REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO.1 OF 2016

(Before D. K. N. Marete)

UNILEVER TEA (K) LTD.....CLAIMANT

VERSUS

JOSEPH ONDIEK MOGAKA.....RESPONDENT

JUDGMENT

This matter was originated by way of a Record of Appeal dated 22nd April, 2009 where the appellant laid out the following grounds of appeal;

> *1. THAT the learned trial magistrate erred both in law and fact in holding that the plaintiff had proved his case on a balance of probability and by awarding the plaintiff the following;*
>
> *(a) Salary arrears of Kshs.7,890/= per month, from 2nd October 1999, to 13th January 2005.*
>
> *(b) 3 months salary of Kshs. 23,670/= in lieu of notice.*
>
> *(c) One way busfare of Kshs.1,380/=.*

There is no evidence of a Response to the Appeal on the part of the respondent. However, the parties are agreeable and have filed written submissions in support of their respective cases.

The appellant in support of his appeal raises and answer the following issues;

> *i. Whether the learned trial Magistrate erred both in law and in fact in finding that the Plaintiff/Respondent had proved its claim against the Appellant.*
>
> *ii. Whether the subordinate court's judgment was arrived at in total disregard of the Appellant's evidence and submissions and the law.*
>
> *iii. What remedies were/are available to the parties herein.*

She seeks to confirm that a scrutiny of the evidence in the matter is critical. The appellant raises issue with the evidence relied on by the learned trial magistrate. The respondent submits that the appellant testified that his termination was premised on allegations that he had sued the appellant twice in Kisii and

Nairobi. He also testified that the appellant had refused to reinstate his employment despite clearance by an investigation team of the appellant- Exhibits 2,3,4 and 5.

The appellant, on the other hand called a witness John Lagat who testified that the plaintiff took a twenty four day leave commencing on 4th September, 1999 but did not report back on 1st October, 1999 as expected. In support of the foregoing, he produced a copy of the Check-Roll (Detailing the work attendance records of employees), as D.Exh 1 and the Plaintiff's History Card in respect of the years 1998 and 1999 which showed that the Plaintiff was on leave between 4th September, 1999 and 1st October, 1999.

The appellant faults the learned Magistrate for surmising that exhibits 2,3,4 and 5 were all exchanged during the period that the plaintiff was alleged to have absconded duty. Though the appellant concedes as much, the respondent did not render any evidence to justify his failure to attend work as from 16th October, 1999 when he was allegedly cleared. The respondent did not indeed submit any letter of protest or other evidence in support of his assertion that he was denied access to his place of work after he reported back from leave on 1st October, 2016, or as from 16th October, 2016 when he was allegedly cleared to work by the appellant's management.

She disagrees and disapproves this reasoning and finding by the learned Magistrate. She supports her version of the evidence and submits that the court should have followed this and dismissed the claim.

The appellant in the circumstances of this appeal faults the exercise of the principle of balance of probabilities in favour of a case of unfair termination of employment on the part of the employer/respondent. I differ. The principle of balance of probabilities is exercised at determination when there is no clear cut evidence to expressly point to an issue in dispute. Hereon, the trial court is forced to look at the most probable scenario on the basis of evidence tabled in support of the respective cases of the parties.

In the circumstances of this case, I find that the learned trial magistrate exercised this discretion appropriately and came up with a finding of unlawful termination of the respondent’s employment. The balance of probability as exercised at trial tilted in favour of the respondent’s case. And this clears the first ground of appeal.

The second issue in contention is whether the learned Magistrate erred in awarding the remedy/award cited at 1-111. It is the appellant's case that the award of Kshs.403,179.00 being salary arrears between the time of suspension and filing of suit 2nd October, 1999 – 13th January, 2005 lacks basis as it is admitted that all this time, the respondent never worked for the appellant. The appellant also submits that the authority cited by the learned trial Magistrate in support of his finding i.e **Imenji Versus Kenya National Co. Ltd (1986) KLR 350** is not applicable in the instant case as it was determined long before the provisions of the Employment Act, 2007 came into operation. It is her submission that if the termination was found to have been unlawful and unjustifiable, three months wages would have been adequate compensation.

The appellant further submits that the applicable law in the circumstance is the Employment Act, Cap 226 and the Trade Disputes Act, Cap 224, law of Kenya (both now repealed.) as the cause of action arose in 1999. I agree.

When we agree on the law applicable, the next issue is a determination of whether the award of Kshs.403,179.00 and the further award of three months salary in lieu of notice were justifiable in the circumstances. The appellant seek to rely on S. 15 of the Trade Disputes Act, Cap 224 and S. 16 of the Employment Act, Cap 226, Laws of Kenya (both now repealed) as follows;

> *15. (1) In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that the employer to reinstate that employee in his former employment, and the Court may, in addition to or instead of making an order for reinstatement, award compensation to the employee:*

Provided that such compensation shall not exceed-

(i)in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal;

(ii) in any other case, twelve months monetary wages.

(2) Without prejudice to any other remedy, any compensation awarded under this section may be recovered summarily as a civil debt.

(3) Any person who without lawful excuse fails to comply with an order for reinstatement shall be guilty of an offence, and shall be liable to a fine of two thousand shillings for every month or part thereof during which the commission of the offence is continued.

(4) Any court imposing a fine under subsection (3) may award compensation to the employee who is the subject of the order for reinstatement for the loss suffered by him as the result of the failure of his employer to comply with the order, and for that purpose the court may pay to the employee the fine or such part of it as the court may think fit.

(5) An award of compensation to a person under subsection (1) shall be a bar to proceedings at the suit of that person in any other court in respect of the same wrongful dismissal.

16. Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be, in respect of the period of notice required to be given under the corresponding provision of that subsection.

These provide for possible legal scenarios in the compensation for unlawful termination of employment as follows;

S. 15 (1) (I) is clear on action an award for unlawful termination of employment. This is;

i. Reinstatement, coupled with the actual pecuniary loss suffered by the employee as a result of the wrongful dismissal.

ii. In any other case, twelve months monetary wages.

It would appear that the learned Magistrate chose the option at S. 15 (1) (i) but forgot to reinstate the respondent to work at the time of determination. I say this because I do not find any reasoning for adoption on utilisation of the other option; S 15 (i) (ii) which would have bound the trial court to take the twelve months compensation route. The learned Magistrate, pursuant to S. 15 above cited had only two options: Reinstatement and actual pecuniary loss suffered by the respondent or in any other case twelve months monetary wages. This is the law and this only enabled him to pursue either of the two options. I therefore find that the learned Magistrate only erred in not completing the circle; not awarding a reinstatement of the employee to work as should have been the case. The award of the compensation in this form and manner remains unlawful in the circumstances and I so find.

The finding above forces this court to relook at the law and come up with an appropriate remedy in the circumstances. In this consideration, I would award the respondent the alternative of twelve months compensation for unlawful termination of employment. I award this in full. This is because, in my estimation an award of pay for periods between 2nd October 1999, to 13th January 2005 would be harsh and somewhat excessive. Employment law and labour relations philosophy is based on pay for work done. The respondent did not work during this period.

The last item for consideration is the award of three (3) months' salary in lieu of notice. S. 16 as cited

above provides for one (1) month's salary in lieu of notice. It is trite law that in the absence of a contract in any direction is for any other period, one month's salary in lieu of notice suffices in law.

The award of one way bus fare is trite practice in the industry and is therefore justified and justiciable.

I am therefore inclined to allow the appeal and award compensation as follows;

i. One (1) month's salary pay in lieu of notice ……Kshs. 7,890.00

ii. Twelve (12) months' salary as compensation

for unlawful termination of employment…….....….Kshs. 94,680.00

iii. One way bus fare…….....…….Kshs. 1,380.00

TOTAL……..…**Kshs.103,950.00**

iv. Each party shall bear their costs of the claim and this appeal.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mbeche instructed by S.B Mbeche & Company Advocates for the Respondent.

2. Mrs. Bett instructed by M/s Bett & Company Advocates for the Appellant.