REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL NO. E055 OF 2020

H. YOUNG COMPANY (E.A) LIMITED.....APPELLANT

VERSUS

IRENE WAMBUI WANJIRU.....RESPONDENT

(Being an Appeal against the Decree and Judgment of the Chief Magistrate's Court at Gatundu (Hon. L.M. Wachira (CM) delivered on the 17th August, 2020 in CMEL No. 1 of 2018)

JUDGMENT

1. The Appellant herein being dissatisfied with part of the judgment of the Honourable Magistrate, Hon. Wachira L.M., sitting at Gatundu delivered on 17th August, 2020 preferred an appeal on grounds:-

1. **THAT** the learned trial magistrate erred in law and

in fact in failing to consider that the Appellant had a valid reason to terminate the Respondent's employment.

2. **THAT** the learned Magistrate erred in law and in fact by

issuing an award that was manifestly excessive given the fact that the Appellant justified the termination of the Respondent.

3. **THAT** in the circumstances of the case, the learned

magistrate failed to uphold the law.

2. The appellant filed written submissions dated 29th July, 2021 whereas the respondent filed written submissions dated 1st September, 2021.

3. The Court has carefully considered the record of appeal and the

submissions and finds at the outset as guided by the Court of Appeal decision in **Selle and Another and Associated Motor Boat Company Limited and Others (1968) E.A. 123** that it is bound to consider the evidence adduced before the trial Court afresh, evaluate the same and reach its own conclusion minded that it did not hear the witnesses directly and therefore is limited on issues of credibility of witnesses. The Court must also bear in mind that it ought not set aside a decision of the trial Court merely because it would have reached a different conclusion on the facts.

4. ***The Court of Appeal stated thus***:-

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect."***
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> ***However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

5. The appeal is targeted on the finding by the trial magistrate that the appellant had no valid reason to terminate the employment of the respondent and that the award of the equivalent of six months' salary was excessive.

6. The trial Court heard the respondent (P.W.1) who adopted a witness statement dated 13th December, 2018 as her evidence in Chief that she was employed by the Appellant as a general labourer in the year 2016 and eventually helped in the road surveying works in the month of April 2017 and worked as such continuously. That she earned Kshs.28,130 per month.

7. That by a letter dated 16th July, 2018, the Appellant terminated the employment of the respondent without notice, reason given and/ or any due process followed. That the letter of termination was abruptly served on the respondent while she worked on the Gatundu road project.

8. That to-date, the respondent has not informed the applicant the reasons for the termination and therefore the termination was wrongful, unfair and unlawful. That no notice was issued to her or to the labour officer to inform her of the intended termination.

9. That no human face was put on the decision to stop the salary of the respondent without notice whilst in the process of recovery from an industrial injury she had suffered while in employment and no due process was followed in terminating her employment. That she never proceeded on leave between the period April, 2017 to July, 2018 and was not paid terminal benefits upon termination including salary for July, 2018, notice pay; leave pay; and service pay. That she claimed maximum compensation equivalent to 12 months' salary in compensation for the unlawful and unfair termination of employment.

10. Under cross-examination, the respondent admitted that she had received payment upon termination and had signed for the funds received. The respondent also admitted that she had received July 2018 salary. The respondent however insisted that she had not been paid in lieu of notice, service pay and in lieu of leave.

11. The Appellant called Duncan Nyabuto who adopted a witness statement dated 28th May, 2019 as his evidence in Chief. He testified that he was a site administrator for the Appellant and the Appellant had secured a road project at Gatundu. The witness also produced documents in support of the defence case. He testified that the respondent was employed as a casual labourer at the Gatundu road project. That she was hired in July, 2017 and worked in the concrete section on the road. That the project was for six months and by then the Appellant had completed most works and the work load had reduced. That the Appellant had eight (8) Labourers working at the site and was forced to reduce the number to four (4) labourers. That before making the decision, the witness considered the order of seniority of the employees, their skills and the Principle of first in last out as required by Employment Act, 2007.

12. That the witness informed the respondent that she would be laid off based on the above criteria.

13. That the respondent was paid all her terminal benefits upon being laid off including one month salary in lieu of notice; leave pay for all untaken leave days, salary for the days worked and gratuity for the one full year worked. The respondent was also given her discharge certificate which indicates the amount payable and the respondent signed the discharge indicating that she did not have any further claim against the respondent.

14. That the claim had no basis and it be dismissed.

15. Under cross-examination, Mr. Nyabuto clarified that the discharge was given to the respondent by the Human Resource Department and that she had acknowledged payment of the terminal benefits. He clarified that the respondent was employed in the year 2017 and not 2016 and that she had worked for about one year. That the respondent was given a verbal notice of termination a month before by the Appellant. The witness admitted that the respondent was sick at the time of her termination. The respondent also stated that particulars of terminal benefit paid are shown in the payslip dated 7th July, 2018. The respondent confirmed that it was still operational. The respondent stated that payment was done upon signing of the discharge. That the discharge certificate is not to forfeit any rights due to the respondent.

16. In her judgment, the trial magistrate correctly found that the respondent had been paid all the terminal benefits she had sought in the statement of claim and so dismissed the claims for notice pay, pay in lieu of leave; salary for days worked in July 2018 and severance pay for one year served.

17. With regard to the issue whether the termination of the employment of the respondent was lawful and fair, it is apparent that the appellant adduced evidence to the effect that the respondent and three others were declared redundant because the work at the Gatundu road project in respect of which they had been hired had drastically reduced. The respondent stated that it had eight (8) labourers in total and that in selecting of the employees to be laid off, the Appellant had considered the seniority of the employees; their skills and the Principle of first in last out as guided by Section 40 of the Employment Act, 2007.

18. Clearly, this was a case of redundancy but it is apparent that the Appellant fell foul of some of the provisions under Section 40 of the Employment Act, 2007 in that there was no evidence that the Appellant had issued a written notice of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy in terms of Section 40(1) (b) to the respondent and to the Labour officer.

19. The aforesaid procedural requirement is mandatory and it is aimed at preparing the targeted employee(s) for the hardship they are about to encounter upon being relieved of their job and continued income. Furthermore, the provision mandates the employer to inform the Labour office of the intended action which office is charged with the welfare of workers in general and to monitor trends and keep statistics of workers in the country.

20. On this basis alone, the respondent failed the procedural test of fairness mandated under Section 45(2) of the Employment Act as follows:-

> ***"45(2) A termination of employment by an employer is unfair if the employer fails to prove:-***

(a) ……

(b) …….

(c) That the employment was terminated in accordance with a fair procedure.

21. It should be noted that one month notice window is supposed to provide the employer with opportunity also to explain the reason for the intended termination to the employees targeted for redundancy declaration and also to explain the selection criteria to be applied in the exercise. The employer is also in the process mandated in terms of Section 41 of the Employment Act, to grant a hearing to the employee targeted for retrenchment and to explain to the employer why he/she is not the suitable candidate for selection for retrenchment. Failure to follow this procedure denies the targeted employee fairness and justice and thus invalidate the otherwise valid reason for declaration of redundancy.

22. In the present case, the Court finds that the trial Court did not err in finding that the termination of the employment of the respondent by the Appellant was unlawful and unfair considering all the circumstances of the case. This Court upholds that finding accordingly, and dismiss the appeal on that issue of merit.

Compensation

23. The guiding principle is that an appeal Court ought not to interfere with the discretion of a trial Court to determine the suitable quantum of damages applicable at the conclusion of a trial, unless it is very clear that the trial Court did not exercise its discretion judiciously by awarding an amount that is inordinately low or inordinately high or that the trial Court failed to take into consideration factors it ought to have considered and/or considered extraneous factors in arriving at the award.

24. **In Gitobu Imanyara And 2 Others Versus The Attorney General** (**2016) eKLR** the Court of Appeal had the following to say

> ***''it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.***
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> ***This is the principle enunciated in** Rook v Rairrie [1941] 1 All ER 297. **It was echoed with approval by this Court in** Butt v. Khan [1981] eKLR 349 **when it held as per Law, J.A that: 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

25. In matters of employment under Employment Act, 2007, the trial Court is guided by the provision of Section 49(1) (c) and (4) in arriving at the quantum of compensation payable to an employee in respect of whom the Court has found was unlawfully and unfairly terminated from employment. The award in terms of Section 49(1) (c) is capped at a maximum of the equivalent of 12 months' salary in compensation.

26. In determining what number of months' salary is to be awarded, there are thirteen (13) factors set out under Section 49(4) (a) to (m) that the Court is mandated to take into account before awarding compensation to a successful claimant. Where the Court fails to expressly take into account factors relevant to the particular case as set out under Section 49(4), the decision is amenable to be set aside for being unfair and unjust.

27. In the present case, the respondent had served the Appellant for a period of one year. The respondent was laid off for operational reasons not the doing of the Appellant though the Appellant failed to follow the mandatory lawful procedure in terminating the employment of the respondent. The Appellant paid all the terminal benefits due to the respondent upon termination and provided the respondent with a certificate of discharge. The respondent failed to notify and or prepare the respondent for the hardship that was about to befall her upon being declared redundant.

28. The employment of the respondent was tied to the duration of the Gatundu Road project and therefore was limited in scope. The value of severance pay to the respondent and the total terminal benefits were evidently not much given that the respondent was employed as a labourer. We do not have any evidence whether the respondent had secured any other employment and or had made any efforts to secure any new employment.

29. The respondent is entitled to compensation for the unlawful and unprocedural termination considering the aforesaid factors.

30. The Court has considered **Civil Appeal No. 46 of 2013 – Kenya Airways Limited –vs- Aviation and Allied Workers Union Kenya and Others** in which the Court of Appeal affirmed the decision of the trial Court that the employer had unfairly declared its employees redundant.

32. The Supreme Court decision in **Petition No. 37 of 2018 – Kenfreight (E.A.) Limited –vs- Benson K. Nguti,** where the Supreme Court affirmed that trial Courts must be guided by the provisions of Section 49 of the Employment Act in meting out remedies to successful employees.

34. The Court is also guided by the decision by Onesmus Makau J. in **Sikuku Nzuiri Nzuvi Ngii –vs- Gacal Merchant, Limited** where the Court awarded the equivalent of 3 months' salary to an employee who had served a period of 7 years; **Cause No. 747 of 2012, Chrisantus Barasa Munyekenye –vs- Kenya Yencheng Making Limited,** where Hon. Maureen Onyango awarded two (2) months' salary in compensation to an employee who had served 14 months and **Cause No. 51 of 2019 – Kenya Plantation an Agricultural Workers Union –vs- Uniliver Tea (K) Limited,** where Hon. Monica Mbaru, awarded the equivalent of 3 months' salary to employees who had served for a period of between 4-5 years.

35. Considering all the factors and case law above, the Court finds that the trial Court failed to take into consideration applicable principles and case law in arriving at an award of the equivalent of 6 months' salary in compensation to the respondent for the unlawful and unprocedural termination of employment.

36. The Court therefore sets aside the award of six (6) months compensation and substitutes it with an award of the equivalent of three (3) month's salary in compensation in the sum of Kshs (28,130 x 3) Kshs84,390.

37. In the final analysis, the appeal only succeeds to the extent that the award of compensation to the respondent payable by the Appellant is reduced to the equivalent three (3) months' salary in the sum of Kshs 84,390.

38. The Appellant to pay half the costs of the suit before the trial Court and this Court.

39. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 16TH DAY OF DECEMBER, 2021.

MATHEWS N. NDUMA

JUDGE

Appearance:

Orego and Odhiambo Advocates for the Appellant

Musa, Boaz and Thomas Advocates for the respondent

Ekale – Court clerk