



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & KANTAI, JJ.A)

CIVIL APPEAL NO. 125 OF 2011

BETWEEN

OSHWAL ACADEMY (NAIROBI).....1ST APPELLANT

OSHWAL EDUCATION AND RELIEF BOARD.....2ND APPELLANT

AND

INDU VISHWANATH RESPONDENT

(Being an appeal from the Award and Decree of the Industrial Court of Kenya at Nairobi (Honourable Mr. Justice Paul Kosgei) dated 29th October, 2010) in INDUSTRIAL CAUSE NO. 110(N) OF 2009

JUDGMENT OF THE COURT

1. This appeal arises from the award of the Industrial Court of Kenya at Nairobi chaired by Honourable Mr. Justice Paul Kosgei made on 29th October, 2010 in respect of a claim by Indu Vishwanath, hereinafter referred to as **“the respondent”**, against Oshwal Academy (Nairobi) and Oshwal Education and Relief Board, hereinafter referred to as **“the 1st and 2nd appellants”** respectively.
2. Through her statement of claim, the respondent sought damages for gratuity benefits, notice pay, redundancy and accrued leave following the appellants’ board decision not to renew the respondent’s contract. At the time of termination of the employment relationship, the respondent was in possession of a 2 year contract commencing 5th October, 2005 issued by the appellants. The respondent avers that she was working for the appellants and their predecessors since 1985 and was issued a contract of permanent employment on 1st September 2001. It is a further averment that the appellants altered the permanent terms of employment and renewed the contract on 22nd February 2005. The respondent thus argued that she had a legitimate expectation and presumption of continuity of employment and also founded her claim on redundancy. The respondent indicated that the reason for the non-renewal of her contract of employment was as a result of overstaffing in the chemistry department where the respondent was the head and the unwillingness of a chemistry teacher accepting to be deployed to teach Biology.
3. In opposing the claim, the appellants averred that the claimant’s employment in 1985 was on

temporary basis as a relief teacher and heavily relied on the contract issued to the respondent commencing 1st September 2006. It was the appellants' argument that the contract being of a fixed term in nature automatically lapsed by effluxion of time and its renewal was at the discretion of the 2nd appellant. By accepting and signing the terms of her contract therefore, the contract is what governed the employment relationship. The appellants denied any form of redundancy and disputed any legitimate expectation on the part of the respondent to continued employment. They added that renewal of past employment contracts were immaterial. The appellants argued that in such a fixed term contract there was no duty to explain the reason for termination of contract.

4. Through a supplementary defence (sic) filed on 12th June 2009 by the appellants, the appellants averred that the fees for obtaining work permit had been raised from Shs.50,000/= to Shs.200,000/= and that, the respondent had received sums under the Staff Provident Fund established by the appellants. The appellants denied redundancy indicating that the appellants still employed chemistry teachers. The appellants also made averments relating to the reasons as to the respondent's conduct, capacity and compatibility that informed the appellants' board decision not to renew the respondent's contract of employment.
5. The trial judge considered the pleadings, oral testimony, written submissions and the documents. In the award, the court found it necessary to look at the respondent's entire period of service with the appellant and found that the employment expired automatically by effluxion of time, upholding the common law position. However, the Industrial court which has since been renamed as the Employment and Labour Relations Court held that the appellant had engaged in unfair labour practice through sporadic and inconsistent use of contracts and changing terms willfully and unilaterally to the detriment of the respondent. The trial court found that the appellants had terminated the employment under a disguised redundancy and the respondent had a legitimate expectation of continuity from the conduct of the parties in the course of the employment relationship. The trial court thus awarded the appellant severance pay to the tune of 1,270,356/= for the 23 years she had worked for the appellants.
6. The appellants being dissatisfied with the award preferred this appeal. The appeal proceeded by way of written submissions. The appellants were represented by **Mr. A.B. Shah and Ms. Njeri Mucheru** while the respondent was represented by **Mr. Martin Ole Kamwaro**. From the submissions, we consider that the issues raised can be condensed as follows for purposes of our determination:-
 - ***Whether change of a permanent employment contract to a fixed term contract amounts to illegal and unfair labour practice;***
 - ***Whether the termination of employment contract amounted to redundancy;***
 - ***Whether the respondent is entitled to any remedies.***
7. Appeals to this Court from judgments by the Employment and Labour Relations Court are governed by **section 17** of Employment and Labour Relations Court Act. The said provision provides as follows:-

“17. Appeals

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.”***

Subsection (2) of **section 17** above was deleted by **the Statute Law (Miscellaneous**

Amendments) Act No.18 of 2014 whose date of commencement was 8th December 2014. With that deletion, there was no limitation on the extent to which this court can determine appeals from the Employment and Labour Relations Court. **Rule 29(1)** of this Court's rules allows this court, on any appeal from a decision of a superior court in the exercise of its original jurisdiction such as the Employment and Labour Relations Court, to re-appraise the evidence and draw inferences of fact. Accordingly, this being a first appeal, we are required to appraise and evaluate the trial judge's interpretation of the Constitution and statutory provisions, the application of these laws to the undisputed and established facts and the evaluation of the reasonableness of the conclusions of the learned judge.

8. Turning to the first issue, it is common ground that the respondent started working for the appellants in 1985 without any contract. The respondent was issued with a permanent employment contract vide letter dated 1st September 2001. The respondent was further issued with a renewal contract of employment vide letter dated 22nd February 2005 for a term of two calendar years with effect from 22nd February 2005. It was during the tenure of this contract that the appellants underwent restructuring leading to the issuance of another letter of employment dated 1st September, 2006 under the 2nd appellant as the owner and manager of the appellant's group of schools. As per this contract the employment was valid for a period of two years with effect from 1st September 2006 subject to termination.
9. **Section 2** of the **Employment Act, 2007** (hereinafter referred to as "the Act") recognizes the different types of employment contracts including permanent and fixed term. Just like any other contracts therefore, we agree that parties are at liberty to amend the contract by execution of another contracts as was the case herein. This recognition was also provided under the Employment Act Cap.226 laws of Kenya that has since been repealed by the Act. **Section 13** of the Act provides for change of initial employment particulars, and the employer is obligated to give the employee a statement indicating such change within a prescribed time frame. Failure to issue such a statement of change is an offence under **section 16** of the Act. Similarly, an employee is free to challenge and complain of any provision that he finds detrimental as a result of the change.
10. Having considered the legality of the change in contract, does the change of contract from permanent to fixed term in this case amount to unfair labour practice? From our perusal of the record and evidence before us, the dispute arose out of the termination of the respondent's employment and not the change of contract from permanent to fixed. Unfairness has to be inferred from the particular set of circumstances and cannot be generalized. Every employee whose services have been terminated has the right under **section 35(4)** of the Act to dispute the lawfulness or fairness of the termination of employment. The moment an employee disputes the termination then, and in this case to the court, the Employment Act guides what should be considered in addressing the dispute.
11. At the time of termination of contract subject to the dispute before us, the contract governing the employment was for a fixed term – 1st September 2006 to 31st August 2008. Clause 18 of the contract in question deals with termination and provides as follows:-

"18.1 This contract may be terminated by either party giving to the other two months written notice to expire at the end of a current term or payment in lieu of notice"
(emphasis supplied)

By a letter dated 23rd July, 2008 approximately 5 weeks before the end of the contract, the appellants issued a letter of termination of employment to the respondent. Termination of fixed term contracts has received judicial consideration by the Industrial Court. In **Bernard Wanjohi Muriuki v Kirinyaga Water And Sanitation Company Limited & another** [2012] eKLR, Riika J, held as follows:-

“In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination.”

12. This position has also been restated in **Francis Chire Chachi - Vs Amatsi Water Services Company Limited, [2012]eKLR** as follows:-

“This court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract.” Section 35 (2) of the Act provides for termination of employment by notice and where the notice is greater than one month then the same should be applicable. In **Ruth Gathoni Ngotho-Kariuki v Presbyterian Church of East Africa and Presbyterian Foundation [2012]eKLR** which was cited by the respondent, failure to give the notice led to the judge inferring automatic renewal of the fixed term contract. Accordingly, the necessary timelines for the communication of the decision not to renew the contract need to be upheld. The trial judge did not inquire as to whether there was any obligation in the contract or the timelines adhered to but nevertheless made a finding to the effect that the claimant was entitled to two months pay in lieu of notice as per the contract of service. We agree with the trial judge in this respect.

13. The appellants contend that there was no evidence at the superior court to justify the trial judge's conclusion that the respondent was a victim of disguised redundancy. The respondent argues that her termination was a result of her unwillingness as head of chemistry department to be deployed to teach Biology and none of the chemistry staff also willing to shift. In the respondent's opinion there was overstaffing in the chemistry department and it was inevitable that the appellants wished to reduce the personnel in the chemistry department. The appellants on the other hand dispute the respondent's assertion and indeed reiterate that they have continued to recruit teachers in the chemistry department following the respondent's departure. From our analysis of the record, there were two opposing factual positions. The trial judge was faced with the task of believing one side and he chose the respondent's and inferred redundancy. This in our view was exercise of judicial discretion on a balance of convenience. Having had the advantage of listening to the witnesses first hand, we as an appellate court are reluctant to interfere with a finding of fact by the trial judge in inferring redundancy. Redundancy is defined under **section 2** of the Act as follows:-

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

This in our view was exercise of judicial discretion on a balance of convenience. Having had the advantage of listening to the witnesses first hand, we as an appellate court are reluctant to interfere with a finding of fact by the trial judge in this respect.

14. From our consideration of evidence, buttressed by the short notice given to the respondent, it can be reasonably inferred that the termination was involuntary on the part of the respondent as the employee but instead at the initiative of the employer. Indeed the appellant's witness listed matters considered by the board in deciding not to renew a contract in line with the appellants' new vision following the merger of the school. The appellant did not on their part prove any valid reason for the respondent's termination based on the respondent's conduct, capacity and incompatibility. Having also regard to the sporadic and inconsistent nature of the employment

contracts between the appellants and the respondents over the period of time the employment relationship was in existence, it smacks a sense of careful calculation on the part of the appellants to smoothly wiggle out of the employment relationship. **Section 43 (1)** of the Act states as follows:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

From paragraph 6 of the „supplementary defence? filed by the appellants at the Industrial Court, now known as the Employment and Labour Relations Court, the appellants argued that the failure to renew that respondent?s contract was reached by the 2nd appellant for reasons related to the claimant?s conduct, capacity and compatibility. In essence, the appellants shifted from the earlier stance that they were not required to give reasons for the termination of the contract. In **Kenya Union of Commercial Food And Allied Workers V Meru North Farmers Sacco Limited, [2013] eKLR**, the Industrial Court, as it was then known held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under **section 41** of the Act. That applies in a case for termination as well as in a case that warrants summary dismissal. See also **Mary Chemweno Kiptui V Kenya Pipeline Company Limited [2014] eKLR**.

We respectfully agree and add that it was incumbent upon the appellants to take the respondent through the mandatory process in this case as spelt out in **section 40** of the Act. This did not happen from our perusal of the record too and as such whereas the appellants may have had good reasons for termination, the claim still amounted to unfair termination under **section 45** of the Act.

15. Having come to the same conclusion as the trial judge that there was merit in the claim as pleaded, we now proceed to determine the remedies available in the circumstances. In our consideration of the appropriate remedies, we are mindful of the peculiar nature of employment contracts as was captured in **Njoroge Muigai vs System Integration Ltd [2013]eKLR** as follows: -

“Employer and employee interests are frequently diametrically opposed. The parties tend to make no investment in the other, beyond the immediate exchange of a shilling for labour. The dealing is at an arms’ length and the employment relationship ignores the realities of interdependence, intimacy, and mutual investment of work. Long service of employment such as enjoyed by Muigai, engenders a familial bond. It is not preposterous therefore, for employment law to borrow from family law, and encourage the recognition and investment in what relationships the parties have over the years built.”

The respondent was in employment for over 23 years and had developed a bond as to expect to work until retirement. We also have to remain conscious of the fact that employment relationships have to come to an end in some instances.

16. The respondent never sought reinstatement but sought damages both special and general. The special damages sought were gratuity benefits, notice pay, redundancy and accrued leave. It is trite law that parties are bound by their pleadings. The claim having been founded on redundancy and not unfair or wrongful termination, we agree that the respondent was entitled to severance pay in terms of **section 40 (1) (g)** of the Employment Act, 2007. The only other damage proved was the notice pay which for some unexplained reason the trial judge failed to award despite making a finding to that effect.
17. In conclusion, we make orders that the appeal is dismissed. We do not find any basis to interfere with the trial court?s assessment of damages on account of severance pay in the amount of Shs.1,270,356.00 and we only add that the respondent be and is hereby awarded two month?s salary in lieu of notice as stipulated in the contract of employment in the sum of Shs.224,000/=.

We further order that the appellant bears costs of the appeal and of the proceedings in the Employment and Labour Relations Court.

Dated and delivered at Nairobi this 18th day of December, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR