



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 184 OF 2014

BETWEEN

KENAFRIC INDUSTRIES LIMITED.....APPELLANT

AND

JOHN GITONGA NJERU.....RESPONDENT

(An appeal from the Judgment and Decree of the Industrial Court

of Kenya at Nairobi (Mbaru, J.) dated 26th November, 2012

in

I.C.C. No. 318 of 2012)

JUDGMENT OF THE COURT

Through an agreement dated 2nd January, 2010, the respondent was engaged by the appellant as Human Resources Manager, which employment was later confirmed after serving six months' probation period vide a letter dated 23rd June, 2010. He continued to serve in that capacity until January 2012, when he was requested to voluntarily tender his resignation, failing which the appellant would terminate his services with full benefits. Apprehensive that a voluntary resignation would prejudice his rights, the respondent declined to resign. True to its word, in a letter dated 12th January 2012, the appellant terminated the respondent's services and paid him a net sum of Kshs.713,308/- in terminal dues.

Dissatisfied, the respondent lodged a claim in the Industrial (now the Employment and Labour Relations) Court Nairobi, seeking a declaration that the termination was unfair and wrongful and for damages for the wrongful dismissal. According to the respondent, the appellant had failed to follow due procedure and had instead used alleged restructuring of its operations as a pretext to unlawfully terminate his employment.

The suit was defended, with the appellant denying all allegations of wrong doing. To the contrary, it was the appellant's case that according to the contract of service between them, the termination was fairly carried out and all terminal dues paid as per the contract of employment.

The claim proceeded to full hearing with each party calling one witness. Upon evaluating the evidence, **Mbaru, J.**, rendered her judgment on 28th November 2012, in favour of the respondent. According to the learned Judge, a case of unfair termination had been made and though in the course of events, the respondent had been rendered redundant, the appellant had failed to follow the laid down procedure. Accordingly, the learned Judge awarded Kshs.720,000/- being 3 months' salary as compensation together with damages equivalent to one month's salary of Kshs.240,000/-, bringing the total sum awarded to Kshs.960,000/-.

Unhappy with this decision, the appellant filed this appeal. In it, the appellant contends that the learned Judge erred when she failed to evaluate the evidence and hold that the termination was properly and lawfully carried out; in holding that the appellant's reorganization constituted redundancy; holding that the respondent's termination was done on account of redundancy within the provisions of **Section 40** of the Employment Act yet such was not the case; erroneously awarded excessive payment, including the 3 month salary in lieu of notice despite the fact that the appellant had already effected the said payment; and lastly, that she failed to recognize that the contractual provisions in place between the parties supported summary termination of employment by the appellant and that in the absence of any law stipulating the contrary, particularly with regard to restructuring, the said contractual provisions remained the sole provisions governing this case.

With leave of Court, the appeal was canvassed by way of written submissions.

Reiterating its position at the trial court, the appellant, through **Mr. Mogeni**, learned counsel, submitted that the respondent's employment was validly terminated on account of the appellant's reorganization which was done in line with its vision 2020, a fact duly communicated to the respondent. **Sections 43 and 45** of the **Employment Act** which require that reasons be given, were complied with, meaning the termination was valid and within the said provisions. Consequently, the appellant advanced the proposition that the Judge erred in supposing that the termination was on account of redundancy under **Section 40** and basing her judgment on that supposition. To the contrary, the appellant contended, since the Employment Act does not recognize reorganization as a ground for terminating employment, the Judge ought to have resorted to the contractual provisions in place between the parties, which allowed for termination of employment by the employer on notice as was the case here. In support of this proposition, counsel relied on this Court's decision in **Steel Makers Ltd v. Joshua Nzuki; Civil Appeal No. 82 of 2015**.

Additionally, the appellant contended that once it is shown that there was a valid reason for the termination and that the same was communicated to the respondent, the onus shifted to the respondent to illustrate that the process was unfair. The appellant's assertion here being that under the law, the employer reserves the right to restructure the organization if need be, if the same serves the best interests of the organization. On this premise, the appellant relied on the holding in

Phillip Abbott v. LIAT [1995] Eastern Caribbean Supreme Court Reports, Antigua and Barbuda/ [ECSCJ] No. 10 and in **Chapman & Others v. Goovean & Rostowrack China Clay Clay Co. Ltd [1973] EWCA Civ 1**.

Lastly, on compensation, the appellant contended that the award of Kshs.960,000/- was unwarranted. In this regard, it presented a two-pronged argument; firstly, that the award of one month's wages of Kshs.240,000/- as damages was erroneous as the same was never supported by any evidence or legal reasoning.

Secondly, that the award of 3 months' wages in lieu of notice totaling Kshs.720,000/- was also without basis, as the appellant had already paid the respondent the same at the time of termination of his employment.

Opposing the appeal, **Ms. Wedah**, learned counsel for the respondent, cited **Section 27** of the Labour Institutions Act, submitting firstly, that appeals from the Employment and Labour Relations Court only lie to this Court on questions of law and not fact. Further, that as rightly held by the trial Judge, the

termination of employment in this case on account restructuring and/or re organization rendered the respondent's services superfluous and thus redundant within the meaning of the Employment Act and the Labour Relations Act. This she said, was evident from the appellant's conduct and from the testimony of its sole witness, one **Okioga James**. However, that in the circumstances of this case, the defence of redundancy could still not avail the appellant as it had failed to meet the legal requirements placed upon it by **Section 40(1)** of the Employment Act on the procedural prerequisites for redundancy. As such, the termination was devoid of any consultative process, procedurally and substantively unfair, and hence unlawful. In this regard, the respondent relied on the holding in **Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & 3 Others; [2013] eKLR**.

In addition, that the award of damages and the quantum thereof were well within the law as **Section 49** of the Employment Act donates to the Employment and Labour Relations Court, the mandate to award up to twelve months' gross salary in damages to an unfairly terminated employee.

As a first appellate court, this Court has the primary role of re-evaluating, re-assessing and re-analyzing evidence that was placed before the learned trial Judge and determining whether the conclusions reached by the learned trial Judge can stand or not. (See **Sumaria and Another v Allied Industries Limited [2007] KLR** and also **Daniel N. Mugendi v Kenyatta University & 3 Others, [2013] eKLR**).

The first issue that arises for determination is, whether the jurisdiction of this Court in this appeal is limited to matters of law only as submitted by the respondent's counsel. Initially, appeals to this Court from the Employment and Labour Relations Court were limited to issues of law only; see **Sections 12 and 27** of the Industrial Court Act and the Labour Institutions Act respectively. However, these provisions have since been amended by the **Statute Law (Miscellaneous Amendments) Act No 18 of 2014**, which repealed both **sections** in their entirety. The import of this is that the jurisdiction of this Court on appeal in labour matters today include issues of both fact and law.

The next issue for determination is, whether the termination was fair. As rightly submitted by both parties, **Section 45(2)** of the Employment Act outlines what constitutes unfair termination. According to the section;

“(2) A termination of employment by an employer is unfair 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 procedure”

Three things must therefore be satisfied; there must be reason(s) given for the termination, the reason(s) must be fair and the procedure followed too must be fair. These three conditions are designed to cater for all cases in which an employer instigates the termination of employment.

In this case, the termination was contested not on account of want of reason, but on the premise that the reason was not fair or in accordance with fair procedure. It is trite law that where termination of employment is contested and alleged to be unfair, the burden of proving that unfairness rests on the employee while the burden of justifying the grounds of termination or dismissal rests with the employer (see. **Kenya Airways case supra.**) In the present case, it is not in dispute that the reason for the termination was communicated as being *inter alia*, “reorganization of the company to meet the vision 2020” as a result of which the respondent's position was “identified for termination.” But was this a valid and fair reason?

According to the termination letter dated 12th January 2012, it was stated in part that:

“RE: TERMINATION OF SERVICE

This is to inform you that in light of the ongoing reorganization of the company to meet the vision 2020. The management feels there is a difference in your working style compare (sic) to the company aspirations in line with the new vision and mission. You have done your part in taking the company to a certain level and now the management has seen a need for a different approach to take the company to the next level. Thus the management has identified your position for termination with effect from 11th January, 2012 being your last day of work...”

In meeting his burden of proof, the respondent contended that the reason advanced above was far from fair, as the alleged restructuring was just a ruse and save for his termination, nothing came of it. Further, that though the letter talks of termination of the position hitherto held by the respondent, the facts on the ground do not support this and that to the contrary, the alleged restructuring only seems to have been discriminatorily and solely targeted at the respondent’s engagement as no other worker was affected. If anything upon his termination, somebody else was hired to replace him in the same capacity. In short, that the reason advanced for the termination was just a smokescreen calculated to cover up the appellant’s capricious conduct of unfairly dismissing the respondent from employment.

However, to the appellant, the law allows an employer free rein to restructure itself according to its operational requirements where need be. Additionally, that since the same law does not lay down a framework as to how restructuring should be executed, the fate of any engagements thereby affected is thus left entirely at the mercy of the provisions of the contract between the parties.

No evidence was led by the appellant in support of its claim that it was in the process of restructuring; or that there was need to do away with the respondent’s position. If anything, the appellant denied that its acts had in effect rendered the respondent redundant. Instead, the appellant placed heavy reliance on the contractual provisions, saying its authority was supported by **Clause 12** of the service agreement which stated in part:

“12. TERMINATION OF ENGAGEMENT:

It shall be in the power and option of the EMPLOYERS at any time without assigning any reason therefore, to put an end to this agreement by giving the EMPLOYEE three month’s notice in writing and in that case the EMPLOYEE shall receive payment of his salary to the date of the said THREE MONTHS together with leave pay, if any, due to him under clause 11(a),

(b) and (c) respectively hereof.....”

The appellant thus seems to advance the case that on the strength of this clause, it could unilaterally terminate an engagement without assigning any reasons, provided a three month notice is issued or payment in lieu thereof made and the worker paid all his accrued dues. It should be remembered that **Section 43** of the Act makes it mandatory that where such termination is contested, the employer must prove that valid reason(s) in support of the termination exists; a position reiterated under **Section 45(2)**. In addition, even where the termination is on account of misconduct, **Section 41** requires the communication of these reasons to the worker, coupled with giving him an opportunity to be heard in response thereto prior to termination of his engagement. The appellant, it does appear, failed to comply with any of these provisions. It failed to prove the veracity of the alleged restructuring. How then was the court to interrogate whether it was a fair reason or not? As stated earlier, where the law provides for a system to be followed by the employer, the same must be strictly adhered to. As a result, the appellant cannot therefore invoke **Clause 12** of the service agreement aforesaid in a bid to avoid compliance with the law. Further the said service agreement is subject to the Employment Act and in particular **Section 35(4)** thereof.

In addition to organizational restructuring, the appellant had on the other hand alleged that the respondent's style of working went against its vision 2020 and that in view of that, it was agreed that the respondent should resign. The appellant seemed to hinge its reason for termination on many elements; on one hand, its dissatisfaction with the respondent's manner of work (which connotes a disciplinary issue), on the other, reorganization of the company (connoting redundancy), and yet still meeting of the minds leading to a resolution that the respondent would resign (voluntary termination). As earlier stated, where the termination is challenged, the Act gives the threshold the employer is supposed to meet in displacing allegations of unfair dismissal. None of the "reasons" advanced herein were supported by any evidence by the appellant. No evidence was led to show that the company indeed restructured, or that the respondent's manner of work was less than satisfactory. Though the appellant's sole witness alluded to a warning letter dated 1st September 2010, issued to the respondent, the same does not form part of the record. In any event, the appellant never complied with the provisions on termination on account of misconduct. Be that as it may, whether termination of service was on account of restructuring or due to less than satisfactory performance, it was upon the appellant to show the veracity of the reason relied on, which it did not. Thus, the appellant failed to discharge its burden of proof; which left the trial court with no alternative but to deem the termination unfair, and rightly so in our view. (See. **Bamburi Cement Limited v William Kilonzi [2016] eKLR**).

In addition the appellant had also faulted the learned Judge for finding that the respondent was rendered redundant and basing her judgment on that finding. Under **Section 2** of the Employment Act, redundancy is defined as:-

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

It is common ground that there was loss of employment, that the same was at the instance of the appellant, that the said loss was involuntary on the respondent's part, that no fault by the respondent was demonstrated and that throughout the entire process, the appellant purported to be restructuring and in the course thereof, abolish the respondent's position. There can be no better example of a worker who has been rendered redundant within the meaning of **Section 2** aforesaid. It is thus not open to the appellant to allege that just because it never outrightly declared the redundancy, the same did not arise in the circumstances. The learned Judge can thus not be faulted for so finding.

In addition, unlike the **Steel Makers case**, upon which the appellant relied and in which retirement age was not provided for, the procedure to be followed when dismissing a redundant worker has adequately been provided for by **Section 40** of the Employment Act thus:-

“Section 40(1)

An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions-

- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed on the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.**
- b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**
- c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy.**

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and,

g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.”

(See **Thomas De la Rule (K) Ltd v David Opondo Omutelema, Civil Appeal No. 65 of 2012 [2013] eKLR.**)

The adherence to the above conditions by the employer is mandatory and not left to its whims. Save for payment of the 3 months' salary in lieu of notice, the appellant never adduced any evidence to show that it had adhered to the rest of the statutory conditions regarding due process in redundancy. Without any proof that the termination was procedurally fair and in the face of the respondent's apparent redundancy, the Judge was right in finding that the respondent was entitled to compensation and the awards made cannot be faulted.

Lastly on the same question of quantum of damages, it has been held time and again that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see **Butt v Khan [1981] KLR 349**). That is not the case here.

Accordingly, we find no merit in this appeal. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR