**THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO.22 OF 2015**

**BETWEEN**

**ALFRED MUTUKU MUINDI……APPELLANT**

**AND**

**RIFT VALLEY RAILWAYS (LIMITED)…… RESPONDENT**

***(Being an appeal from the judgment of the Industrial Court of Kenya at Mombasa (Radido, J.) dated 5th September, 2014***

***in***

***I.C.C. No. 174 of 2014*)**

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**JUDGMENT OF THE COURT**

This appeal arises from the judgment of the Employment and Labour Relations Court previously referred to as the Industrial Court at Mombasa that addressed a claim by the appellant based on unfair dismissal, payment of final dues, including 1 month salary in lieu of notice, unpaid leave, lost bonus and severance pay.

Before the trial the litigants reached a compromise on some of the claims, to wit: payment for the notice period, the bonuses and leave pay. The issues that remained for determination therefore were whether or not the appellant was entitled to severance pay, whether or not the termination was lawful and finally whether or not the appellant was entitled to costs.

The trial court found that indeed the termination though procedurally fair, was nonetheless not in accord with justice and equity and that the appellant was therefore entitled to one month salary in lieu of notice, one month accrued leave and one month salary as compensation. The total award came to Kshs.169,437/- but was reduced to Kshs.56,479/- on account of notice and leave pay having already been paid to the appellant by the respondent earlier. The award of Kshs.56,479/- was on account of compensation for unfair termination. The appellant was however denied severance pay because under the Kenya statutory framework, it is only payable where an employee has been declared redundant

which was not the case here. He was also denied costs on the ground that he had failed to file his written submissions within the time lines set by the court. These findings prompted the appellant to file a memorandum of appeal in this Court on four grounds, in summary, that the learned Judge erred in law and fact in:-

i. in awarding only one month salary for unfair termination;
ii. in failing to appreciate the period of employment before the wrongful termination;
iii. in failing to appreciate that the reason proffered by the respondent for the unfair dismissal was illogical and failing to award damages as appropriate; and finally,
iv. in failing to award costs due to the appellant's late filing of written submissions though they were considered.

This Court has appellate jurisdiction to hear appeals arising from the Industrial Court as donated to it by **Article 164(3) (b)** of the Constitution and **Section 17(1)** of the Industrial Court Act. Being a first appeal we are obligated to re-consider and re-evaluate the evidence tendered during the trial and finally draw our own conclusions. We should however be mindful of the fact that we neither saw nor heard the witnesses and should make due allowances in that respect. See **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**

The parties filed written submissions in support of and in opposition to the appeal that were subsequently orally highlighted. The appellant in his written submissions stated that he had pleaded that the termination was unfair and that he had not been paid his terminal dues. The court then having found the termination to be unfair, only awarded him a month worth of salary which was not fair and just. We also heard further that the trial court failed to consider the circumstances of the appellant's dismissal and in particular the reasons advanced by the respondent that the appellant had refused to answer a cell phone call to report for duty which was unfair. The appellant submitted that the trial court failed to exercise its discretion fairly in light of **Sections 40, 49 (1) (c)** and **50** of the Employment Act. The court did not offer a reason for awarding one month salary for unfair termination. Further, the trial court failed to consider the period of employment which was for a total of 22 consecutive years, the appellant having been engaged by the respondent's predecessor Kenya Railways Corporation for 15 years and 7 more years by the respondent. That though the court found that the termination was equivalent to *"responding to a mosquito bite with a hammer"* it failed to give an appropriate award.

On costs, the appellant submitted that as he played no role in the late filing of the written submissions and the trial court in any case having considered them, it ought to have awarded him the costs.

When it came to highlighting, the appellant merely reiterated the written submissions aforesaid. The appellant though did not refer to any authorities in the written and oral submissions although he did file a list of authorities which bore these past decided cases: **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR, Jonah Racha Abdi v Kenya Forestry Research Institute [2014] eKLR** and **Sarah Wanyaga Muchiri v Henry Kathii & another [2014] eKLR** which we have carefully considered.

The respondent in its written submissions took the view that the issues for determination were whether or not the appellant was entitled to 12 month's severance pay and costs. The respondent submitted that the trial court found that severance pay under Kenyan statutory framework was only applicable to a worker declared redundant and the appellant had not been so declared. Further, that the court had pleaded on behalf of the appellant by adding a relief for compensation and exercised discretion on that which had not been prayed for. It relied on the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2013] eKLR** for the preposition that parties are bound by their pleadings and evidence at *"variance with the averments of the pleadings goes*

*to no issue and must be disregarded.*" An issue not pleaded can only be put on record by amendment and that a party is not entitled to a relief not specified in his claim as was held in the same case. The respondent in addition submitted, without prejudice to the foregoing that the court had properly exercised its discretion in awarding one month's salary in accordance with **Section 49(4)** of the Employment Act. That since the court in so doing was exercising a discretion, it cannot be faulted. It relied on the case of **Mbogo v Shah [1968] E.A. 93** for that proposition**. That t**he one month salary in lieu of notice, therefore, was the only amount the appellant was entitled to and the relief granted by the court ought to be rescinded. It further relied upon **CMC Aviation Limited v Mohammed Noor [2015] eKLR** for the preposition that as the contract of employment was terminable by one month's notice, an award of one month's salary in lieu of notice was reasonable compensation.

When highlighting the respondent submitted that it had complied with the legal requirements in dismissing the appellant. In terms of the contract of employment the respondent was entitled to dismiss the appellant upon payment of one month's salary in lieu of notice which it did. Hence, the further award of one month's notice in effect gave the appellant two month's salary in lieu of notice which was erroneous. On costs it submitted that the trial court had given directions on filing of written submissions. The appellant filed his late and never offered a reason for the delay and had thus breached a court order. The respondent further submitted that costs in Employment and Labour Relations Court actions do not follow the event unlike in other ordinary civil proceedings. Indeed, they are discretionary. They are only awarded in the rarest of the cases. It relied upon the findings in **Hellen Waikunu v Dotsavvy Limited v Kenya Ports Authority (2013) eKLR** where the court held that under the Industrial Court Act costs are discretionary and do not follow the event. That the court acted within **Section 12(4)** of the Industrial Court Act and did not therefore abuse its discretion.

From the written and oral submissions made, there are essentially two issues for determination in this appeal. The appellant appears to have conceded and or accepted the finding by the Judge on the question of severance pay as he did not address it in his written submissions nor during the highlights. We need not therefore address that complaint. The two issues are whether the Judge erred in;

i. awarding only one month salary for unfair termination, and secondly,
ii. failing to award costs to the appellant

With regard to the complaint by the respondent that the court had pleaded on behalf of the appellant and granted an award not asked for and that the parties are bound by their pleadings and prayers, we note that the respondent has not filed a cross appeal, though it is calling upon us to interfere and set aside the award of one month salary for unfair termination. **Rule 93 (1)** of the Court of Appeal Rules is clear that:-

**"(1) A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, or to make in that event, as the case may be."**

From this provision, the jurisdiction that the respondent is asking us to exercise can only be invoked when there is a cross-appeal. As none was filed we must therefore resist the appellant's invitation to annul the one month's salary ordered as compensation or indeed any other award of damages.

Turning to the first issue, it would appear that the remedy for unfair termination is discretionary. The Employment Act **Section 49(1)** provides:-

**"Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer** may recommend **to the employer to pay to the employee any or all of the following-**

**(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;**

**(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or**

**(c)** 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**."** *(emphasis added)*

The role of the court in granting remedies is provided for under **Section 50** of the Act which provides *inter alia* that:-

**"In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of** section 49**.**"

All said and done, whether to and how to compensate a party whose termination of employment is deemed to be unfair and the quantum thereof is solely at the discretion of the trial court.

An appellate court in general is reluctant to interfere with the exercise of discretion by the trial court. The predecessor of this Court, in the case of **Mbogo v Shah** (Supra) rendered itself thus on the subject, as per **Sir Clement De Letang VP***:*-

**"I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion**."

This Court also held in **Caroline Elsa Anne Sturdy v John Greaves Hilder [1984] eKLR**") per **Nyarangi, AG. J. A.** (as he then was) that:-

"It **would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's decision would have been different**."

Our attention has not been drawn to any misdirection by the trial court that may have led it to act on matters it was not called to act upon or failed to consider matters it ought to have considered. Had this been the case, we would intervene. Certainly this is not the case. But was the termination of the appellant's employment unfair"

The appellant was dismissed from service as a locomotive driver for gross misconduct when he failed to report on duty after being summoned by his supervisor on phone. Apparently he was unable to answer the phone call as it had mistakenly been put on silent mode by his son who had been playing with it. As

a result he received a notice to show cause letter dated 13th February, 2013 regarding those events. He responded to it and a disciplinary hearing was conducted and concluded four months later on 2nd August, 2013 with his dismissal. The court found in so far as procedural fairness as per **Section 41** of the Employment Act was concerned, the respondent could not be faulted. Nonetheless, the court determined that the dismissal was unfair. In order however to determine whether or not the dismissal was unfair there has to be established a breach of either procedural fairness or substantive fairness or both in terms of **Section 45(5)** of the Employment Act. The trial court found that the events leading to a disciplinary hearing on 20th February, 2013 were properly dealt with. This is a finding of fact. Again, it is the practice of this Court not to interfere with findings of fact. See **Mary Njoki v John Kinyanjui Mutheru [1985] eKLR** where the Court rendered itself thus:-

**"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484."**

This Court did in fact deliver itself further thus in the case of J**. S. M. v E. N. B. [2015] eKLR:**-

"**We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."**

The trial court found that the appellant had failed to answer his cell phone summoning him to work as had always been the practice and so he failed to turn up for duty. It further found that conduct warranting summary dismissal is that which would undermine "*the confidence and trust expected in an employment relationship*" a question of fact again. At the trial the appellant testified that his cell phone was charging when his son played with it and inadvertently put it on silent mode and without the appellant realizing, he turned in and woke up at about 4.00 am when he noted 10 missed calls from his supervisor registered on his cell phone. The court found that the respondent had established a system where the locomotive drivers would await such calls in order to report for duty. Even after seeing the several missed calls, the appellant never made efforts to contact the respondent. Given these set of circumstances and the appellant having been taken through the due process, we cannot see how then the decision to dismiss the appellant can be said to have been contrary to justice and equity.

In reaching its conclusion that the dismissal was unfair, the court based its decision on the lack of substantive fairness. **Section 47(5)** of the Employment Act requires the employer to justify the grounds for termination. It provides *inter alia*:-

**"For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."**

On the evidence on record, we are satisfied that the respondent did discharge the burden placed on it when it made the ultimate decision to dismiss the appellant from its employment. Indeed, this was not

the only incident that the appellant had been found wanting in the discharge of his duties. We also note that the court was alive to its limits when considering the issue. The court observed:- *But the court should not substitute its decision for that of an employer but to determine whether the decision to dismiss was valid and fair within the circumstances of the employer."*

Under **Section 12(4)** of the Employment & Labour Relations Court Act it is provided that: -

**"In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just."**

The couching of the provision gives the trial court discretionary powers to award costs or not. The costs in these kind of claims do not automatically follow the event unlike other civil claims. The court gave reasons for declining to award costs to the appellant, stating that he did not comply with the directions of court as to filing and service of written submissions and only did so long after the respondent had filed. The appellant did not offer any explanation and the argument that he was not involved in the filing of the submissions is of no consequence. He was represented by counsel and counsel did not offer an explanation to the trial court that would perhaps have persuaded it to exercise its discretion in the appellant's favour. The court was therefore within its powers to exercise its discretion as it did and we cannot therefore interfere with that decision.

The upshot is that the appellant has not succeeded in this appeal. It is accordingly dismissed with costs.

**Dated and delivered at Mombasa this 4th day of December, 2015.**

**ASIKE-MAKHANDIA**

**…….**

**JUDGE OF APPEAL**

**W. OUKO**

**…….**

**JUDGE OF APPEAL**

**K. M'INOTI**

**……..**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**