IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

EMPLOYMENT APPEAL NO. 24 OF 2019

MULTIPACKAGING LIMITED T/A PRINTPAK .....APPELLANT

-VERSUS-

TITUS KYALO KILATYA .....1ST RESPONDENT

ERICK OMONDI OKUKU .....2ND RESPONDENT

(Being an appeal against the Judgment and decree of the Honourable G.A. Mmasi (SPM) delivered on 15th July, 2019)

JUDGMENT

1. This appeal arises from the judgment of the Senior Principal Magistrates Court at Nairobi in case no. CMEL No. 113 of 2018 where the two Respondents herein were the Claimants, (herein referred to as the Respondents), and the Appellants were the Respondents.

2. In their statement of claim dated 24.8.2018, the Respondents alleged that they were dismissed from employment by the Appellant on 21.8.2017 on grounds that they had tampered with machines setting before to proceeding on leave. They contended that the termination was wrongful and unlawful because the reason cited was not valid and they were not afforded any fair hearing as required under section 41 of the Employment Act. Therefore they sought salary in lieu of notice, compensation for unfair termination, Certificate of Service and terminal dues including salary arrears arising from salary underpayment. The 1st Respondent tabulated his dues at Kshs. 506,616.35 while the 2nd Respondent tabulated his at Kshs. 669,478.23.

3. The Appellant filed response to the Statement of Claim dated 8.10.2018 in which it admitted that it dismissed the Respondent from service lawfully for interfering with the Machine settings. It further averred that the decision to dismiss them was reached after several meetings with the Respondents trade union (KUPRIPUPA). It further averred that the Respondents were served with show cause letters but they failed respond. Therefore it prayed for the suit to be dismissed with costs.

4. At the trial, both sides gave evidence and thereafter filed written submissions. In brief the Claimants confirmed that they were sharing the same Machine with other persons in different shifts and the machine was automatic. They further contended that they were sent on 21 leave days by the HR Manager and when they reported back on 21.8.2017 they were asked to explain how they left the machine; that after giving their explanation they were told to go home and came for information on 22.8.2017 but on the said day they were restrained at the gate. They denied that on 23.8.2017 they were served with show cause letter and further denied being members of any trade union. They however, admitted that there was a Mr. Namasaki from the union who used to talk to everybody.

5. Mr. Were Odumbe a Supervisor testified for the Appellant as DW1. He stated that the Respondents operated the said machine on 31.7.2017 upto 5.15 p.m. when they left to begin their leave on 1.8.2017; and that on the said date, Mr. Mulwa was assigned the machine but when he opened it, he found all the programmes deleted. He contended that the Appellants left without handing over to him as the Head of Departments as required. As a result of the foregoing matters, he made a report to the HR Manager who raised the issue with the respondents when they reported back from leave, but they left work willingly.

6. During cross-examination, DW1 contended that the contracts for the Respondents ended on 31.7.2017 but he did not produce the contract in court. Further, he contended that he restored he programmes within one hour and it started working again. He contended that investigation was done and the Respondents were found to be responsible. He acknowledged being unaware of any show case letters served on the Respondent.

7. Ms. Janet Mutunga Respondent's HR and Administration Manager testified as DW2. She explained how she received complaint on 1.8.217 from DW1 that machine settings had been deleted. The machine were being used by the Respondents and Mr. Charles and therefore she asked them to explain the problem but they denied being aware of the deregistration of machine settings. They further refused to respond

to the show cause letter.

8. She further testified that on 22.8.2017 he received letters from Respondent's union requesting for a meeting and the same was held on 18.1.2018 between her, Mr. Namasika from the union, and the Respondents. She contended that the Respondents were found culpable and their contracts terminated on 6.12.2017

9. On cross-examination, DW2 stated that the Respondents were employed under 2 years contract which expired on 30.8.2015 but thereafter they continued working without signing any contracts. She contended that the Claimant reported back from leave and from 23.8.2017 they absconded duty until 6.12.2017 when their services were terminated by the letter dated that date. She admitted that no prior notice was served.

10. Finally, she testified that the salary paid to the Respondents was inclusive of house allowance, and that the Appellant paid NSSF contributions for the Respondents.

11. After considering the evidence and the submissions by both side, the trial court made a finding that the Respondents had proved their case of unfair termination on a balance of probability and awarded them one month salary in lieu of notice, house allowance for January 2001 – January 2011, service pay for 5 years, 12 months salary as compensation for unfair termination, Certificate of Service and costs. The 1st Respondent was given Kshs. 377,629 and the 2nd Respondent was given Kshs. 540,491.23.

12. The Appellant was aggrieved and brought this appeal citing the following 10 grounds:

(a) The Learned Magistrate erred in law and in fact in finding that the Claimants had proved their case on a balance of probabilities.

(b) The Learned Magistrate erred in law and in fact in failing to give reasons for her decisions on the awards she gave the Claimants.

(c) The Learned Magistrate erred in law and in fact in not determining the employment contract to be enforced.

(d) The Learned Magistrate erred in law and in fact in enforcing a contract that was not produced in court.

(e) The Learned Magistrate erred in law in making house allowance awards based on statute barred claims.

(f) The Learned Magistrate erred in law and in fact in awarding house allowance in clear contravention of statutory provisions.

(g) The Learned Magistrate erred in law and in fact in finding that the termination of the Claimants was unfair.

(h) The Learned Magistrate erred in law and in fact in awarding 12 months gross salary compensation for unfair termination and loss of employment.

(i) The Learned Magistrate erred in law and in fact for not distinguishing the validity of the contract at the point of termination and any other that may have existed before.

(j) The Learned Magistrate erred in law and in fact in making a finding of fact without any proper regard to the evidence adduced by the Respondent.

13. The appeal was disposed of by written submissions.

THE APPELLANT'S CASE

14. The Appellant condensed the said Grounds of Appeal into the following 3 grounds:

(a) The trial court erred in law and fact in reaching the conclusion that the Respondents herein had proved their case on a balance of probability.

(b) That the trial court erred in law and facts in finding that the Respondents were unfairly and unlawfully terminated without giving reasons.

(c) The trial court erred in law and fact in awarding the Respondents an inflated amount that is over and above the required amount.

15. The Appellant submitted that the trial court did not take into consideration its evidence that the Respondents had maliciously tampered with the machine they were using so that no one could use it without reprograming. Further, it submitted that the trial court failed to consider that the contract of employment for the Respondents provided for summary dismissal based on the grounds set out under section 44(4) of the Employment Act. It contended that tempering with the machine was a valid reason for dismissing the Respondents. For emphasis, it relied on **Judiciary Service Commission vs Gladys Boss Shollei** where the issue of dishonest and breakdown of employment was discussed by the Court of Appeal.

16. The Appellant further submitted that the evidence of DW1 and DW2 proved that the Respondent absconded work from 23.8.2017 to 6.12.2017 when they were dismissed. Further, it submitted that DW1 testified that the Respondent neglected their duty to hand over before

going for leave but the trial court ignored all that evidence plus the evidence that the Respondents were given a chance to express themselves but they failed to satisfactorily do so. In its view, its witnesses demonstrated that the defence case was more probable than the Respondent's case.

17. As regards the allegation that the finding for unfair termination was without any good reason, the Appellants submitted that the trial court was obligated to give reasons for arriving at her decision that the termination was unfair. It relied on Philip **Mururi Ndaruga v Gatemu Housing Cooperative Society Ltd [2016] eKLR** where the court held that it is fundamental requirement of common law that reasons for judgment or ruling be given by the judicial officers.

18. Finally, as regards the awards, the Appellant submitted that the trial court awarded excessive amounts. It stated that although the Respondents monthly salary was Ksh. 15416, the trial court awarded Kshs. 20447.15. It relied on section 49(1) (9) and **CMC Aviation Ltd v. Mohammed Noor [2015]eKLR** to urge court for notice.

19. In addition it submitted that the award of house allowance for 2001 – 2011 was also excessive as there was no evidence that the Claimant was earning Kshs. 12416 from 2001 – 2011.

20. As regards the award of 12 months salary compensation for unfair termination, the Appellant submitted that the court did not give any justification for the same and as such it fell into error. It relied on **Ol pajeta Ranching Ltd v David Wanjau Muhuro [2017]eKLR** where the Court of Appeal held that in the absence of any reason justifying the maximum award, the trial court had taken into account irrelevant considerations and or failed to taken into account relevant consideration while making the award.

21. In the end the Appellant prayed for its appeal to be allowed with costs.

RESPONDENT'S CASE

22. The Respondents opposed the appeal and asked the court to dismiss it with costs. They contended that the Appellant has failed to justify the ground that the trial court erred in fact and in law in reaching the conclusion that the (Respondents) had proved unlawful termination on a balance of probability. In their view the evidence adduced by PW1 and their pleading were coherent. They maintained that their evidence showed that they were never issued with any show cause letter; that they were sent back home immediately after reporting back from leave; and that when they returned on 22.8.2017 they were denied access to work by the security men at the gate.

23. They contended that the evidence by defence that they absconded work up to 6.12.2017 was not true. They also laughed off the allegation by DW2 that a disciplinary hearing was held on 18.1.2018 after the dismissal.

24. As regards the ground that the trial court gave no reason for finding that the termination was unfair, the Respondents submitted that the court did indeed hold that there was no justifiable reason for the termination. They contended that the court further observed that the Appellant relied on assumptions and apprehensions that it was them (Respondents) who tampered with Machine settings and they were dismissed by DW2.

25. The Respondents further submitted that the trial court observed that the procedure provided in the law was not followed prior to locking them from accessing work premises.

26. Finally, the Respondents submitted that the quantum of damages awarded by the trial court cannot be faulted because it was based on the General Wage order of 2017, which provided for basic pay of Kshs. 17447.15 for machine operators. They submitted that based on 15% of the said basic pay their house allowance was Kshs. 3000 to total to a gross pay of Kshs. 20447.15 per month. They contended that the Appellant did not challenge that pay in its pleadings and evidence.

Issues for determination

27. This being a first appeal, the role of this court is as it was explained in **Mary Njoki v John Kinyanjui Matheru [1985] e KLR** where the Court of Appeal held that: -

> ***"whilst an appellate court has the jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide."***

28. Again the Court of Appeal restated the role of the court in a first appeal in **kenya Ports Authority v Kusthon (Kenya) Limited [200] 2 EA 212** as follows: -

> ***"on a first appeal from the High Court, the Court Appeal should consider the evidence, evaluate it itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

29. More recently, the Court of Appeal in **J. S. M. v E. N. B. [2015] e KLR, thus**:

> ***"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court***

had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions." (Emphasis added)

30. The gravamen of this appeal as I see it concerns the fairness or lack of it in termination of the Respondents employment by the Appellant and the remedies awarded by the trial court in the impugned judgment. I therefore frame the issues raised by the appeal as follows:

(a) Whether the contracts lapsed automatically or they were terminated.

(b) Whether the termination of the Respondents employment was unfair.

(c) Whether the Respondents were entitled to the awards granted

(d) Whether the award of damages should be interfered with

Whether the contracts lapsed or the same were terminated

31. The appellant's letter dated 6.12.2017 notified the respondents that their explanation on 21.8.2017 with regard to the alleged damage on the Machine they were operating before proceeding on leave was unsatisfactory. The letter also notified them that since they failed come back with the correct explanation as directed, that amounted to negligence, ignorance and gross misconduct and consequently, their contracts would not be renewed. According to Dw1, the contracts lapsed on 31.7.2017.

32. However, the respondents' case was that, after the expiry of the fixed term contract issued in 2013 expired, it was not renewed but they continued to work without a fixed term. The foregoing position was confirmed by Dw2 who stated that the 2 years contract lapsed on 30.8.2015 but the respondents continued working without any written contract.

33. I have perused the contracts dated 1.9.2013 and confirmed that the expiry date was 30.8.2015. The contracts provided that upon expiry, the contract will be either be extended or terminated at the discretion of the employer. However, the contracts are silent about the procedure for the extension and the terms for the extension..

34. It is common ground that the contracts were never expressly renewed after the expiry but the parties continued discharging their obligations. The only person with the discretion to extend the contract was the appellant but it failed to do so. It means, therefore that, the parties, impliedly entered into a fresh contract for an indefinite period terminable upon notice or for a cause under the provisions of the Employment Act.

35. Having considered the evidence and the submissions by the parties, I find that the respondents' new contracts never lapsed automatically on 31.7.2017 and it never required any renewal. Therefore I find and hold that the new contracts were terminated by the appellant for alleged misconduct.

Whether the termination of the respondent's employment was unfair

36. Under section 45 of the employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on valid and fair reason related to the employees' conduct, capacity and compatibility or based on the operational requirement of the employer; and that a fair procedure was followed.

37. The appellant contended that the trial court erred in law and facts, when it held that the termination of the respondent's employment was unfair without citing any reason for same. On the other hand the respondents contended that the trial court was right in its judgment because there was no justification for the termination and the procedure followed was unfair.

38. The Dw2 testified that the appellant terminated the respondent' contract on 6.12.2017 after they were found culpable of misconduct tampering with machine settings before proceeding on leave, and for absconding work from 23.8.2017 after being served with show cause letters. She acknowledged that the respondents ceased being employees of the appellant on 6.12.2017.

39. The respondents denied the alleged tampering with the said machine before proceeding on leave and denied ever being served with a show cause letter. They further contended that after being questioned about the machine by Dw2 on 21.8.2017, they were told to come back on 22.8.2017 but on the said date they were denied access to the office by the security guards at the gate. They also denied ever being served with any show cause letter and the alleged absconding of duty.

40. After considering the evidence, it is clear that the trial court made conclusion that the respondents had proved their case on a balance of probability without giving any reason to support that decision and proceeded to award damages including 12 months' salary as compensation for unfair termination. In my view that conclusion was made in a rush and without justifying the same contrary to Rule 28(2) of the ELRC Procedure Rules and Oder 21 Rule 4 of the Civil Procedure Rules which require that a judgment must state the facts of the case, the issues for determination, the decision by the judge and the reasons for the decision reached.

41. The trial court ought to have first established from the evidence whether the contract was terminated by the employer and that the employer breached the provisions of section 45 of the Employment Act which protects employees from unfair termination. However, the court never made any specific finding whether or not the reasons cited for the termination were valid and fair or whether the a fair procedure was not followed as contrary to Section 45 of the Act.

42. Consequently, I agree with the appellant that the court erred in holding that the respondents had proved their case on a balance of probability without giving any reason for that decision.

43. Having carefully reconsidered the evidence on record, it is clear that the reasons for the termination of the respondents' employment was the suspicion that they deleted the settings of the Gilotin machine they were operating before going on leave, and secondly they failed to respond to show cause letters and absconded work from 23.8.2017 until 6.12.2017 when they were dismissed. Under section 43 and 45 of the Employment Act, the Appellant had the burden of proving the said reasons during the trial and in default, the termination was unfair.

44. The respondents testified that on 21.8.2017 they reported to work but they were summoned to the by Dw2 who asked them about tampering with the machine settings before going on leave but they denied any involvement and they were told to come back the following day. They further testified that on 22.8.2017 they were denied entry at the gate by the security guards with orders from the office.

45. Dw1 testified that the respondents used the machine up to 5.15 pm on 31.7.2017 and left to start their leave without filing any handing over report to him as the Supervisor; that on 1.8.2017, the person was assigned to another operator but surprisingly the machine settings were found to have been deleted; that the respondents were the last persons to operate the machine and therefore the investigations done found them culpable. Dw1 stated that he is the one who restored the settings and it took one hour to finish the programming.

46. Dw2 testified that on 21.8.2017, she summoned the respondents and asked them about the machine and how it was tampered with because they were assumed to be the culprits; that the respondents denied being aware of the said tampering; that she told them to put that defence in writing and they wrote a joint letter; that when she demanded each to write separate letter, they declined; that on 22.8.2017, she received a letter from the union stating that the respondents had filed a complaint and requested for a meeting; that on 23.8.2017, the respondents went to her office to say that they would not write individual letters and as a result she served them with a show cause letter but they refused to receive and disappeared until 6.12.2017 when they were dismissed.

47. Tampering with the settings of a machine could result from deliberate and malicious act or due to an accident. The respondents did not deny that they operated the machine on 31.7.2017 until 5.15 pm but they denied the alleged tampering. The appellant treated the tampering with settings as misconduct and I would say it was not without basis because there is no dispute that the respondents were the last to operate the machine before the fault was discovered on 1.8.2017. Under section 44(4)(g) of the Employment Act, employer is entitled to dismiss an employee on reasonable suspicion that the employee has conducted himself in a manner that is detrimental to the employer's property.

48. However, the alleged absconding has not been established because the evidence that the respondents were barred from entering the appellant's premises by security guards has not been rebutted by the guards. Likewise, the alleged failure to respond to show cause letters was not proved because no evidence was adduced to show that the letters were served upon the respondents as alleged by the Dw2.

49. As regards the procedure followed I find that the evidence by Pw1 that they were dismissed before being taken through disciplinary hearing was also not rebutted. Section 41 of the Employment Act provides:

> **"(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."**

50. Dw2 testified that the meeting between her and the union representative occurred on 18.1.2018 which was more than a month after the separation vide the letter dated 6.12.2017. Consequently, I find that the termination was not done in accordance with a fair procedure and was therefore unfair within the meaning of section 45 of the Act.

Whether the respondents were entitled to the reliefs granted.

51. The award of one month salary under section 36 of the Act was justified because the appellant never served the respondents with any prior notice.

52. The award of 12 months' salary is a discretionary relief which cannot be interfered with on appeal unless it can be shown that the discretion was not exercised without a proper basis or the award is manifestly excessive. In this case, the trial court did not consider any of the factors set out under section 49(4) of the Act and therefore, it is obvious that it failed to consider matters it ought to have considered before reaching the quantum of 12 months' salary as damages for unfair termination. The same position was taken the Court of Appeal in **Ol pajeta Ranching Ltd v David Wanjau Muhuro [2017]eKLR** when it set maximum compensation like in this case.

53. In view of the foregoing, I proceed to set aside the said maximum compensation and in its place award each claimant 6 months' salary as compensation considering that they had served the appellant for over ten years and they had contributed to the termination through the said misconduct.

54. The claim for house allowance and service pay for the period up to January 2011 is decline for being time barred. It is clear that the respondents signed fixed term contract in 2013 which was distinct contract from the previous engagement. In my view any right not settled or carried forward to the new contract became time barred after the lapse of three years after the signing of the fixed term contract in 2013 by dint of section 90 of the Employment Act. The suit herein was filed in 2018 five years after the said time.

55. The trial court dismissed the claim for underpayment stating that the respondents had not proved that they were permanent employees. In my view that was factual error because the respondents were serving under very express terms contained in a written contract which shows that from 2015 to 2017, they were paid salary which was below the minimum salary set by the government. However, since there is no cross appeal by the respondents I will say no more save to state that the salary in lieu of notice and compensation awarded above is based on the minimum salary for a printing Machine Operator under the General Wage order in force on 6.12.2017 when the separation occurred. The basic pay was Kshs.17, 447.15 plus the agreed house allowance of Kshs.3000 equalling a gross pay of Kshs. 20447.15 per month.

56. As regards the claim for certificate of service, the award by the trial court is firmly grounded on section 51 of the Employment Act and it is affirmed. Finally, the award of costs of the suit granted by the lower will also not be interfered with.

Conclusion

57. I have allowed the appeal to the extent that the trial court failed to give reasons for finding that the respondents had proved their case on a balance of probability. However, after evaluating the evidence, I have found that there was sufficient reason for the trial court to hold that the respondents had proved their case for unfair termination. Finally I have set aside the quantum of damages awarded by the trial court and substituted therewith the following:

TITUS KYALO KILATYA

Notice	Kshs. 20,447.15
Compensation	Kshs. 122,682.90
Total	**Kshs. 143,130.05**

Certificate of service

ERIC OMONDI OKUKU

Notice	Kshs. 20,447.15
Compensation	Kshs. 122,682.90
Total	**Kshs. 143,130.05**

Certificate of service.

The award is subject to statutory deductions but in addition to costs of suit in the subordinate court plus interest at court rates from date of the impugned judgment. However, I award no costs for the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 2ND DAY OF SEPTEMBER, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE