IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 58 OF 2014

BETWEEN

NICHOLAS MBUYA

GABRIEL DOLAN

PENINAH KAMAU

FRANKLIN FAIDA

PIUS MUTHOKA (Appealing as the Trustee of

GOOD LIFE ORPHANAGE...APPELLANTS

AND

ALICE GESARE MONINDA..RESPONDENT

(Being an Appeal against the judgment of the Industrial Court of Kenya

at Mombasa (Makau, J.) dated 26th October 2014

In

ICC No. 425 of 2013)

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JUDGMENT OF THE COURT

By a letter of appointment dated 1st May, 2009, the respondent was offered employment by the appellants as a house mother at the Good Life Orphanage "*the Orphanage*", a trust foundation based in Kilifi and run by the appellants. The terms of engagement, provided *inter alia*; that she would earn a monthly salary of Kshs.7,000/-plus a bonus of Kshs.2,000/ per month, with the latter amount being kept in a separate account to be paid to the appellant only upon her completion of five years of service.

Things ran smoothly until the evening of 28th September, 2013 when, upon return from her usual Sabbath service, the respondent was met by the manager of the orphanage, one **Mercy Nyadzua Mbingo**, who

served her with a letter indefinitely suspending her from employment. The basis of the suspension was said to be allegations of assault levelled against her by some of the children in her care. She was thus required to leave the orphanage immediately.

According to the respondent, though the appellants had purportedly placed her on suspension, the tenor of the suspension letter, coupled with the unceremonious manner in which she was banished from the premises, suggested immediate termination of her employment. This suspicion prompted her to report the matter to the Kilifi County Labour Officer. Following the labour officer's intervention, the appellants, according to the respondent hastily convened a '*disciplinary hearing'* on 18th October, 2013, ostensibly to look into the respondent's alleged misconduct with the consequence that, they resolved to terminate her services forthwith.

This provoked the respondent to lodge a claim with the Industrial Court (now the Employment and Labour Relations Court) at Mombasa. In the claim she averred that she was unfairly dismissed from employment by the respondent on 30th September, 2013 and claimed Kshs.286,000/- made up as hereunder:-

a. 1 month salary in lieu of notice	Kshs.10,000/-
b. Accrued leave	Kshs.10,000/-
c. Service pay for 4 years	Kshs.40,000/-
d. 12 months pay for unlawful termination	Kshs.120,000/-
e. Kshs.2,000 per month bonus for 53 months	Kshs.106,000/-
TOTAL	**Kshs.286,000/-**

The claim attracted a fierce response by the appellants in terms that the respondent was suspended for gross misconduct and subsequently failed to adhere to the disciplinary process leading to the termination of her services for gross misconduct. In the circumstances, the respondent was not entitled to Kshs.286,000/- claimed or at all. Finally, it averred that the respondent was paid all her terminal dues and had no claim whatsoever against the appellants in the circumstances.

Upon a full hearing of the claim, **Makau, J.** ruled in favour of the respondent holding that the belated disciplinary hearing conducted by the appellants was a mere sham meant to cover up the unprocedural termination of the respondent's employment. The court went on to hold that the dismissal was unlawful for want of a fair disciplinary hearing and allowed the respondent's claim albeit in part. Whilst granting prayers (a) & (e) above in full, the learned Judge comminuted prayers (b) and (c) to Kshs.3,461.50/- and Kshs.60,000/- respectively, bringing the total sum awarded to Kshs.179,461.50/-, with prayer (c) being disallowed.

Dissatisfied with part of the said judgment and decree, the appellants preferred this appeal. They impugn the judgment on two broad grounds; that the Judge erred in failing to properly analyze the facts and law in holding that the termination was unlawful and that the Judge erred in awarding a bonus of Kshs.106,000/- as per prayer (e) of the claim despite the fact that the respondent had not yet completed the mandatory five year contractual period of employment to be eligible for the bonus.

With the court's leave, the parties disposed of the appeal by way of written submissions that were highlighted on 17th June, 2015. When highlighting, **Mr. Ndeto,** learned counsel holding brief for **Mr. Mulwa** for the appellants, submitted that the judge fell into error when he held that the respondent's termination was with effect from 30th September, 2013 instead of 18th October, 2013. According to counsel, the former was the date when the respondent was suspended while the latter was the date of actual termination. He added that upon her suspension, the respondent opted not to continue working for

the appellants and was consequently dismissed on 18th October, 2013, following a disciplinary hearing held on even date. In view of the above, counsel submitted, the dismissal could not be faulted for want of fair hearing and the Judge erred in holding otherwise. Accordingly, it was the appellants' contention that the termination having been fair and lawful, the respondent was disentitled to the six month pay awarded by the trial Judge under the head of unlawful termination.

On the award of bonus for the months worked, counsel submitted that this too ought not to have been granted as the letter of appointment categorically provided that the bonus was only due and payable once the respondent had completed five years of service with the appellants, which was not the case here. That since the bonus was pegged on the happening of an event which had not yet occurred, the same had failed to accrue and was hence not payable. The Judge in allowing the claim had effectively re-written the contract between the parties which was not acceptable. He thus urged this Court to allow the appeal on those grounds.

Opposing the appeal, **Mr. Nyabena,** learned counsel for the respondent maintained that the dismissal was unfair and that contrary to the appellants' assertions, the same had taken effect on 28th September, 2013 when the suspension letter was issued. He added that this would even explain the certificate of service issued by the appellants to the respondent on 30th September, 2013. Given the foregoing, it was the respondent's case that the dismissal was unfair, as she had not been accorded a disciplinary hearing before the dismissal and that the subsequent hearing on 18th October, 2013 was a sham meant to obfuscate the appellants' illegalities. The respondent thus contended that following the unfair termination, she was entitled to the entire sum awarded by the trial court. Whilst acknowledging that bonus payment was payable only upon five years of service as per the contract, counsel submitted that the Judge's *pro rata* award of the same was valid, as the respondent's failure to serve five years was due to no reason of her making but the appellants'. Accordingly, he prayed for the dismissal of the appeal.

Previously, appeals to this court from the Employment and Labour relations courts were limited to issues of law only. Indeed, **Section 17** (since repealed) of the Industrial Court Act No. 20 of 2011 *(the Act)* provided that:-

> *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* (emphasis added)

However, these provisions have since been repealed by the **Statute Law (Miscellaneous Amendments) Act No 18 of 2014** which deleted **Section 17** aforesaid in its entirety. The import of this is that the jurisdiction of this Court in labour disputes was broadened and can thus now include issues of both fact and law.

Such being the case, the Court is under statutory duty to reanalyze and re-evaluate the evidence adduced at the trial court in a bid to reach its own findings and conclusions. See **Rule 29(1)** of this Court's Rules. As we see it the issues for determination in this appeal are fairly simple and straight forward:

i. Whether the termination was unlawful, and the consequence thereof.

ii. Whether the respondent was entitled to the bonus as awarded.

On the first issue, the appellants contend that the respondent's dismissal took effect on 18th October, 2013 following a disciplinary hearing. The respondent disagrees and maintains that the dismissal was effected on 28th September, 2013 when she was suspended and issued with a Certificate of Service stating that she had served the Orphanage from 1st May, 2009 to 30th September 2013. The High Court ruled in favour of the respondent and rightly so in our view. Looking at the letter of suspension, it stated in part;

"……….we are still working on this matter, we therefore suspend you from work with immediately (sic) effect till further notice. Kindly ensure that you leave Glo with your belonging (sic). We wish you the best."

It is without doubt that this was to operate as an indefinite suspension from duty. As the learned trial Judge rightly noted in the judgment, no mention of a disciplinary hearing date was made in the letter. Indeed, the disciplinary hearing only came to be after the Labour Officer's intervention in the dispute, vide his letter dated 4th October, 2013. The appellants never disputed this fact. The tone of the letter and its noncommittal position as to when the disciplinary hearing would be (if at all) does suggest that a decision had been made to do away with the respondent's engagement. Coupled with this, was the fact that the respondent is said to have been immediately issued with a certificate of service on 30th September, 2013. Under **Section 51** of the Employment Act**,** a certificate of service is issued by an employer to the employee upon termination of his employment. It follows therefore, that as at 30th September, 2013, the respondent's employment was for all intents and purposes, terminated. Accordingly, the learned Judge was right in holding that the respondent's employment came to abrupt halt on the aforesaid date.

The appellants have also contended that the issuance of the certificate of service was at the respondent's instance and request. Further, that if as at 30th September, 2013 the respondent chose to believe that her employment had been terminated, that was the respondent's own illogical conclusion, because as far as the appellants were concerned, they had merely suspended her. Even if this contention was valid, the question that arises is; why had the appellants thereafter convened a disciplinary hearing? If it is true that the respondent had terminated her own employment, for whichever reason(s), what then was the purpose of the disciplinary hearing? In fact, if such was the case, nothing would have been easier than for the appellants to inform the labour officer that the respondent had left employment on her own volition. Instead they chose to convene a belated disciplinary hearing. The totality of this is that, by the appellants' own conduct, the dismissal of the respondent was on 30th September, 2013, the same was done without any disciplinary process and the subsequent disciplinary hearing of 18th October, 2013 was a sham only provoked by the labour officer's query, and a deliberate move calculated to obscure and veil the appellants' lapses in due procedure.

It is trite law that under Section 41 of the Employment Act, an employer must, 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. Failure to do so as was the case here, constitutes unfair termination *(*see. **Kenya Union of Commercial Food And Allied Workers v. Meru North Farmers Sacco Limited, [2013] eKLR and also** CMC Aviation Limited v. Mohammed Noor [2015] eKLR*)*

As a result, the dismissal herein went against statute and the rules of natural justice and to that extent, the same was unfair and unlawful. Accordingly, Makau,J. was right in so holding and proceeding to award appropriate damages.

The remedies available to an unlawfully dismissed worker are provided for under statute and common law cases to apply when a matter is regulated by statute. According to Section 49 of the Employment Act a worker dismissed unfairly is entitled to any or all of the following remedies; payment in lieu of notice, accrued wages, or twelve (12) months' payment of the gross monthly wages as at the time of dismissal. In determining this, the court is guided by among others; the contract between the parties, the conduct of the parties as well as any compensation, including *ex gratia* payment, in respect of termination of employment paid by the employer and received by the employee.

In this case, the respondent received no payment as at the time of claim before the trial court. In this appeal, save for Kshs.60,000/- awarded as 6 month pay for unfair termination and Kshs.106,000/- awarded in respect of bonus for the 53 months worked, the other heads awarded remain unchallenged and

there is no point in reverting to them. As regards the 6 month pay, it is our view that under the Employment Act, the court has discretion to determine the quantum of wages payable for unfair termination. This is on condition that the same should not exceed twelve months salary. Indeed, under Section 49(1):-

> *"(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following-*
>
> *a. …….*
>
> *b. ……..*
>
> *c. <u>the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.</u>* (emphasis added)"

This provision applies not just to the labour officer, but to the court as well as under Section 50, the Act requires that the court be guided by the aforesaid provision in its determination of complaints for unfair termination. In the instant case, in electing not to award 12 months' pay as had been prayed, the trial Judge was of the view that the respondent could have secured equally paying employment within six months of dismissal. No cross appeal has been lodged to challenge this position. Conversely, in challenging the award, the appellant has failed to show sufficient reason as to why this court should interfere with the exercise of the Judge's discretion so far as this limb of the award is concerned. As a result, given that the Judge has discretion to grant the award, we do not think that there is any basis for our intervention.

We now turn to consider the award based on bonus. The Letter of Appointment between the parties stipulated the respondent's dues to be as follows:-

> *"Your gross salary will be Kshs.7,000/=. <u>Kshs.2,000/= bonus per month will be kept on your behalf in a separate account and will be given to you upon completion of five years of service. If you do not complete the five years of service, the same will not be paid to you."</u>*(emphasis added)

The parties have advanced conflicting interpretations of this clause. The appellants are of the view that the contract made it mandatory that the respondent must have served five years in employment for the bonus to accrue and be payable to her. In line with this, they contend that by awarding bonus for the 53 months served by the respondent, the trial Judge fell into error, as he in effect re-wrote the terms of the agreement. The respondent's view of the matter is that since the termination of employment was unfair and attributable to no fault of her own, then there is no reason as to why she should not be paid her bonus for the months worked.

Our labour laws are silent on the issue of bonus payment. It would then appear that where a bonus dispute arises, such dispute is left exclusively to the province of the agreement between the parties. As such, bonus liability (if any) must be construed within the meaning and intent accorded by the parties under their contract. From the above excerpt of the agreement, it is clear that the bonus was conditional on the respondent's completion of five years of employment and that in the event that she failed to do so, then the same would not be paid. The respondent has contended that the termination having been unfair and thus beyond her control, she ought to be awarded the bonus accrued thus far. She has presented a compelling argument. That the appellants ought not to benefit from the fruits of their unlawful conduct. For in so doing, the court would be condoning the unjust enrichment of the appellants. Nonetheless it should be remembered that parties are bound by their contracts and a court can and should only award what is sought and proven within the confines of the law and the contract of employment. Further, the respondent in her testimony did concede that as worded, she could only access the bonus upon completion of 5 years of service which in this case she had not. Strictly speaking therefore she was not entitled to the bonus until and unless she had attained five (5) years of service with the appellants.

This Court in **John Njoroge Michuki v. Kenya Shell Ltd, C.A No. 227 of 1999** held that courts ought not to frustrate the clearly expressed intentions of parties and should instead seek to enforce such intentions. In this case, the parties had expressly provided in their contract of employment that should the respondent fail to serve in employment for five years, then her entitlement to the bonus would be extinguished. In the absence of fraud or undue influence, which was never pleaded in this case, nor canvassed during the hearing, courts will not rewrite contracts between the parties but will instead enforce the same (see. **National Bank of Kenya v. Pipe Plastic Samkolit (K) Limited & Another C.A No. 950 of 1999** and also **Alfred M.O Michira v. Gesima Power Mills Ltd C.A No 197 of 2001**)

This Court will thus give a strict interpretation of the contractual terms, which clearly dictated the fulfilment of five years of service by the respondent to enable her to claim the bonus. Service of five years was a condition precedent to the bonus entitlement, failure of which would render the same non payable. Had the parties been desirous of stating or providing other additional requirements thereto, nothing would have been easier than for the contract to state as much.

As a result, and in view of the aforegoing, we hold the view that the appeal should succeed in part, with the prayer for bonus payment being disallowed. This will bring the figure awarded down to **Kshs.73,461.50/-** payable to the respondent. The same will attract interest at court rates from the date of filing of the suit. As there has been no outright victor in this appeal, we order that each party bears own costs.

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

ASIKE-MAKHANDIA

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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