one, that no notice period or payment in lieu thereof ever issued, two, they were never accorded an opportunity to be heard and lastly they were never given any reasons for the termination. The appellant was however, of the view that since this was a case of summary dismissal, the requirements cited by the respondents were unnecessary. The appellant contended that under **Section 35** of the Employment Act 2007, it had the right to dismiss the respondents without any notice.

Looking at the evidence tendered, it is common ground that upon demand for reasons by the respondents' union official, the appellant's manager indeed cited the illegal strike as the reason for dismissing the respondents. In a letter dated 6th February, 2014, to The County Labour Office, the manager stated in part that:-

> **"I have to report to your office that my nine employees downed their tools on Thursday with effect from 6.00 am. The said employees reported but refused to work. I had no alternative than** (sic) **to close the hotel.**
>
> **Further, they did not issue a strike notice as required and as to date, I am not aware of their grievances. I have had therefore, to dismiss their services with immediate effect and hire others."**

As stated, this letter only came after the dismissal had already been enforced. It is thus not in dispute that no hearing or communication of the reason for termination took place prior to the dismissal. According to **Section 41** of the Employment Act 2007, even where an employer summarily dismisses an employee, there has to be notification of the reason and hearing before termination on grounds of misconduct. The provision states *inter alia* that:-

> **41. (1) ……. an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2). 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.**

Therefore, giving of reasons and according a hearing to an employee who it is intended to dismiss even summarily on grounds of misconduct is absolutely necessary mandatory and for good reason, for no individual should be condemned unheard on account of charges unknown to him.

This Court has previously had occasion to consider on this issue in the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** wherein it stated that:-

> **"Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination…"**

The totality of the foregoing is that though the appellant was entitled to summarily dismiss the respondents from its employment, it was nonetheless, bound to not to only give notice and reasons for the

termination but also accord the respondents a chance to be heard prior to effecting the dismissal. The appellant's assertion that Section 35 of the Employment Act does away with the requirement for notice, also fails. This is because while that section defines the notice periods applicable to the various contracts of employment, it does not do away with the requirement that notice should be issued. To the contrary, subsection (3) thereof states that:-

> "(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands."

Again under subsection (4) (b) it is provided that;

> "(4) Nothing in this section affects the right—
>
> (a) ……..
>
> (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law."

The employer has the onus of proving that there exists a cause recognized by law which warranted the failure to give notice. No such cause was advanced in this case. As a result, the appellant failed to follow through with the other statutory imperatives thereby rendering the summary dismissal unlawful.

As a result, there exists no reason to interfere with the findings of the trial court in so far as notice pay and compensation for unfair termination is concerned.

This leaves overtime, leave pay and underpayments as the outstanding issues in terms of quantum. There is no dispute that the hotel operated from 6.00 am till 10.00 pm. According to the appellant's sole witness, these hours were divided into two shifts, with the first running from 6.00 a.m. to 2.30 p.m. and the second one running from 3.00 p.m.- 10.00 p.m. The respondents alleged that the appellant's manager had merged the two into a single shift, which he then imposed upon the respondents without any added pay; an allegation denied by the appellant. In the face of the appellant's denial that the shifts had been merged, the onus lay with the respondents to call evidence to prove that they put in the extra hours of work. No such evidence was adduced. It is trite law that the onus to prove a fact and discharge the evidentiary burden is on one who alleges, in this case, the respondents. Failure to do so as was the case here means that the allegation that they worked extra hours remains just that- an allegation. In any event and as already stated and conceded by the respondents, the new manager was only employed on 6th February, 2014. Therefore their claim for overtime can only be for the period after his employment and not before.

On the whole therefore, the appeal succeeds in part. The judgment and the decree of the Employment and Labour Relations Court are set aside but only to the extent of overtime payments. Considering the circumstances of the case, there shall be no order as to costs in the appeal as well as the Employment and Labour Relations Court.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR