REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CIVIL APPEAL NUMBER 1 OF 2004

BETWEEN

KENYA PORTS AUTHORITY…….. APPELLANT

AND

FESTUS KIPKORIR KIPROTICH…….. RESPONDENT

[An Appeal from the Judgment of Hon. S.N. Riechi, Chief Magistrate, Mombasa Law Courts, delivered on 18th December 2013 in Civil Suit Number 2148 of 2003]

BETWEEN

ERNEST KIPKORIR KIPROTICH…….. PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY…….. DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Mrs. Ikegu Advocate for the Appellant

Ms. Makokha Advocate for the Respondent

JUDGMENT

[Section 12 [1] of the Industrial Court Act 2011 and Rule 27 [1] [b] of the Industrial [Procedure] Rules 2010]

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1. The Respondent filed Civil Suit Number 2148 of 2003 at the Mombasa Chief Magistrate's Court way back in 2003. The Suit was against his former Employer. He claimed he was irregularly and unlawfully

dismissed from employment. He sought the following remedies:-

a. A declaration that the Plaintiff's dismissal from employment was wrongful, unlawful and unwarranted;
b. A mandatory injunction restraining the Defendant from evicting the Plaintiff from its Staff Quarters H10 Door Number 7, Shimanzi Mombasa;
c. Alternatively, the Defendant to pay the Plaintiff all his terminal benefits due and accruing leave to date;
d. General Damages; and
e. Costs and Interests.

2. The Court awarded the Respondent the following:-

a. Kshs. 700,000 General Damages for unlawful dismissal;
b. Salary for September 2002;
c. Payment of the share of one month to the contribution of the pension calculation; and
d. Costs and Interest at Court rates from the date of the Judgment to payment in full.

3. Disaffected, the Respondent filed this Appeal setting out 7 Grounds of Appeal, alleging errors of law and fact in the Trial Court's decision. These are:

a. Failing to find the Respondent's Cause of Action was barred under Section 66 of the Kenya Ports Authority Act Cap 391 the Laws of Kenya;
b. Finding the Respondent's dismissal irregular and unlawful;
c. Failing to consider evidence of the Appellant;
d. Wrong exercise of discretion in award of general damages;
e. Finding payment of share contribution due to the Respondent ;
f. Finding Payment of salary for the month of September 2002; and
g. By granting costs to the Respondent.

4. The Respondent filed a Response to the Memorandum of Appeal on 20th June 2014. The answers to the Grounds of Appeal are:-

a. First Ground was not pleaded or raised as a point of preliminary objection at the Trial;
b. Appellant never proved Respondent's dismissal was regular and lawful;
c. All evidence was considered;
d. The amount of damages was reasonable;
e. Payment of a month's share contribution was reasonable;
f. DW2 admitted the Respondent was not paid his dues for September 2002; and
g. No error in awarding of costs.

5. The Appeal was argued on 13th November 2014. The first Ground of the Appeal was abandoned.

6. *Appellant's Factum:*

i. The Appellant submits the Respondent was its Employee. Prayer [b] of his Claim relating to the house in Shimanzi was dispensed with. The Appellant's evidence was not considered. The Appellant was a habitual drunkard. The Appellant availed Medical Records, showing the Respondent had been severally treated for alcoholism. He was persistently drunk and disorderly at the Workplace.

ii. In the year 2000 he was required by the Appellant to show cause why his services should not be terminated in Public Interest. He requested for personal hearing, and a Committee of Inquiry proposed to hear the Respondent on 25th July 2000. He did not attend, and was issued another hearing notice for the 28th July 2000.

iii. On 28th July 2000, he attended the Committee of Inquiry drunk and incoherent. The Committee recommended the Respondent should be retired in Public Interest.

iv. The Respondent was given the chance, even after this recommendation, to redeem himself between the years 2000 and 2002. He was not drunk just on one occasion; he was a habitual drunkard

v. On 20th August 2002 he was medically examined at the request of the Appellant, to ascertain whether he was drunk while on duty. The Doctor confirmed from the Respondent's urine and blood samples that the Respondent was indeed drunk. The Respondent was summarily dismissed in accordance with the Appellant's Staff Regulations and the Employment Act Cap 226, Section 17. He was informed of the decision in the letter of summary dismissal dated 6th September 2002, in which the Appellant gave the specific reason for dismissal to the Respondent, and pointed out to him the specific law and contractual provisions under which the Appellant made its decision. Dismissal was regular and lawful.

vi. Even if the Court found dismissal irregular and unlawful, there was no basis, under the existing law, to grant the Respondent damages. He was only entitled to notice or salary in lieu of such notice. Under his contract, the Respondent was entitled to 3 months' salary in lieu of notice.

vii. Relying of the ***Kenya Court of Appeal at Nairobi in Civil Appeal Number 108 of 2010 between Kenya Revenue Authority v. Menginya Salim Murgani [2010] e-KLR***, and ***Kenya Court of Appeal at Nakuru in Civil Appeal Number 27 of 1992 between Rift Valley Textiles Limited v. Edward Onyango Oganda [1994] e-KLR,*** Mrs. Ikegu submits that the Appellant was under no obligation to assign reasons for its decision to summarily dismiss the Respondent.

viii. The Appellant submits it is aware of ***the Industrial Court of Kenya Cause Number 715 of 2011 between Major Wilfred Kyallo Kangullyu v. Tetra Pak Limited [2014] e-KLR***, which concluded that an Employee whose contracts of employment were terminated before the year 2007 when the new Employment Law came into force, and who filed their Claims in the Civil Courts, should not be treated differently from Employees who at the time filed their Claims at the Industrial Court under the Trade Disputes Act Cap 234, and who could be awarded compensation or reinstatement for unfair and unlawful dismissal. Mrs. Ikegu argues that even in adopting such an approach, the Court would have to consider factors, such as are set out under Section 49 of the Employment Act 2007, in determining the nature of the remedy. Compensation could not be on the basis of the expected remainder term of the service. An award of general damages is not a matter of right.

ix. The Appellant adduced evidence at the Trial, that the Respondent was paid his dues under the Appellant's defined Benefits Scheme. Everything was calculated and paid out to the Respondent. DW2 gave a breakdown. The Respondent admitted this payment during the Trial.

x. He was paid his salary up to the last day worked, 23rd September 2002. He was not owed any salary. On the last ground, the Appellant submits that costs follow the event and the Appeal should be allowed, with costs to the Appellant.

7. *Respondent's Factum*

i. The Appellant did not show dismissal was lawful. Employer is required to show justification. The Appellant did not prove to the Trial Court that the Respondent was drunk while on duty.

ii. DW1 testified that: when the Respondent went to the Clinic, he was not supposed to be on duty; the Appellant had a Welfare Centre where alcohol was served; it was a Club for Appellant's Employees; there was no problem if the Respondent drunk while on duty; and when taken to Mombasa Hospital, he was not on duty.

iii. All evidence was considered by the Trial Court. Dismissal was irregular. The alleged drunken behaviour was not shown to have taken place while on duty.

iv. The Employment Act 2007 was not in force at the time of dismissal. The law as it existed was applied. The Trial Court found it fit to award damages. Current law could not apply to the Respondent. He was 46 years on dismissal and expected to work up to 55 years. The award of general damages was just.

v. Payment of 1 month pension contribution related to days left out in calculating Respondent's September 2002 salary. DW2 admitted that the Appellant left out 15 days in its calculation of the Respondent's working days. The Respondent proved his case, and the Appeal should be rejected with costs to him.

The Court Finds:-

8. The Respondent took its decision under Section 17 [b] of the repealed Employment Act, Cap 226 the Laws of Kenya and under Section G2 [a] [ii] and G4 of its Staff Regulations 1992.

9. Section 17 [b] made it a matter of gross misconduct warranting summary dismissal, if the Employee, ‘’***during working hours, by becoming or being intoxicated, renders himself unwilling or incapable properly to perform his work****…’’*

10. Section SG2 [a][ii] of the Regulations stated that disciplinary action would be taken against an Employee who among other things, ‘’***incapacitates himself for the performance of any of his duties by indulgence in any stimulant, alcoholic drink or intoxicating drugs such as heroin, cocaine, marijuana, cannabis sativa, etc. ‘’***

10. Section SG 4 of the Regulations governed disciplinary proceedings against Unionisable Employees in Grade PA6 and below. This Regulation called for investigations, charges and hearing of the concerned Employee, in much the same way, today's Employment Law calls for procedural justice in termination processes.

11. The popular, prevailing view, at the time the Respondent was summarily dismissed on the law on termination of employment was as propounded by the Court of Appeal of Kenya in the cases of ***Murgani*** and ***Oganda*** and a catena of other judicial opinions**,** cited by the Appellant. Employers were not obliged to give reason, or hear the Employee before termination. Employment was- at- will of the Employer. The Employer could terminate the contract of employment for good cause, bad cause or no cause at all. This was the law of wrongful or unlawful termination. The relationship was seen within the 4 corners of the employment contract.

12. As pointed out in the case of ***Major Kangullyu***, there is another body of termination of employment decisions, generated by the Industrial Court, based on the powers donated to that Court under Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya, which established there was an obligation on the part of Employers to assign reason or reasons for termination decisions. Compensation and reinstatement were possible remedies under this regime. This was the law of unfair or unjustified termination. The relationship went beyond the contract of employment, incorporating other standards imposed on the Parties by legislation, rules of fairness, just and equitable treatment. Unfortunately, the decisions of the Industrial Court, generated for over 40 years were not reported or otherwise publicized, and even in their limited circulation, were seen as a contraband jurisprudence. They were hardly quoted in illuminating this doctrinal tension.

13. The Employment Act Cap 226 did not require Employers to assign reasons for their decisions on termination. The Trade Dispute Act which in force at the time, suggested there was need to assign reasons.

14. The Trial Court was convinced reasons were required in terminating the Respondent's contract. The Appellant itself did not just terminate; it assigned reason for its decision. The principles regulating unfair termination were in full play. The Claimant was unionisable, going by the letter of summary dismissal. Most of the CBAs, even under the old regime when employment-at- will was recognized, when the decisions of ***Murgani*** and ***Oganda*** were written, incorporated substantive and procedural justice in employment termination. The concept of unfair termination was common in most workplace labour contracts. The Industrial Court's decisions were not only based on the Trade Disputes Act; they were largely influenced by a majority of labour contracts, subject matter of many trade disputes. These decisions were based on the Trade Disputes Act, read together with the CBAs concluded by most Employers and Employees. The Appellant's Regulations called for charges, investigation and hearing. There appeared to be a requirement for substantive and procedural justice, so that even if the Appellant were to fall back on the argument that notice or notice pay sufficed at the date of accrual of the action, it would still be bound by the terms and conditions of service imposed on the Parties by the Staff Regulations. The above Court of Appeal decisions held that substantive and procedural justice, and the rules of natural justice, could be incorporated in the contract of employment, becoming binding on the Parties upon termination of employment. The Employment Law merely sets the minimum employment standards, leaving the Employers and the Employees latitude to improve on those standards. The Parties in this Appeal had such mechanisms calling on them to go beyond the requirement for notice or notice pay, in terminating the contract of employment for disciplinary reasons. The Appellant investigated allegations of alcoholism over a period of 2 years, and even called the Respondent to a hearing. Medical tests were carried out. There was every effort made to justify termination. It is not correct that the Appellant turns around on Appeal, and argues the law did not impose the burden of justification, while all along, it went about justifying its eventual action.

15. It was not shown that the Appellant was drunk on the job. Both the Act and the Regulations required the Employee to be drunk during working hours, and incapacitated, unwilling, or incapable to properly perform his work. The law and the contract did not bar drunkenness. It did not bar being drunk at the workplace. The Appellant in fact had a joint within the Premises for its Employees, where alcoholic drinks were served. It would be expected that Employees would report to work at some point, having taken some alcoholic drink. What the law and the contract loathed and prohibited, was being drunk and incapable of performance. This is the position with regard to the present law. Was the Respondent drunk while on duty, and incapable of performance"

16. The Trial Court at page 250 and 251 of the Record of Appeal, evaluated evidence on this question. The Dismissal letter alleged the Respondent was examined by the Chief Medical Officer on 20th August

2002, to ascertain whether he was under the influence of alcohol while on duty. The test resulted in a conclusion by the Appellant that the Respondent, was ''*under the influence of alcohol… indicating you were practically drunk....''* This was the basis of the summary dismissal. It was not any other incident of alcoholism from the Respondent's past. The Trial Court relied on the evidence of DW1 Marko Mulwa Ngolia, who testified that the Respondent was not supposed to be on duty on 20th August 2002 when the medical test was carried out. There clearly was no evidence that the Respondent was on duty on 20th August 2002. There was no evidence that he was drunk while on duty. There was no evidence that he was drunk and in any way incapacitated, unwilling, or incapable of properly performing his duty on 20th August 2002. The Respondent did not act in contravention of the law and the contractual provisions regulating intoxication while on duty.

17. The Appellant relied on past reports of alcoholism in arguing substantive justification. It argued that the Respondent was a habitual drunkard. He had a history of alcoholism. This was the wrong approach. The Appellant seems to hold that termination was justified because of this history of alcoholism. Each incident should have been isolated and treated differently. The reports of 2000 were considered in 2000, and dealt with. The Respondent was taken through disciplinary processes in 2000. The Appellant opted to continue accommodating the Respondent. The occurrence of 2002 should not have been taken as a continuation of the process that was concluded in 2000.

18. The Medical Records relied on by the Appellant in the Trial showed the Respondent was no doubt, an alcoholic, in and out of hospital regularly, being attended to for alcohol related sicknesses between 1998, and 2002 when he was summarily dismissed. Throughout this period, there is nothing to show the Respondent was, as a result of his alcoholism, prevented from conducting the tasks necessary for his employment. The Appellant did not complain about the Respondent's performance. There was no recorded appraisal, where the Respondent's performance was found wanting. In a letter of 18th April 2000, the Appellant's main complaint against the Respondent was that as a result of his alcoholism, he had become a burden on medical facilities. As seen above nonetheless, the reason for termination focused on the 20th August 2002, when the Respondent was alleged to have been drunk while on duty. His history was not in consideration. There was no evidence supporting the Appellant's position with regard to the Respondent's inebriation on the 20th August 2002.

19. ***Ground [b] and [c] of this Appeal in paragraph 3 above, fails***. The termination was irregular and unlawful, and the relevant evidence from the Appellant was considered.

20. In granting the Respondent general damages of Kshs. 700,000, the Trial Court stated ***'' I note the Plaintiff had worked for over 20 years. I would find an award of Kshs. 700,000 adequate compensation…''*** There was no other consideration to justify the amount of Kshs. 700,000, beyond the Respondent's length of service.

21. The Respondent's years of service had been recognized and rewarded through his Pension Scheme. He was paid a net lump sum of Kshs. 366,106 as pension for 20 years worth of service The Trial Court should have considered other benefits, paid to the Respondent on termination. The years of service alone, could not determine the amount of damages awardable in a Claim for unlawful termination. The Respondent in this Appeal does not argue that he had served 20 years in justifying damages of Kshs. 700,000; he submits that he was 46 years on termination and expected to work until he was 55 years. Nothing in the Judgment explains the award of Kshs. 700,000 in the context of years served or the years expected to serve. It would be unrealistic and unreasonable to found an award of damages on the years left in service, in termination of employment claims. The Respondent for instance was an alcoholic, and barring his own effort at rehabilitation, it was not given that he would have gone on productively working for the Appellant, for the remainder of service.

20. Compensatory awards, in redressing unfair termination under Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya, were capped at the equivalent of the Employee's 12 months' gross salary. This law was in place at the time of the Respondent's dismissal. In ***G.M.V v. Bank of Africa Limited [2013] e-KLR***, the Industrial Court of Kenya, quoting the ***House of Lords*** in ***Eastwood & Another v. Magnox Electric PLC [2004] UKHL,*** explained the capping in statutory compensation for unfair termination as follows:

''in fixing these limits on the amount of compensatory awards, parliament expressed its view on how the interest of employers and employees, and the social economic interest of the country as a whole, are best balanced in unfair dismissal. It is not for the Courts to extend further, a common law implied term, when this would depart significantly from the balance set by legislature.''

21. The Trial Court awarded the Respondent damages of Kshs. 700,000 under common law, for unlawful dismissal, while a statute in place, the Trade Disputes Act, set the limit the equivalent of 12 months' salary as the maximum compensation in redressing unfair termination. It would defeat the legislative purpose in capping, if Courts treated 12 months' salary compensation as the floor, rather than the ceiling. This is a ceiling that should not be ignored, and even when Courts feel they should consider compensatory awards above the ceiling, should have clear legal justification in doing so. The Trial Court did not attempt to justify departure from the principles of termination of employment set under the Court of Appeal decisions of ***Murgani*** and ***Oganda,*** or even justify the quantification of damages at Kshs. 700,000, in this simple everyday termination of employment dispute.

22. There was strong argument and Judicial Authorities that under common law, notice pay, and not general damages would suffice in redressing premature termination of employment. The Trial Court however, and not without a good reason, treated the dispute between the Parties as a case for unfair termination, where substantive justification and procedural fairness, were required to be observed by the Appellant in taking its decision against the Respondent. The conduct of the Parties, and the Workplace Regulations, suggest there was requirement for substantive justification and procedural fairness. The critical question was what level of damages was available for breach of these standards" The Trial Court did not explain its grant of Kshs. 700,000 as damages, in a labour market where a substantive law on compensation for unfair termination at the time cause of action arose, set a ceiling of 12 months' salary.

23. The measure of compensation should have been guided by the statutory capping- the statutory standards in place- at the time of termination. The Respondent benefited from the principles regulating unfair termination, and should not have been granted anything outside the contemplation of the existing law of unfair termination. It would not make sense for Parliament to set a capping of 12 months' salary, if Courts could still award random amounts of money in compensatory awards under common law. Employment disputes were not intended to be in the same vein as running down matters. How are Employees coming to the Courts today, to understand why the Legislation favours a maximum of 12 months' salary in redressing similar employment wrongs as suffered by the Respondent, while the Respondent could obtain compensation the equivalent of 54 months' of his salary at another forum, under the guise of common law" How is an Employee who is told by the Courts notice or notice pay suffices, understand these divergent judicial pronouncements" While this Court does not agree with the Appellant, that the Respondent was only entitled to 3 months' salary in lieu of notice, it does agree that there was no basis for the quantification of the Respondent's compensation at Kshs. 700,000. His salary was Kshs. 12,960 per month, and the general damages granted to him, amounted to the equivalent of 54 months' salary, or 4 ½ years' salary. The Trial Court failed to balance the interest of the Employer and the Employee, and the socio-economic interest of the Country as a whole, by grant of a random compensation of Kshs. 700,000. It failed to consider other terminal benefits available to the Respondent under his terms and conditions of service, and gave no thought to the capping created by statute on

compensatory awards.

24. Ground [d] of the Appeal under paragraph 3 above succeeds. The order for payment of general damages at Kshs. 700,000 is set aside. The ***Court grants the Respondent compensation the equivalent of 12 months' salary at Kshs. 155,520 for unlawful and unfair termination. He would also merit 3 months' salary in lieu of notice which the Court grants to the Respondent at Kshs. 38,880.***

25. The evidence of DW2 Patrick Kibor Kitur appears to have justified the award of payment of September 2002 salary, and payment on the share of the one month to the contribution of pension calculation. He stated the Respondent's last date of service was 23rd September 2002, and 15 days were left out in computation of the pension. He stated '' *I am not aware if his salary for the month of September 2002 was paid.''* The Respondent himself is not quoted in his evidence conceding receipt of his September 2002 salary. The Appellant should have provided evidence of payment, such as would be available in bank transfer, pay roll acknowledgment, petty cash or at the very least, the September 2002 pay slip. The Respondent should therefore have been paid salary for the 23 days worked in September 2002, and 15 days included in computation of his pension. ***Grounds [e] and [f] of the Appeal, at paragraph 3 above fails, except that the Appellant shall pay the Respondent salary for 23 days worked in September 2002, not the whole of September 2002.***

26. The Appellant did not justify termination to the standards necessary under the law and the contract regulating the employment relationship. There was however common evidence that the Respondent was an alcoholic who had been reasonably accommodated over time by the Appellant. He was burdensome to the Respondent, and even though ultimately not treated fairly, in accordance with the rules of fairness to which his contract of employment was subject, contributed in creating the circumstances which led to the termination of his contract of employment, and made this litigation necessary. ***The Court shall allow the last ground of Appeal. Parties shall meet their own costs in the Trial Court. Parties shall similarly meet their own costs of the Appeal.*** IT IS ORDERED:-

a. ***Grounds 2 and 3 of the Appeal fail. Summary dismissal was irregular and unlawful;***

b. ***Ground 4 succeeds in part. Award of general damages by the Trial Court to the Respondent, at Kshs. 700,000 as compensation is overturned. The Respondent shall be paid by the Appellant 12 months' gross salary at Kshs. 155,520 as compensation, and 3 months' salary in notice pay at Kshs. 38,880-total Kshs. 194,400;***

c. ***Ground 5 and 6 fail, except that the Appellant shall pay to the Respondent salary for 23 days worked in September 2002, not the whole of September 2002;***

d. ***Ground 7 succeeds. Parties shall bear their own costs of the Trial.***

e. ***Similarly Parties to meet their own costs in this Appeal.***

Dated and delivered at Mombasa this __5TH_____ day of December 2014

James Rika

Judge