



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 316 OF 2013

BETWEEN

D. K. NJAGI MARETE.....APPELLANT

AND

TEACHERS SERVICE COMMISSION....RESPONDENT

(An appeal from the judgment of the Industrial Court at Nairobi (Rika, J.) dated 28th June 2013 in *Industrial Cause No 379 (N) of 2009*)

JUDGMENT OF THE COURT

Background

1. **D. K. Njagi Marete**, (the appellant), was an employee of the **Teachers Service Commission, (TSC)** (the respondent), between 25th November 2003 and 2nd February 2009. He served the respondent in the capacity of Senior Principal Legal Officer until 2nd February 2009 when he received a letter informing him that he had been retired in the public interest with immediate effect.
2. The appellant filed a statement of claim on 17th July 2009, which was later amended on 16th July 2010, in which he challenged the termination of his employment. He sought various orders including a declaration that his retirement was unlawful and was therefore a nullity, payment of salary and various allowances for the time that he would have served until he left the service of the respondent on retirement amounting to Kshs 26,337,665.00, as well as general damages for breach of contract, punitive damages, exemplary damages, aggravated damages, costs and interest.
3. The respondent denied the appellant's claim by way of a statement of defence in which it admitted that the appellant had been retired on the ground of public interest. The respondent denied owing the appellant any monies, having paid him his benefits, including pension, notice and outstanding leave in accordance with his terms of employment. The respondent claimed that the appellant's employment was not terminated, but that he was retired in the public interest and was accordingly paid all his benefits.
4. The respondent contended that the appellant's retirement was lawful and did not offend any law or any conditions of employment, and that there was no justification to award the appellant monies that he would have earned in the eleven (11) years that he would have served the respondent until he retired at the age of 60 years. Counsel further urged that the appellant had not suffered any loss, and that there had been no breach of the employment contract that would require redress in the form of damages.
5. The claim was heard by the Industrial Court (the predecessor of the Employment and Labour Relations Court) (Rika, J.) In his judgment, the learned Judge considered three main claims by the appellant. The first was whether or not retirement in the public interest could amount to unlawful or unfair termination of employment. The court found that an employee could be retired in the public interest, and that such retirement would still be governed by the Employment Act. The trial court stated as follows:-

“18. Retirement on public interest is a form of termination of employment, instigated by the employer, and would therefore fit the description of involuntary termination. It is not necessarily the result of a disciplinary process. It may for instance, result from an administrative decision by the employer, taken for the removal of persistent non-performers from the employer's business. As a decision based on public interest results in termination of employment, it would fall within the requirements of Section 43 of the Employment Act 2007. It is the responsibility of the employer to prove the reason or reasons for the retirement.”

6. The second question was whether or not the appellant who was 49 years at the time he was retired by the respondent was entitled to be paid the salaries and allowances that he would have earned for the period of eleven (11) years had he worked for the respondent until he retired at the age of 60 years. The trial court stated as follows:-

“21. The Respondent did not justify retirement of the Claimant on public interest. It was not shown that there was a complaint against the Claimant, initiated by a member of the public or by the Respondent; that this complaint was investigated; the Claimant given a chance to answer the complaint; and a decision made to retire him based on valid grounds. It appears to this Court that the Claimant was retired for no reason, the facts giving rise to public interest, having never been disclosed to the Claimant, and to this Court in the materials filed herein. Retirement on public interest was an empty termination of employment reason (sic). The Court was not told what common well-being, or general welfare of the public, the retirement of Marete was meant to serve.

...

24. Section 43 states that where the employer fails to prove the reason or reasons for termination, the termination shall be deemed to be unfair within the meaning of Section 45 of the Employment Act 2007. The Court is convinced *termination of the Claimant's contract of employment through premature retirement, was unfair under Section 43 as read with Section 45, of the Employment Act 2007*”.

7. The final question considered by the trial court was whether or not the appellant's retirement was lawful and fair, and if such employment was unfair, if he was entitled to general damages for breach of contract, punitive damages, exemplary damages and aggravated damages, or in the alternative, compensation for unfair termination of his employment. On this point, the trial court held that:

“30. From the above analysis the Court does not see this as a case where general damages for breach of contract, punitive, exemplary, and aggravated damages, are suitable remedies. Section 49 of the Employment Act affords the Claimant fair, adequate and reasonable remedy of compensatory award as prayed in the alternative to other damages. The Claimant is granted compensation for unfair termination, at 12 months? gross salary, calculated at Kshs. 1,847,820.

...

The claim for travel and accommodation is allowed at Kshs. 54,475. The letter of retirement stated it was effective from 1st February 2009. The Claimant states he received this letter in the afternoon of 2nd February 2009. He worked the 2 days after the letter of 30th January 2009. The claim for the salary for 2 days worked in February 2009 looks persuasive and is allowed at Kshs. 10,998. The Court finally, is of the view, that each party bears its own costs. There shall be no order on the costs and interest. (Emphasis supplied)

8. The trial court held as follows:-

“26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act, 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate (sic) double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.”

9. Accordingly, the learned Judge dismissed the claim for anticipatory salaries and allowances amounting to Kshs 26,272,191.00. The learned Judge dismissed the claim for general damages for breach of contract, punitive, exemplary and aggravated damages.

10. The learned Judge allowed the appellant's claim of: compensation for unfair termination at 12 month's gross salary, travel and accommodation and salary for 2 days worked in February, 2009 amounting to Kshs 1,913,293.00.

11. Aggrieved by the decision the appellant filed this appeal against part of the judgment of the Employment and Labour Relations Court enumerating a number of grounds of appeal which can be summarized as follows, that the learned Judge: erred in his assessment of the compensation to be awarded to the appellant; disregarded the evidence tendered by the appellant with respect to the unfair and unlawful termination; failed to consider that the appellant was entitled to special damages; failed to award the appellant exemplary damages arising out of the misfeasance instigated by the respondent; and failed to consider that the termination of the appellant's employment was aimed at tainting his career which justified an award of exemplary and aggravated damages.

Submissions by counsel

12. At the hearing of the appeal, learned counsel **Ms. Christine Kirimi** represented the appellant while learned counsel **Mr. Allan M. Sitima** represented the respondent. Counsel for both parties had filed written submissions and list of authorities.

13. Ms. Kirimi relied on the appellant's written submissions. The appellant presented his appeal on these grounds on two fronts: in the first

place, the appellant contended that he was entitled to the payment of the liquidated claim for the salary, allowances and benefits that he would have received while in the employ of the respondent until the age of retirement of 60 years.

14. On the second issue, the appellant contended that he was entitled to general damages for breach of contract, punitive and aggravated damages and exemplary damages for the unlawful termination of his employment. The appellant faulted the trial court's finding that an award under these heads of damages would amount to unjust enrichment. Relying on the definition of damages in Black's Law Dictionary, Tenth Edition, to mean '**those relating to monetary loss or injury to a person or property?**', the appellant submitted that since the court had already made a finding that the appellant had been wronged by the actions of the respondent, then damages were due to him on grounds of the breach of the employment contract, and this was the reason he was awarded twelve months wages. However, he urged, that the court ought to have awarded him general damages to compensate him for the loss, aggravated damages to compensate him for his loss and exemplary damages due to the respondent's reckless, malicious and deceitful actions.

15. The appellant urged us to be guided by the declaration of unfair termination of the appellant by the respondent, and look beyond the Employment Act in compensating the appellant, and to be guided by the cases of **Rookes v Barnard and Others [1964] AC 1129 and Obonyo & Another v Municipal Council of Kisumu [1971] EA 91** to hold that the respondent, as a Government institution, acted arbitrarily and oppressively towards the appellant, and as such, he was entitled to the payment of damages as prayed for in his statement of claim.

16. **Mr. Sitima** opposed the appeal and relied on the respondent's written submissions which he briefly highlighted. In its submissions, the respondent contended that the trial court reached the correct conclusion in making its award. The respondent submitted that **Section 49(1)** of the Employment Act provides the remedies that an employee is entitled to in case of either wrongful dismissal or unfair termination and may award damages that are capped by **Section 49** of the **Employment Act** to a maximum of twelve months of the employee's gross monthly wage at the time of the termination of his employment.

17. Rejecting the assertion that the appellant ought to have been paid the anticipatory benefits as well as additional benefits, the respondent urged us to consider that the law on unfair termination is now well settled in this regard, and that there ought not to be excessive compensation as it has no statutory foundation. The respondent urged us to consider various authorities on the issue, including **Hema Hospital v Wilson Makongo Marwa [2015] eKLR (Kisumu Civil Appeal No 72 of 2014)** and consider that remedies for termination of employment ought to be proportionate to the economic injuries suffered by employees, and should not be aimed at facilitating unjust enrichment of those employees. On this basis, the respondent urged us to dismiss the appeal with costs.

Determination

18. This being a first appeal, our role is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw out our own conclusions. See also **Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212** where this Court held 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”

19. We have considered the appeal, the submissions, the authorities cited and the law. Two issues arise for our consideration; the first is whether the appellant is entitled to anticipatory remuneration until attainment of the mandatory retirement age of 60 years; and whether the appellant is entitled to general damages for breach of contract, punitive, exemplary and aggravated damages. Put differently, was the appellant entitled to an award of damages and payment of further salaries, over and beyond what was ordered to be paid to him by the trial court?

20. We note from the record that the termination of the appellant's employment, was as noted by the trial court, indeed unfair. The remedies for unfair termination are outlined under **Section 49** of the Employment Act 2007. **Section 49(1)(c)** in particular provides that the employer may be required to pay to the employee:

“the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

21. **Section 50** of the **Employment Act**, as well as **Section 12(3)(vi)** and **(vii)** gives the Employment and Labour Relations Court power to make an award in line with section 49 aforementioned. The power to award the remedies provided for under **Section 49** of the Act is discretionary. Judicial discretion must however be exercised judiciously, and in the words of this Court in **Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR (Civil Appeal No. 24 of 2018)**:

“The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.”

22. The appellant urged us to interfere with the discretion of the trial court and go beyond the award of twelve months wages, arguing that **Article 159** of the Constitution of Kenya requires that substantive justice is done to the appellant. In considering this question, we remind ourselves of the purpose of awarding any form of compensation in a dispute on unfair termination. In **Hema Hospital v Wilson Makongo Marwa (supra)** this Court adopted with approval the holding of the Labour Court of South Africa in **Le Monde Luggage cc t/a Pakwells**

Petze vs. Commissioner G. Dun and others, Appeal Case No. JA 65/205 which when applying provisions of the Labour Relations Act of South Africa held that:

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to *make good the employee’s loss and not to punish the employer.*”

23. The Labour Relations Act of South Africa at sections 193 and 194 are worded in similar terms to section 49(1)(c) of the Employment Act, and empower the Labour Court of South Africa to order payment of compensation to an employee, limited, to **“no more than the equivalent of 12 months remuneration.”**

24. This is what was awarded to the appellant for the unfair termination of his employment contract. The law allows the court to make any other order that is necessary in the interests of justice, and as was stated by this Court in that appeal, **“the peculiar circumstances of each case should have a bearing on the nature and quantum of relief that should be awarded.”**

25. We have considered whether, from the facts of this appeal, the appellant was entitled to a further award for compensation in terms of the anticipatory benefits. One of the factors to be considered under section 49 of the Employment Act is section 49(f) which provides that **“the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;”** as well as at section 49(g) **“the opportunities available to the employee for securing comparable or suitable employment with another employer.”**

26. On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word „permanent employment?.”

27. Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.

28. This leads us to the appellant’s claim for damages under various heads of damage as claimed in his statement of claim as well as the memorandum of appeal. To justify this award, the appellant urged us to consider the case of **Obonyo and Another v Municipal Council of Kisumu (supra) at 94** where the predecessor of this Court, referring to the English Decision of Rookes v Barnard and Others (1964) AC 1129 stated that:

“it will be convenient to begin summarizing very briefly the effect of Rookes v Barnard. In the first place, it was held that exemplary damages for tort may only be awarded in two classes, of case (apart from any case where it is authorized by statute, these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government (emphasis in original) and secondly where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behavior, the punishment imposed must not exceed what would likely have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the defendant’s conduct is to be taken into account.”

(Emphasis supplied)

29. Based on the foregoing passage, the appellant submitted that the respondent acted arbitrarily and oppressively against him, and urged us to award damages as the respondent, being a public institution, we ought to be guided by the definition of the term ‘government’ in **Obonyo and Another v Municipal Council of Kisumu (supra)** where Law, JA agreeing on the position of an award of exemplary damages in actions for tort stated that:

“...exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended. This raises the question whether the expression „government? should be read as meaning the central government only, and whether it should be interpreted as including a local government ...”

30. The appellant urged us to find that the respondent, not being an individual or private corporation as outlined above, and whose actions were arbitrary and oppressive against the appellant, would therefore be liable for an award of damages to him. As at the time of the dispute arising between the parties herein, the respondent was a creature of statute. It is not contested that the respondent is a public body charged

with establishing and maintaining a teacher’s service adequate to the needs of public schools in Kenya. However, despite the fact that the respondent is a public body and an agent of the Government, the dispute between the parties herein is purely one that arises out of an employment relationship between the parties.

31. As we have stated before, the trial court correctly found that the termination of the appellant’s employment was unfair.

Section 49 of the Employment Act guides the courts in the remedies that can be awarded for unfair termination. In the instant appeal, the trial court made an award of twelve months gross salary as compensation for unfair termination. This is the maximum allowed by the Act, and while we agree with the appellant, and with the prior decision of this Court in *Hema Hospital v Wilson Makongo Marwa (supra)*, that in certain cases, the court may make an additional award where the circumstances so merit, we find no such special circumstances herein that would warrant additional compensation in the manner claimed for by the appellant.

32. We have considered whether the appellant was entitled to an award of general damages and we find that he did not sufficiently lay out a basis for the same. It is apparent that after he received the letter terminating his employment on 2nd February 2009, the appellant worked the rest of the day and then proceeded to vacate the office. He was paid his terminal dues, and that rested the matter until he filed suit. In the circumstances, this is not a fit case for the award of general damages. First, the appellant was granted his alternative prayer for unfair termination and secondly, he has failed to lay a basis which would justify the grant of an award of further compensation. This prayer therefore fails.

33. The appellant sought for exemplary damages. As stated by this Court in *Godfrey Julius Ndumba Mbogori & another V. Nairobi City County [2018] eKLR*

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard [1964] AC 1129* where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

34. In the circumstances of this appeal, we are not satisfied that the respondent’s actions were so arbitrary and oppressive as outlined in *Obonyo and Another v Municipal Council of Kisumu (supra)* so as to justify an award of exemplary damages. We are fortified in this finding due to the fact that the appellant went ahead to secure employment shortly after the termination of his employment. Our consideration of the circumstances herein alongside the case law on the subject as well as **Section 49(f) and 49(g) of the Employment Act** lead us to find that the claims for exemplary or aggravated damages must fail.

35. As we stated at the beginning of this judgment, the award made by the trial court was an exercise in discretion. See *Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR (Civil Appeal 31 of 2015)*, and we have demonstrated that the appellant has failed to satisfy us as to why we ought to disturb the award made by the trial court. This appeal must therefore fail, and we hereby order it dismissed.

36. The order that best commends itself to us on costs in this appeal is that each party bears its own costs. It is so ordered.

Dated and delivered at Nairobi this 6th day of March, 2020

R. NAMBUYE

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true Copy of the original

DEPUTY REGISTRAR

