REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CIVIL APPEAL NO E003 OF 2021

NEW WORLD STAINLESS STEEL LIMITED.....APPELLANT

VS

COSMAS MBALU MUNYASYA.....RESPONDENT

(Appeal from the judgment of Hon. D.W. Mburu, SPM delivered on 4th December 2020 in

Milimani CMEL No. 138 of 2018)

JUDGMENT

Introduction

1. The trial court (**D.W. Mburu, SPM**) entered judgment on 4th December 2020 in favour of the Respondent in the following terms:

    a) One month's salary in lieu of notice…….Kshs. 16,000

    b) Salary for June 2018…….....16,000

    c) Compensation for unlawful termination…….96,000

    d) Security deposit…….....13,600

    e) Costs plus interest.

2. The Appellant was dissatisfied with the judgment and therefore filed the present appeal.

The Appeal

3. In its Memorandum of Appeal dated 13th January 2021, the Appellant raises the following grounds of appeal:

    a) That the learned Magistrate erred in law by finding that the Respondent had proved a case of unfair termination as envisioned under Section 47(5) of the Employment Act;

    b) That the learned Magistrate erred in law and fact in failing to take into consideration the fundamental and basic principle of the law establishing the burden of proof as enshrined under Sections 107 and 108 of the Evidence Act;

    c) That the learned Magistrate erred in law and in fact and arrived at a decision against the weight of evidence placed before the court;

    d) That the learned Magistrate misdirected himself on the law and applicable case law when he upheld facts that had not been pleaded by the Respondent in his pleadings;

    e) That the learned Magistrate erred in fact by finding that the Respondent is entitled to salary for the month of June 2018 since the Respondent had absconded employment;

f) That the learned Magistrate erred in fact by finding that the Respondent is entitled to payment of salary in lieu of notice whereas the Respondent was never terminated and/or dismissed from the Appellant's employment;

g) That the learned Magistrate erred in law and in fact and misdirected himself on the law applicable for the award of general damages for unfair termination when no case of unfair termination had been proved.

4. The foregoing grounds fall within two related questions; first, whether the Respondent had proved a case of unlawful and unfair termination of employment and second, whether he was entitled to the remedies awarded.

Unlawful and Unfair Termination?

5. This being a first appeal, I am obligated to re-consider and re-evaluate the evidence on record and draw my own conclusions, taking into account that I did not have the opportunity to encounter the witnesses first hand.

6. In this regard, I am guided by the decision by the Court of Appeal in ***Selle v Associated Motor Boat Company Ltd [1968] E.A 123*** where it was held:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities……..or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

7. The Appellant's line of defence before the trial court was that the Respondent himself had absconded duty, the corollary being that his employment had not been terminated. When an employer takes this line, they place on themselves the burden to prove that the employee had in fact absconded duty.

8. Absconding or deserting duty is not the same as absenteeism in that an absconding or deserting employee has formed the intention not to return to work. This distinction was well captured in the persuasive South African case of ***Seablo v Belgravaia Hotel (1997) 6 BLLR 829 (CCMA***) as follows:

> ***"…desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the other hand…..an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.***

9. And how does an employer discharge its burden in proving that an employee has absconded duty? Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered (see ***Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR*** and ***Dickson Matingi v Db Schenker Limited [2016] eKLR***).

10. In his judgment delivered on 4th December 2020, the learned trial Magistrate states:

> ***"…the Respondent did not table any evidence to prove the allegations that the Claimant had been absent from work as alleged or that he subsequently absconded duty. There are also no minutes of a disciplinary meeting and/or any other form of record to show that the Claimant was accorded a fair hearing. The court is satisfied that the claimant was never afforded a fair hearing as envisaged under the law."***

11. I agree and having done so, I find no reason to interfere with the finding by the trial court that the Respondent had proved a case of unlawful and unfair termination of employment.

Remedies

12. In making an award for compensation for unlawful termination, the learned trial Magistrate was exercising judicial discretion and the rule of thumb is that an appellate court will not interfere with such an award unless it is clear that the trial court has proceeded on the wrong principles.

13. In its decision in ***Catholic Diocese of Kisumu v Tete [2004] eKLR*** the Court of Appeal restated this principle thus:

> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if satisfied that the trial court applied wrong principles. As by taking into account some irrelevant factor or leaving out of account some relevant one or misapprehended the evidence and so arrive at a figure so inordinately high or low as to present an entirely erroneous estimate."***

14. Based on this principle, I find no reason to tinker with the compensatory award made by the trial court.

15. Having affirmed the finding that the Respondent's employment had been unlawfully terminated, I confirm the award for one (1) month's salary in lieu of notice.

16. It was incumbent upon the Appellant to prove that the Respondent's salary for the month of June 2018 had been paid. In the absence of any evidence on this account, the award on this limb is also confirmed.

17. The claim for security deposit was admitted and is payable.

Final Orders

18. On the whole, this appeal fails and is dismissed with costs to the Respondent in this Court and the court below.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF DECEMBER 2021

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JUDGE

Appearance:

Miss Kikano h/b Mr. Kaya for the Appellant

Mrs. Njiru for the Respondent