



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 15 OF 2014

BETWEEN

RAFIKI DTM (K) LTD.....APPELLANT

JULIUS NG'ANG'A MBUGUA.....RESPONDENT

*(Being an appeal against the judgment and decree of the High Court of Kenya at Mombasa
(Makau, J.) dated 29th September, 2013*

in

H.C. Ind. Case No. 180 of 2013)

JUDGMENT OF THE COURT

This is an appeal against the judgment of **Makau, J.** delivered on 27/09/2013 in Mombasa Industrial case number 180 of 2013. The circumstances leading up to that suit were as follows:

By a contract dated 05/08/2011, the appellant engaged the respondent as a Graduate Trainee-Business Development for a term of six months. The nature of this engagement was that the respondent would work as an intern, earning a monthly allowance of Kshs.20,000/- The internship ran smoothly, with the respondent's appointment subsequently being confirmed and elevated to that of a permanent employee, with the job title of Relationship Officer-Business Development. The terms governing the employment were embodied in a contract dated 01/03/2012. Under this new scheme of arrangement, the Respondent's remuneration was a gross monthly salary of Kshs.30,000/-. In the course of his employment, the respondent was promoted to the position of Relationship Officer- credit department. Consequently, his salary was reviewed upwards, with the figure resting at Kshs.40,000/- per month plus a medical cover as at the time of filing the said suit.

However, through a letter dated 07/06/2013, the appellant terminated the respondent's employment, terming it a summary dismissal on account of the respondent's non-performance, insubordination and gross misconduct. In the said letter, the appellant undertook to pay the respondent his pro rata dues and issue him with a certificate of service. This was however said to be subject to his handing over and

settling all outstanding loans he may have with the appellant.

As would be expected, the respondent had a different view of the matter. He termed the termination of his employment as wrongful and contrary to the law. With this in mind, he filed the aforesaid suit in the industrial court, seeking:

“1. A declaration that the Claimant’s employment was a contract of employment having worked for a continuous period of three (3) years.

2. A declaration that the termination of the Claimant’s employment was unlawful.

3. A declaration that the Claimant was entitled to one (1) month leave after every twelve (12) months.

4. An order directing the Respondent to pay the Claimant the following sum:

*(a) Service pay
Kshs. 40,000/-*

(b) Salary arrears for 7 days worked in June 2013 *Kshs. 9,100/-*

(c) Leave allowance for two years (2011 & 2012) *Kshs. 80,000/-*

(d) One (1) month’s salary in lieu of notice *Kshs. 40,000/-*

TOTAL

Kshs. 169,100/-

5. An order that the Respondent issue a Certificate of service to the Claimant.

6. Any other relief this Honourable Court may deem fit and just to grant to meet the ends of justice.

7. Costs of this suit.”

The claim was opposed through the appellant’s statement of defence dated 05/08/2013. The matter came up for hearing before the learned Industrial Court Judge with the parties calling a single witness each. From the pleadings and the testimony adduced before the trial court, the respondent’s case was premised on the contention that prior to the dismissal, he was neither given notice nor accorded a fair hearing. In addition, to this, was the averment that even upon termination, the appellant neglected to pay his terminal dues, two years’ worth of leave and salary in lieu of notice. The respondent expressed dismay that the appellant had instead falsely alleged that the respondent was indebted to it to the tune of Kshs.15,567.95/- In the respondent’s view that was merely a ploy by the appellant in a bid to evade paying the respondent’s lawfully accrued dues.

On its part, the appellant defended its acts by saying that the dismissal was fair and had been actuated by the respondent’s non-performance, insubordination and gross misconduct. As a result, the appellant was well within its rights in summarily dismissing the respondent as he had failed to make amends despite the appellant’s advice. To further shed light on the respondent’s misdeeds, the appellant cited instances when the respondent would serially abscond work, fail to submit performance reports and returns as required and would collude with some of the appellant’s clients to secure loans and thereafter share in the proceeds. With regard to insubordination, it was the appellant’s case that the respondent continually ignored summons by the branch manager, who was his immediate superior; a case in point being the summons sent to him vide an email dated 29/05/2013. Further, that in his application for a transfer, the respondent failed to follow the laid down procedure; in that he bypassed the branch manager and mailed the said application directly to the Human resource department and this soured the respondent’s relationship with his immediate boss even further.

In a brief rejoinder, the respondent refuted the reasons cited for the dismissal, on grounds that his work did not reflect under performance and that he promptly responded to any summons by his superior. Whilst admitting that he had come upon the aforementioned email late in time on the day it was sent, he nonetheless made a point of seeing his superior as directed and in view of the lateness of the day, they mutually agreed to hold the meeting the following day. He states that come the following day, both were in attendance and even discussed his application for a transfer, which the boss DW1) endorsed. The above notwithstanding, he indicated that he had duly responded to the letter to show cause sent to him by the appellant with regard to the same issues raised by the appellant in the suit. In his view, his response sufficiently shed light on the matter. The totality of this he said, is that it obviated any claims of insubordination or misconduct, and termination on these grounds was unwarranted.

In his Judgment, the learned Judge was convinced of the respondent’s case and ordered as follows:

“(a) The termination of the Claimant’s employment by the Respondent is declared unlawful and unfair.

(b) The Respondent to pay the Claimant the following:

- (1) One month salary in lieu of notice.....40,000*
- (2) 11 days salary 14,667.70*
- (3) 12 months’ salary for unfair termination480,000. 00*

TOTAL **534,666.70**

(c) Costs and interest.”

The appellant was discontent with this outcome and filed this appeal, whose grounds can be summarized as follows: that the learned judge was in error when he held that the termination was unfair and proceeded to award compensation; yet neither the unlawfulness of the termination nor the compensation had been pleaded. Secondly, that the learned Judge also erred when he held that the Respondent had not been accorded a fair hearing and that he fell into further error when he based his judgment on such a finding yet the same had neither been pleaded nor proven. Thirdly, that the learned judge erred in failing to find this to be a case of summary dismissal and lastly, that the resultant compensation was irregular and the quantum thereof at variance with what was pleaded in the Memorandum of claim.

By consent of the parties and with the leave of court, the appeal proceeded by way of written submissions, with both parties duly having their submissions on board.

In advancing its case, the appellant by and large reiterated the submissions it had made in the court below. In addition thereto, the appellant urged this court to find that the Learned Judge had failed to consider the evidence placed before him, namely the testimony of the appellant’s witness, one **Onesmus Irungu Kamau, (PW1)** the then Branch Manager, Likoni Branch. More particularly, it is alleged that the judge ignored the evidence of correspondence between the parties produced by the said witness, which evidence if considered, proved the respondent’s unbecoming conduct. Moreover, the appellant asserted, since the respondent acknowledged having received, read and understood the terms of the termination letter, the absence of compelling evidence in rebuttal by the respondent should have led the Judge to hold that the appellant was within its rights in dismissing the respondent. In the appellant’s view, the failure by the respondent to persuasively rebut the allegations contained in the termination letter lent credence to the appellant’s claims of insubordination, misconduct and ineptitude. According to the appellant, had the learned court considered this evidence, it would have duly concluded that the respondent’s conduct warranted a summary dismissal in accordance with **Sections 44(4),(a), (c) and (e)** of the Employment Act as well as **Article 4** of the International Labour Convention of 1982 on employment and that such was the case herein. In addition to the above, the Appellant contends that in cases of Summary Dismissal, there is no requirement that notice be given prior to the dismissal. It was strongly submitted that in order to

successfully sue for unfair dismissal, the burden of proof was upon the Respondent to impute and prove malice on the part of the Appellant and that this he had failed to do.

Lastly, the appellant faulted the learned Judge for having awarded relief that had not been pleaded. To this end, the appellant drew this court's attention to the sum of Kshs.534,666.70/- awarded by the learned Judge, which the appellant contends is at variance with the Kshs.169,100/- sought in the Memorandum of claim. In so doing, the appellant says, the learned judge introduced a new subject matter in the judgment and this prejudiced the appellant's right to be heard in relation to the same. Citing a plethora of authorities, the appellant concluded by saying that the court and the parties are bound by their pleadings and should not derogate from what is pleaded. With the above in mind, the appellant sought that the appeal be allowed and the judgment of the superior court set aside.

As was the case with the appellant, the respondent too echoed the submissions he had made at the trial court. He however added that under the provisions of **section 41** of the Employment Act, 2007 (Act No. 11 of 2007) an employee being considered for termination on grounds of misconduct or poor performance has a right to receive a prior explanation of why the termination of his employment is being considered. Further, that during such explanation, he is also entitled to have another employee or a union representative of his choice present, which was not the case herein and this was yet another aspect that made this a case of unfair dismissal. The respondent also refuted the appellant's assertions on burden of proof, saying that it was upon the appellant to prove its allegations of misconduct and insubordination. He submitted that this is a duty placed upon the appellant under **section 43** of the Employment Act aforesaid and that where an employer fails to discharge that burden, then the termination of such a worker is automatically deemed as unfair within the meaning of **section 45** of the Act. Lastly, as regards the award of compensation based on unpleaded issues, it is the respondent's case that the trial court had the mandate to do so as long as it is an issue that appears to have been left to the court's discretion. In this regard, the respondent cited the authority in **Herman P. Steyn vs. Charles Thys [1997] eKLR**. He argued that this is even moreso where the issues though unpleaded, have been raised by the parties in the course of trial. The respondent concluded on this issue by stating that the judgment was within the provisions of **Sections 49** and **50** of the Employment Act 2007, which allowed the learned court to award upto 12 months' worth of compensation for unfair dismissal. In view of this, the respondent urged the court to uphold the impugned judgment and dismiss the appeal with costs.

We have considered the record, the judgment, the grounds of appeal and the oral submissions herein. Section 17 of the Industrial Court Act provides that appeals from the court shall lie to the Court of Appeal against any judgment, award, order or decree

1. Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.

2. An appeal from a judgment, award, decision, decree or order of the Court shall lie only on matters of law."

It is with the above acknowledgement that we proceed to determine this appeal.

The letter of employment signed by the appellant and the respondent is dated 1st March, 2012. Paragraph 17 of the said letter provided that:

17. After confirmation, the employment hereunder may be terminated at any time during the contact period by Rafiki DTM giving the employee one month's notice in writing or salary in lieu of such notice or by the employee giving the DTM one month's notice in writing or salary in lieu of such notice.

Further paragraph 17(d) provided that where an employee is:

(d) ... guilty of serious personal misconduct or commit any serious or persistent breach of any of the obligations to Rafiki DTM or any Associated Company (whether under this contract or

otherwise) or refuse or neglect to comply with any lawful orders or directions given to you by Rafiki DTM or the Board whether in writing or not, then the DTM shall be entitled to terminate.”

It follows that it was possible for the appellant to have laid off the respondent in the event of misconduct. To this end, the appellant did write a “show cause for non-performance and failure to submit your daily performance report.” dated 8th May, 2013. The letter further provided that the response was to be submitted “by close of business 7th May, 2013”. Going by the record, it was not possible for the respondent to have responded to the letter of 8th May, 2015 by 7th May, 2015! Clearly there was something amiss in this correspondence which in any event cannot come to the appellant’s aid

The other reason given for the dismissal of the respondent was insubordination. It was the appellant’s case that after an email was sent to the respondent on 29th May, 2015, he failed to see the manager. However, the respondent explained that when the email was dispatched he was out in the field and he was not able to access his email until that evening. He then saw the manager (DW1) at 6p.m. who postponed the meeting to 30th May, 2015. It is instructive to note that during this meeting, the manager endorsed on his letter of transfer. Contrary to the accusation that on receiving the letter to show cause the respondent’s insubordinated, the manager by asking for a transfer which transfer letter he addressed to the Human Resource Department without it going through the manager, DW1 endorsed the following remarks on the transfer request, “***kindly consider the request***”. How could it therefore be said that the respondent insubordinated DW1 in asking for transfer without having the transfer letter forwarded by DW1? Why did DW1 favourably endorse the application for transfer if the respondent had insubordinated him without mention of insubordination?

The record also indicated that the letter of dismissal, although written on 7th May, 2015, it was not until 11th June, 2015 that the letter was delivered to the respondent by DW1 who although was on leave, took the letter to the respondent. The import of this is that the respondent was not given an opportunity to be heard before his termination. Section 41 of the Employment Act, 2007 provides:

41. Notification and hearing before termination on grounds of misconduct

(I) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. Emphasis added)

We find that the respondent was terminated without being given a hearing contrary to **section 41(1)** of the Employment Act. Neither was there another person as mandatorily provided by the law. He is therefore entitled to one month’s salary of Kshs40,000/- in lieu of notice.

In his evidence in court, the respondent did not explain why he was asking for severance pay of Kshs.40000/= Suffice to state that the respondent had been confirmed in his employment. Paragraph 9 of the letter of contract provided that:

9. PENSION SCHEME

Rafiki DTM has in place a contributory Pension Scheme, details of which will be given to you upon taking up the appointment. You will qualify for the pension scheme upon confirmation of your appointment at the expiry of the six months’ probation period.

It was therefore expected that the respondent was a member of the pension scheme and was not entitled to severance pay. Again, the respondent did not explain why he was entitled to leave for two years in 2011 and 2012. In any event, the letter of contract provided that:

II.LEAVE

You will be entitled to paid leave calculated at the rate of 25 working days per twelve months period commencing from the date of employment. For the purposes of computing, leave taken on Sunday and Kenyan public holidays shall not be counted as full leave days.

The leave shall be taken at such times as may be convenient to the DTM. Leave entitlement may not be accumulated and any leave not taken within three months after the year which it was due may be forfeited at the discretion of the DTM

We also note that the said court did not award the respondent severance pay and salary in lieu of leave and neither did the respondent file a cross appeal.

Apart from the one month's salary in lieu of notice and eleven (11) days salary, (although the respondent asked for 7 days salary) the learned judge awarded the respondent twelve (12) month's salary for unfair termination. In explaining the reasons for this, the learned Judge stated

"... The court notes that the claimant was unrepresented by counsel and therefore he may not have understood that after praying that the dismissal was unlawful, he needed to ask for compensation".

Clearly, this was wrong. A party is entitled to prayers that he/she has sought in the statement of claim. The appellant had no opportunity to contest the award as it arose in the judgment stage. The appellant was not accorded an opportunity to controvert the issue introduced by the Judge in his judgment. We think that this was unfair and prejudicial to the appellant. In ***Pashito Holdings Limited and another v Paul Nderitu Ndu'ngu and two others, Civil Appeal Number 138 of 1997***. The court stated (pg 4),

"It is an indispensable requirement of justice that the party who had to decide shall hear both side, giving an opportunity of hearing what is urged against him. There is an unpronounced Latin maxim which in simple English means: 'He who shall decide anything without the other side being heard, although he may have said what is right, will not have done what is right.' "

The upshot of the above is that we find that the Industrial Court correctly assessed the evidence and found that the respondent was entitled to one month's salary in lieu of notice. He was also entitled to seven (7) days salary of Kshs.9,100/- as this is what he sought in the statement of claim. It was wrong however for the trial Judge to have awarded twelve (12) months' salary for unfair termination as the same was not sought by the respondent. If he had, and as explained above, the appellant would have had an opportunity to challenge the same.

The upshot of the above is that this appeal partially succeeds and we find that the respondent is entitled to salary for 7 days worked in June 2013, a sum of Kshs.9,100/- plus one (1) month's salary in lieu of notice less the sum of Kshs.15,567.95 admittedly owed by the respondent to the appellant. Accordingly we affirm the judgment of the lower court for the following one month salary in lieu

of notice	Kshs.40,000/-
Salary for 7 days worked	<u>Kshs. 9,100/-</u>
Less amount owed to appellant	<u>Kshs.15,567,90/-</u>
Total	<u>Kshs.33,532.05</u>

The sum awarded shall bear interest from the date of filing the statement of claim.

In view of the outcome of this appeal, we direct that each party shall bear their own costs.

Dated and delivered at Malindi this 19th day of March, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR