IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, MAKHANDIA & ODEK, JJ.A)

CIVIL APPEAL NO. 198 OF 2011

BETWEEN

JARED AIMBA……..…….….APPELLANT

AND

FINA BANK LIMITED ……..…...……..……... RESPONDENT

(An appeal from the Award of the Industrial Court of Kenya at Nairobi (Honourable Mr. Justice Paul Kosgei and members) dated 25th March, 2011)

in

INDUSTRIAL CAUSE NO. 525(N) OF 2009

****

JUDGMENT OF THE COURT

1. Jared Aimba (hereinafter referred to as "the appellant") lodged his memorandum of claim before the Industrial Court as it then was on 16th September 2009 seeking reliefs against Fina Bank Limited (hereinafter referred to as "the respondent"). The appellant then filed an amended Statement of Claim dated 26th October 2010. The claim arose out of the appellant's termination of employment with the respondent.

The appellant later amended his claim to and made claims for unexpired period of his contract, twelve months salary in lieu of notice, a finding that the termination of the contract was unfair and illegal, exemplary damages and a finding that the respondent had breached **sections 10 and 45** of the Employment Act, 2007.

2. In his memorandum of claim, the appellant was employed in 2006 by the respondent as Head of Business Banking in Nairobi as per contract of employment. In October 2008, the respondent offered the appellant a new position as Managing Director in Uganda for 3 years specifying the responsibilities and remuneration which the appellant took up relocating his family to Uganda. The appellant while on leave and in Nairobi met the respondent's Chief Executive Officer who requested the claimant to resign. The parties corresponded on the issue following the meeting leading to a letter dated 30th June 2009 which terminated the appellant's services leading to the claim.

3. In it's filed memorandum of reply, the respondent reiterated its contract of employment which had provision for termination of employment by one month's notice or salary in lieu of notice and also had a provision for the transferability of the appellant's services to any of the respondent's existing or future branches. In line with this, the respondent transferred the appellant to Uganda and the respondent raised concerns as to the appellant's discharge of his duties including exposing the respondent financially and irregularly obtaining unsecured loan from the respondent's Uganda branch by concealment of material facts and in contravention of the regulations on insider lending, distributing an inaccurate Management Information System and failure to dispatch Personal Declaration Forms to a prospective director leaving the respondent exposed to penal consequences by the Ugandan authorities. The respondent did not dispute the informal meeting held between its Chief Executive Officer and the appellant but argues that the meeting was informal, without prejudice and did not have any firm offers, agreements or conclusions. The upshot of the respondent's case is that the termination was lawful, procedural and fair.

4. Following the hearing and submissions on behalf of the parties, the industrial court in its award found the termination to be justified and lawful and the respondent was thus entitled to one month's pay in lieu of notice as offered by the respondent in the letter of termination, pay for the month of June 2009 and issuance of the Certificate of service. The Industrial Court dismissed the rest of the claims.

5. The appellant being dissatisfied with the award preferred this appeal. From his memorandum of appeal dated 15th September 2011, the appellant lists eight grounds of appeal. The appeal was argued before us by **Ms. V. Wangui Shaw** learned counsel appearing for the appellant while **Kimani D.K** learned counsel held brief for **Mwangi E.N.** for the respondent.

6. In her arguments Ms. Shaw's submissions were a reiteration of the arguments offered before the Industrial Court at the first instance. To learned counsel, unfairness was to be inferred from the fact that the appellant's employment was terminated based on a contract dated 10th January 2008 which had been discharged and replaced with that of 28th October 2008 the latter being the operational contract. On this point counsel referred us to **Chitty on Contracts, 28th edition Volumes 1 and 2** and the House of Lords decision in **3W.L.R. Devis Ltd v Atkins (H.L.(E.)) [1977] 214.** Learned counsel further argued that the appellant was discriminated against as under **section 45(5)(d)** of the Employment Act as a past employee of the respondent was dealt with differently by the respondent compared to the appellant under the same circumstances.

7. In response, Mr. Kimani for the respondent submitted that the termination of the appellant's employment was for a valid reason occasioned by the appellant's failure to attend to a disciplinary committee hearing. Learned counsel also pointed out the instances of lack of integrity on the appellant's part such as irregularly taking an unsecured loan and non-disclosure of material information required to the Ugandan authorities under the **Financial Institutions (Insider Lending Limits) Regulations 2005.** Learned counsel argued that there was no reason for the appellant to refuse being subjected to the disciplinary process as the appellant was terminated on 30th June 2009 and not earlier. Regarding the employment contract in operation at the time between the parties, Mr. Kimani argued that the subsequent letter dated 28th October 2008 regarding the appellant's responsibilities in Uganda was not a new contract but rather a variation of the earlier contract dated 10th January 2006. Counsel urged us to dismiss the appeal with costs as none of the reliefs sought were available to the appellant.

8. From the arguments by counsel, and as per the award subject to this appeal, we take the view that the following are the main issues for our determination in this appeal:-

a. **Whether the termination was unfair, unlawful, unprocedural and unjustified in light of the provisions of sections 45 and 41 of the Employment Act**

b. **Whether the appellant is entitled to any remedies**

9. On a preliminary point, we found it necessary to consider whether the appeal was right before us in

light of counsel for the respondent's submission that appeals lie to the high court. We noted that this appeal arises from a claim filed in September 2009 as amended in October 2009. It is important to highlight this in view of the various amendments in the employment and labour relations laws in the recent past an particularly following the promulgation of the constitution in the year 2010. At the time of filing the memorandum of claim before the industrial court as it then was, appeals to this court from awards of the industrial court were governed by **section 27** of the **Labour Institutions Act** which came into operations on 2nd June, 2008. The said section 27 provides as follows:-

> ***"27. (1) Any party to any proceeding before the Industrial Court may appeal to the Court of Appeal against any final judgment, award or order of the Industrial Court.***
>
> ***(2) Appeals from a judgment, award, or decision of the Industrial Court shall only lie on matters of law."***

10. From the above statutory provision, it is evident that appeals to the Court of Appeal only lie on matters of law. Needless to say, **Part III of the above Act** was deleted in the year 2011 by virtue of an amendment introduced by Act **No.20 of 2011 (now known as The Employment and Labour Relations Court Act)**. Be that as it may, it is well known that a new law cannot have retrospective application. In the circumstances, we have considered this appeal in the context obtaining at the time.

11. **Rule 29(1)** of this court's rules allows this court, on any appeal from a decision of a superior court in the exercise of its original jurisdiction such as the Employment and Labour Relations Court, to re-appraise the evidence and draw inferences of fact. Accordingly, this being a first appeal, we are required to appraise and evaluate the trial judge's interpretation of the statutory provisions, the application of these laws to the undisputed and established facts and the evaluation of the reasonableness of the conclusions of the learned judge.

12. The question as to what amounts to a point of law was discussed by this court in **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR** as follows:-

> ***We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re-evaluation of the Judge's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law***

13. In the same breadth the scope of our jurisdiction on matters of law was also discussed in **Timmamy Issa Abdalla v. Swaleh Salim Imu and 3 others, Civil Appeal No. 36 of 2013** by the Court of Appeal as follows:

> ***"In addition to the above guidance, this appeal being a first appeal to this Court, it is important to keep in mind the principles to be followed in a first appeal as reflected in Peter's v. Sunday (1958) EA 424 and Selle v. Associated Motor Boats Company Limited (1968) EA 123, that although the Court has jurisdiction to reconsider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an Appeal such as the one before us where the Right of Appeal is limited to matters of law only, because the jurisdiction of this Court to draw its own conclusions can only apply to conclusions of law. We must be careful to isolate conclusions of law from conclusions of fact and only interfere if two conditions are met, firstly, that the conclusions are conclusions of law, and secondly, that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower Court on the facts."***

14. Turning back to the issue for determination being the fairness, lawfulness and procedure used in termination of the employment, **section 45** of the Employment Act deals with unfair termination. Termination is considered to be unfair if an employer fails to prove that the reason for the termination is a

valid reason or that the reason for termination is a fair reason related to the employee's conduct, capacity or compatibility or that the employment was terminated in accordance with fair procedure. Unfair termination involves breach of statutory duty. Where there is a is a fair reason to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under **section 41** of the Employment Act. Wrongful dismissal on the other hand involves breach of employment contract like where dismissal is done without notice or contrary to the employment contract. See **CMC Aviation Limited v Captain Mohammed Noor [2015] eKLR** though this case was decided way after the appellant's cause of action arose.

15. From the record, the appellant was terminated by a letter dated 30th June 2009. The operative part of the letter is reproduced below:

> ***Further to your email to the Group Executive Officer dated 30th June we note that you are not willing to attend a Disciplinary Committee in respect to the irregular loan you tool out in Fina Bank Uganda***
>
> ***Under the circumstances we therefore have no alternative but to terminate your employment with immediate effect as per clause j) of your Terms and Conditions of Service***.

16. Prior to this letter of termination, there had been correspondence and discussions between the parties. In summary, the Chief Executive Officer of the respondent met the appellant and discussed a potential separation on 4th June 2009. This was followed up by the letter dated 11th June 2009 in which the appellant stated his position but nevertheless proposed a separation package. In response, the respondent through its letter dated 25th June 2009 the respondent raised integrity issues and other failings occasioned by the appellant which were the basis of the separation meeting discussions. Part of this letter provides:-

> ***"In recognition of your time with Fina Bank, I gave you the opportunity to resign and whilst your last working day in the Bank was 10th June2009, to date I have not received your letter."***

17. The respondent having not received a resignation from the appellant withdrew its offer for exit package and instead expressed intention to convene a disciplinary committee to consider the matter and its way forward. The appellant then wrote an email to the respondent's representative on the morning of 30th June, 2009 and expressed his observations negating the possibility of an amicable settlement owing to the deterioration of basic trust. As to the proposed disciplinary committee sessions, the appellant took issue on the grounds that there had been constructive dismissal with effect from 10th June 2009 and the committee could not consider the matter retrospectively and the appellant's participation would only serve to sanctify an already flawed process. This culminated into the termination letter of 30th June 2009 as reproduced above.

18. The industrial court considered the parties memoranda and annexure thereto and the counsel's submissions. The industrial court was persuaded that a valid reason had been established to warrant the termination of employment. The reasons revolved from abuse of trust and abuse of position as director, to which the respondent had expressly communicated to the appellant. **Section 43** of the Employment Act places the burden of proof that the termination by the employer was fair failure of which the termination is deemed to be unfair.

19. From the record, the respondent adduced evidence including complain by the Bank of Uganda where the respondent's Uganda bank under the management of the appellant was asked to show cause why it should not be penalized for submission of inaccurate returns and breach of some sections of the Financial Institutions Act of Uganda. There was no much cavil on the fact that the appellant had taken out an unsecured loan despite the appellant's subsequent assertion that his Nairobi property was enough to secure the loan in Uganda. On a balance of probability, we are persuaded by the Industrial Court's finding that there was a valid reason under **section 45** of the Employment Act.

20. However, under **sections 45 and 41** of the Employment Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to the termination.

In **Kenya Union of Commercial Food And Allied Workers V Meru North Farmers Sacco Limited, [2013] eKLR,** the Industrial Court, as it was then known held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under **section 41** of the Act

21. Applying this to the present circumstances, the appellant's email of 30th June 2009 comes to our attention. From the tone of the email, the appellant adopted a belligerent approach on the discussions that had been ongoing making it clear that not only was there no prospect of an amicable settlement of the matter but also the appellant's was not going to participate in any disciplinary process to which the appellant took the position that it was flawed. The appellant construed the letter of 25th June 2009 as having terminated the appellant's employment.

22. We have perused the appellant's memorandum of claim as amended and the basis of the proceedings now before us. Paragraph 10 of the said memorandum of claim appreciates the termination subject to proceedings being 30th June 2009. Our reading of the appellant's letter of 11th June 2009 containing the appellant's proposal for a separation package is that we can reasonably infer that the appellant had contemplated exit from employment and it was only upon his proposal not being granted that the appellant changed tact and now went for the jugular. We are convinced that with this new approach, the appellant did not bother to wait for any disciplinary process and the respondent was not left with much choice other than to terminate the appellant as set out in the termination letter. This does not however mean the appellant was not afforded the opportunity to be heard as the appellant at all times knew the allegations against him. In our view, attending a disciplinary process however flawed it is does not in any way diminish an employee's right to complain or bring any action under **section 47** of the Employment Act. We are therefore in agreement with the Industrial Court's finding in this respect that the termination of the appellant's contract was not unfair within the meaning of **sections 45 and 41** of the Employment Act.

23. Now we turn to the next issue as to whether the appellant is entitled to remedies sought. Termination is regulated by **section 35** of the Employment Act which makes provisions for categories of contracts and their manner of termination. **Section 35 (2)** of the Employment Act provides for termination of employment by notice and where the notice is greater than one month then the same should be applicable. A month under **section 3 of the Interpretation and General Provisions Act** means a calendar month.

24. The appellant argued that there was a second contract in October 2008 that discharged the initial contract of January 2006. The respondent argued that the correspondence in October 2008 was a mere variation of terms and not a new contract in itself. Indeed a perusal of the said letter dated 28th October 2008 buttresses the respondent's case that the letter was not a new contract. For instance, the letter is drawn on the official letter head of the Fina Bank Kenya Limited and not Fina Bank (Uganda), the letter does not contain all the terms that are contained in an employment contract such as the one dated January 2008 and finally it is a mere offer subject to contract between the respondent and African Management Services Company. In essence, the said letter was coached in the following manner:-

> ***"Key benefits attached to the position include but not limited to the***
>
> ***following: . . .***
>
> ***Kindly sign below, signifying your acceptance of our offer and return it to us earliest possible to enable us draw up the contract with AMSCO"*** (emphasis ours)

25. Moreover, the fact that the respondent opted to file its claim against the respondent in Kenya and not Fina Bank (Uganda) was not lost on us. In the premises, we take the view that the appellant was subject to

the contract dated 10th January 2006 and not 28th October 2008, the latter not having discharged the former but merely operating as a posting. The appellant did not persuade us otherwise on this matter.

26. Having found that the termination was valid and the applicable employment contract is that of 10th January 2006, termination thereof was provided for under clause (j) to the effect that the employment may be terminated by either party giving the other one month's notice in writing or by payment of salary for one month in lieu of notice. As already noted above, the termination letter was in accordance with clause (j) of the employment contract. The respondent upon termination as per the letter of termination was entitled to payment both the June 2009 salary and one month's basic salary in lieu of notice. From the Supplementary Record of Appeal filed by the respondent, there is a final dues computation dated 13th October 2009. Since neither the appellant nor the respondent submitted on the computation of dues we take it that the appellant was paid to his satisfaction.

27. From the foregoing findings and not having any reason to interfere with the Industrial Courts decision, we hold that the appellant, having been paid what is due to him is not entitled to any further remedies. In conclusion, we make orders that the appeal is dismissed with no order as to costs as being without merit with no order as to costs.

Dated and delivered at Nairobi this 17th day of June, 2016.

P. M. MWILU

……

JUDGE OF APPEAL

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

……..…

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR