IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 82 OF 2015

BETWEEN

STEEL MAKERS LIMITED……..……APPELLANT

AND

JOSHUA NZUKI……RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Mombasa (Rika, J.) dated 17th July, 2015

in

E.L.R. C. C. No. 427 of 2013.)

****

JUDGMENT OF THE COURT

For close to 27 years, the respondent was the appellant's employee, but that changed suddenly on 23rd August, 2013, when he was retired from employment. That retirement forms the heart of the dispute between the parties to this appeal. It is common ground however, that at the time of retirement, the respondent was 60 plus years of age. Nonetheless, he felt that the retirement was un-procedural and contrary to the appellant's laid down practices as he was not due for retirement and neither was he given notice of it nor paid one month's salary in lieu of notice. In addition, upon being retired, he was never paid his gratuity and retirement benefits. In his view therefore, this constituted unfair termination, thus prompting him to lodge a claim against the appellant in the Industrial Court (now the Employment and Labour Relations Court.) He particularized his claim as follows:-

a. A further (sic) one month pay in lieu of notice Kshs. 43, 367/=
b. Gratuity pay for 12 years

Salary Ksh. (43,367x 16 days x 12 years) Kshs. 320,248/=

c. Compensation for unfair termination (43,367 x 12) Kshs. 520,404/=

TOTAL CLAIM **KSHS. 884,019/=**

Through a response dated 14th March, 2014, the appellant countered the claim, averring that the respondent was properly retired upon having attained the company's mandatory and compulsory retirement age of 58 years. Further, that he was also given two months' written notice of the retirement and paid all his dues. With regard to gratuity, the appellant contended that the respondent was not a unionized worker which meant that it was under no contractual obligation to pay him any gratuity. He was in fact part of the management team of the appellant which disentitled him to gratuity and in any event, he was a member of the National Social Security Fund which again disentitled him to gratuity.

Upon a full hearing of the claim, judgment was rendered on 17th July 2015, with **Rika, J.** holding that indeed the respondent was disentitled to notice pay and gratuity as claimed. However, he went on to find that a case of unfair termination had been demonstrated and proceeded to award the respondent the sum of Kshs.299,232/=; being 6 months' pay compensation for unfair termination. The basis for the award was that the appellant had not proved the reason for termination under **Section 43** of the Employment Act, 2007, and the termination was therefore unfair, within the meaning of **Section 45** of the same Act.

That judgment and decree is what has precipitated this appeal, in which the appellant impugns it on grounds that the learned Judge erred; in finding that the retirement constituted unfair termination within the meaning of **Section 45** of the Employment Act, 2007**;** in making an award of Kshs.299,232/= for unfair termination based on the respondent's gross salary of Kshs.49,872/=, and lastly; in finding that the appellant needed to adduce medical evidence in support of its decision to retire the respondent.

By consent, the parties proceeded to dispose of the appeal by way of written submissions with no oral highlights.

According to the appellant, the termination cannot be deemed to have been unfair as it was based on the respondent having reached 58 years, the retirement age set by the company. That the respondent was duly informed that the reason for his termination was on account of retirement due to his age and that a notice to this effect issued; as encapsulated in the letter sent to him dated 20th June, 2013. To the appellant therefore, the requirements of due process and fairness as envisioned by **Section 45** of the Employment Act, 2007, were inapplicable, as retirement is automatic upon a person reaching the requisite age. That therefore, the court misdirected itself when it placed weight on the respondent's fitness to serve because even though the notice letter had made a fleeting mention of the respondent's health, it categorically gave the reason for termination as being retirement on account of age.

For the respondent, it was submitted that the learned Judge was right in finding the termination to have been unfair given that the appellant failed to prove its validity. That having failed to discharge its onus of proof under **Section 45** of the Act, in particular, that the termination was valid, based on fair reason(s) and in accordance with fair procedure, the logical conclusion would be that the termination was unfair. According to the respondent, the appellant's contention that it had a policy capping the retirement age of its workers at 58 years was false; and that indeed, no evidence was led in support of that assertion. In the premises, it was contended, the trial court was right in inferring unfair termination. On the sums awarded, the respondent contended that those were based on his basic pay at the time of termination and that in fact, the 6 month pay was inadequate, given that he had diligently served the appellant for more than 30 years. In that regard, he submitted that the same should be enhanced to a sum equivalent to 12 months' pay. However, he did not cross-appeal in that respect. Accordingly, it is not a matter falling for our determination.

This being a first appeal on both law and fact, *this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.* (See. **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123.)** An appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did. (See **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88] 1 KAR 278)**.

Bearing these principles in mind, the issue for determination here is simple and straightforward; whether the retirement of the respondent in the circumstances constituted unfair termination of employment within the meaning of **Section 45** of the Employment Act. Under the said section, an employer is prohibited from terminating an employee's engagement unfairly. The section describes unfair termination to mean where the employer is unable to prove that:-

> **"(2) A termination of employment by an employer is unfair if the employer fails to prove-**
>
> **(a) the reason for the termination is valid;**
>
> **(b) the reason for the termination is a <u>fair reason</u>-**
>
> **(i) related to the employee's <u>conduct, capacity or compatibility</u>; or**
>
> **(ii) based on the <u>operational requirements</u> of the employer; and,**
>
> **(c) the employment was terminated in accordance with <u>fair procedure</u>."**

It thus follows that where an employee feels he has been unfairly dismissed, he may lodge a claim and plead that any of the above elements were not met in his or her case. At that point, the onus of proof would then shift to the employer to demonstrate otherwise. In this case, the respondent alleged that his termination was unfair for want of notice and that the retirement was contrary to the appellant's policy. However, a perusal of the record indicates that by a letter dated 20th June, 2013, the appellant wrote to the respondent as follows:-

> **"<u>RETIREMENT</u>**
>
> **On obtaining** (sic) **the retirement age of over 58 years, and considering your physical fitness level and your inability to perform your duties as usual, the management has decided to retire you from employment with effect from 24th August, 2013 and we hereby serve you notice for two months.**
>
> **Prior to proceeding on retirement, you are required to procego** (sic) **on leave for two months from 24th June, 2013 to 23rd August, 2013.**
>
> **You are further required to surrender all company property to the stores and obtain clearance certificate before proceeding on leave.**
>
> **The management would like to thank you for your services and wish you an enjoyable retirement**
>
> **Thanking you,**
>
> **For, STEEL MAKERS LIMITED;**
>
> **Julius C. Kalama**
>
> **(Personnel Officer)"**

This letter was received and acknowledged by the respondent on 21st June, 2013, as evidenced by his appended signature thereon. This was two months prior to the termination date. Although the respondent was entitled to only one month's notice, the appellant was generous enough to grant him two months'

notice with full pay. As a result, as rightly held by the trial Judge, the contention that the respondent was entitled to one month's pay in lieu of notice should fail, since the requisite notice indeed issued.

With regard to the reason for the termination, the said letter made it known to the respondent that termination was first and foremost on account of retirement age. While the respondent has contended that this was against company policy, he did not lead any evidence to that effect. Indeed, if he visited the Labour Offices at both Mombasa and Kilifi with respect to the retirement as he claimed in his testimony, it would naturally be expected that he would have raised the issue with the respective labour officers so as to enable them conduct investigations in that regard and file a report thereon. Nor has the respondent claimed that the said letter was issued in bad faith.

As stated in ***Engineer Francis N. Gachuri v. Energy Regulatory Commission- Industrial Cause No. 203 of 2011,*** and approved by this Court **in Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR:-**

> ***" Employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word '****permanent employment'****."***

But what happens where the termination on account of retirement is not provided for in the contract or under the law? Indeed, it is clear that our statutes do not have a set mandatory retirement age for persons working in the private sector. It is also common ground that the appointment letter dated 20th August 1986, issued to the respondent, made no mention of the retirement age. Then in that instance we take the view that the issue falls purely within the realm of the law of contract. As with any other contract, the courts will look at the conduct of the parties to ascertain their true intention on the unwritten aspects.

As stated above, the appellant rightly discharged its burden under **Section 43** and **45** of the Act the moment it showed that the termination was based on valid reason. In order to impeach this reason, the burden shifted back to the respondent to show in what manner the appellant acted against the policy. Instead, he merely asserted that 58 years was not the right age of retirement. In the absence of any documentary proof under contract, the conduct of the parties has not supported any other conclusion than, that the retirement age was 58 years. The respondent did not even assert what he considered to be the '*right*' retirement age. Was he to work in perpetuity? Indeed, there was evidence that the appellant was keen to retire the respondent in the year 2011 upon attaining the age of 58 years but the respondent requested for an extension of two years to enable him deal with the family financial constraints. The appellant readily agreed. How then can the respondent turn around and claim that he was unaware of the appellant's retirement age policy?

Accordingly, the appeal is allowed. The judgment and decree dated 17th July, 2015 are set aside. In lieu thereof, we make an order dismissing the respondent's claim in the trial court. This being a labour dispute, we direct that parties bear their own costs both in the appeal and in the trial court. It is so ordered.

Dated and delivered at Malindi this 15th day of July, 2016.

ASIKE- MAKHANDIA

……..……..

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