REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 499 OF 2016

(Formerly HCCA 327 of 2006)

GALAXY PAINTS & COATINGS LTD.....CLAIMANT

VERSUS

JAMES OTIENO KOKO.....RESPONDENT

JUDGMENT

1. This appeal arose from the Judgment of the lower court (Hon. Wekesa (Ms) SRM'S delivered on 28th April, 2006 in Nairobi CMCC No. 5894 of 2005.

2. The appellant faults the Judgment of the lower court on two main grounds namely:

> a. THAT the learned trial Magistrate erred in law and fact in finding that the plaintiff had proved his claim and hence entitled to service pay.
>
> b. THAT the learned trial Magistrate erred in law and fact in finding that the plaintiff's service had been unlawfully terminated by the defendant without any proof to that effect.

3. The other grounds of appeal are periphered and a finding on these two main ground would resolve the other grounds of appeal.

4. In her brief Judgment the learned magistrate states at the material part as follows:-

> "I have seen the defendant's letter dated 30th November, 2014. I am satisfied from that this was sufficient notice to the plaintiff of the termination of the employment.
>
> However the plaintiff claims service pay. The plaintiff's letter and even evidence of DW1 does not distinguish the plaintiff's termination and clearly plaintiff an amorphous termination can only operate in his favour. The plaintiff by law is entitled to service pay. On a balance of probabilities defendant letter having failed to show the basic circumstances of the termination, plaintiff case must succeed and I hold that he is entitled to service pay for 15 days worked and for each full year worked."

5. Mr Weru for the appellant submitted among others that the trial magistrate erred by determining that the respondent had proved his claim and therefore deserved pay as a result. According to counsel, service pay was only payable when an employee has been declared redundant. Redundancy was described under the repealed Trade Disputes Act to mean:

> "The loss of employment occupation job or career by voluntary means through no fault of employer involving termination of the employee at the initiative of the employer where the service of the employee are superfluous…."

6. According to Mr Weru therefore, the only instant which an employer may be entitled to payment of service payment is in the event of redundancy which did not occur in the case of the respondent. The appellant merely terminated the contract of employment by issuing notice to the respondent. Furthermore, the respondent alleged redundancy which he failed to prove. According to counsel for the appellant the respondent failed to demonstrate in what manner his position at workplace had become superfluous or abolished.

7. Mr Weru complained that the learned Magistrate pronounced Judgment awarding service pay to the respondent on the basis that the reasons for termination of employment were unclear and ambiguous yet the law at the time clearly stated that an employer had the power to

terminate employment by either one month's salary payment in lieu of notice or the notice itself in advance. In the light of this and with reference to the contract of employment, the appellant could terminate the services of the respondent by giving one month's notice. In this regard counsel relied on the case of Pius Ngao Mwanga V. Kenya Tourist Development Corporation [2013]eKLR.

8. Ms Guserwa for the respondent on the other hand submitted that within the meaning of section 2 of the repealed Trade Disputes Act, the respondent lost his employment through no fault of his since the termination was at the initiative of the appellant without any reason whatsoever as evidenced by the termination letter dated 30th November 2004 which clearly indicated that it was the appellant who terminated the respondent's contract on grounds of redundancy without disclosing the same. According to counsel this type of termination clearly fitted in the meaning of the redundancy hence the respondent's assertion that he was declared redundant. The effect of such termination was to render the respondent redundant subsequently section 16 A (1) (f) of the Employment Act (Cap 226) (repealed) applied. The section provided that an employee declared redundant was entitled to severance pay at the rate not less than 15 days pay for each completed year of service.

9. Counsel further submitted that it was clear that the appellant terminated the respondent's employment without giving any reason which was unlawful as required by section 45, 46 and 47 of the Employment Act, 2007. Further, the appellant contended that under the provisions of section 14 (5) (iii) of the Employment Act (Cap 226) (repealed) there was no requirement for reasons to be given upon termination of employment however the principles of natural justice provided that a man should not be condemned unheard. The fact that the respondent was not given an opportunity to defend himself was in breach of rules of natural justice.

10. The respondent's letter of termination dated 30th November, 2004 read in part as follows:

> "Dear Mr Kioko,
>
> This is to inform you that your services with the company will be terminated with effect from 31st December, 2004.
>
> As per the terms and conditions of your employment this letter serves 30 days notice period……"

11. It is this letter which the respondent contends constituted termination of service on account redundancy since the letter did not give reasons for termination.

12. Section 14 (5) (iii) of the repealed Employment Act which was the applicable law when the dispute arose provided as follows:-

> "Every contract of service ……. Without reference to time or to undertake a journey, if made in Kenya;
>
> Where the contract is to pay wages periodically at intervals of or exceeding one month, a contract terminate by either party at the end of the period of twenty eight days following the giving of notice in writing."

13. This section only applied to cases where there was written contract of service. In this particular case, the respondents' letter of appointment dated 5th April, 1979 provided for one month's notice on either side.

14. The respondent contended that since the letter of termination did not assign reasons for the termination of his services he was thus declared redundant and was entitled to severance pay which the court below awarded him. However the state of the law when the cause of action accrued was unfortunately that there was no obligation on either party to assign any reason for terminating a contract of employment provided the termination clause in the contract was observed.

15. In event of default, payment in lieu of the stipulated notice period would cure the omission to give the required notice.

16. The state of the law then was harsh especially to the employee hence the labour law reforms which yielded the current Employment Act which now makes it mandatory requirement to assign reason for termination of employment.

17. Counsel for the respondent in her submissions invoked provisions of sections 45, 46 and 47 of the current Employment Act which requires assignment of reasons for termination. Unfortunately these provisions cannot apply retrospectively since parliament did not decree that the current Employment Act applies to situations arising before it came into law.

18. It is the court's view therefore that to interpret the omission to assign reason for termination of the respondent's service as a declaration of redundancy was erroneous.

19. In conclusion the court finds the Appeal merited and hereby sets aside the Judgment of the lower Court and substitutes it with an order dismissing the suit with costs.

20. The appellant shall have the costs of the Appeal.

21. It is so ordered.

Dated at Nairobi this 8th day of February, 2019

Abuodha Jorum Nelson

Judge

Delivered this 8th day of February, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

…………for the Claimant and

…………for the Respondent.