IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 202 OF 2011

BETWEEN

MOI UNIVERSITY.....APPELLANT

AND

KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL

INSTITUTIONS, HOSPITALS AND ALLIED WORKERS.....RESPONDENT

(appeal from the award of the Industrial Court of Kenya at Nairobi (Madzayo, J.,

Warrakah & Siele, Members) made on 27th August 2009

in

Cause No. 29 of 2008

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JUDGMENT OF THE COURT

The respondent is a registered trade union mandated by its constitution to represent workers from various public institutions, among them public universities. The appellant is a public university and is the former employer of twenty four members of the respondent. On 23rd November 2002, the twenty four former employees of the appellant sustained injuries when they took a ride in a university bus, registration number KZX 891, which was involved in a road accident in which several of the passengers suffered injuries. It emerged that the bus was not insured. When the appellant failed to compensate the workers, they sued it for damages. Later on, between March and April 2006, the workers were terminated, which according to the respondent was due to their refusal to withdraw their suit against the appellant.

Consequently, a dispute arose between the parties herein. In accordance with the provisions of the Trade Disputes Act (now repealed) the respondent reported the dispute to the Minister for Labour. The Minister appointed a labour officer who investigated the matter and gave his recommendations, which were that the workers were well within their rights to sue the appellant for compensation, and that they should be reinstated to their former positions without loss of benefits. The appellant refused to accept these recommendations, which led to the Minister referring the dispute to the Industrial Court for settlement.

The Industrial Court was tasked with considering whether or not the termination of the workers was unlawful and whether it complied with a Collective Bargaining Agreement (CBA) entered into between the parties. That clause provides that employment of a worker may be terminated by either party giving written notice and reason(s) or making payment in lieu of notice. Clause 6(f) of that agreement further reserves the right of either party to terminate the appointment of an employee, without notice, for any lawful cause under to the Employment Act.

The court found in favour of the workers. Relying on section 45 of the Employment Act, 2007 it held that the termination of the workers was unfair and declared that it was unjustified, illegal and therefore null and void. It therefore ordered that they be reinstated to their jobs from their dates of termination and without any loss of salary or benefits.

The appellant was aggrieved with that order and filed an application for review before the Industrial Court. It stated that the court had erred in basing its decision on the employment laws enacted in 2007 which were therefore not in force at the time of the events giving rise to this appeal. The appellant further argued that it had already recruited replacements for the twenty four former employees, and therefore urged that it would be subjected to great logistical and financial difficulties if it had to reinstate the dismissed employees.

The court, after hearing the parties, held that it had authority from Sections 14 and 15 of the Trade Disputes Act, to determine whether there was victimization and or unfair labour practice applied by the appellant, and that the it therefore had jurisdiction to determine whether or not the termination of the workers was lawful. Consequently, the court therefore reviewed the award to the extent that it ordered the unlawful termination of the workers be reduced to normal termination without any loss of their full salaries and all other benefits and allowances up to the date of their termination, and that the appellant pay to each of the workers six months' salary, being compensation for loss of employment. The Court also ordered the Provincial Labour Officer, Rift Valley, to tabulate each employees' final dues from the date of termination to the date of the ruling, and to file his report confirming compliance within 60 days.

The appellant who is aggrieved with the outcome of the review has preferred this appeal against the orders made therein. We remind ourselves that in this appeal, we must confine ourselves to matters of law only, as Section 27 of the Labour Institutions Act, 2007 which at the time established the Industrial Court, provided that:

> ***"Appeals from a judgement, award, or decision of the Industrial Court shall only lie on matters of law."***

The jurisdiction of the Industrial Court, as then established, was derived from Industrial Court (Procedure) Rules, 2010 in the following manner:

> ***32. Review***
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> *1.* ***A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—***
>
> ***(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or***
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> *b.* ***on account of some mistake or error apparent on the face of the record; or***
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> *c.* ***on account of the award, judgment or ruling being in breach of any written law;***
>
> ***or***
>
> *d.* ***if the award, the judgment or ruling requires clarification; or***

e. ***for any other sufficient reasons.***

An application for review is not in the nature of an appeal. In an application for review, the Court is asked to review orders it has made in order to clarify them, or to correct some apparent error on the face of the record, or for some other sufficient reason. This point was succinctly made by this Court in ***National Bank of Kenya Ltd v Ndungu Njau*** ***[1997] eKLR (Civil Appeal No 211 of 1996)*** this Court (differently constituted) stated with regard to review:-

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

These are the principles that we must bear in mind as we determine this appeal. The appellant submitted that the learned judge erred by retrospectively applying the provisions of the Employment Act, 2007 and the Labour Institutions Act, 2007, both of which became operational on 2nd June 2008, yet the cause of action arose in March 2006. The appellant referred to the authority of ***Municipality of Mombasa v Nyali Limited*** ***[1963] EA 330 CAN*** for the proposition that where legislation affects substantive rights, then it cannot be given retrospective effect. The Industrial Court dealt with this issue by disagreeing with the appellant that it had erred in basing its ruling on unlawful termination.

We note that clause 6 of the Collective Bargaining Agreement upon which the appellants rely provides in part that ***"either party reserves the right to terminate appointment without notice for lawful cause according to the Employment Act."*** We agree with the appellant that in this case, the statute that the court ought to have referred to was the Employment Act (repealed) and not the Employment Act enacted in 2007. However, this did not have any adverse effect on the initial findings of the court since, as pointed out, section 15 of the Trade Disputes Act allowed the court to make inquiry into a wrongful dismissal in the following terms:

> ***"15. (1) In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that employer to reinstate that employee in his former employment, and the Court may in addition to or instead of making an order for reinstatement, award compensation to the employee."***

Thus, the Industrial Court had the power to inquire into the propriety of the dismissal, and where it found that the dismissal was wrongful, or in breach of the Collective Bargaining Agreement or the law, it could make an award for compensation, provided that the amount awarded did not exceed twelve months wages. The court's award in that regard therefore did not breach any written law, and this ground of appeal therefore fails. However, we note that the court ordered that the termination of the workers be reduced to normal termination ***without any loss of their full salaries and all other benefits and allowances, with effect from the date of unlawful termination up to the date of [the] ruling.*** Section 16 of the Trade Disputes Act gave the court power to award compensation or reinstatement. Where the court ordered compensation without ordering reinstatement, it could not exceed twelve months monetary wages. The award requiring the appellant to pay to the workers all salary arrears is therefore in breach of those clear provisions, and therefore should have been reviewed by the court.

The appellant also faults the Industrial Court for making an order that damages be assessed by the Provincial Labour Officer. It alleged that the court failed to appreciate that the labour officer has no power to assess a claim on behalf of a court, and relied on the decision of this Court in ***Kenya Revenue Authority v Menginya Salim Murigani*** ***[2010] eKLR (Civil Appeal No 108 of 2010)*** in support of the proposition that the quantum of damages is a judicial function which cannot be delegated to a ministerial official. We agree with the proposition of this Court in that decision that:

> ***"Assessment of damages is not a ministerial act as envisaged by Order 48 of the Civil Procedure Rules and a direction to "assess" or "calculate" damages in a judgment would be contrary to the requirements of Order 20 of the Civil Procedure Rules because it would be incomplete without the assessment and would patently be a nullity."***

However, as we have found that the court erred in making an award of for the salary arrears, the order requiring attendance of the Provincial Labour Officer is rendered superfluous.

In the result, this appeal has partially succeeded. We therefore make orders as follows:

a. The order granting the twenty four employees their full salaries and other benefits and allowances from the date of their termination to the 2nd June 2011 is hereby set aside;

b. The respondent shall pay to each of the twenty four employees all the statutory and contractual dues to them up until the date of their termination;

c. The respondent shall pay to each of the twenty four employees six (6) months' salary being compensation for loss of employment;

d. Each party shall bear its own costs in this appeal.

Dated and Delivered at Nairobi this 11th day of March, 2016

H. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR