IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), KOOME & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 123 OF 2018

BETWEEN

OVERDRIVE CONSULTANTS (K) LTD.....APPELLANT

AND

MAZHAR SUMRA.....RESPONDENT

(Being an appeal against the Judgment and Decree of the Employment and Labour Relations Court at Mombasa (O.N. Makau, J.) dated 6th April, 2018 in ELRC No. 738 of 2016)

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JUDGMENT OF THE COURT

By a written contract dated 26th November, 2014, the respondent was employed by Overdrive Consultants Limited as a technical director for a period of 3 years from 1st December, 2014 earning a salary of Kshs. 100,000 which would be reviewable every 6 months.

According to the respondent, sometime in February 2015, he noticed that the appellant had changed its name from Overdrive Consultants Limited ("Overdrive 1") to Overdrive Consultants (K) Limited (the appellant) without prior notice. The only addition to the original company was letter (K). As a matter of fact, all else remained the same; the company address, letterhead logo and directorship. It was the respondent's position that, despite the changes, he was in the dark; that he was never given a new contract and his terms of employment remained the same. He continued to be in charge of the the Nairobi Branch and took care of the technical teams in Mombasa.

On 10th May, 2016, the respondent received a notice of termination of employment from the appellant on grounds that he was resistant to growth, had exchanged unethical emails with the director and declined to honour the chain of command. The respondent filed a claim before the Employment and Labour Relations Court (ELRC) in which he asked the court to find that his termination was unfair for the reason that he was never invited to any disciplinary hearing. As a consequence of that termination, he applied for: 3 months' salary *in lieu* of notice, compensation for unfair termination, service pay, accrued leave, unpaid salary, general damages for breach of contract, certificate of service and costs of the suit.

The appellant, for its part, through its Director, Keval Devani conceeded that the respondent was employed from December 2014 to May 2016 but insisted that it was a term of employment that either party could terminate the contract by giving the other 3

months' notice; that as a result of a disagreement in management of the Overdrive 1, he registered the appellant, a separate entity from Overdrive 1; that for a period of about 8 months, the two companies operated under one roof until the appellant got its own offices; that after breakup, some of the employees continued to work for Overdrive 1 while others moved with the appellant; and that the respondent was one of the members of staff who moved and continued to work with appellant earning a monthly salary of Kshs. 100,000.

In August 2015, the respondent was transferred to Nairobi. A few months later, in November 2015, the appellant employed Mr. Imtiaz as the General Manager and transferred him to Nairobi in December 2015; that the relationship between the respondent and the new General Manager was virulent. The main accusation against the respondent was that of insubordination. It was alleged that he exchanged an infromal email chat with the director.

The appellant commenced the disciplinary process by issuing to the respondent a 30 days' notice of termination of the contract in accordance with the Employment Act since there was no formal contract between it and respondent thus insisting the termination was fair and regular.

The ELRC identified 4 issues as being in controversy, namely, as between Overdrive 1 and the appellant, who was the respondent's employer from 1st December, 2014 to 10th May, 2016"; what were the respondent's terms of employment"; whether the termination of the respondent's employment was procedurally and substantively unfair; and whether the respondent was entitled to the reliefs sought.

On the basis that the contract of employment commenced on 1st December, 2014, the same time the appellant was registered, the learned Judge had no difficulty in concluding that the appellant and not Overdrive 1 was the respondent's employer; and that according to that contract, the notice period for termination remained 3 months and a provision for 21 leave days per year.

The learned Judge found that, by reason of the respondent's insubordination, that the termination of his employment was justified. However, the appellant did not follow procedure laid down in **section 41** of the Employment Act; and that the respondent was not heard before the termination. For this specific reason, judgment was entered in favour of the respondent in the sum of Kshs. 1,115,384.65 plus costs and interest made up as follows:

i. Kshs. 300,000 being 3 months' salary in lieu of notice;

ii. Kshs. 600,000 being 6 months salary compensation for unfair termination;

iii. Kshs. 126,923.10 being accrued leave between December 2014 and May 2016;

iv. Kshs. 38,461.55 being 10 days salary from 1st to 10th June, 2016;

v. Kshs.50,000 being service pay for 1 year at the rate of 15 days salary per year; and

vi. A certificate of service.

The finding of liability and the above award aggrieved the appellant who lodged this appeal on 7 grounds which Mr. Bwire, learned counsel for the appellant, condensed and argued as two. In the first place, he submitted that the learned Judge was in error for holding that the lawful procedure to terminate the respondent's employment was not followed.

Secondly, he argued that the Judge failed to appreciate that the appellant and Overdrive 2 were two distinct companies by treating them as one and the same; that while there was a written contract of employment between the respondent and Overdrive 1, there was no such contract between the appellant and the respondent; that as at 26th November, 2014 when the contract with Overdrive 1 was signed, the appellant that was incorporated on 2nd December, 2014 had not been registered.

On the contractual terms, the appellant posited that the 3 months' salary in lieu of notice was only in relation to the contract between the respondent and Overdrive 1 and reiterated that there was no privity of contract between it and the respondent; that, in any case, it was erroneous for the learned Judge to award 6 months' compensation for unfair termination since the respondent had himself expressed satisfaction with the termination and described it as "good news" because he had, during that very period, received a letter of appointment to another organization; and that in addition, the respondent had even started a rival company called "Exfinity Limited".

It was submitted further that, since the contract was for 3 years, and the respondent having served for only one year and a few months, an award of the 6 months as compensation was excessive; that the principles for awarding damages set out in the Employment Act were not followed; and lastly, that the 12 days of leave that the respondent had taken were not considered in awarding him Kshs. 126,923.10 for leave accrued.

Opposing the appeal, Ms. Mboku, learned counsel for the respondent, urged us to dismiss the appeal for lack of merit and uphold the learned Judge. In her view, the appellant was the respondent's employer; that the respondent's contract was dated 26th November, 2014 which was 4 days before the registration of the appellant; that the respondent continued to work without being informed that a new company had been incorporated; that the only thing that changed was the introduction of the word "(K)" to the original company since everything else remained the same, including the directors and offices; and that the appellant ought to have issued the respondent with a new letter of employment.

Regarding the termination, it was submitted that the same was unfair for not complying with **section 41** of the Employment Act.

Learned counsel asked us not to interfere with the award of damages since, in her opinion, the learned Judge properly exercised h discretion by applying the provisons of **section 49** of the Act. Finally, it was submitted that the 3 months' notice was provided in the contract.

Before we consider those grounds, we remind ourselves that our duty on a first appeal is, in the first place, to analyze and re-assess the evidence on record so as to reach our own independent conclusions on the evidence and the law. See: **Selle vs. Associated Motor Boat Co.** (1968) EA 123. The trial court, having heard and seen the witnesses, we will be slow to disturb its findings of fact unless the findings are based on no evidence. **See: Ephantus Mwangi vs. Duncan Mwangi Wambugu** (1982-88) 1 KAR 278.

Taking into consideration these rival submissions, it is our view that the determination of this appeal rests on: whether there was a contract of employment between the appellant and the respondent; whether the termination of the respondent's employment was lawful and whether the respondent was entitled to the damages awarded.

Basing his determination of the first question on the contract of 26th November, 2014, the learned Judge explained that there was no evidence that the respondent was aware of the incorporation of the appellant; and that,

"...on a balance of probability, therefore, I have formed the view that Rw1 engaged the clamant with the sole intention of working in the respondent company. The reason for the foregoing view is that the contract they signed on 26.11.2014 was to commence on 1.12.2014, the same time when the respondent was registered. It would appear without any doubt that the claimant never worked for the Overdrive Consultants Limited. The foregoing view is fortified by the fact that Rw1 stated in his testimony that the claimant joined the respondent in December 2014. Consequently, I hold that claimant's employer

from 1.12.2014 to 10.5.2016 was the Respondent."

We really have no difficulty, from the totality of the evidence on record, in reaching the conclusion that the aforesaid contract of employment of 26th November, 2014 was between the respondent and Overdrive 1; that that contract was signed by Mr. Keval Devani, the director of the appellant, in his capacity as the Director of Overdrive 1. The contract was to commence on 1st December, 2014 for a period of 3 years. At this point, the appellant was yet to be incorporated. This is evident from its certificate of incorporation which shows that it was incorporated on 2nd December, 2014, some 5 days after the respondent had signed a contract with Overdrive 1 and 1 day after the commencement of the said contract.

As Lord Macnaughton, in the time-honoured House of Lords decision in **Salomon vs. Salomon & Co. Ltd.** [1897] AC 22 reminds us, the company is at law a different person altogether from the shareholders and directors; that though it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them. Though decided over a century ago, **Salomon vs. Salomon** (supra), to this date, still represents the traditional view of separate legal personality under the company law, although a number of exceptions have since evolved.

While we entertain no doubt that at the time the respondent was being employed by Overdrive 1, the appellant was not in existence, by both its conduct and words, there is uncontroverted evidence that the appellant was the respondent's employer. This litigation is in itself proof of that relationship. In defending the action, the appellant admitted that;

"Following the wrangles at Overdrive Consultants Limited and the subsequent registration of the respondent, the claimant was offered employment at the respondent as a technician….that the claimant voluntarily accepted to leave Overdrive Consultants Limited and join the respondent herein".

There could not have been a more direct and unequivocal admission than the oral testimony of the appellant's director that the respondent was employed by the appellant from December 2014 to May 2016. The respondent continued to receive his negotiated salary and commissions from the appellant. The appellant further admitted that, though there was no written contract of employment, the respondent and it were bound by certain implied and express terms. It is those terms that the appellant alleged that the respondent had breached, by acts of insubordination and outrightly being in competition with the appellant, by operating a company engaged in similar business while still an employee of the appellant. It is the appellant, who, by its letter of 10th May, 2016, terminated the respondent's employment.

For all these reasons, and with respect, we could not agree more with learned counsel for the respondent, that the respondent was an employee of the appellant from December 2014. The absence of a written contract of employment did not impair the legal validity of that employment. Indeed, the Employment Act at **section 8** makes it obvious that under it, an employment relationship can be established by either oral and written contracts. It follows from this conclusion that the learned Judge erred in insisting that the contract between the parties herein was the one dated 26th November, 2014.

The next substantive question is whether the termination of the respondent's employment was fair and lawful. For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. Under **section 45(2)** of the Act, termination of employment contract by the employer is unfair if the employer fails to prove that there were valid reasons for doing so and that the procedure for termination was followed.

According to the Judge, by reason of the respondent failing to take instructions from his seniors, insubordination was proved on

a balance of probability; that by the emails exchanged between the appellant's director, the respondent and the newly employed General Manager, the respondent, in a rude and sarcastic tone, dismissed the fact that one Imtyiaz was the General Manager, and therefore his superior.

For these reasons, the learned Judge concluded that the appellant had justified its action and had sufficient reason or reasons for terminating the respondent's employment for misconduct.

Even though the reason for termination was found to be valid, the learned Judge was bound to interrogate whether the right procedure was followed in reaching the determination. In **Kenfreight (E.A.) Limited vs. Benson K. Nguti** [2016] eKLR the Court stressed that:

"Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken.

Looking at the pleadings, the correspondence between the parties and the evidence on record, no reason at all was given to the respondent why his services were terminated. He was not informed of his transgressions. Neither was he given an opportunity to explain himself."

The learned Judge resolved the question stating that the appellant did not follow the mandatory procedure under **section 41** of the Act; and that the respondent's services were terminated without him being heard in the presence of another employee rendering the decision unfair within the meaning of **section 45** of the Act.

It is common factor that the respondent was never invited to explain himself on the allegations. **Section 41** of the Employment Act reads as follows:

"41. (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 subsection (1), make."

Without extending a hearing to the respondent, we agree respectfully with the Judge, that the termination was unfair in terms of **section 45(2)(c)** of the Act.

The only contentious sum awarded in damages, according to the memorandum of appeal, is Kshs. 600,000 being 6 months salary compensation.

Again, we emphasize that assessment of damges is a matter for the discretion of the trial Judge and an appellate court will only interfere with such an award where it is demonstrated that the trial Judge, in assessing the damages, considered an irrelevant factor, or left out a relevant one, or where the amount is so inordinately low or so inordinately high that it must be an erroneous estimate of the damage. See **Peter M. Kariuki vs. Attorney General** [2014] eKLR.

Factors to be considered by a court in awarding damages for unfair termination were set out by this Court in the case of **Ol Pejeta Ranching Limited vs. David Wanjau Muhoro** [2017] eKLR as follows:

"Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act…… In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee."

In awarding 6 months' compensation for unfair termination, the learned Judge considered the fact that the respondent contributed to his termination through his misconduct; and that he welcomed the termination since he had just received a letter of appointment to another organization.

In our considered opinion, in addition to the foregoing, and of great significance, the court ought to have considered the length of the respondent's service which was between 1st December, 2014 to 10th May, 2016, and the fact that there was no actual loss, as the respondent had found another job.

He was also found to be rude and arrogant to his superiors. Basing compensation on 6 months and an award of Kshs. 600,000 was, in the circumstances, excessive.

In the result, this appeal, to that narrow extent, succeeds. We accordingly allow it and set aside the award of Ksh. 600,000 and substitute with an award of Kshs. 300,000.

We award half of the costs of this appeal to the appellant.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

M.K. KOOME

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR