IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME, JJ.A)

CIVIL APPEAL NO. 15 OF 2014

BETWEEN

NAIMA KHAMIS ……..…APPELLANT

VERSUS

OXFORD UNIVERSITY PRESS (E.A) LTD…….RESPONDENT

(Appeal from the judgment/award of the Industrial Court of Kenya at Nairobi (Rika J.), dated 19th October, 2012

in

Industrial Court of Kenya Cause No. 595 of 2010)

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JUDGMENT OF THE COURT

This is an appeal from the judgment/award by the Industrial Court Nairobi (Now Employment and Labour Relations Court) Rika J. dated 19th October, 2012. In the said suit, judgment was entered in favor of Naima Khamis (appellant) as against Oxford University Press (E.A) Ltd (respondent) as follows;-

“(a) The termination of the claimant’s contract of employment was substantively justified, but procedurally deficient and therefore unfair under section 45 of the Employment Act;

(b) The respondent shall pay to the claimant compensation at 5 months’ gross salary adding up to Ksh 908,710/= within 30 days of the delivery of this Award

(c) Other prayers are rejected as explained in the body of this Award.”

This is the order that has provoked the instant appeal. We will briefly set out the background facts, which are fairly straight forward so as to put this judgment in perspective. By a letter of appointment

dated 3rd February, 1978, the appellant was engaged in the respondent's employ as a copy typist. She progressively worked for the respondent for the next 32 years, ultimately rising to the position of warehouse assistant. As at the time her services were terminated her monthly salary was Kshs. 181,782/-. The appellants' problems started in January, 2009 when she was issued with a warning letter cautioning her for being disrespectful to other managers. Another letter followed in August, 2009 in which she was warned against carting away office equipment from the office premises. On 8th September, 2009, the appellant received yet another warning letter reprimanding her for releasing a customer's correspondence entrusted to her which were allegedly found in the hands of the respondents' competitor. Perhaps demoralized by these series of warning letters, and reprimands, the appellant's performance deteriorated so rapidly that she was rated below average. What eventually broke the proverbial camel's back was the notice dated 30th March, 2010 that terminated the services of the appellant.

Aggrieved by this turn of events, the appellant lodged a claim at the Industrial court (now the Labour and Employment Relations Court) seeking remedies for termination which she termed unprocedural and substantively unfair. In particular, she contended the termination was malicious and done without proper notice or justification. Consequently, she sought the following remedies:

a) Reinstatement to her previous position/job without any loss of benefits.

b) In the alternative, payment of all the lawful terminal dues made out as follows:

i) 32 years' service pay at the rate of Kshs. 181,782 per month ……..Kshs. 5,815,744/-

ii) 2009/ 2010 yearly bonus …….....Kshs. 181,782/-

iii) Medical cover reimbursement for the period January- March, 2010....Kshs 10,500/-

TOTAL **Kshs. 6,007,786/-**

c) Damages for and/or unlawful termination.

d) Maximum 12 months' compensation for wrongful dismissal.

e) Costs of the suit with interest thereon.

The respondent filed its memorandum in response to the allegations raised by the appellant and denied all the allegations that the termination was predicated on malice or bad faith. The respondent contended the appellant was paid one month salary in lieu of notice in accordance with the contract of employment. They recited certain instances where the appellant was accused of misconduct and poor performance. As a result of deteriorating performance and poor working relationship with other managers, the respondent claimed due process was followed when the appellant's employment was terminated.

The matter was heard, with the appellant calling two witnesses while the respondent called one witness in support of their respective positions. Upon considering the evidence and by a judgment/award delivered on 19th October, 2012, the learned trial Judge, **Rika J.,** ruled in favour of the appellant in part. Though the learned Judge disallowed all the other prayers, he nonetheless awarded the appellant a sum Kshs. 908,710/- as compensation for unfair termination as per **section 45** of the Employment Act. In coming to this conclusion, the learned trial Judge was of the view that the termination was substantively fair but procedurally unfair; hence the award of 5 months' salary for unfair termination. This is what the learned Judge posited in a pertinent portion of the said award;-

"…The Court finds that there was substantive justification in the termination of the contract of employment of Naima Khamis, by Oxford University Press Ltd. (sic) **was it procedurally fair" The issuing of cautions and warnings; the convening of meetings pursuant to these cautions and warnings; and the reporting of the employee's failures by her supervisor to the next senior officer in the chain of management, do not in themselves constitute a fair hearing…**

Section 41 of the Employment Act requires that before terminating a contract of employment other than a probationary contract of employment, on the grounds of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language understood by the employee the reason for which the employer is considering termination. The employee has a right to be accompanied by another employee, or have a shop floor union representative of his choice present during the explanation…"

The learned Judge, in our view, fastidiously considered each and every remedy sought by the appellant and gave very cogent reasons for each of the prayers. As regards reinstatement, the Judge found this unviable given the appellant's attitude towards work and her failure to perform. She was described by the Judge who saw and heard the evidence as "**disloyal, incompatible and refused to give her all in the last days, scoring 25% mark in performance appraisal"**.

Although the termination was justified, the process was faulted, meaning the remedies of reinstatement and contractual damages were rejected because the only injury the appellant was found to have suffered was unfair procedure because she was not given a hearing in the presence of a witness. In addition, given the appellant's proven lackluster performance, she was equally undeserving of the bonus pleaded and further, she never proved that the contract between the parties provided for service pay and medical reimbursement, those prayers too were disallowed. Lastly, on costs, the court held the same to be discretionary and declined to award the appellant any.

Dissatisfied with a part of aforesaid decision, the appellant is contending in her memorandum of appeal that the learned Judge erred; in holding that termination of employment was substantively justified but procedurally improper, contrary to the evidence on record; by awarding low compensation in the sum of Kshs. 908,710/- being 5 months' gross salary instead of the 12 months' salary envisaged by **section 16 (c)** of the Labour Institutions Act 2007 and **section 12 (vi)** of the Industrial Court Act No. 20 of 2011; by failing to appreciate the law and analyze the evidence and pleadings; and lastly, by failing to award costs of the suit to the appellant.

On its part, the respondent filed a notice of cross appeal, contending that the award ought to be reversed as the learned Judge erred in holding the termination was procedurally unfair; holding that the respondent was liable notwithstanding the court's finding that the termination was justified; in awarding a sum that was manifestly excessive in the circumstances and generally giving an award that went against the weight of the evidence.

Counsel filled written submissions, and during plenary hearing, respective counsel made oral highlights. **Ms. Guserwa** learned counsel for the appellant faulted the reasons given by the respondent to support the termination; she submitted that non-performance and the allegation that appellant carted away some work documents from the company offices were made against the appellant several months before the termination for which the appellant had already been punished for; using the same complaints to justify the appellants termination several months later amounted to double jeopardy. In addition, counsel stated that under **section 45** of the Employment Act, the reasons for termination were flimsy infractions that did not amount to valid reasons, nor were the same proven and that all in all, the learned Judge failed to follow the provisions of **section 49** of the Employment Act. In conclusion, counsel for the appellant faulted the quantum of damages awarded which was too low, given that the law provides for upto12 months' compensation particularly in light of the 32 years the appellant had worked for the respondent.

Mr. Michuki learned Counsel appearing for the respondent, supported the appellants' termination which in his view was lawful and was supported by evidence of non-performance, disloyalty of the appellant coupled with a negative attitude. According to counsel for the appellant, the learned Judge exercised his discretion fairly based on factual evidence of documented process of warning letters and other reprimands that clearly proved the decision to terminate the appellant's contract was lawful; thus the learned Judge properly exercised his discretion in the face of the evidence and this Court cannot justifiably interfere with the trial Judges exercise of discretion. Counsel relied on the decision in **Kenya Airways Ltd. v. Aviation and Allied Workers Union & 3 others [2014]**

in support of the aforesaid preposition. Counsel urged us to dismiss the appeal and allow the cross appeal.

Having regard to the grounds of appeal, the evidence before the trial court, the entire record of appeal and submissions made before us, the issues that fall for our determination are;-

(a) Whether the trial Judge erred in holding the termination of the appellant was substantively fair except for the procedure that did not allow the appellant an oral hearing of the reasons for termination.

(b) Whether the award of 5 months' salary instead of 12 months was reasonable.

(c) Whether the appellant, having succeeded partially was entitled to be awarded with costs

(d) Whether the cross – appeal should be allowed by dismissing the appeal with costs.

This is a first appeal and that being so, we are mandated to reconsider the entire evidence before the

trial court and give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify. (See the case of **Selle vs. Associated Motor Boat Company *(*1968) E.A. 123 at page 126**, where the Court of Appeal held:-

"…….. this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…" See **Jivanji vs. Sanyo Electrical Company Ltd.(2003) KLR 425".**

On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of **Section 43(1)** of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also Section **45(2) (c)** requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.

In a claim for unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests on the employer **(section 47(5)** of the Act). In this case, the memorandum of claim, faulted the termination which the appellant contended was laced with mala fides as she was not given a hearing and the reasons given in the termination letter were flimsy and merely contrived to support an illegal termination. The respondent was accused of maliciously waging a successive and unwarranted harassment by issuing several warnings in a bid to lay a dishonest basis for the appellant's eventual termination. On the other hand, the respondent attributed the termination to the appellant's poor performance, insubordination and irregularly carting away work products and material out of the company premises.

The respondent produced correspondence in support of these contestations. In a long letter detailing the appellant's failings, the respondent lamented the appellant's diminishing output, her insubordination, abuse of office and neglect of duty. This letter was acknowledged by the appellant, who duly gave a response thereto, denying all the allegations leveled against her; but that was deemed unsatisfactory by the respondent. Coupled with the appraisal which saw the appellant's performance pegged at 39%, the respondent decided to terminate the appellant's employment. That appraisal form too, was produced in evidence. The appellant did not deny her poor performance although she denied other allegations.

It is necessary to point out that reasons for termination of a contract are matters that an employer at the time of termination of contract can genuinely support by evidence and which impact on the relationship of both the employer and employee in regard to the terms and conditions of work set out in a contract.

For example poor performance, insubordination and lack of loyalty or commitment are some of the grounds that were alleged to have had an impact on the said contract of employment and which amounted to misconduct. These matters were all laid out in evidence before the learned trial Judge who had the opportunity to see and hear the witnesses. The appellant was given several opportunities to improve her performance but it would appear her loyalty, trust and commitment to the employer had shifted, and no wonder, the tapestry that holds employee/employer relationship had been lost, culminating in a rather unpleasant end for the appellant's many years of service that was brought to an end by a letter of termination under **Section 43(2**) of the Employment Act. Given the circumstances herein, we are unable to fault the learned trial Judge for finding the termination was justified save for the procedural lapses for which the employer was found to have flaunted.

With regard to the submission by **Ms. Guserwa** that the reasons relied on amounted to double jeopardy as the appellant had already been punished for the alleged wrongs, that allegation is misplaced, as it was never pleaded at the trial. It is a new matter that is introduced in the appeal for the first time by way of submissions. It is a well-established rule that pleadings are binding not just on the parties, but on courts as well. As succinctly stated in a comparative case of **Thorp v Holdsworth (1876) 3 Ch. D. 637:**

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

Pleadings therefore give fair notice to the other party and to the court on the issues to be addressed (see also. **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR).** Accordingly, a party cannot be allowed to introduce new allegations by way of submissions; more so at the appellate stage, for neither the trial Judge nor the parties had opportunity to deal with the new issues.

On the procedural fairness of the termination, the respondent in its cross appeal has contested the Judge's findings, saying he ought to have found the termination procedurally proper. However, no evidence was led to show that the respondent had accorded the appellant a chance to be heard prior to dismissal. As rightly found by the learned trial Judge, the termination was procedurally improper. Nonetheless, the reasons for termination were accepted as valid in line with the provisions of **Section 45** of the Employment Act which provides a litany what constitutes a fair termination as follows:

"(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove –

a) That the reason for the termination is valid

b) That the reason for the termination is a fair reason-

i) related to the employees conduct, capacity or compatibility; or

ii) Based on the operational requirements of the employer; and

c) that the employment was terminated in accordance with fair procedure

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

a) The termination is for one of the reasons specified in Section 46; or

b) it is found out that in all the circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider –

a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

b) the conduct and capability of the employee up to the date of termination;

c) The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d) the previous practice of the employer in dealing with the type of circumstances which led to the termination and; and

f) the existence of any pervious warning letters issued to the employee."

Further under **Section 41**, the right of an employee to be heard before being terminated even if gross misconduct is alleged is imperative. The section is in the following terms:

"41. Notification and hearing before termination on grounds of misconduct.

1) Subject to section 42 (1) an employer shall before terminating the employment of an

employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person if any, chosen by the employee within sub-section (1), make".

The above analysis of the statute, taken with **section 45(4) (b)** which requires the employer to act in accordance with the rules of equity when effecting a termination were properly applied by the learned Judge in the instant appeal. We find ourselves agreeing with the conclusions by the learned trial Judge that the termination of the appellant was substantively justified but procedurally defective.

The above finding settles the cross appeal which is bereft of merits but we have to address the crux of this appeal being the issue of damages awarded. The appellant's beef is, damages awarded for the procedural errors where she was not accorded a fair hearing were manifestly low, while the respondent contends that it should not have been issued at all. **Section 49(1)** provides that:-

"**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 decision on how many months' worth of compensation a litigant ought to get under **section 49(1) (c)** above is left to the courts' discretion. Also this court can only interfere with discretionary decisions sparingly. As stated in **Mary Njoki v John Kinyanjui Mutheru [1985] eKLR** :-

"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."

In the instant appeal, it has not been demonstrated that the exercise of discretion by the learned trial Judge was in any way improper or injudicious. This is crucial considering the precedent set in the case of;- in **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."

See also;- **MBOGO –V- SHAH [1968] E.A. 93:**

"…..A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this 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 as a result there has been injustice."

We are not persuaded the learned Judge erred at all in arriving at the conclusion he did by awarding of 5 months salary. The assessment of damages cannot merely be upset simply because another Judge would have issued a higher award. It is not our mandate to merely substitute the Judges conclusion when we have pointed out there was no improper appreciation of the evidence or the law.

This now takes us to the issue of costs of the suit being the last ground of appeal that is urged in the memorandum of appeal although counsel for the appellant made no submissions on it. It is common ground that the appellant partially succeeded with her claim as she was awarded damages equivalent to 5 months' salary although the bulk of other claims were dismissed but the learned trial Judge further in exercise of his discretion ordered each party to bear their own costs. Under **Section 12 (4)** of the Employment & Labour Relations Court Act it is provided that;-

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

The above provision is couched in a manner that gives the trial court discretionary powers to either award costs or decline. Therefore, in our considered view, costs in labour relations claims do not automatically follow the event unlike in civil claims. As emphasized in the body of this judgment, this court will not interfere with an exercise of discretion where there are no demonstrable errors that amount to illegalities.

For the aforesaid reasons we find both the appeal and cross appeal lacking in merit, they are both

dismissed. As we do not wish to set these parties against each other anymore, just like the learned trial Judge, we are minded to order each party to bear their own costs of the appeal and cross appeal.

Dated and delivered at Nairobi this 9th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR