IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI & KANTAI, JJ.A)

CIVIL APPEAL NO. 146 OF 2013

UNITED STATES INTERNATIONAL

UNIVERSITY.....APPELLANT

AND

ERIC RADING OUTA .....RESPONDENT

*(Being an appeal against the award and order of the Industrial Court at Nairobi (**Mukunya, J.**) delivered on 30th December, 2011*

in

Industrial Cause No. 82 of 2011)

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JUDGMENT OF THE COURT

The Respondent, **Eric Rading Outa**, sued the appellant, **United States International University** at the Industrial Court (now re-named Employment and Labour Relations Court) at Nairobi. It was stated in the statement of claim amongst other things that the respondent was employed by the appellant as its Vice Chancellor, Finance and Administration through a letter dated 20th December, 2004. It was further claimed that on 3rd January 2010 the respondent was summoned by the appellant's Vice Chancellor and was given two options: to either resign or be sacked, and that because the respondent refused to take the option of resigning, his services were terminated the same day. His claims were denied by the appellant in a statement of defence filed in that court.

The matter was heard by Justice Isaac E.K Mukunya who delivered an award on 30th December, 2011 where it was ordered that the respondent be reinstated to his office forthwith at the salary he was earning at the time of termination and it was further ordered that the respondent be paid twelve (12) months' salary as compensation for wrongful, unfair and unlawful termination.

Those are the orders that have provoked this appeal. Being a first appeal, it is our duty as a 1st appellate court to re-evaluate the evidence, reappraise the same and come to our own conclusion, always remembering that we did not see or hear the witnesses - see, for instance, for an enunciation of these principles that govern the jurisdictional aspect of a first appeal, **SELLE & ANOTHER v ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] E.A. 123** where the following holding appears at p. 126:

"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must 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. In particular this Court is not bound necessarily to follow the judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or possibilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

In oral evidence tendered in court, the respondent reiterated the matters we have already stated, stating further that the termination of his employment was contrary to law and was also contrary to the Staff Handbook which governed the relationship of employer/employee on matters of employment and termination of service of employees.

Mrs. Frida Brown, the appellant's Vice Chancellor testified that the respondent's employment was terminated because of non-performance of his duties. She confirmed in evidence that non-performance of an employee fell within the category of "*minor misconduct*" in the Staff Handbook. She also confirmed that the disciplinary procedure set out in the said handbook as related to minor misconduct was not followed. Two other witnesses testified on behalf of the university, but it is not necessary to repeat their evidence here as nothing turns on it in this appeal. The learned judge evaluated the evidence and reached the conclusion that the appellant did not follow its own procedures on disciplinary matters for employees and therefore made the orders that we have adverted to.

There are nine (9) grounds of appeal in the memorandum of appeal drawn for the appellant by its advocate. The learned judge is faulted for holding that the termination of the respondent's employment was unfair and wrongful and for issuing the order of reinstatement. The learned judge is further faulted for making the order for damages in the sum of 4,862,400/= as compensation and that those damages were excessive. The learned judge is also faulted for failing to appreciate a common law principle that there should be no order for specific performance in a contract for service except in exceptional circumstances. It is also said that the learned judge erred in failing to appreciate the impracticability of issuing an order for reinstatement. It is also said in the memorandum of appeal that the learned judge did not consider the evidence tendered by the appellant and that he ignored the defence. The learned judge is finally faulted for ordering that each party bear their own costs. It is therefore prayed that the appeal be allowed and that the case in the lower court be dismissed.

This appeal came up for hearing before us on 3rd October, 2016 when learned counsel Mr. James Ochieng Oduol assisted by Mrs. Maryshiella Oduor appeared for the appellant while learned counsel Mr. Oluoch Olunya appeared for the respondent. Learned counsel for the appellant submitted that the learned judge erred in making an order for reinstatement while at the same time ordering an award of damages when the two remedies had been sought as alternatives. According to learned counsel, reinstatement should not be ordered as it was contrary to provisions of the **Employment Act**. Learned counsel also faulted the judge for awarding what counsel thought were excessive damages. According to learned counsel, the appellant was entitled to terminate the respondent's services for misconduct and for lack of performance.

Mr. Olunya in opposing the appeal submitted that because the respondent had not been given a fair hearing, a notice not having been served, termination was unlawful and the trial court was entitled to make the orders that it did. Learned counsel was of the view that alternative prayers can be granted at the same time. In any event according to counsel, no evidence had been placed before the court to show the misconduct that the respondent had been accused of.

We have considered the record of appeal, the written and oral submissions by counsel and the cases cited and the law and have come to the following view of this appeal. According to him, the respondent was summoned on 3rd January, 2010 by his immediate supervisor, Vice-Chancellor Frida Brown (DW1) and given the option of resigning forthwith or his services would be terminated immediately. He refused to resign and a termination letter was handed to him where he had not previously been given any reasons for termination, and according to him, there were no valid reasons why his employer was taking such action.

Frida Brown in evidence before the trial court testified that she justified the respondents' termination as she handed him the termination letter on the date of termination of employment. She confirmed that the offence that the respondent was accused of fell within a category of "*minor misconduct*" in the Staff Handbook that governed employment matters.

The letter of offer (letter of employment) signed by the Vice-Chancellor and the respondent did not contain a provision on termination of employment but instructed the respondent to:

"Please stop by the Human Resources Office to complete personnel forms and pick a copy of employee handbook which stipulates other terms and conditions of service ---"

That Staff Handbook had provisions relating to a situation where an employee could resign, discharge/termination of employment, summary dismissal, retirement and redundancy. An elaborate disciplinary procedure was then set out and "*minor misconduct*" was defined to be:

"1. Absence from duty without showing proper cause or without reporting the absence in a timely manner;

2. Inattention to punctuality regarding Official Working hours;

3. Failure to repay or justify advances or loans from the organization within the stipulated timed period;

4. Failure to carry out all duties as listed in the job description

5. Malingering."

Major misconduct was also defined but in view of the evidence tendered where the appellant confirmed that the offence charged was for minor misconduct we need not go there at all.

Where minor misconduct was alleged of an employee, the Staff Handbook required that the employees' immediate supervisor should investigate the facts along given guidelines which included taking a statement from the employee; the supervisor was also to record a statement and interview witnesses or any corroborative information was to be recorded. An investigative report was thereafter to be compiled by the supervisor and interview submitted to the Human Resource Manager who would study it and advise the appropriate action. During that period the employee was to continue performing his duties pending the finalization of the disciplinary process. That disciplinary process was indeed in accordance with the **Employment Act, 2007**.

In the letter dated 3rd January, 2010 terminating the respondent's employment, various allegations were made pertaining to the respondent's ability to lead the finance office but there was no evidence produced to show that the appellant had taken issue in any way with the respondent's performance of his duties before that day. Instead, what we see is a letter (probably wrongly) dated 9th November, 2010 where the respondent's title and salary were elevated and documents showing evaluation of performance of duties where the respondent was evaluated positively by the respondent's Vice-Chancellor, the very same person who issued the termination letter on 3rd January, 2010.

Having evaluated all these matters and in the absence of any evidence by the appellant to show that it had in any way taken issue with the respondent's performance of his duties the learned trial judge was satisfied that the appellant had, in terminating the respondent's employment without any notice, ignored the disciplinary procedure set out in the said Staff Handbook and the law and that such a decision had to be reversed. We agree. There was good reason in the employer/employee relationship that obtained in the matter that the same be governed by an agreed set of rules and regulations which the two parties had contracted to abide by when the respondent was employed by the appellant to serve it in a fairly senior position of Deputy Vice Chancellor, Finance and Administration. Upon assuming office the respondent, who reported directly to the Vice Chancellor, Frida Brown, had his performance evaluated twice and he scored highly on both occasions. His salary was even increased, which could not be the case if the appellant had issues with his performance. It was therefore wrong for the said Frida Brown to summon the respondent on 3rd January, 2010 and give him the ultimatum to resign forthwith or be sacked. No notice was served; the respondent was not asked to show cause why disciplinary action should not be taken for alleged misconduct then unknown to him; nothing at all. The said Vice Chancellor totally ignored the very elaborate disciplinary process set out in Staff Handbook and in the

event acted contrary to law. An institution like the appellant should not treat its senior employee, or any employee for that matter, with such callousness where the options given to an employee are between the frying pan and the fire. We, therefore, on our own analysis of the evidence and available material conclude this aspect of the matter by agreeing with the learned trial judge that the appellant's termination of the respondent's employment was wrong.

The learned trial judge proceeded, upon finding that termination of the respondent's employment was wrongful, to order reinstatement and an award of damages for wrongful termination. The appellant complains in the memorandum of appeal and in submissions before us, that the order for reinstatement of the respondent to office was wrong and further faults the learned judge for making the said award for damages.

The **Employment Act, 2007** has elaborate provisions on the manner in which formal employment may be terminated by either party to an employment contract. It provides at **Sections 35** and **36** thereof that a contract to pay salary monthly may be terminated by either party giving a 28 days' notice to terminate employment or paying to the other party remuneration for that period of notice. Where a contract of employment has been unfairly terminated there are provisions on how the issue is to be dealt with including a provision on how a dismissed employee may make a complaint to a labour officer and the way the dispute is to be handled. Remedies available to an employee who has been dismissed unfairly include a recommendation by the labour office to the employer to: pay the wages which the employee would have been entitled to under the contract of service; where dismissal terminated the contract before the completion of any service upon which the employees' wages become due, the proportion of the wage due for the period of time for which the employee has worked and any consequent loss upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice which the employee would have been entitled to by virtue of the contract; or 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.

The other remedy that the labour officer may recommend to an employer is a reinstatement of the employee to the previous position or to another position comparable to that which the employee had been employed prior to dismissal. The Act also gives guidelines to the labour officer which he should consider in making the said recommendations.

It was common ground in the matter before the trial court that the respondent was employed by the appellant in a senior position of Deputy Vice Chancellor, Finance and Administration. He reported to the Chief Executive Officer of the appellant, the Vice Chancellor. Of his relationship with his immediate boss the respondent told the trial judge:

"--- I was targeted for removal. I was considering contesting the position of Vice Chancellor ---"

and

"---- the university refused to have any dialogue --- I did not have any personal vendetta with Vice Chancellor. We had disagreements over issues of taxation of several employees e.g. Brother Sincotta and to her ---"

The learned judge considered that and the other evidence but still held the view that the respondent was entitled to a reinstatement order and that once reinstated the respondent could be redeployed to any other department and not necessarily the Finance and Administration docket. He held this view even in the face of evidence by the Vice Chancellor that:

"--- His position and responsibilities have been taken by a Chief Accountant. He cannot be reinstated. The financial performance improved since he left as well as the other departments he had oversight ---"

Mr. Ochieng Oduol, learned counsel for the appellant, submits that it was wrong for the learned judge to order reinstatement when the respondent had also prayed for damages in the alternative.

We have gone through the judgment of the trial judge and have considered the various provisions of the **Employment Act 2007**. The learned judge was entitled to find as he did that the appellants' termination of the respondents' employment was wrongful but having done so, he should have evaluated the matter carefully before ordering reinstatement of the respondent to employment. As we have shown the respondent occupied a fairly senior position at the university where he reported directly to the Vice Chancellor and there was evidence by the Vice Chancellor that the position previously occupied by the respondent had been redesigned and was occupied by a holder who, according to the Vice Chancellor, was performing his duties as required by the appellant. The learned judge did not evaluate the evidence on this aspect and we think that had he done so he would have come to the conclusion that it was not appropriate in the matter before him to order reinstatement. In a situation where the respondent had lost a senior job at a teaching institution it was wrong for the learned judge to order reinstatement. There was no evidence that the respondent could be redeployed to any other position and there was direct evidence that the respondent's previous position had been redesigned and was occupied by another officer. There was no evidence that there was any similar position to which the respondent could be redeployed within the university. In addition, there was evidence that the respondents' relationship with the Vice Chancellor had become bad and it is doubtful that the two could work together again. We think we are justified to fault the learned judge for failing to consider all these and other relevant factors in ordering reinstatement. To this extent the appeal succeeds and we set apart that part of the judgment where the learned judge ordered that the respondent be reinstated by the appellant to employment.

The learned judge awarded damages for wrongful termination in the sum of Kshs.4,862,400/= being 12 months' salary.

As we have shown in this judgment the **Employment Act 2007** allows a labour officer to recommend to an employer who has wrongfully terminated an employee from employment to recommend payment of

salary not to exceed 12 months' salary last earned by the employee.

Learned counsel for the appellant submits that the said award was excessive but learned counsel for the respondent thinks otherwise.

The award of salary at 12 months of last salary earned by the appellant was allowed in law but was it justified in the matter before the trial judge"

After finding that the termination of the respondents' employment was wrongful the learned judge proceeded to order the said award but did not assign any reason why he thought that an award in the maximum number of months allowed in law was appropriate in the case before him.

We are, of course, aware that a question on an award of damages is at the discretion of the trial judge and that, as was stated in **Mbogo & Another v Shah [1968] EA 93**:

""A Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice …"

The principles which guide an appellate court in this country in an appeal on award of damages are now well settled. In **KEMFRO AFRICA LTD v LUBIA & ANOTHER**, (No. 2) 1987 KLR 30, Kneller JA identified the principles as follows:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."

In the recent case of **Peter M. Kariuki v Attorney General [2014] eKLR** it was stated by this Court that:

"***It is trite that this Court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a large sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

The sole question that arose for the determination of this Court in Civil Appeal No. 314 of 2000 **Johnson Evan Gicheru v Andrew Morton & Anr [2005] eKLR** was whether the damages awarded in a defamation case were too low as not to represent a proper award in the premises. This Court considered the evidence and circumstances where the appellant, who was Chief Justice, was awarded

Kshs.2,000,000/= was too low and the court was entitled to interfere and enhance the award.

In the instant appeal the learned trial judge gave a maximum award of 12 months' salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made.

Although we have found, like the learned judge, that the appellants' termination of the respondents employment was wrongful, we find, on our own consideration of the matter, that the learned judge erred in making a maximum award. He did not assign any reason for doing so and in the event he fell into error by not considering any or any relevant factor that should have guided him to make an award of compensation for wrongful termination of employment. To this extent, we agree with learned counsel for the appellant that the award of 12 months' salary as compensation for wrongful termination of employment was wrong in the circumstances of this case. The award was excessive and did not reflect a proper assessment of what should have been awarded. For these reasons we are entitled to interfere with the discretion of the learned judge and we do so by setting aside the award of 12 months' salary as compensation to the respondent and substitute therefor an award of 3 months' salary last earned by the respondent in the office he held with the appellant.

In the premises the appeal partially succeeds in that we have set aside the order for reinstatement and have interfered with the award on compensation for wrongful termination of employment.

On costs we think in the circumstances of this appeal that each party should bear their own costs here and below.

It is so ordered.

DELIVERED and DATED at Nairobi this 2nd day of December, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR