IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, MARAGA, & KANTAI, JJ. A)

CIVIL APPEAL NO. 37 OF 2014

BETWEEN

RIFT VALLEY RAILWAYS KENYA LTD.....APPELLANT

AND

SYMON ODHIAMBO ORITA..... RESPONDENT

(Appeal from a Decree and Judgment of the High Court of Kenya at

Kisumu (Hon. Lady Justice Hellen Wasilwa , J) dated 14th March, 2014

in

INDUSTRIAL CAUSE No. 207 OF 2013

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JUDGEMENT OF THE COURT

Section 17 of The Industrial Court Act (now renamed Employment and Labour Relations Act through Act No. 18 of 2014) mandates us, on an appeal from the Industrial Court, to consider only matters of law. That provision provides:

> **"(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."**

Are there matters of law arising from the findings of Hellen Wasilwa, J, in the judgement appealed from which was delivered on 14th March, 2014 in Kisumu Industrial Court Cause No. 207 of 2013 between the respondent Symon Odhiambo Orita and the appellant Rift Valley Railways Kenya Limited?

The uncontested facts emerging from the evidence recorded by the said learned judge and which are summarized in the said judgement were that the respondent was employed by the appellant as a Train Control Officer vide Letter of Appointment dated 27th October 2006 on terms and conditions set out in

that letter. In January 2013 the respondent proceeded on his annual leave which was to end on 4th February, 2013 when he was required to resume duty. As fate would have it, the respondents' wife was taken ill that very morning and the respondent wrote a text message to his immediate superior **Thomas Yogo (RW1) (Yogo)** explaining his predicament and requesting for emergency leave. Yogo declined to grant leave. The respondent followed the telephone text message to Yogo with a formal letter of the same day which was delivered by DHL to Yogo. Meanwhile the respondent rushed his wife to Clinix Health Care where they were referred to Amani Hospital, Kisumu the same day. Amani Hospital could not deal with the condition that afflicted the patient and referred the matter to Nairobi West Hospital

where a diagnosis disclosed that the respondent's wife had suffered brain haemorrhage. Because costs at that hospital were high beyond the respondent's reach the case was referred to Tenwek Hospital where successful surgery was performed after the patient was admitted there on 14th February, 2013.

The respondent reported to work that day at about noon but could not resume work as he was served with a letter on that very day where he was required to show cause why disciplinary action could not be taken against him for desertion of duty.

By a letter dated 18th February, 2013 the respondent explained the events concerning his wife's illness pleading that the case concerned an emergency and he had no opportunity to make a formal request for emergency leave by use of processes set up by the appellant. He apologised for the inconvenience he had caused to his employer.

By a letter dated 29th April, 2013 the appellant wrote to the respondent informing him that he had been dismissed from employment giving reasons that the respondent had absented himself from work without approved leave and further that he had in December, 2012 been given a final warning for a similar offence.

Those are the events that led to the suit at the Industrial Court, Kisumu where the respondent contested the appellant's actions praying for a declaration that the dismissal be declared wrongful and that he be reinstated to employment and payment of terminal benefits. After hearing evidence from the respondent and two witnesses for the appellant the learned judge framed as issues for her determination whether the respondent had committed acts of misconduct to entitle the appellant to dismiss him from employment; secondly whether the appellant followed laid down disciplinary procedures before dismissing the respondent and finally whether the respondent was entitled to the orders sought in the statement of claim.

On the first issue the learned judge reviewed evidence pertaining to the appellants wife being taken suddenly ill which illness led to her admission to hospitals and surgery being undertaken and considered the appellant's contention that there were laid down procedures for applying for leave which procedures the respondent had not followed. The learned judge held that:

> **"... It is true that the code of conduct provides for sick leave , but in the case of a matter of life and death as in the case of the claimant's wife, it is prudent to save a life than pursue leave applications first. The insistence by the respondents that claimant should have applied for leave first is inhumane and unreasonable given the circumstances of this case. The absence following claimant's desire to save his wife's life cannot be termed as desertion..."**

In respect of the second issue the learned judge found that the appellant was wrong to term a warning issued to the respondent on 14th December, 2012 as a final warning because it related to one event and terming it a final warning violated provisions of the appellants Code of Conduct which required that an employee who misconducted himself be served with a first written warning followed by a second written warning in case of further misconduct. If such employee received three warning letters in a period of twelve months the third warning would serve as a final warning – Clause 7.0 (b) of the said Code of Conduct. The appellants witnesses confirmed in evidence that the respondent had only been

warned once in the year 2012 and therefore the warning served on 14th December, 2012 could not be termed a final warning but was indeed a first warning. The learned judge therefore held that the appellant had not followed its own procedure in dismissing the respondent from its employment and it followed that the respondent was entitled to compensation.

There are eight grounds of appeal set out in the Memorandum of Appeal filed by the appellant. In the first ground it is said that the learned judge erred in law by finding that dismissal of the respondent by the appellant was unlawful and unfair. In the second ground the learned judge is faulted for failing to consider that the respondents dismissal was based on desertion of duty and thus, says the appellant, not entitled to any payment of salary and allowances.

In the third ground it is said that the learned judge erred for failing to consider that the respondent had admitted his failure to report back to work without formal leave.

In the fourth ground the learned judge is said not to have considered the appellants disciplinary process while in the fifth ground it is said that award of damages was contrary to the provisions of the Employment Act.

The sixth ground faulted the learned judge for ignoring documents produced in court as part of the evidence while the penultimate ground faults the learned judge for arriving at a decision which is said to be contrary to law. The final ground says that the learned judge erred for failing to find that the process leading to the respondent's dismissal was fair, lawful and constitutional.

Mr. Jones Nyachiro, learned counsel for the appellant in submissions before us submitted that the appellant was entitled to terminate the respondents' services because the respondent was involved in previous disciplinary issues. Counsel also faulted the learned judge for adopting a salary in computing compensation which salary had not been proved.

Mr. Rayola Olel, learned counsel for the respondent, in opposing the appeal supported the learned judge for finding that the warning letter dated 14th December, 2012 was indeed a first warning but not a final warning at all. Counsel conceded that actual salary earned by the respondent had not been proved.

We have considered the record of appeal, the Memorandum of Appeal, submissions made before us and the law.

We agree with the learned judge that the appellant flouted its own code of conduct when it served the respondent with what it called a final warning on 14th December, 2012, when, indeed, that was a first warning. Clause 7.O (b) of the said Code required the appellant to serve a first warning followed by a second warning if the misconduct was repeated and a third and final warning if such employee committed the same offence within a period of twelve months. It was further required by the said Code that such final warning carries the information that termination may follow if such an employee did not improve his conduct.

The learned judge held, correctly, we think, that the circumstances that faced the appellant on the morning of 4th February, 2013 when he was required to report to work were grave and compelling and that the respondent acted reasonably when he sent a telephone text message to his immediate superior, Mr. Yogo, whereafter he rushed his ailing wife to hospital. The respondent took further reasonable steps when he sent a letter to his employer dispatched through DHL where he requested for emergency leave. The respondent took his ailing wife to various hospitals in different towns and he duly reported to work on 14th February, 2013 when his wife was admitted at Tenwek hospital. In any event while taking his wife to Nairobi West Hospital the respondent visited the appellants headquarters offices in Nairobi where he reported his predicament to the Human Resources Manager.

Counsel for the appellant submits that the learned judge awarded a monthly salary of Kshs. 46,000/= when actual salary had not been proved. This complaint has merit. In the statement of claim a

salary of Kshs. 40,148/= is pleaded but in evidence the respondent stated that his salary was Kshs. 46,000/=. The letter of employment produced in evidence gave a consolidated salary of Kshs. 30,000/= per month.

Parties are bound by their pleadings and it was not open to the respondent to plead a sum as monthly salary and change it in evidence without amendment of the pleading. In **Independent and Boundaries Commission and Anor v Stephen Mutinda Mule & 3 others Civil Appeal No. 219 of 2013** this court cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIA) Limited v Nigeria Breweries PLC SC 91/2002** where Pius Adereji, JSC stated thus in respect of pleadings:-

> **"... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."**

It was also stated by the Supreme Court of Nigeria that:-

> **"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**

In the case before the learned judge the monthly salary pleaded was denied in the statement of defence. The learned judge, with respect, erred when she awarded a salary which was not in accord with what was pleaded. That salary was not proved and was denied in the defence. In the circumstances of the case that was before the learned judge the correct figure to use in calculating compensation awardable to the respondent was the sum of Kshs. 30,000/= which was the salary stated in the letter of employment produced as part of the evidence and which letter was common to both sides in the case before the learned judge.

We therefore interfere with the award in the judgement appealed from by substituting the sum awarded in respect of one month salary in lieu of notice with a sum of Kshs. 30,000/=. The award of twelve months salary as compensation for unlawful termination translates to Kshs. 360,000/=.

This appeal succeeds only to the extent of such interference.The appellant shall have $^1/_3$ of the costs of the appeal.

Those, then, are our orders.

Dated and Delivered at Kisumu this 12th day of March, 2015.

W. KARANJA

JUDGE OF APPEAL

D. MARAGA

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR