IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 25A OF 2013

BETWEEN

ELIZABETH WAKANYI KIBE …….. APPELLANT

AND

TELKOM KENYA LTD…….. RESPONDENT

(An appeal from the judgment of the Industrial Court of Kenya at Nyeri

(Abuodha, J.) dated 4th June, 2013

in

Industrial Cause No. 2 of 2012)

****

JUDGMENT OF THE COURT

1. By an amended Memorandum of Claim, the appellant filed suit in the Industrial Court wherein she sought the following orders:-

- ***Declaration that the summary dismissal of the claimant (appellant) by the respondent from employment on 13th April, 2010 was wrongful;***

- ***An award of damages for wrongful summary dismissal of the claimant by the respondent;***

- ***Declaration that the termination of the claimant was unfair;***

- ***An award of damages for unfair termination of the claimants employment;***

- ***An award for expected salary from the time of the claimant's wrongful summary dismissal on 13th April, 2010 to 15th July, 2024 being the expected date of her retirement to the tune of Kshs. 34,188,628/=;***

- ***An award of the balance of her retirement fund benefits in the tune of Kshs. 175,417.50/=;***

- ***An award of Kshs 2,271,695/= as expected pension loss from the time of the claimant's wrongful dismissal to the expected retirement period;***

- ***Declaration that without a certificate of service under Section 51 of the Employment Act there was no valid termination of the claimant's employment;***

- ***Costs of the claim.***

2. The appellant was employed by the respondent as a casual telephone assistant on 21st August, 1989 earning a salary of Kshs. 37.40/= per working day. She worked as a casual telephone assistant for a period of 16 months until she was employed by the respondent as a clerical officer III on a permanent and pensionable basis on 1st September, 1990. By a letter dated 26th October, 2009 the respondent gave the appellant a 1st and 2nd warning on the grounds that she had failed to meet her set targets for the second half of the year 2009. In response, the appellant vide an email dated 16th November, 2009 explained that she was unable to meet the targets because in the months of June and July she had been attached to the customer care desk and later proceeded for leave for a period of two weeks in the month of August. On 9th November, 2009 the respondent's Nyeri branch manager informed the appellant that she had been exempted from targets. Based on the foregoing communication, the appellant maintained that the earlier warning letter dated 26th October, 2009 had been cancelled.
3. On or about 1st April, 2010 the respondent informed the appellant that her exemption from targets had been cancelled. On 13th April, 2010 the respondent terminated the appellant's services on the grounds of poor performance, failure to meet deadlines and lateness. The appellant by a letter dated 19th April, 2010 appealed against her termination indicating that she had never received any complaints in respect of the grounds that were cited in the termination letter. By a letter dated 13th May, 2010 the respondent informed the appellant that her appeal had been dismissed.
4. It was the appellant's case that her termination was unlawful and unfair because firstly, the respondent contravened its own disciplinary procedure as set out in its Human Resource Policy Manual. According to the manual, the respondent ought to have prepared a statement giving details of the offences committed by the appellant; the statement and any evidence was required to be forwarded by the controlling officer to the line manager; the line manager should have charged the appellant with the offence spelling out the penalty applicable; thereafter the appellant ought to have been given an opportunity to defend herself within 48 hours. She also maintained that the respondent was required to issue her with three warning letters in succession before her services could be terminated.
5. Secondly, the appellant argued that she had upgraded her professional capacity by attending and completing several telecom courses. Thirdly, on 30th June, 2009 the respondent gave her Kshs. 11,210/= as an exceptional bonus in appreciation of her contribution to the company's achievement. Fourthly, the appellant contended that the respondent failed to give her an opportunity to be heard contrary to ***Section 45(5)*** of the ***Employment Act.***
6. At the time of the appellant's termination she was earning a monthly salary of Kshs.40, 386/=. The appellant maintained that she was entitled to benefit from the respondent's revised salary schemes in the event the trial court entered judgment in her favour.
7. The respondent in opposition to the appellant's claim filed a Replying Memorandum. It was the respondent's case that the appellant's termination was within the law and conformed to due process. The respondent averred that the appellant was only exempted from meeting the targets for the month of November, 2009; when she proceeded on leave her targets were adjusted

accordingly. The respondent maintained that the appellant was never exempted from her targets whilst performing customer care services.

8. The respondent contended that the appellant's performance was rated against the adjusted lower targets and her performance was found to be unsatisfactory. Upon the review, the respondent maintains that the appellant acknowledged that her performance was below target; she was taking long to adjust from customer care services to a target based sales role.
9. In respect of the appellant's pension, the respondent averred she was paid a sum of Kshs. 206,375.35/= being her contribution by pension scheme and the employer's contribution was deposited to the pension scheme; the same could only be released under the regulations of the scheme and the respondent had no control over the scheme.
10. At the hearing of the claim, only the appellant testified while the respondent elected not to call any witness. The appellant reiterated the averments in her claim. She testified that the customer care desk was very busy and she could not serve customers as well as meet the targets set. She gave evidence that the email dated 9th November, 2009 which informed her she had been exempted from meeting her targets did not indicate the duration of the exemption. She also contended that the respondent's Human Resource Policy Manual required the respondent to come up with an improvement plan in respect of an employee who was under-performing; the purpose of the improvement plan was to clearly indicate the areas in which the employee was under performing and to give the employee an opportunity to improve. She testified that she was never put on such an improvement plan prior to her termination.
11. The trial court (Abuodha, J.) vide a judgment dated 4th June, 2013 entered judgment in favour of the appellant. The trial court issued the following orders; declaration that the appellant's services were wrongfully terminated; an award of 3 months salary in lieu of notice of termination and 6 months' salary for wrongful termination. Aggrieved with the said decision, the appellant has filed this appeal based on the following grounds:-

- ***The learned trial Judge erred and failed to grant the appellant's claim in the Superior Court as prayed.***

- ***The learned trial Judge erred in not considering and appreciating the principle of estoppel as enunciated in the case of Rt. Rev. Silas Njiru & Catholic Diocese of Meru –vs- Andrew Kiruja- Civil Appeal No. 312 of 2004 and therefore not awarding the appellant the expected salary of Kshs. 34,188,628/=.***

- ***The learned trial Judge erred in law and in fact in not addressing the appellant's claim of Kshs. 34,188,628/= being expected salary from the time of the appellant's wrongful dismissal on 13th April, 2010 to 15th July, 2024 being the time of retirement.***

- ***The learned trial Judge erred in law and in fact in not considering the appellant's submissions and authorities in support of the claim on expected salary to arrive at a reasoned decision.***

- ***The learned trial Judge erred in law and in fact by holding that 6 months' salary would adequately compensate the appellant.***

- ***The learned trial Judge erred in law in holding without any evidence that the appellant had prospects of getting another job and was not entitled to 12 months' salary as prescribed by the Employment Act.***

- ***The learned trial Judge erred in law and in fact by holding that the appellant was only***

entitled to benefit from salary increments prior to 10th April, 2010 when the appellant was terminated and not thereafter.

- ***The learned trial Judge erred in law by failing to address the issue of certificate of service.***

12. Mr. Onindo, learned counsel for the appellant, submitted that the trial court failed to address the issue of costs of the suit. He stated that costs ought to follow the event and therefore, the appellant was entitled to costs of the suit. He argued that the learned Judge erred in awarding the appellant 6 months' salary as compensation; the award was too low and the appellant should have been granted 1 year's salary as per the ***Employment Act***. According to Mr. Onindo, the trial court did not consider the appellant's claim regarding her entitlement to the expected salary and pension she would have earned at her retirement. Placing reliance on this Court's decision in ***RT. Rev. Silas Njiru & Catholic Diocese of Meru –vs- Andrew Kiruja – Civil Appeal No. 312 of 2004,*** Mr. Onindo argued that the respondent was estopped from terminating the appellant's services based on her inability to meet her targets since she had been exempted from meeting the same. He urged us to allow the appeal.
13. Mr. Nyaburi, learned counsel for the respondent, in opposing the appeal, submitted that the appellant's case was not fully successful because the trial court only allowed some prayers. He stated that the trial court exercised its discretion by not awarding costs. Mr. Nyaburi stated that the learned Judge granted the appellant 6 months' salary as compensation after finding that the disciplinary procedures had not been followed and all the reasons cited as the basis for termination were not valid. He argued that the learned Judge found that the decision in ***RT. Rev. Silas Njiru & Catholic Diocese of Meru –vs- Andrew Kiruja (supra)*** was not good law because the ***Employment Act*** had not been considered. He further argued that the ***Silas case*** was distinguishable from the instant case because in Silas case, there was an express undertaking not to terminate the employee before retirement.
14. According to Mr. Nyaburi, the trial court could only allow a maximum of 12 months' salary as compensation. Therefore, the other claims on expected salary at retirement were not founded in law. He maintained that 6th months compensation that had been awarded was reasonable and the learned Judge gave reasons for issuing the said award. Mr. Nyaburi argued that the appellant had a lot of experience and qualifications and could find alternative employment. He admitted that the trial court did not address the issue of certificate of service. He urged us to dismiss the appeal.
15. We have considered the Record of Appeal, rival submissions by learned counsel and the law. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123,*** thus:

"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 an 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 this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

This court further stated in ***Jabane – vs- Olenja [1986] KLR 661***,

"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni -vs- Kenya Bus Services (1982-88) 1 KAR 870."

16. In this case, the trial court in considering whether the appellant's dismissal was unfair expressed itself as herein below:-

"Under Section 45(1) of the Employment Act, no employer shall terminate the employment of an employee unfairly. And a termination of employment would be considered unfair if the employer fails to prove that the reason for termination is valid, and that the reason for termination is a fair reason related to the employees conduct, capacity or compatibility or based on the operational requirements of the employer and that the employment was terminated in accordance with fair procedure. In this particular case the Court is not satisfied that the respondent proved that the reason for terminating the claimant's employment was valid. That is to say the reasons themselves may have been valid for terminating employment generally but the respondent has failed or omitted to show how the claimant failed to meet the targets set to the satisfaction of the court. Section 47(5) provides that for any compliant 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 termination of employment or wrongful dismissal shall rest on the employer. The claimant through documents filed in court especially the termination letter; the dual warning letter, her response thereto and oral testimony, has shown to the satisfaction of the court that her termination was not justified besides she has demonstrated that even if there may have been valid grounds for terminating her, the respondent failed to show it followed its own laid down procedures in terminating her services. For this reason the court reaches the conclusion that the claimant's services were wrongfully and unfairly terminated."

Having perused the record, we concur with the above mentioned findings and also note that none of the parties challenged these findings.

17. Based on the grounds of appeal and the submissions by learned counsel, we are of the considered view that the following issues fall for our determination:-

- ***Did the trial court err in awarding the appellant six months salary as compensation for wrongful termination of her services by the respondent"***
- ***Was the appellant entitled to benefit from the respondent's salary increments up to her expected retirement on 16th July, 2024"***
- ***Did the trial court err in failing to address the issue of the appellant's certificate of service"***
- ***Did the trial court err in not making any orders as to costs of the suit"***

18. It was the appellant's contention that the learned Judge (Aboudha, J.) erred by not awarding her

Kshs. 34,188,628/= being the expected salary she would have earned at the time of her retirement; by finding that 6 months' salary would adequately compensate her. The appellant maintained she was entitled to a compensation of 12 months salary as prescribed by the ***Employment Act***. The ***Employment Act*** provides for the remedies for unfair termination at ***Section 49*** as follows;

*"**1. 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 on 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.

2. Any payments made by the employer under this section shall be subject to statutory deductions.

3. Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to-

(a)Reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or

(b) Re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage."

Section 50 of the ***Employment Act*** provides that the Industrial Court in considering a claim for unfair termination shall be guided by the provisions of ***Section 49*** of the ***Employment Act***. Onyango, J. while considering the remedies available in a case of unfair dismissal correctly expressed himself in ***Engineer Francis N. Gachuri -vs- Energy Regulatory Commission- Industrial Cause No. 203 of 2011,*** as follows:

"There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word 'permanent employment".

The court further held,

"Claimant is not entitled to special damages of Kshs.42,588,000 which is equivalent to the loss

of income to the date of retirement. There was no guarantee of employment to the date of retirement. The claim is thus dismissed."

19. Rika, J. in ***D.K Njagi Marete -vs- Teachers Service Commission- Industrial Cause No. 379 of 2009***, held

"What remedies are available to the Claimant" This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees.These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others -vs- Nairobi City Water & Sewerage Company Limited and Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga -vs-Coca Cola East Africa Limited, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.....

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy ….

In the High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani -vs- Kenya Revenue Authority, Hon Justice Ojwang' stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration."

We are of the considered view that the decision in ***RT. Rev. Silas Njiru -vs- Andrew Kiruja- Civil Appeal No. 312 of 2004*** is distinguishable in this case. This is because the decision was made under the repealed ***Employment Act***. We find that the learned Judge correctly dismissed the prayer for expected remuneration that the appellant would have earned upon her retirement.

20. The learned Judge exercised his discretion under **Section 49 (1)(c)** of the ***Employment Act*** and awarded the appellant 6 months salary as compensation for unfair termination of her services by the respondent. Before we can interfere with the learned Judge's discretion we must be satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or, that he misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another- vs- Shah (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held,

"…..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 misjuctice…."

Section 49 (4) of the ***Employment Act*** requires the court to take into account a number of factors in determining which of the aforementioned remedies to grant. One of the factors include the opportunities

available to the employee for securing comparable or suitable employment with another employer. In this case the learned Judge in awarding 6 months salary correctly considered the appellant's age, length of service and her prospects of getting another job. In ***Southern Highlands Tobacco -vs- McQueen (1960) EA 490,*** the predecessor of this Court held,

"A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss."

See this Court's decision in ***Kenya Ports Authorioty -vs- Silas Obengele- Civil Appeal No. 38 of 2005.***

21. Based on the foregoing findings, we are of the considered view that the appellant was not entitled to benefit from the respondent's salary increments up to her expected retirement. The learned Judge correctly held as follows:-

"The claimant was terminated on 13th April, 2010. Her exit salary level was as at the time of termination of her services Kshs. 40,386. She is therefore entitled only to benefit from any increment that took place prior to 10th April, 2010 when she was terminated."

22. The learned Judge in his judgment dated 4th June, 2013 did not address his mind on the issue of certificate of service. ***Section 51*** of the ***Employment Act*** requires an employer to issue a certificate of service to an employee whose services have been terminated, unless the employment was for a duration of less than four consecutive weeks.
23. Last but not least on the issue of costs, we find that the learned Judge erred by not awarding costs of the suit to the appellant. This is because the appellant's claim was partly successful and costs ought to follow the event.
24. The upshot of the foregoing is that we find that the appeal has no merit and we dismiss the same with costs to the respondent. Save that we hereby order that the respondent do issue the appellant with the certificate of service. The appellant shall also have costs in the trial court based on the decretal sum awarded.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

*****.....*****

JUDGE OF APPEAL

MARTHA KOOME

*****.....*****

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR