IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 63 OF 2015

BETWEEN

BAMBURI CEMENT LTD .... APPELLANT

AND

FARID ABOUD MOHAMMED .... RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court (Makau, J.) delivered on 26th June, 2015

in

Employment and Labour Relations Cause No. 39 of 2015)

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JUDGMENT OF THE COURT

The respondent was employed by the appellant with effect from 4th January, 1990 until his services were terminated in 2014, having served the appellant for a period of 24 years. It is the manner of that termination that is in contention in this appeal, the Employment and Labour Relations Court having found that the termination was wrongful and awarded the respondent Kshs.8,250,048 in gratuity in addition to the admitted two months' salary in lieu of notice in the sum of Kshs.229,168 and Kshs.26,042 constituting 20 leave days earned but not taken at the time of the termination.

In order to discharge our role to reconsider afresh the circumstances of this dispute and to arrive at our own independent conclusion as the first appellate court, the following brief background is critical.

In 1995, while in the employment of the appellant, the respondent sustained an injury on the right knee while playing football. There is a letter on record from one of the Human Resource Officers written on 2nd April 2014 at the commencement of the disciplinary process suggesting that the respondent *"suffered an injury during the Factory Good Will Games, way back in the late 90s"*.

According to the respondent, he underwent several surgeries the costs of which were met by the appellant. On 5th December, 2012, he filed a claims form for compensation alleging that he was injured on 19th August 2012 while climbing a crane. That claim became the subject of a show-cause letter addressed to the respondent by the appellant in which he was asked to explain why he lodged the claim

when he knew that he was not on duty on the date of the alleged accident; and that contrary to the company regulations, he made no report of the accident. Consequently, he was asked to explain these anomalies in writing by 25th April, 2014, 8 days from the date of the show-cause letter.

The appellant was not satisfied with the explanation proffered by the respondent and invited him to attend a disciplinary hearing. He was accompanied to the hearing by two union officials of his trade union and a fellow employee. The hearing took place on two consecutive days at the end of which the appellant communicated to the respondent its decision to summarily dismiss him. The respondent was aggrieved and appealed to the appellant. That appeal was allowed and the decision for summary dismissal reversed with a directive that in place thereof the dismissal be substituted with a decision to terminate his services. The termination was to be effective from 16th May, 2014 and the respondent was also notified that he would be entitled to two months' salary in lieu of notice and a payment of 20 accrued leave days.

This latest decision once again aggrieved the respondent who brought an action in the Employment & Labour Relations Court against the appellant for:

a. a declaration that the decision to terminate his service was based on no evidence; and that the entire disciplinary process was null and void;

b. an order for damages for unfair termination based on 12 months' salary amounting to Kshs.1,375,008;

c. an order for interim payment of Kshs.262,410 with interest from 16th May, 2014;

d. payment of meal allowance in the sum of Kshs.7,200;and

e. gratuity calculated at three months basic pay for each completed year of service amounting to Kshs.8,364,632.

In total the respondent applied for judgment in the sum of Kshs.10,002,050,costs and interest.

The appellant responded to the claim denying liability and insisting that the respondent's service was properly terminated. It also counter-claimed for two months salary paid to the respondent after termination of his service and rent arrears, amounting to Kshs.199,680.

Both sides called evidence with the respondent confirming that the origin of his injury was a football March in 1995; that following an operation in 2012 on the injured knee, the Human Resource Officer of the appellant at the time, one Esperanze, advised him to complete the claims form and thereafter the respondent submitted himself to a doctor for examination. He returned the completed form to the appellant. Nothing happened until 8th May, 2014 when he was summoned by the new Human Resource Manager, Rose Sally who wanted to know why he had placed a claim for an injury which allegedly occurred when he was not on duty. She accused him of attempting to defraud the appellant. At a subsequent meeting with the same Rose Sally, the respondent explained to her that he had erroneously recorded that he was injured on 19th August 2012 instead of 25th July 2012 when he was infact on duty. That explanation was rejected and he was served with a show-cause letter.

At the disciplinary hearing, his explanation was once more rejected and he was summarily dismissed. He challenged that decision by way of an appeal to the appellant. The appeal was allowed but once more he was not satisfied because, instead, the appellant decided to terminate his services with 2 months' salary in lieu of notice, compelling him to bring the suit giving rise to this appeal.

The appellant on the other hand called evidence to rebut the claim for unfair termination through Rose Sally who maintained that the respondent deliberately made a false claim with the intention of defrauding the appellant; that on the date he claimed to have been injured, he was in fact not on duty; and that no

report was made, as required, to his superiors. In her opinion, this was a case of gross misconduct warranting termination of service; that the termination process was procedurally conducted with the respondent being given an opportunity to be heard; that he was offered payment of two months' salary in lieu of notice, and 20accrued leave days. The witness denied that the respondent was entitled to gratuity because the Collective Bargaining Agreement (CBA) did not provide for it and that, in any case it was not payable on account of the fact that the termination was due to misconduct on the part of the respondent.

In his judgment, the subject of this appeal, the learned Judge (Makau, J.) merely noted that after the summary dismissal was *"reduced to a normal termination,"* there were only two issues to be determined; whether the respondent was entitled to the reliefs sought in the suit and whether the respondent's counter-claim would be allowed. He entered judgment for gratuity in the sum of Kshs.8,250,048, Kshs.229,168 constituting 2 months pay in lieu of notice, and Kshs.26,042 for unutilized 20 leave days. He dismissed the claim for meal allowance for want of particulars. But he allowed the counter-claim as prayed.

Aggrieved, the appellant has brought this appeal challenging, mainly, the finding on termination and the award of gratuity. In the written arguments, the appellant submitted that it was justified to terminate the respondent's service; and that there was no basis for awarding gratuity to the respondent. According to the appellant, the Employees' Handbook and prevailing CBA had specific provisions to the effect that no terminal benefits would be payable where an employee was summarily dismissed or fairly terminated.

Without making specific finding on whether the termination was unfair, the learned Judge went ahead to dismiss the claim for compensation for unfair termination holding that the issue was not relevant after the reversal of summary dismissal replacing it with termination, and that the only remaining claim was that of gratuity. This cannot be correct in view of the clear averments in the memorandum of claim. In the claim, the respondent himself claimed that there was no evidence to warrant the termination; that the disciplinary process was flawed; and that as a result of the *"illegal termination"* he suffered loss. Consequently, he prayed, *inter alia*, for damages for unfair termination at the rate of 12 months' pay.

Where a party makes a claim for unfair termination, the court must be satisfied of two things; the procedure employed in terminating the party's service and the reason or reasons assigned to the termination. The procedural requirement includes the termination notice under **section 35** and the disciplinary hearing under **section 41** of the Act. Where the employer does not issue the requisite notice under the law or in accordance with the terms of an employment contract, the employee is entitled to payment of salary in lieu of notice. On the other hand, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, or before summarily dismissing an employee, the employer is required to explain to the employee the reason for the intended action in the presence of another employee or a union official. Thereafter, the employer must hear the employee's representation before taking any disciplinary step. Termination is unfair under **Section 45** of the Act if the employer fails to prove that the reason for the termination is valid, that the reason for the termination is fair in relation to the employee's conduct, capacity or compatibility, or based on the operational requirement of the employer, and that the employment is terminated in accordance with fair procedure.

The termination will also be unfair if it is done on the basis of a female employee's pregnancy, or for reasons related to an employee going on leave or an employee's membership of a trade union, or his participation in the activities of the trade union outside working hours, or his refusal to join or withdraw from a trade union or on account of the employees race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability.

The termination will equally be unfair if it is done because an employee has initiated a complaint or other legal proceedings against the employer or where the employee participates in a lawful strike. See **Section 46.**The burden of proving that an unfair termination of employment or wrongful dismissal has occurred is upon the employee, while it is the responsibility of the employer to demonstrate the existence of justifiable grounds for the termination.

Bearing in mind all these we do not see how the learned Judge could begin to consider the remedies

before laying out the foregoing and making a finding on the question of whether or not the termination was fair. We are satisfied that the respondent was subjected to a fair hearing procedure, by being invited and notified of the disciplinary hearing date, by being accompanied to the hearing by persons of his choice and by the grounds upon which the termination of his service was sought being explained to him. After his summary dismissal, he was still heard on appeal and the decision varied.

The respondent himself said of the procedure in his own words that;-

> ***".....I already knew the reason for the meeting......on 8th May 2014.....I attended disciplinary hearing with John Oduma, David Kenga and Joseph Odhiambo, all union officials. The proceedings went on well and the union officials asked questions.......The proceedings were good and I was satisfied."***

That having been the case and only after satisfying himself of the procedural propriety was the learned Judge expected to turn to consider the reasons for termination before addressing the reliefs. Indeed, it is the reasons for termination, if found to be unfair, that would lead to a consideration of what relief an employee is entitled to. The appellant was required to prove that at the time of termination of the contract of employment it genuinely believed that the respondent intended to defraud it by making a false claim. Was the reason for the termination valid or fair? We shall be guided in the answer to this question by the following passage from Halsbury's Laws of England, 4th Ed. Vol. 16 (1B) paragraph 642 which was reproduced in **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona,** Civil Appeal No. 3 of 2014:

> ***"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."***

The question was answered differently in the Canadian case of **Michael Dowling v Workplace safety and Insurance Board** (2004) CAN LII where the court stated;

> ***"It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional-dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct."***

Applying the above standard and bearing in mind the provisions of the Employment Act, the CBA and the appellant's Employees' Handbook, all of which emphasize the duty of confidentiality, honesty and reasonable care in the performance of the contract of employment, the respondent, by lodging a claim in 2012 for an injury that occurred in 1995 in a football match and alleging that it was caused by a slip while climbing a crane on a date he was not on duty, acted, in our view, dishonestly and in bad faith. While we entertain no doubt that indeed the respondent, for a long time suffered pain on the right knee, it is his attribution of that injury to a fresh cause that made the claim suspicious bearing in mind also the fact that no report of the fresh injury was made. The respondent admitted that, in view of his experience of over 24 years in the company, he knew the importance of reporting accidents whenever they occurred. Clause 11.7 of the Employees' Handbook requires an employee who is injured at work to report the occurrence, however slight or minor immediately to the immediate supervisor.

On the basis of the foregoing, we think that the appellant discharged its burden of proving that the reason for the termination was valid and fair as it related to a proven misconduct by the respondent. The respondent, on the other hand, failed to demonstrate that the termination was unfair. The learned Judge ought, upon analysis of the circumstances, to have so found. None of the remedies for unfair termination enumerated under **section 49** of the Act, for the foregoing reasons, was available and none should have been awarded, except those that were conceded by the appellant, such as salary in lieu of notice, and payment of 20 days leave.

Was the respondent entitled to gratuity? The CBA for the period 1st May, 2009 to 30th April 2012, which was the only one presented at the trial, at clause 30 makes provision for payment of either service gratuity or retirement pension scheme and states, *inter alia*, that both apply only to employees proceeding on normal retirement at the age of 55 years; that those in service as at 7thNovember 2005 were at liberty to elect to remain in service with the gratuity arrangement or move to the retirement pension scheme.

The Employee's Handbook, on the other hand only provides for payment of pension as defined under the Company Pension Scheme Rules where an employee's service is terminated. Those rules were not availed at the trial and we do not know their terms. The respondent's claim was that having served for 24 years and 4 months he was entitled to **"gratuity pension calculated at three months basic pay for each completed year of service and prorata basis: 114,584 x 4 (sic) 24 x 4 months = Kshs.8,364,632."**

Clearly, this calculation was based on **clause 30 (a)** of the CBA which provided that for service over 20 years, an employee would be entitled to 3 months' basic pay for each completed year of service – and a pro-rata payment where the year is not completed. The burden was upon the respondent to prove that he was entitled to gratuity. It is apparent from **clause 30 (a)** of the CBA that gratuity is only payable to an employee who retires upon attaining the age of 55 years. It cannot therefore be paid to an employee who has been dismissed or whose employment has been fairly terminated. By its own meaning, the word gratuity denotes a *gratis* payment by an employer in appreciation of service. The employee does not make any contribution towards this payment.

Having had his employment terminated for reasons of misconduct, the respondent was not entitled to gratuity. The learned Judge was in error when he found that the respondent was entitled to gratuity. Save for the fact that the respondent was entitled to two months' pay in lieu of notice and 20 leave days pay, the appeal is allowed. We make no orders as to costs.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR