IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 15 OF 2015

BETWEEN

JMK…..…..…….APPELLANT

AND

MWM……..…….....1ST RESPONDENT

MFS…….....….....2ND RESPONDENT

(Appeal from the ruling and order of the Industrial Court of Kenya at Mombasa (Makau, J.) dated 3rd October 2014

in

I.C.C. No. 268 of 2013)

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JUDGMENT OF THE COURT

In this appeal, the appellant, ***JMK,*** is aggrieved by the ruling and order of the Industrial Court at Mombasa, ***(Makau J.),*** dated 3rd October 2014 in which the learned judge declined to review and set aside his judgment dated 30th May 2014, so as to afford the appellant an opportunity to be heard. By that judgment, the learned judge held that the appellant, who was not a party to ***Industrial Court Cause No 268 of 2013*** in which the judgment was entered, had sexually harassed the 1st respondent, ***MWM***. Accordingly he awarded her, as against her employer at the material time, **MFS *(the 2nd respondent), Kshs 500,000*** as general damages. For completeness of the record, the Industrial Court has been renamed the ***Employment & Labour Relations Court*** by the ***Statute Law (Miscellaneous) Amendment, Act, 2014,*** which came into force after the ruling in question. For convenience however, we shall refer to the court as the Industrial Court.

The undisputed facts are that at all material times, the appellant was the Managing Director and Chief Executive Officer of the 2nd respondent, with which the 1st respondent had a contract of employment as a senior microfinance officer for a term of 5 years with effect from 1st March 2011. After about one year of her employment, the 1st respondent was promoted to a manager, and the terms of her employment were changed from contract to permanent and pensionable. On 19th June 2013 however, the 2nd respondent

terminated the 1st respondent's employment, thus setting in motion the events that have culminated in this appeal.

By a Memorandum of Claim filed in the Industrial Court on 22nd August 2013 against the 2nd respondent only, the 1st respondent prayed for a declaration that the termination of her employment was unlawful, unfair and in breach of contract; compensation for breach of contract; salary in lieu of notice; leave pay for one year; severance pay; gratuity; certificate of service; and costs of the claim. As of the date the claim was filed, the appellant was still in the employment of the 2nd respondent as the Managing Director and Chief Executive Officer. In the claim as initially filed, the 1st respondent did not make any allegations whatsoever against the appellant personally.

By a letter dated 1st August 2013, the appellant resigned as the Managing Director of the 2nd respondent with effect from 1st November 2013, but indicated that he would continue to serve as a director until the next general meeting of the shareholders where new directors would be elected. The significance of the appellant's continued service as a director of the 2nd respondent and whether it afforded him access to information regarding the 1st respondent's claim is a contested issue. Suffice to point out that in a letter dated 4th August 2013 accepting the appellant's resignation, the Chairman of the 2nd respondent's Board of Directors wrote as follows in the pertinent part:

> ***"We have also deliberated on the question of your remaining as a director and the board feels that you should resign from both your position as the MD and also as a Director. This will however be regularized in the next AGM since you are an AGM elected Director. <u>You may be invited by the board on some occasions but you are not obliged or required to sit in the Board meetings and committees</u>." (Emphasis added).***

On or about 5th November 2013, that is, after the appellant had left the employment of the 2nd respondent, the 1st respondent amended her memorandum of claim. By a new paragraph 6A the 1st respondent pleaded, among other things, that the appellant had subjected her to sexual harassment. The relevant part of the claim read as follows:

> ***"The Managing Director, JK severally made unwanted sexual advances to the claimant that really affected the claimant's morale and job satisfaction. The claimant stood her ground and the Managing Director must have looked for any opportunity to get rid of her. The Claimant graduated with a masters degree in Business Administration on 29th June 2013 and the respondent's Managing Director must have felt very insecure that a business unit manager would be more qualified than him and therefore in the same month of her graduation, she was laid off; and it was not just by coincidence."***

In addition to the reliefs sought initially, the claimant prayed in the amended Memorandum of Claim for damages for exposure to sexual harassment and violation by the appellant.

Although serious allegations were made against the appellant personally in the claim as amended, he was not made a party to the suit, if we understood the 1st respondent's argument properly, for three reasons. The first was that the sexual harassment, which he was accused of under section 6 of the Employment Act, is a strict liability offence against the employer, and therefore it was not necessary to make the appellant a party to the claim. Secondly that the 1st respondent was seeking damages against the employer rather than the appellant, and lastly that in any event it was open to the 2nd respondent and it was the expectation of the 1st respondent and any reasonable person, that the appellant would be called by the 2nd respondent as a witness.

Be that as it may, the appellant was never called as a witness and he contends that he never became aware of the allegations of sexual harassment made against him by the 1st respondent until after the judgment of the Industrial Court. By that judgment dated 30th May 2014 Makau, J. held, among other things, that the

appellant had sexually harassed the 1st respondent, and awarded her damages of Kshs 500,000, payable by the 2nd respondent.

The appellant laments that he learnt of the judgment on 6th June 2014 when the *Daily Nation* Newspaper prominently covered it. Under an item headlined ***"Sex claim costs firm Sh. 590,000",*** the newspaper reported as follows, in so far as this appeal is concerned:

> ***"Managing director fired woman for turning down sexual advances and refusal to buy shares***.
>
> *A woman has been awarded a total of Sh. 598,000 compensation for sexual harassment dismissal. Mr. Justice Onesmus Makau of the Industrial Court in Mombasa found managing director of MFS, Mr. JK guilty of sexually harassing Ms. MM, contrary to section 6 of the Employment Act. Ms. M had, through her lawyer JK, challenged her dismissal last year. She told the court that one of the reasons she was dismissed was because of refusing to give in to sexual advances by the MD. She said that between the end of 2012 and April 2013, the MD invited her to his office for no good reason. Ms. M further testified that Mr. K hugged her several times. He invited her to his house for a weekend on April 13 2013 but she declined. Mr. K later hosted her for lunch on Moi Avenue in Mombasa during which he promised "to take care of her as a woman." Ms. M said she rejected his advances and told him that she was a born again Christian. After the lunch the boss told her that he had been expecting her resignation-a thing she said, took her by surprise."*

On 10th June 2014 the appellant filed an application in the Industrial Court seeking to be joined as a co-respondent in the claim, review and setting aside of the judgment of 30th May 2014 and an order for a fresh hearing of the suit, upon the appellant filing a response to the 1st respondent's allegations of sexual harassment against him. The application was taken out under the Constitution, the Industrial Court Act, the Industrial Court (Procedure) Rules, and the Civil Procedure Rules, 2010.

The 1st respondent vigorously opposed the application vide a replying affidavit sworn by the 1st respondent on 20th June 2015. Makau, J. agreed with the 1st respondent and in his impugned ruling held that although the court had jurisdiction to review and set aside its decisions, it had no jurisdiction to join the applicant in the claim after judgment and further that the applicant's complaint of denial of the right to be heard was an issue that should be raised in an appeal rather than in an application for review. Lastly the learned judge concluded that it was not necessary to join the appellant as a co-defendant in the suit because no orders were sought or made against him and that the decree passed by the court was capable of enforcement without his involvement.

It is that ruling that led to the appeal now before us, in which the appellant has raised 7 grounds of appeal, which ***Mr. Joseph Munyithia***, his learned counsel, argued globally.

Mr. Munyithia submitted that the appellant had been condemned as a sexual harasser without an opportunity to be heard. It was contended that the judgment of the Industrial Court, while not condemning the appellant to pay damages to the 1st respondent, had nevertheless destroyed his reputation and standing before his peers and the public. To the extent that the judgment affected the appellant personally and directly, it was submitted, the Industrial Court had erred in failing to afford the appellant an opportunity to be heard at the trial and by dismissing his application for an opportunity to be heard after the judgment, once he had learnt of it.

Learned counsel further submitted that the judgment of the Industrial Court was a permanent public record, which had resulted from a flawed process and unless it was corrected or affirmed following a fair hearing of the appellant's side of the story, it would forever negatively affect his family, professional and public life.

The judgment that the court declined to set aside, it was submitted, was a blatant violation of natural justice and in particular the *audi alteram partem* principle, which demands that no person should be condemned unheard. It was the appellant's contention that natural justice lies at the heart of a fair trial,

whether criminal or civil, and that the Industrial Court is obliged by the Constitution of Kenya to respect and uphold the principles of natural justice, which it had spectacularly failed to do in this case. To emphasize the centrality of natural justice in our legal system, counsel relied on the judgment of this Court in ***ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456***.

Counsel concluded by submitting that under the Industrial Court Act and the ***Industrial Court (Procedure) Rules, 2010*** the court has broad and unrestricted power to review its rulings or judgments where injustice had been occasioned and that a court is never *functus officio* until it has pronounced itself on an application for review or stay of proceedings. The decision of the Industrial Court in ***KENNETH KIPKEMBOI SETTIM & ANOTHER V. NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES, ICC No. 204 of 2011*** was relied upon in support of that proposition.

Mr. Jackson Muchiri, learned counsel for the 1st respondent opposed the appeal, contending that the Constitution does not guarantee any person a right to be heard, but merely an opportunity to be heard. In this case, learned counsel submitted that the appellant had adequate notice of the 1st respondent's allegations against him and still he had failed to apply to be made a party to the suit before judgment. It was submitted that the issue of the 1st respondent's sexual harassment by the appellant had been broached in the pre-litigation letter of demand, which was sent to the 2nd respondent while the appellant was still its Managing Director and Chief Executive.

In addition, it was contended that even though the appellant had resigned as the Managing Director and Chief Executive Officer of the 2nd respondent before the 1st respondent's claim was amended, he had continued to serve in the board of directors and therefore he must have been aware of the 1st respondent's allegations against him once her claim was amended. It was also submitted that the appellant had been afforded an opportunity to be heard through the 2nd respondent when the suit was adjourned to enable the 2nd respondent call its witness, which it failed to do. In learned counsel's view, the 2nd respondent's anticipated witness could only have been the appellant.

The appeal was also opposed on the ground that the appellant had no standing before the Industrial Court because he was not a party to the suit; that by the time he filed his application to be heard, the court had become *functus officio*; that ***Order 1 Rule 10*** of the Civil Procedure Rules permits joinder of a party before trial and not after judgment; that in any event it was not necessary to join the appellant in the suit because no remedy was sought against him; that the decree was capable of execution without the appellant; that the appellant had failed to establish basis for an order of review of the judgment under Order 45 of the Civil Procedure Rules and that; if the appellant was aggrieved by the report in the *Daily Nation*, his remedy was against the media house.

Counsel concluded by submitting, on the authority of the decisions of the Supreme Court of California in ***RENO V. BAIRD (S065473)*** and ***STATE DEPARTMENT OF HEALTH SERVICES V. THE SUPERIOR COURT OF SACRAMENTO COUNTY (S103487)*** that in respect of claims similar to those founded on sexual harassment under section 6 of the Employment Act, the employer is strictly liable and that the victim is supposed to sue the employer rather than an individual such as fellow employee.

We have anxiously considered this appeal whose facts are rather peculiar and whose determination must turn on those particular circumstances. At the centre of this appeal is a clash between two fundamental values: on the one hand the need to deal decisively with cases of sexual harassment that in the majority of cases dehumanize and devalue women at the work place, and on the other the need to afford the alleged sexual harasser a fair hearing. The two values are not mutually exclusive because sexual harassment, like all offences and crimes, is best confronted on the basis of a framework of observance of constitutional guarantees.

Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo motu*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision,

the learned authors of ***Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887),*** state that:

> ***"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."***

This Court adopted the same approach in ***CENTRAL KENYA LTD. V. TRUST BANK & 4 OTHERS, CA NO. 222 OF 1998***, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

> ***"all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."***

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. ***Sarkar's Code***, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in ***TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448,*** stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.

The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. In other words, the appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for *de novo* hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment. However, he declined to do so on the grounds that the issues that the appellant was raising could only be raised in an appeal rather than in an application for review.

On our part, we entertain considerable doubt whether the appellant could have been able to appeal to this Court against the judgment of the Industrial Court when he was not a party to the suit whose judgment aggrieved him and had not otherwise participated in the proceedings. Both the ***Industrial Court Act, 2011*** and the ***Industrial Court (Procedure) Rules*** made thereunder confer wide jurisdiction on the court to review and set aside its judgment. ***Section 16*** of the Act provides as follows:

> ***"The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules***."

Rule 32 (1) of the Procedure Rules, on the other hand provides as follows:

> ***" 1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—***
>
> ***(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or***

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons."

The rules do not define *"aggrieved person"* but it defines *"party"* to mean ***"a person, a trade union, an employer, employer's organization or any corporate body directly involved or affected by an appeal, or claim to which the Court has taken cognizance or who is a party to a collective agreement referred to Court for registration."*** (Emphasis added). A person who is directly affected by an appeal, or claim to which the Court has taken cognizance is deemed by the rules to be a party, and we do not find any reason why such a person cannot be an aggrieved party for purposes of applying for review of a decree or order of the court.

It does not take much imagination to see that under section 16 as read with rule 32, the Industrial Court is empowered to exercise its review jurisdiction on far much broader grounds that the High Court is allowed under ***Order 45*** of the Civil Procedure Rules. Under ***rule 36 (6)***, if the court allows an application for review, it is empowered to review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

In this appeal, the appellant was entitled to contend, as he did, that the judgment of the Industrial Court which directly affected him, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). He was also entitled to contend that to the extent that the judgment found him guilty of sexual harassment without affording him an opportunity to be heard, that in itself constituted sufficient reason for review of the judgment.

The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ***ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456***, ***Nyarangi, JA*** asserted at ***page 459:***

> ***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."***

At ***page 460*** the learned judge added:

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

And in ***MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206***, at page 210, this Court stated as follows:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

In answer to the appellant's lamentation that he was condemned unheard, the 1st respondent contends that the appellant was afforded an opportunity to be heard as a witness of the 2nd respondent; that he knew of the sexual harassment allegations against him because of the pre-litigation letter of demand and the fact that after resigning he had continued to serve as a director of the 2nd respondent; and that the damages that were awarded to the 1st respondent were not payable by the appellant.

While the record indicates that the 2nd respondent had applied for adjournment of the hearing to call its witness, there is nothing on record to suggest that the intended witness was the appellant. In view of the seriousness of the allegations that were made against the appellant, we are of the view that he deserved an opportunity to be heard of his own right, not merely as a witness of any other party. The contention that the appellant must have known of the sexual harassment allegations made against him, is based on conjecture rather than evidence. It is not denied that the 1st respondent's initial statement of claim, which was served when the appellant was still in office, did not contain any sexual harassment allegations. In addition, the letter of 4th August 2013 from chairman of the 2nd respondents Board of Directors accepting the appellant's resignation was clear that the appellant would not be required to attend meetings of the Board, where presumably he may have had the opportunity to know the 1st respondent's allegations against him.

Lastly, is the argument that to the extent that the impugned judgment of the Industrial Court did not require the appellant to pay the damages that were awarded to the respondent, the appellant has no interest in the matter and has no cause to complain. In our view, that is a simplistic way of looking at the problem because the loss of or damage to the appellant's reputation is as important, if not more important, than the loss he would have suffered were the award of Kshs 500,000 made against him. If a party must be heard before he is condemned to pay half a million shillings, such party is equally entitled, in our view, to be heard before his reputation is sullied.

On the value and importance of reputation, it may be apt to digress a little and let ***William Shakespeare*** speak from the grave. In ***Othello, Act III, Scene 3,*** the bard states through ***Iago***:

> *"Good name in man and woman, my dear lord, is the immediate jewel of their souls.*
>
> *Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed."*

And in ***Richard II, Act I, Scene 1,*** he proclaims through ***Thomas Mowbray:***

> *"The purest treasure mortal times afford Is spotless reputation; that way, Men are but gilded loam or painted clay. A jewel in a ten-times-barr'd-up chest Is a bold spirit in a loyal breast. Mine honour is my life, both grow in one; Take honour from me and my life is done."*

The value a person's reputation is not a concern of poets and playwrights alone. The Courts in various jurisdictions have underscored the value of reputation, particularly in the context of defamation actions. Thus in ***Rosenblatt v Baer (1966) 382(US) 75 at 92, Justice Stewart of the US Supreme Court***, *stated:*

> *"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."*

In Canada the, ***Cory, J.*** expressed similar views in ***Hill v Church of Scientology [1991] 126 DLR 129:***

> *"Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited."*

Lastly in the UK, Lord Nicholls had the following to say in ***Reynolds v. Times Newspapers Ltd*** ***[1999] 4 All ER 609:***

> *"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society, which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation."*

Having carefully considered this appeal, we are satisfied that the appellant ought to have been afforded an opportunity to be heard before he was condemned as a perpetrator of sexual harassment. We are equally satisfied that in the particular circumstances of this appeal, the industrial court ought to have reviewed and set aside its judgment dated 30th May 2014 to afford the appellant an opportunity to be heard.

In the premises, we allow this appeal, set aside the ruling and order of the industrial court dated 3rd October 2014 dismissing the appellant's application and substitute therefor an order allowing the appellant's application dated 10th June 2014. The effect of our order is that the judgment of the Industrial Court dated 30th May 2014 is reviewed and set aside. The 1st respondent's claim shall be heard *de novo,* with the appellant being afforded an opportunity to be heard, before any judge of the Industrial Court other than Makau, J. In the circumstances of this appeal, we order each party to bear their own costs. It is so ordered.

Dated and delivered at Malindi this 17th day of July 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.