



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MWILU & SICHALE, JJA)

CIVIL APPEAL NO. 132 OF 2011

BETWEEN

INTERNATIONAL PLANNED PARENTHOOD FEDERATION....APPELLANT

AND

PAMELA EBOT ARREY EFFIOM..... RESPONDENT

(Appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (Honourable Mr. Justice Isaac E.K. Mukunya, Mr. Nashon N. Udoto (Member) and Mr. Moses Hillary Allumande (Member)) delivered on 4th February 2011)

in

INDUSTRIAL CAUSE NO. 471(N) OF 2009

JUDGMENT OF THE COURT

1. This appeal arises out of an employment dispute between International Planned Parenthood Federation (hereinafter referred to as “the appellant”) and Pamela Ebot Arrey Effiom, (hereinafter referred to as “the respondent”).
2. From the memorandum of claim filed before the Industrial Court (as it then was) by the respondent on 24th August 2010, she was the appellant’s Deputy Regional Director since the year 2006 through a letter of employment dated 14th December 2006. As per the said letter of employment, the respondent was contracted until 14th January 2010. However, on 15th June 2009 the respondent received a notice of termination of her services with immediate effect without prior notice or reasons for the termination. This prompted her to file the claim seeking, *inter alia*, reasons for termination of employment, three months’ salary in lieu of notice and the equivalent of twelve months salary.
3. At the trial, the appellant raised a preliminary objection on the industrial court’s jurisdiction to hear and determine the dispute on the ground that the respondent enjoyed diplomatic privileges and immunity from the judicial process as provided by law. The appellant’s advocate, **Mr. Kangata** argued that the immunity accrued in terms of **4th Schedule paragraph 1 to the Privileges and Immunities Act**. Counsel submitted that the diplomatic immunity was vested in ministerial order in 2008 after the appellant had issued the respondent’s letter of appointment in 2006.

4. The respondent, through its counsel **Mr. Chacha Odera** submitted that the appellant had waived the diplomatic immunity in the letter of employment which provided that parties would in the event of a dispute submit themselves to jurisdiction of Kenyan Courts. Counsel reiterated the jurisdiction conferred on the court under **sections 11 and 12 of the Labour Institutions Act** to cover disputes such as the present one. In its ruling, the Industrial court considered the arguments and advice contained in a letter from the Ministry of Foreign Affairs ref: MFA.ADM 1/6 dated 9th September 2009. The preliminary objection was dismissed and the appellant ordered to file its memorandum of reply.

5. In its memorandum of reply filed on 28th January 2010 the appellant stated that the respondent's contract was lawfully terminated in terms of the contract between parties within the provisions of **section 35(1) and 36** of the Employment Act 2007. The appellant contended that the right to dispute the lawfulness or fairness of the termination as conferred under **section 35(4)** of the Employment Act is limited only to the reasons set out in **section 46** of the Employment Act. It was the appellant's response that the respondent did not seek to dispute the lawfulness or fairness of her termination. The appellant further contended that **section 43** of the Employment Act does not place any obligation on an employer to give reasons for terminating employment where such termination is done in accordance with the terms of contract of employment. The appellant therefore disputed the respondent's prayers as lacking any basis in law and or fact. The appellant further conceded its willingness to pay the three months salary in lieu of notice to the respondent and denied the court's jurisdiction to determine the matter.

6. The matter then proceeded to full trial where the respondent testified. From her testimony, the respondent is a Cameroonian national and her grievance is that she was terminated without notice and due process was not followed. The respondent also testified that she had been offered three months salary in lieu of notice on condition that she signs a compromise agreement which was not part of the terms of contract. The appellant did not avail any witnesses at the trial but relied on the pleadings which were in any event uncontested.

7. In the end, the Industrial Court found that the termination of the respondent's employment was wrongful because it prematurely ended the employment and it was also unlawful since no reason or reasons were given to the claimant by the respondent as required by provisions of **section 41(1)** of the Employment Act. The court awarded the prayers sought and ordered the appellant to pay ten months salary as compensation for wrongful loss of employment in addition to three months salary in lieu of notice.

8. Dissatisfied with the award of the industrial court, the appellant has filed this appeal, listing eight grounds of appeal. The appeal proceeded by way of written submissions.

9. From the submissions filed, the appellant abandoned the first ground relating to the jurisdiction of the Industrial Court to hear and determine the dispute on grounds of immunity enjoyed by the appellant and consolidated the remaining grounds into the following two main grounds:-

- a. **Whether the termination of employment was unlawful and /or wrongful.**
- b. **Whether the respondent was entitled to the reliefs sought.**

The respondent on its part filed its submissions responding to each of the eight grounds raised in the memorandum of appeal. Just as had been before the Industrial Court, the parties retained and were represented by the same counsel at the appeal.

10. The appellant having abandoned its first ground of appeal, we shall in the interest of judicial time not address ourselves to the issue of the immunity status of the appellant and the jurisdiction of the Industrial Court. In the premises, we shall make our determination on the two main grounds mentioned above.

11. The memorandum of claim was filed on 31st August 2009 while the award was made on 4th February 2011. By the time the respondent approached the Industrial Court in August 2009, the said court operated under the provisions of the Labour Institutions Act. Accordingly, appeals to this court from awards of the

Industrial Court were governed by **section 27** of the **Labour Institutions Act**. 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 (emphasis ours) Part III of the above Act was later 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)** which came into operation in August 2011. This amendment in effect removed the restriction limiting appeals to this court on matters of law only.

12. We have been careful on the question of our jurisdiction to handle this appeal as at the time the appellate jurisdiction was invoked. This is so in light of this court's previous decision in ***Director Kenya Medical Research Institute v Agnes Muthoni & 35 others [2014] eKLR*** wherein the provision of **section 27** of the Labour Institutions Act was considered with the finding that this court had no mandate to receive direct appeals from the industrial court as it was then established in view of the provisions of **section 3 and 64** of the retired constitution and **section 3** of the Appellate Jurisdiction Act. Remedies for grievances on awards by the Industrial Court lay under judicial review, declaratory suit and /or petition.

13. Whereas this decision on the unconstitutionality of **section 27** of the Labour Institutions Act was rendered in May 2013, the notice of appeal had been filed in May 2010, the Industrial Court award having also been made in May 2010, prior to the promulgation of the current Constitution 2010. At the time of filing the present appeal in June 2011 therefore, appeals to the Court of Appeal only lay on matters of law, the decision being appealed from having been rendered on 4th February 2011 under the current constitutional dispensation which had elevated the Industrial Court, now known as the Employment and Labour Relations Court as a court with the status of the High Court under **Article 162(2)(a)** of the Constitution of Kenya 2010.

14. **Rule 29(1)** of this court's rules empowers this court, on any appeal from a decision of a superior court in the exercise of its original jurisdiction, 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.

15. The question as to what amounts to a point of law was considered by the Supreme Court in ***Petition No. 2B of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & Others [2014] eKLR***, which considered **section 85A** of the Elections Act, which like **Section 27(2)** of the Labour Institutions Act limits the right of appeal to matters of law only. After reviewing comparative jurisprudence from several jurisdictions on what constitutes matters of law and matters of fact, the Supreme Court provided an appropriate guideline in identifying matters of law as follows:

“From the forgoing review of the comparative judicial experience, we will characterize the three elements of the phrase “matters of law” as follows:

(a)The technical element: involving the interpretation of the constitutional or statutory provision.

(b)the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record.

(c) the evidential element: involving the evaluation of the conclusion of the trial court on the basis of the evidence on record

.....

We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standard of knowledge, technical competence, and probity in electoral dispute adjudication , on the other hand. ”

16. The Supreme Court position was adopted and reiterated by this Court in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** as follows:

“Thus, the jurisdiction of this Court in this appeal as circumscribed by the Constitution and the Industrial Court Act, requires the appraisal and evaluation of the learned Judge's interpretation of the Constitution and statutory provisions relating to the appellant's mandate, and the respondent's constitutional right; the application of these laws to the undisputed and established facts; and the evaluation of the reasonableness of the conclusions of the learned Judge.”

17. Having said that we now proceed to consider whether the termination of the respondent's employment was unfair and/ or wrongful. Part VI of the Employment Act makes a distinction between wrongful dismissal and unfair termination. There is no contest that the respondent was terminated on 15th June 2009. The appellant offered to pay three months salary in lieu of notice as per clause 1.3 of the letter of employment. It is also uncontested that the employee still had until 14th January 2010 to the end of her term under the letter of employment. The point of contention is whether the employee was entitled to reasons for termination of contract and whether the contract was terminated in accordance with the law.

18. Wrongful dismissal involves breach of terms of the employment contract like where dismissal is done without notice or contrary to the employment contract. **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 applied accordingly. The letter of employment in clause 1.3 required the parties to each give a three months' notice of termination of employment. Clause 19.2 of the respondent's Staff Handbook also recognized the termination of employment by the appellant. As per the said handbook, the period of notice was to be in accordance with the termination clause in the contract of employment and where due notice is not given, payment would be made in lieu of notice. It is clear that the appellant's termination letter not only gave the respondent three months notice as was required but the appellant also opted to pay the salary in lieu of notice not obliging the respondent to work during the notice period. As such, the appellant complied with the provisions of the statute *ex facie*.

19. Every employee whose services have been terminated has the right under **section 35(4)** of the Employment Act to dispute the lawfulness or fairness of the termination of employment. Such lawfulness or fairness is in accordance with the provisions of **section 46** of the Employment Act which section gives what is not considered a fair reason for termination of employment. It is evident from the record that the respondent's termination did not fall within the express circumstances set out in **section 46** of the Employment Act. The holding by the Industrial Court that the termination was “**wrongful because it prematurely ended the employment**” lacks legal basis and cannot in our view hold. The provisions of **section 35** of the Employment Act are not superfluous and in vain but are meant to ensure obedience by employers. The Employment Act merely sets down the minimum terms that should be observed in an employment contract, employers reserving the right to improve on them and where such improvement occurs, the improved position holds.

20. Having said that we appreciate that the above **section 35** cannot be construed to be complied with in isolation. **Section 87(1)(b)** of the Employment Act allows employees to complain or file suit whenever any dispute concerning the rights or liabilities of the parties arises. In the same vein, **section 47(1)** of the Employment Act entitles an employee who has been unfairly terminated without justification to lodge a complaint. Such a complaint is to be dealt with as a complaint lodged under **section 87** of the Employment Act.

21. Under **section 47(5)** of the Employment Act, for any complaint of unfair termination of employment or wrongful dismissal lodged, the burden of proving that an unfair termination of employment or

wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employee. In the present case, the respondent sought to find out why she was terminated through letters she directly wrote and also through her advocates. This position is not contested though the appellant remained adamant that there was no obligation to give such reasons.

22. We remain mindful that unlike the repealed Employment Act prior to the year 2007, the reforms introduced by the labour law reforms brought by the five legislations enacted in the year 2007 represented a radical change from the past statutory regime including the employer's power to terminate employment at will. As was aptly put by this court in **Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR**:-

“The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.”

23. Such legal developments brought to the fore the concept of unfair termination. **Section 45** of the Employment Act proscribes unfair termination of employment. A termination of employment by an employer is unfair in terms of **section 45**, if the employer fails to prove;

“(a) that the reason for the termination is valid;

b. that the reason for the termination is a fair reason -

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedures.”

Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair.

24. **Section 43** of the Employment Act deals with proof of reason for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of **section 45**. The reason for termination of contract is the matter that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

25. It is evident that the respondent's employment was terminated prematurely and the letter of termination did not give the reasons for termination. Such termination being involuntary on the respondent's part, all she needed to do was allege that termination was unfair. From the record and facts before us, we are unable to trace any reason for the termination. The appellant did not give any hint as to the likely reason for the decision to terminate, particularly in the absence of testimony by any of its representatives before the trial court. We cannot therefore infer misconduct, poor performance or physical incapacity within the realm of **section 41** of the Employment Act as to require notification and hearing prior to termination. We are also unable to infer termination on account of redundancy under the provisions of **section 40** of the Employment Act.

26. In the circumstances, we have considered the conduct of the parties in light of the burden placed on the employer and the employee under **sections 43 and 47(5)** of the Employment Act and the guiding principles under **section 45**. The respondent severally tried to get the reasons and justification for her dismissal in vain. It is only from the reasons that the appropriate procedure for termination would have

been followed or at least the respondent given an opportunity to explain herself. Instead the appellant forwarded a unilateral compromise agreement as a precondition to enable the respondent be paid her salary in lieu of notice.

27. We are in agreement with this court's expression in similar circumstances in the **Kenfreight (EA) Limited case** (supra) above, where the judges held as follows:-

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken. Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself.”

Despite having issued proper notice by payment in lieu of notice, the appellant failed to discharge its duty to explain the reasons for termination thereby denying the respondent an opportunity to make any representation on the matter. This was an unfair procedure which leads us to conclude that the termination was unfair. To this end, albeit on different reasoning, we agree with the Industrial Court's finding in this respect.

28. Having found that the termination of the respondent's employment was unfair, we now consider the reliefs awarded by the Industrial Court. There is no dispute that the respondent was entitled to three months salary in lieu of notice. The appellant is however contesting the Industrial Court's award of ten months' salary as compensation in addition to the three months salary pay in lieu of notice on the grounds that there is no basis in law and fact, the award having been made arbitrarily. The appellant argues that the award should not have exceeded the remainder of the contract which was seven months inclusive of the three months notice. The appellant submitted that in awarding the ten months salary, the Industrial Court disregarded the fact that in terms of **section 50** of the Employment Act, it was required to take into account the provisions of **section 49(4)(f)** of the Employment Act regarding the remaining period that the respondent would have worked for the appellant, but for the alleged wrongful termination.

29. The respondent on the other hand submitted that the quantum of compensation is not tied to the remainder period of the contract and **section 50** as read with **section 49** of the Employment Act prescribes general guidelines on factors to be taken into account when assessing the quantum of the compensation. The respondent referred us to **section 49(4)(a) and (b)** of the Employment Act requiring the court to take into account the wishes of the employee and the circumstances in which the termination took place including the extent to which the employee contributed. In this regard, it is the respondent's argument that the appellant failed to furnish the reasons for premature termination of employment and failed to pay the three months pay in lieu of notice pending the signing of a *compromise agreement* which was not a document under contract and whose contents were not discussed. The respondent referred us to **Butt v Khan (1982-88) 1KAR 1** and **Berkley-Steward v Waiyaki (1982-88) 1KAR 1118** for the proposition that the Court of Appeal will not interfere with an award of damages unless the same was inordinately high or low or the judge proceeded on wrong principles.

30. In awarding damages, the Industrial Court relied on **section 15 of the Labour Institutions Act** which provides that if the Industrial Court finds that a dismissal was unfair it may order the employer to pay compensation to the employee to a maximum of twelve months wages. **Section 50** requires the courts to be guided by the provisions of **section 49** of the Employment Act in determining damages. **Section 49** of the Employment Act provides a range of remedies. These are;

- i. ***The wages which the employee would have earned had he been given the period of notice to which he was entitled,***

ii. *The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*

iii. *Reinstatement of the employee*

iv. *Re-engagement*

The first two remedies are provided for under **section 49(1)** while the last two are provided under **section 49(3)** of the Employment Act.

31. **Section 49(1)** of the Employment Act particularly provides as follows:

“(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—(emphasis ours) . . .”

From our emphasis, it is clear that the first two remedies of notice pay and twelve months pay can be awarded concurrently. There is no doubt that the remedies are discretionary in nature and the discretion should be exercised judiciously.

32. In **C.P.C. Industrial Products v Angima, Civil Appeal No. 197 of 1992**, the Court (**Gicheru, Kwach and Muli, J.J.A**), in a departure from the previous decisions, held that the principle that damages will only be limited to the period of notice agreed between the parties could only apply if, in exercising its right to terminate the appointment, the employer was not actuated by ulterior motives or did not act in bad faith; and that if the employer acted maliciously, oppressively or even callously the court was bound to consider that fact in assessing the damages the employee would be entitled to for wrongful termination or dismissal.

33. To the extent that the Industrial Court exercised its discretion in considering the lack of reasons for termination of employment and the termination prematurely ending the contract, we think that the discretion was judicially exercised. The Industrial Court did explain its decision and took into account the parties arguments that have been repeated before us. We therefore see no need to interfere with the discretion at this point. In the end, we hold that the appeal is dismissed with no order as to costs.

Dated and delivered at Nairobi this 1st day of July, 2016.

M. WARSAME

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR