



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & AZANGALALA, JJ.A)

CIVIL APPLICATION NO. SUP 13 OF 2015 (UR NO.10/2015)

BETWEEN

CAPTAIN NOOR MOHAMMED.....APPLICANT

AND

CMC AVIATION LIMITED.....RESPONDENT

(Being an application for grant of leave to appeal from the Court of Appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi (Karanja, Musinga & Gatembu, JJA), dated 24th April, 2015

in

Civil Appeal No.199 of 2013)

RULING OF THE COURT

[1] *Captain Noor Mohammed* (hereinafter referred to as the applicant), was the respondent in Civil Appeal No.199 of 2013, in which CMC Aviation Limited, (herein the respondent), was the appellant. The appeal was against the judgment delivered on 10th November, 2011 by the Industrial Court of Kenya (now renamed Labour and Employment Court). In the judgment, the Industrial Court held that the applicant's summary dismissal by the respondent amounted to unfair dismissal.

Consequently the Industrial Court awarded the applicant US \$ 9,000 as one month salary in lieu of notice; US \$ 108,000 being 12 months gross salary plus unpaid leave days for the year 2010; and the costs of the suit. The respondent was aggrieved by the judgment hence the appeal. The applicant also filed a cross-appeal and grounds for affirming the Industrial Court's decision.

[2] Having heard the appeal, a bench of this Court (differently constituted), dismissed the cross-appeal and partially allowed the respondent's appeal. The Court upheld the Industrial Court's finding that the applicant's dismissal was unfair, but set aside the award of 12 months gross pay as compensation for wrongful dismissal, maintaining that the applicant's employment was terminable by either one month's salary or one month's notice or payment of one month's salary in lieu of notice. The Court therefore set

aside the award of US \$ 108, 000 and awarded the applicant one month's salary in the sum of US \$ 5,075 as payment in lieu of notice and commensurate payment of 5.25 for accrued leave for the year 2010. The Court further ordered each party to bear its own costs of the appeal.

[3] The applicant is aggrieved by the judgment of this Court and therefore wishes to proceed on appeal to the Supreme Court under Article 163(4)(b) of the Constitution. The applicant therefore seeks orders for leave to appeal to the Supreme Court, and certification that his intended appeal raises a matter of general public importance. The applicant has identified the issues of general public importance that he intends to canvass in the appeal as follows: the rights that accrue to an employee where the employment is wrongfully terminated; clarity on the legal position as regards the issue of whether or not general damages can be awarded in cases of wrongful or unfair termination of employment; clarity on the legal position as regards the issue of computation of damages and or compensation awardable in cases of wrongful or unfair termination of employment; clarity on what amounts to an issue of law to justify an appeal under Section 27(2) of the Labour Institutions Act; and the need for reinstatement of the law regarding the identified issues and vindication of labour rights as human rights and a matter of great importance to the society as a whole.

[4] The applicant further contends that substantial miscarriage of justice may occur unless he is given the opportunity to canvass his intended appeal. This is because according to him, the learned judges of appeal erred and misdirected themselves in failing to appreciate that the applicant's rights to lawful and proper termination of employment affects his other fundamental rights; and also erred in failing to appreciate the provisions of Section 49 of the Employment Act. The applicant further contended that the issues raised in the intended appeal go beyond the circumstances of the parties in the dispute, and also interrogate in detail the specifics of the termination of employment contracts and subsequent payment of terminal dues.

[5] In arguing the application, Ms. Edel Ouma, who appeared for the applicant, pointed out that the learned judges of appeal in their judgment concurred with the finding of the Industrial Court that there was unfair termination of the applicant's employment; that Section 49 of the Employment Act provides for an award of up to 12 months' salary for such infraction; and that in setting aside the award made by the Industrial Court for payment to the applicant of 12 months' salary as compensation there was confusion in the judgment of this Court hence the need for the matter to proceed to the Supreme Court for clarity on the issue of damages. Counsel relied on several authorities that were availed to the Court. She maintained that the applicant had met the threshold provided in ***Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone [2013] eKLR***. She reiterated that the matter was not just of interest to the parties before the Court but also concerned definitive rights that were of public concern in employer-employee relationship.

[6] Learned Counsel Ms. Margaret Miringu, who appeared for the respondent in the motion, urged the Court to dismiss the application contending that the intended appeal does not raise any issues of general public importance. Counsel pointed out that the issue of computation of damages having not been argued before the Court of Appeal, cannot form the substratum of the appeal before the Supreme Court; that there was no confusion as the learned judges of the Court of Appeal analyzed the law before setting aside the award of 12 months' salary; that the judges were clear that damages could be awarded under Section 49 of the Employment Act and the issue of clarity did not therefore arise. In addition, counsel submitted that the employment law is now clear and well settled in regard to damages; and that the Court properly exercised its discretion. Finally, counsel urged the Court to find that the threshold for referring matters to the Supreme Court has not been met, and therefore the applicant's motion be dismissed.

[7] Under Article 163(4) appeals lie from the Court of Appeal to the Supreme Court as follows:

“(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

(5). A certification by the Court of Appeal under clause (4)(b) may be reviewed by the Supreme

Court, and either affirmed, varied or overturned.”

[8]The applicant having moved this Court under Article 163(4)(b) the issue is whether the intended appeal raises a matter of general public importance as to justify certification by this Court. In ***Hermanus Phillipus Steyn v Giovanni Gneccchi-Rusccone*** (supra), the Supreme Court set out the governing principles in determining whether or not a matter involves a question of general public importance.

[9] The principles are as follows:

- a) The intending appellant must satisfy the Court that the issue to be canvassed on appeal transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
- b. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***
- c. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;***
- d. Where the application for certification has been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***
- e. Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court must still fall within the terms of Article 163(4)(b) of the Constitution;***
- f. The intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance: which he or she attributes to the matter for which certification is sought;***
- g. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”***

[10] The dispute between the appellant and the respondent leading to the motion now before us arose out of an employment contract. In the judgment of this Court that the applicant wishes to appeal against, it is noted at paragraph (7) that the applicant’s prayers against the respondent in the Industrial Court were as follows:

- a. Reinstatement to his employment as chief pilot.***
- b. Damages in the sum of US \$ 108,000 for unfair and unlawful termination of employment and unlawful demotion equivalent to 12 months gross salary.***
- c. House allowance at the statutory rate of 12% of the gross salary for the period of his employment.***
- d. Underpaid salary for the period between 2008 and 15th March 2010 amounting to US \$ 33,000.***
- e. Unpaid leave days for the years 2008 and 2009.***
- f. Payments due from the staff retirement benefit scheme.***

g. Costs of the suit.

[11] It is evident from these prayers that the applicant's claim in the Industrial Court was purely anchored on rights arising from the employer-employee relationship resulting from the applicant's employment contract. Thus, the suit concerned purely private rights and cannot be said to concern public interest.

[12] From the judgment of this Court dated 24th April, 2015, it can be discerned that the applicant's appeal was anchored on nine grounds all of which related to his alleged unfair and illegal summary dismissal, breach of contract of his employment, and claim for damages and compensation. It is evident that there was no issue raised in the appeal regarding the issues that the appellant now wants to raise before the Supreme Court such as general issues concerning the protection of employees' rights through recognition of labour rights as human rights. Thus, this Court has not had the opportunity of rendering its opinion on the issues that the applicant intends to canvass in the Supreme Court. That is to say that the applicant has not satisfied one of the principles governing certification of a matter as one of general public importance that was laid down in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione* (supra), that the question or questions of law intended to be raised in the Supreme Court must have arisen in the courts below and have been the subject of judicial determination.

[13] As regards the issue of damages, under Section 49 of the Employment Act, in the judgment of 24th April, 2015, this Court addressed the issue at length as follows:

"...We have already set out the remedies for wrongful dismissal and unfair termination as stipulated under section 49 of the Act. The trial court did not state why it opted to give the remedy provided under section 49(1)(c) that is, twelve months gross salary, and not the other remedies under section 49(1)(a) or (b) . The court should have been guided by the provisions of section 49(4) but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did. Although the respondent had prayed for an award of "damages" in the sum of US\$108,000 for unfair and wrongful termination of employment, it appears to us that in giving that award the trial court was not awarding damages as sought. The court stated that it was twelve months gross salary which is what section 49(1)(c) provides as one of the remedies for wrongful dismissal.

The respondent was serving a two year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation...

[14] In our view, the above paragraph does not reveal any argument regarding uncertainty in the law in the award of damages under section 49 of the Employment Act. The court was simply applying that provision of the law to the peculiar circumstances before it. It cannot therefore be said that the applicant's claim and the issues canvassed before the Industrial Court and in the appeal that was argued before this Court ***"transcends the circumstances of the particular case and has a significant bearing on the public interest."*** The Court interpreted that section given the circumstances before it. While this section maybe an important section in the vindication of employees' rights, it has not been shown that the dispute herein justified an interpretation covering a wider application.

[15] We wish to reiterate what this Court stated in *Civil Application Sup. 5 Of 2015 (Ur 4/2015)*, an application similar to the present one, that:

"The matter between the parties herein is premised on a contract of employment between two private persons, the determination of which will not have a bearing on public policy or on any

other party beyond the litigants. The law regarding contracts of employment is well settled, and we do not perceive the applicant to be raising any new issues of jurisprudential moment that would require the input of the Supreme Court. As matters now stand before us, the issues arising out of the dispute between the parties herein do not meet the threshold of a matter of general public importance.”

[16] Likewise, we find that the issues intended to be raised by the applicant in the intended appeal were not canvassed in the trial court or on appeal before this Court, nor are they matters whose interests transcend the private interests of the parties herein. That is to say, that the applicant has failed to meet the threshold required under Article 163(4)(b) of the Constitution to establish that the intended appeal raises a matter of general public importance. Accordingly, we decline to issue a certificate and dismiss the applicant’s motion with costs.

Dated and Delivered at Nairobi this 4th day of November, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR