IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 04 OF 2014

BETWEEN

KIMA INTERNATIONAL SCHOOL

OF THEOLOGY ……...……. APPELLANT

AND

BEN JULIUS ACHILA …….. RESPONDENT

(An Appeal from the Judgment of the Industrial Court of Kenya at Kisumu (Wasilwa, J.) dated 25th July, 2013

in

INDUSTRIAL COURT CASE NO. 33 OF 2013)

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JUDGMENT OF THE COURT

1. The Respondent, a teacher by profession who also served as a chief and retired at the rank of senior chief, was on 5thJune, 2006, employed by the appellant as Director of Security. His initial salary was Kes.6,000/= per month. It was later raised to Kes.8,600/=.

2. On 15th January 2013, there was a robbery at the appellant's school and it was alleged that property worth about Kes.400,000/= was stolen. The respondent reported the matter to police but he says he does not know whether any action was taken.

3. On 27th January 2013, the respondent's services were terminated. His letter seeking to know the reasons or grounds for that elicitedno response from the appellant. So on 15th March 2013, he filed a claim in the Industrial Court challenging his termination and claiming his unpaid terminal dues.

4. In response, the appellant filed a memorandum of reply and stated that the respondent's services were lawfully terminated on grounds of insubordinationand negligence in the performance of his duty.In the circumstances, it had no option but to terminate his services in terms of the contract of service between them by paying him one month's salary in

lieu of notice.

5. After hearing the claim the Industrial Court found that the termination of the appellant's services was unlawful forbeing condemned unheardcontrary to **Section 41(2)** of the Employment Act and the rules of natural justice. It therefore awarded him damages equivalent to 12 months salary amounting to Kes.85,260/=.It also found that the appellant was being underpaid holding that the sum of Kes.8,600/= being salary inclusive of house allowance was below the minimum wage. In this regard, it awarded him 15% of that salaryas house allowance for the six years he had worked for the appellant which amounted to Kes.92,880/=. The two awards totaled to Kes.178,140/=.This appeal is against that decision.

6. In its Memorandum of Appeal, the appellant faulted the learned Judge for finding that the services of the respondent were unlawfully terminated; that the awards of Kes.85,260/= and Kes.92,880/= had no basis and amounted to unjust enrichment of the respondent;and that the learned Judge erred in failing to properly re-evaluate the evidence before him and ended up with a decision based on extraneous matters and comprising of unclaimed reliefs.

7. Presenting the appeal before us, **Mr. Mbiyu**, learned counsel for the appellant submitted that the respondent refused to comply with its directive to work with new guards which action threatened to undermine the appellant's authority.Given that insubordination, the termination of his services was justified under **Sections 35** and **43** of the Employment Act.He said besides payment of one month's salary in lieu of notice, the respondent was also paid severance pay of 15 days salary for each year worked, and salary in lieu of leave not taken. Counsel contended that the correspondence exchanged between the parties appearing on pages 14 and 15, 28, 29 and 66of the record of appeal amounted to accordingto the respondent a hearing.However, if the termination was indeed fair as the respondent claimed, counsel submitted that the court should have proceeded under **Section 49(1)(c)** of the Employment Act.

8. On damages, counsel submitted that if the termination was unlawful, given the short period the respondent had worked for the appellant, he was entitled to no more than damages equivalent to three months salary. Counsel cited several authorities in which damages for unlawful termination have ranged from an equivalent of one to twelve months salary but in each case, reasons were given for the awards. He said in this case the learned Judge gave no reason for his award of damages equivalent to the statutory maximum period of twelve months salary.

9. As regards the award of damages for underpayment, counsel submitted that the same had no basis as it had not been pleaded in the respondent's statement of claim. Moreover, he concluded, the respondenthad accepted the salary of Kes.8,600/= per month inclusive of house allowance as reasonable.Counsel therefore urged us to allow the appeal with costs.

10. Opposing the appeal, **Mr. Madialo**, learned counsel for the respondent, submitted that the respondentwas asked to show cause why his services could not be terminated. The first communication he received from the appellant in this matter was his letter of termination. In the circumstances, counsel said, the Judge was perfectly entitled to find that contrary to **Section 41(2**) of the **Employment Act** and the rules of natural justice, the respondent had been condemned unheard.

11. Counsel further argued that although the learned trial Judge did not give a reason for the award of twelve months salary as damages for wrongful dismissal, the law authorizes such an award and this Court has no reason to disturb that award. On underpayment, counsel submitted that as the respondent's salary was below the statutory minimum wage, the court was perfectly justified in awarding damages without a specific claim being made by the

respondent in that regard. With those submissions, he urged us to dismiss this appeal with costs.

12. The law is settled on the duty of an appellate court in a first appeal like this one: the first appellate court is obliged and has power to examine and re-evaluate the evidence on record, where that becomes necessary, and interfere with the trial court's finding of fact if it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding. This principle was enunciated by the predecessor of this Court in the celebrated case of **Selle& Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126**and has since religiously been followed in subsequent cases including **Mwanasokoni v. Kenya Bus Services Ltd, [1985] KLR 931**.

13. As regards the quantum of damages, the principleapplicable as stated in many decisions of this Court including **Kemfro Africa Ltd & Another v. Lubia& Another (No.2) [1987] KLR 30,** is that to justify disturbing the trial court's award;

> ***"the appellate courtmust be satisfied that, in assessing the damages, either the judge took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

14. However, these principles do not apply in this appeal as **Section 17(2)** of the **Industrial Court Act** restricts appeals from decisions of the Industrial Court to consideration of points of law only. Pursuant to thislimitation, we have considered the submissions presented to us in this appeal and carefully read the record of appeal.

15. With regard to termination of employment, the traditional common law view is that illegal termination of a contract of employment entitles the dismissed employee to damages-**Paramount Bank Ltd v. Mohamed G. Qureishi& Another, (Civil Appeal No. 239 of 2001) (CA); [2005] eKLR**-and that the measure of damages in that regard is salary in lieu of and equivalent to the period of the notice provided for in the service contract. See **Rift Valley Textiles Ltd Vs Edward OnyangoOgada Civil Appeal No.27 of 1992; Alfred Githinji v. Mumias Sugar Company Ltd Civil Appeal No.194 of 2001;**and**Central Bank of Kenya v. Nkabu [2002] 1 E.A. 34.**Where no notice is provided for in the service contract, the court will award reasonable damages having regard to the circumstances of each case-**Ombaya v. Gailey& Roberts Ltd [1974] E.A. 166.**

16. However, since the enactment of the Employment Act and the Industrial Relations Act both of 2007 and the Industrial Court Act of 2011, damages and reinstatement are now statutory reliefs and the court has jurisdiction, inter alia, to order reinstatement of the affected employees or award to them reasonable damages of up to 12 months' salary. Read together, **Sections 49(1)(c) and 50** of the **Employment Act** 2012 as well as **Section 12(3)(v),(vi)& (vii)** of the **Industrial Court Act, 2011** make this change abundantly clear.

17. The termination in this case having been after the enactment of these Acts, the appellant was obliged to follow them. The Employment Act incorporates in**Section 41** thereof the rules of natural justice, which had hitherto been outlawed (see **Rift Valley Textiles Ltd v. Edward Onyango Ogada Civil Appeal No.27 of 1992)**and requires that employees be given an opportunity of being heard before any adverse action is taken against them.That Section provides that:

> ***"41. (1) 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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

18. In this case, we agree with counsel that the respondent having not even been asked to show cause why his services could not be terminated, he was, contrary to **Section 41(2)** of the Employment Act and the rules of natural justice, condemned unheard. Read together,**Sections 49(1)(c)**and **50**of the **Employment Act** 2012 as well as **Section 12** of the **Industrial Court Act, 2011**vest the Industrial Court the jurisdiction to award damages of up to 12 months' salary.The learned trial Judge cannot therefore be faulted for awarding to the respondent damages equivalent to 12 months salary. And in our view, that award was not outrageous. The award was not too high to be described, in the words of this Court in the case of **Kemfro Africa Ltd & Another v.Lubia& Another (No.2)**(supra), as *"so inordinately high that it must be a wholly erroneous estimate of the damages."* In the circumstances, there is no legal basis for disturbing it.

19. The remaining ground of appeal relates to the Industrial Court's award of Kes.92,880/= as damages for salary underpayment.

20. Section 17(1) requires employers to pay to their employees *"the entire amount of wages earned or payable to an employee in respect of work done by the employee in pursuance of a contract of service."* Employers cannot therefore jettison the minimum wage provision by any contrived clause in the contracts of employment with their employees.

21. In this case, the appellant did not dispute the fact that the sum of Kes.8,600/= inclusive of house allowance that it used to pay the respondent was below the minimum wage. It follows that it was not paying the respondent *"the wages … payable"*to him. Under **subsection (10)** of that Section, that is a criminal offence. This being a statutory requirement, the learned Judge was therefore justified in awarding damages for underpayment without a specific claim being made by the respondent in that regard. The house allowance of 15% of the pay that she awarded is quite reasonable.

22. For these reasons we find no merit in this appeal and accordingly dismiss it with costs.

DATED and Delivered at Kisumu this 9th day of December, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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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