



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**APPEAL NO. 2 OF 2019**

**SOTIK CO. LTD.....APPELLANT**

**VERSUS**

**HENRY NYAUTO MENTA (suing in his capacity as the personal represented of**

**MARY KERUBO MANDERA (DECEASED).....RESPONDENT**

**JUDGMENT**

**(Being an appeal from the judgment and decree of Honourable Principal Magistrate R. Omwansa in Sotik in PMCC No. 31 of 2003 delivered on 10<sup>th</sup> September 2015)**

1. The Respondent (Plaintiff in the lower court) was employed by the appellant from 1983 to 1998. The contract of service was governed by a collective Agreement (CBA) signed between the employer and the respondent's trade union.
2. On 4/9/1998, there was a strike by workers and some employees were arrested and charged in court including the respondent. The respondent was then dismissed summarily for absconding from duty while the criminal trial was pending. After the trial she was acquitted and brought suit in the lower court seeking damages for wrongful dismissal plus terminal benefits under the CBA.
3. The appellant filed defence denying the alleged wrongful dismissal and averred that the termination was justified and that the rightful dues (Kshs705.25) for the respondent had been deposited at the labour office. Therefore, it prayed for the suit to be dismissed.
4. The suit took 12 years before final judgment was rendered and it was handled by several judicial officer. On 8/6/2006, the counsel for the two parties signed a consent agreeing that the summary dismissal of the claimant was justified. Consequently, the only issue left undetermined was quantum of terminal benefits payable to her and parties agreed to negotiate settlement or take evidence on the same.
5. No settlement was reached on the issue of benefits payable and the parties tendered evidence and thereafter filed submissions for the trial court to determine the same.
6. The respondent testified as PW1. She reiterated the facts set out in her amended plaint. She stated that while on duty in 1998, there were screams and every one run away. However, she was arrested with others and charged with burning of shades. In the end she was acquitted but never went back to work because she had been dismissed and evicted from the staff quarter. She was not paid any money after the termination. Therefore, she prayed for damages, including gratuity.
7. On cross examination, she admitted that she was neither issued with any appointment letter nor termination letter. She denied knowledge whether the factory was burnt down. She contended that there was a group, which went on strike and told the other employees to leave the farm. She and others complied with the threat and ran to hide in the bush but the police arrested everybody.
8. She stated that her trade union laid a claim for her but later the union representative sided with the employer and became hostile to her. She admitted that the employer told her to go for her dues at the labour office but she never went for the same because the same was too little for the years served.
9. The appellant called its accountant, Mr. Nicholas Cheruiyot Kirui and he testified as DW1. He admitted that the appellant as Tea Plucker employed the respondent. Until 4.4.1998 when she was arrested and detained by the police. In his view, the respondent did not pick tea that day and as such she was deemed to have absconded work. He did not have knowledge whether the respondent reported back to work and was chased away for absconding work. **e also did not know whether any terminal dues for the respondent was deposited at the labour office.** He also did not know whether any terminal dues for the respondent was deposited at the labour office.

10. After the hearing, the respondent filed submissions urging the court to find that the termination was wrongful and award the damages sought. However the appellant submitted that there was a consent order to the effect that the dismissal of the respondent was justified and that the only issue remaining for determination was terminal benefits. The appellant further submitted that the respondent was not entitled to any damages except the sum deposited at the labour office.

11. On 19/9/2015, the trial court rendered its determination that the dismissal of the respondent was wrongful and proceeded to award her salary in lieu of notice, gratuity, accrued leave and costs.

12. The appellant was aggrieved and brought this appeal citing the following grounds:-

*a) That the Learned Trial Magistrate erred in law and in fact in failing to make a finding that the respondent's suit did not disclose a reasonable case of action taking into account the entire circumstances of the case.*

*b) That the Learned Trial Magistrate erred in law and in fact in holding the Respondent had been wrongfully dismissed the Appellant when there were no cogent grounds to sustain the finding*

*c) That the Trial Magistrate erred in law in awarding a remedy that was not available in law having found that the Respondent had been wrongfully and / or unfairly dismissed from employment.*

*d) That the Learned Trial erred in Law and in fact in failing to analyze the evidence tendered by the Appellant herein.*

*e) That Learned Trial Magistrate erred in law and in fact, in that he totally failed to take into account the Appellant's case and placed undue weight on the Respondent's.*

*f) That the Learned Trial Magistrate erred in law and in fact in determining that the respondent was wrongfully dismissed when there was compelling evidence that the respondent had absconded from work.*

*g) That the Learned Trial Magistrate erred in law and in fact in holding that the directions taken by the parties on 16th August, 2012 that the matter do proceed de novo varied a valid consent previously entered 8<sup>th</sup> June, 2015 to the effect that summary dismissal of the Respondent summarily was justifiable where there was no such express intention by the parties.*

*h) That the Learned Trial Magistrate erred in law and in fact by allowing the Respondent's claim as prayed and thus in essence awarding the Respondent remedies that were not legally available.*

*i) That the Learned Trial Magistrate erred in law and in fact by awarding the Respondent interest on the awards made from the date of filing as opposed to the date of the judgment.*

13. The appeal was canvassed by written submissions. The appellant filed on 30/6/2020 while the respondent filed hers on 8/7/2020.

14. The appellant submitted on two issues, namely that the trial court erred in finding that the dismissal of the respondent was not justifiable; and by awarding the respondent remedies that were not legally available.

15. On the first issue, the appellant submitted that the plaintiff did not disclose any reasonable cause of action against it since it did not set out the particulars of the alleged wrongful termination. It further submitted that the trial court erred by disregarding the consent order entered on 8/6/2006 by which the parties had agreed that the dismissal of the respondent was justifiable and the only issue for determination was whether the respondent was entitled to terminal benefits. It submitted that by holding that the dismissal was not justified, the trial court unlawfully set aside the consent order dated 8/6/2006.

16. For emphasis it relied on **Flora Wasike V Desmond Wambeolla [1980] KAR** where the court held that a consent judgment or order has the effect of a contract and can only be set aside on grounds that justifying setting aside a contract.

17. As regards the issue of award of damages, the appellant submitted that clause 24 and 31(b) of the CBA disentitled an employee payment of gratuity if he/she was dismissed for gross misconduct. Consequently, it submitted that the trial court was barred from awarding gratuities to the respondent because she was dismissed from misconduct.

18. The respondent submitted on all the 9 (nine) grounds of appeal. He submitted that the suit raised a reasonable cause of action against the respondent and accused the appellant for raising new matters, which were not pleaded in the defence. She further submitted that the trial court was right in making a finding that her dismissal was wrongful. She contended that the trial court rightfully blamed the employer for dismissing her for the alleged absconding of work when it is the same employer who caused her arrest and detention.

19. On the hand she submitted that the trial court was right in awarding gratuity, salary in lieu of notice and accrued leave because they were provided for under clause 31(a), 23(c) and 7 (a) (1) of the CBA respectively. In the respondent's view, the impugned judgment was grounded on facts and the trial court made no error in his reasoning. Therefore he prayed for the appeal to be dismissed with costs.

#### **MANDATE OF THIS COURT**

20. This being a first appeal, my duty is well cut out, namely, to review and re-evaluate the evidence and draw my own conclusions to test whether the decision reached by the trial court should stand. The said mandate has been restated by the Court of Appeal in numerous

decisions including *Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212* where it held inter alia that:

***“On a first appeal from the High Court, the court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that 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.”***

21. Having considered the pleadings, evidence, submissions and the impugned judgment, the following issues arose for determination:

- a) Whether the trial court erred in finding that the dismissal of the respondent was wrongful and unjustified,
- b) Whether the trial court erred by awarding the respondent gratuity, salary in lieu of notice, leave, and costs of the suit
- c) Who bears the costs of the appeal?

#### **WRONGFUL AND UNJUSTIFIED DISMISSAL**

22. The appellant submitted that the issue of justification of the dismissal of the respondent had been settled by the consent order signed by the parties on 8/6/2006. The respondent submitted that the trial court was right in making a determination on the issue afresh because the consent order had been set aside by the court's directions that the matter starts afresh.

23. I have considered the rival submissions by the two sides and the typed proceedings of the lower court record. It is indeed a fact that on 8/6/2006, the parties entered a consent partial judgment to the effect the dismissal of the respondent was justifiable and that the only outstanding issue for parties to agree on or the court to determine was whether the respondent was entitled to the terminal dues sought.

24. It appears the parties did not reach any settlement on the issue of terminal benefits and on 30/7/2009 the hearing started. On 14/6/2012 the matter went before another Magistrate who directed that proceedings be typed and for the matter to proceed from where it had reached.

25. On 16/8/2012 the respondent gave her testimony again and closed her case but the appellant did not.

26. On 15/11/2012 the parties agreed to go for conciliation of the matter before the Labour Office, Kericho. However nothing came out of that process and the parties were back to court again on 13/8/2015 when the appellant gave evidence and closed its case.

27. I have given the above summary of the proceedings to show that the consent order entered by the parties on 8/6/2006 was never set aside and the court never directed the matter to start *de novo*. The record is clear that after the said consent order, the only other relevant order was made on 14/6/2012 that directed the matter to proceed from where it had reached. Further the court ordered for the court proceeding to be typed.

28. The trial court in the impugned judgment acknowledged the existence of consent order by the parties but stated as follows:-

***“When this court was going through the submissions of the defendant it came out that the parties entered into a consent dated 8.6.2006 indicating that the dismissal of the plaintiff was justifiable. Indeed, I have gone through the proceedings and I find such consent on record. Trying to understand on what basis the consent was entered and why again the case is still pending, this court has not laid its fingers on anything [sic] reason recorded. The matter has been handled by more than three judicial offices but not to its conclusion. On the 3/11/2005 directions were taken to the effect that the matter was to start a fresh for the files were destroyed by fire. On the 30/7/2007 the plaintiff's viva voce evidence was recorded. On the 14/6/2012 further directions were taken to the effect that the matter was to proceed from where it had reached. However, again on the 16/8/2012 the matter started afresh and the evidence of the plaintiff was retaken and cross-examination followed thereafter and the plaintiff closed her case. Thus, the court construes this state of events that the past orders or directions were put behind the parties. The suit started a fresh which is reason enough for both counsels in framing the issues for the court to determine are reduced to two as herein above noted. It is thus my considered opinion that the consent does not subsist as the defendant wants to allude, the defendant thus cannot be allowed to take the court into such small circle, and neither will it be in the interest of justice to allow the defense to blow cool and warm at the same time.”***

29. The above paragraph from the impugned judgment manifest a misdirection because the alleged direction of the matter to begin afresh due to destruction of the court record by fire was on 3/11/2005 while the consent by the parties was entered on 8/6/2006. The court also considered the fresh giving of evidence by the respondent followed by the appellant to mean that the consent order had been set aside. It follows that the trial court considered a wrong matter in justifying his mandate to determine the issue which had been settled vide the consent order entered on 8/6/2006.

30. Consequently, I agree with the appellant that the trial court fell into error when it disregarded or set aside the consent order dated 8/6/2006 and proceeded to make a finding that the dismissal of the respondent was not justifiable.

31. I further agree with the appellant that the said consent order had the nature of binding contract between the parties to the suit, and as such it could not be set aside through assumption or otherwise except for the same reasons that would justify settling aside a contract.

32. I gather support from the case of **FLORA WASIKE V DESMOND WAMBEOLLA [1980], KLR** where the court held that:

***“A consent judgment or order has contractual effect and can only be set aside on grounds which justify setting aside a contract or if certain conditions remain to be fulfilled which are not carried out”***

### **RELIEFS GRANTED**

33. The appellant contends that, since the respondent was dismissed for gross misconduct, she lost her right to payment of gratuity under clause 31(b) of the CBA. The said clause provides that:-

***“(b) An employee who is dismissed or terminated for gross misconduct shall not be entitled to gratuity.”***

34. The respondent was dismissed for misconduct and a consent order was entered on 8/6/2006 to the effect that the dismissal was justified. Consequently, I agree with the appellant that the trial court fell into error when it awarded the respondent the prayer for gratuity contrary to clause 31 (b) of the CBA.

35. The appellant faults the decision of the trial court to award 2 months' salary in lieu of notice to the respondent despite the fact that her summary dismissal was justified. Under clause 23 of the CBA, an employee is entitled to notice or payment of salary in lieu of notice before termination of service. However, the right to notice was lost if the employee was summarily dismissed for gross misconduct.

36. clause 23 (c) provided that:-

***“For employees of over 5 year's continuous service, the employee except in the case of gross misconduct shall be entitled to no less than 2 months of termination of service or pay in lieu and similarly shall give two months' notice to his employer or payment in lieu should he wish to leave employment”***

37. As regards the issue of leave, the appellant did not submit on the same at the lower court and before this court. It only made a general statement that the claimant is not entitled to the damages sought since her rightful dues were already deposited at the labour office.

38. The respondent prayed for KShs.4693 as her leave calculated at the rate of 26 days leave per year. The appellant did not adduce any evidence in the form of leave records to rebut the said claim. Clause 7 of the CBA provides that:-

***“...Employees with over three years, continuous service shall be entitled to 25 working days leave, and employees with over 5 years continuous service, shall be entitled for 26 working days' leave”***

39. In view of the foregoing clause, I find and hold that the trial court was right in awarding the claim for leave as prayed.

### **COSTS OF THE APPEAL**

40. The appeal has only succeeded partially. Consequently, I will not condemn any party to pay costs of the appeal.

41. As a parting shot the court notes and wonders why such a small matter would be tried for over 12 years and again make another journey in this appeal for six years. What went wrong? This should never happen again in the dispute resolution process for labour disputes in the country. It is a shame and denial of justice, to say the least, for a party to litigate until death and fail to enjoy the fruit of the litigation after incurring huge costs due to delayed justice.

42. In the conclusion, I allow the appeal to the extent stated above, by:-

**a) Reversing the finding by the trial court that the dismissal of the respondent was not justifiable and substituting therewith, a finding that the dismissal was indeed justifiable as agreed by the parties vide consent order signed on 8/6/2006.**

**b) Setting aside the award of gratuity and salary in lieu of notices and only upholding the award of leave.**

**c) Ordering each party to bear own costs.**

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9<sup>TH</sup> DAY OF DECEMBER 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 15<sup>th</sup> 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**