Case Number:	Civil Appeal 114 of 2016
Date Delivered:	20 Dec 2017
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	George Benedict Maina Kariuki, Sankale ole Kantai, Fatuma sichale
Citation:	Heritage Insurance Company Limited v Christopher Onyango & 23 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, F. SICHALE & S. KANTAI JJA)

CIVIL APPEAL NO. 114 OF 2016

BETWEEN

HERITAGE INSURANCE COMPANY LIMITED.....APPELLANT

AND

CHRISTOPHER ONYANGO &23 OTHERS.....RESPONDENTS

(Being an appeal from the Judgment/Award of the Employment &

Labour Relations Court of Kenya at Nairobi,

(Mbaru, J.) dated 7th April, 2016

in

E. L. R. C. No. 781 OF 2015)

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JUDGMENT OF THE COURT

Background

1. The appellant,**Heritage Insurance Company Limited,** has appealed to this Court against the judgment of the Employment and Labour Relations Court at Nairobi **(Monica Mbaru, J.)** delivered on 7th April 2016 in Cause No. 781 of 2015. In that judgment, the Employment and Labour Relations Court (E & L R C) awarded compensation to the 24 respondents who are the former employees of the appellant by way of salaries for the number of years each had worked, and for notice and severance pay, all totaling to Kshs.12,000,000.00. This award was predicated on an amended Statement of Claim dated 30th June 2015 in which the respondents pleaded that they were employees of the appellant in various senior positions and that they all received positive appraisal from the appellant on 2nd March 2015 and therefore looked forward to work with the appellant during the year 2015. However, less than 2 months after the positive appraisal, the respondent terminated their employment on 30th April 2015 on the grounds of redundancy said to be necessitated by review of structures and implementation of the ICT systems. The appellant averred that some of the roles had been merged while others had been redefined. Each respondent was paid redundancy package calculated up to and including 30th April 2015 before deduction of one month's pay in lieu of notice, and for outstanding leave days, prorated leave allowance and severance (redundancy) pay. There were also payments for pension benefits and in-patient treatment benefit for a period of 30 days effective 1st May 2015.

2. In the impugned judgment dated 7th April 2016, the learned Judge grappled with the issue relating to

employment policy and the question whether there was a redundancy and the legal requirements thereof, and whether there was discrimination. Additionally, she examined the issue of loans due from the respondents and whether the remedies sought by the respondents were available to them.

3. In her determination, the learned Judge found that all the respondents were terminated "*through a generic notice dated 30th April 2015"* and that *"the reason was the same".* She observed that while termination of employment in all letters of employment ranged from one to three months, all the respondents were employed before the new resource policy handbook of the year 2013 was promulgated. The learned Judge made a finding that the respondents' employment fell within the 1994 handbook policy framework. The learned Judge held, *inter alia,* that:

"....the case stands out as a redundancy that should never have been. The evidence that the respondent management agreed to effect the terminations on 30th April 2015 without notice or prior warning to the Claimants was ill advised. Where indeed a redundancy was contemplated, Section 40 of the Employment Act apply (sic). The terminal dues paid are also not commensurate with a redundancy. Had the respondent made effort to pay the dues in accordance with their handbook/policy document 1994, such would have assisted the court to a large extent. Without compliance with the requirements of the law as set out above, costs for the suit are due to the claimants.

Judgment is hereby entered for the Claimants against the respondent in the following terms.

(a) I declare that the redundancy notice issued to the claimants on 30th April 2015 was unlawful;

(b) I declare the termination of employment of the claimants on 30th April 2015 was unfair;

(c) I declare the unlawful acts of the respondent of 30th April 2015 of issuing redundancy notice and terminating the claimant's employments amounted to discrimination against the claimants herein;

i. For unlawful and unfair termination of employment each claimant is awarded 10 months gross salary;

ii. For discrimination each Claimant is awarded 500,000.00 in damages.

iii. Notice pay is due for 2 months' salary for each claimant;

iv. Severance pay is due for 15 days for each year worked;

v. Dues above are payable to the claimants per the schedule below. (SEE BELOW SCHEDULE)

(d) Dues above are subject to the provisions of Section 49 (2) of the Employment Act.

(e) The Claimants with loan balances due to the respondent shall continue repaying the same at the same rate and interest as at the time of termination – 30th April 2015. The interests due shall remain the same as at 30th April 2015 without undue disadvantage caused by the termination of employment.

(f) Any loan payments at different higher rates other than the rates applicable as at 30th April 2015 shall be put into account in process any balances due and where such has since been paid in

full, the differences are due.

(g) Costs of the suit awarded to the claimants."

4. The court considered the evidence adduced by the appellant regarding the policy handbook and held that the 1994 handbook applied and not the 2013 Handbook the appellant relied on. In its own words, the court found that:

"the policy produced by the respondent (now the appellant) for 2013 has no value to the proceedings herein. Such was never brought to the attention of the claimants (the respondents) so as to effect any other rights at work when it subsisted".

Further the learned Judge observed that:

"A human resource policy or manual and in some cases a handbook that set out the rules of operations at the work place is not similar to an employment contract. The employment contract is the primary document that give employment, the human resource policy gives rules and regulations at work that give guidance to employees on how to undertake their work in the midst of other employees so as to ensure harmony, order, discipline and any regulation that an employer requires to be taken into account due to the nature of its business. Such a policy can also incorporate the various benefits in employment and how they are administered. Such should contain a comprehensive schedule on how to address disciplinary matters, terminations, and redundancy. In a best case scenario, such a policy go together with the employment contract by being brought to the attention of the employee immediately upon employment to ensure such an employee is inducted into its contents and consents to the applications so as to form part of the employment contract. Such a policy cannot therefore be kept away from the employee and then removed to apply at the convenience of the employer. Where the employer has a big workforce such as the respondent had, heads of departments should not be mere custodians of the policy. Such is to be brought to the attention of every new member of the team upon employment and confirmation of an induction on its content. Otherwise the document is of no value to the employees."

5. Section 40 (1) of the Employment Act which prohibits an employer from terminating a contract of service on account of redundancy unless the employer complies with the conditions set out in Section 40 (1) (a) to (g) was considered by the learned Judge who expressed herself as follows:

".....a redundancy is not at the discretion of the employer to apply where they have no other reason for terminating employment..... Redundancy is regulated in law and only applies in cases where there is a business need.....

".....in this case, where the respondent (the appellant in this appeal) has a new ICT system that was under implementation, I find there were 3 years since 2013 to put that into account and where they required to lay off some employees, there were sufficient structures to address any change. The respondent (appellant) chose not to apply the law and randomly terminated the claimants (respondents) without sharing any criteria in advance as required under Section 40."

6. The learned Judge then proceeded to find that the termination of the respondents had no justification and that *"there was no redundancy at all."* The learned Judge observed that *"the material submitted to court had arisen only after the respondents filed suit and was meant to camouflage the termination process after the fact."*

Memorandum of appeal

7. In the Memorandum of Appeal, the appellant contends that the learned Judge of the E &LR Court erred in law and fact in declaring that the redundancy was unjustified as the evidence before the court was to the contrary; that there was no basis for the grant by the E & LR Court to each respondent/claimant of Kshs 500,000.00 as damages for discrimination; that the learned Judge failed to evaluate and analyze the evidence and submissions by the appellant; that there was no basis for the grant of an award to each respondent of ten months' salary as compensation; that severance pay was erroneously calculated on the basis of 30 days for each completed year contrary to the provisions of the Employment Act; that the learned Judge erred in holding that the loans granted by the appellant to the respondents shall run their full term; that the learned Judge erred in law and fact in failing to apply the precedents by the Court of Appeal and incorrectly interpreting and applying the provisions of the Employment Act, 2007 as regards payment of compensation.

Written Submissions

8. Pursuant to directions given during the case management held on 22nd March 2017, following the filing of the record of appeal, parties had filed written submissions. On record by the appellant were submissions filed on 21stMarch 2017 and supplementary submissions filed on 8th May 2017. The respondents on their part filed their written submissions on 19th April 2017.

Hearing of Appeal

9. The appeal came up for hearing before us on 22nd May 2017 when**Mr. Allen W. Gachuhi** and **Mr. JothamArwa** assisted by **Mr. Kevin Wakwaya**, learned counsel for the appellant and the respondents respectively highlighted their written submissions and the court reserved the delivery of this judgment.

10. In his address, **Mr. Gachuhi**, learned counsel for the appellant relied on his written submissions and authorities and drew our attention to the fact that the respondents' Statement of Claim in the E & LR Court was amended and that the amended Statement of Claim superseded previous pleadings which included two prayers, Nos 4 and 5 relating to payment of interest and repossession of motor vehicles which were abandoned in the amended Statement. Mr. Gachuhi faulted the learned Judge's decision for not disregarding the claim made in the original Statement of Claim in prayers 4 & 5 in respect of interest and repossession of motor vehicles which had been dropped and abandoned in the amended Statement of Claim. It was wrong, said counsel, for the learned Judge to give relief on the basis of the original Statement of Claim.

11. Counsel urged us to find that the holding by the learned Judge that the redundancy was not justified and that the termination was unfair was in error.

12. Counsel also urged us to find that the 2013 handbook manual was the one that governed the respondents' terms of service and not the 1994 handbook manual and consequently the period of notice of termination of employment of 15 days reflected in the 2013 handbook manual is the one that ought to have been applied in computing the respondents' dues. We observe that the 1994 handbook policy manual provided for 30 days redundancy notice while the 2013 Handbook Policy Manual provided for 15 days’ notice. The evidence shows that in the 1994 Handbook Policy Manual, the appellant stipulated that it reserved the right to, *inter alia,* change without notice all or any part of the policies, procedures and benefits reflected in the handbook at any time subject to notification of the changes to the respondents. The policies in the 1994 handbook were subject to variation. Mr. Gachuhi submitted that it was an error on the part of the judge to predicate the relief on the abandoned handbook and urged us to

allow the appeal. He stressed that the statement of claim did not particularize the special damages and in his view this resulted in a trial by ambush where the appellant had no notice of the full relief sought. It was his submission that the respondents did not show the particular Article of the Constitution which was violated to validate the claim of discrimination and justify the award of Shs.500,000/= as damages. Counsel also pointed out that the appellant through its counsel took objection to the claim for damages and although the trial court rightly indicated the need for the statement of claim to be amended, in the final decision the court granted relief that included damages for discrimination in absence of amended pleading. Counsel drew our attention to the decisions, amongst others, in the cases of **Housing Finance Company of Kenya v. J. N. Wafubwa** [2014] eKLR and **Anarita Karimi Njeru v. The Republic** [1976-1980] KLR 1272.

13. On behalf of the respondents, learned counsel **Mr. Arwa** opposed the appeal and relied on his written submissions and list of authorities and contended that the appeal had no merit. The first issue, he said, was the Staff Handbook; in his view, the learned judge did not rely on the wrong staff Handbook. He submitted that the respondents' adduced evidence of the Handbook that they were aware was in force at the time they were rendered redundant. Relying on the decision in **Abraham Gumba v. Kenya Medical Supplies Authority** [2014] eKLR, counsel contended that human resource policies and procedure manuals do not automatically become incorporated into employment contracts simply by their publication to employees; it must be shown that an employee has consented to be bound by signing to show acceptance. It was learned counsel's further submission that the revised Handbook (2011) had not been shown to have been received or consented to or signed by the respondents. It was counsel's submission that the learned Judge of the E&LRC was correct in holding that the Handbook applicable was the 1994 one and not the 2011 Handbook.

14. As regards damages, the respondents' counsel supported the award on account of discrimination, and urged that the statement of claim as amended did in its paragraph 14 plead discrimination. We observe, after perusal of the amended statement of claim dated 30th June 2015, thatparagraph 14 appears twice. The first paragraph 14 reads "*The said termination was mischievously, fraudulently and deceptively disguised as redundancy."* The second paragraph 14 states "the fact that the claimants were illegally, unfairly and discriminatory terminated (sic) can be demonstrated by the following facts." The Amended Statement of claim then proceeds to set out in subparagraphs (i) to (v)matters intended to buttress the alleged illegal, unfair and discriminatory termination but none of them alluded to the Constitution or can be said to buttress the alleged discrimination.

15. Mr. Arwa further submitted that the trial court had discretion under Section 49 of the Employment Act to award damages for a period of up to 12 months, and that it awarded for a period of 10 months. MrArwa urged us to uphold the decision of the E & LRC and dismiss the appeal with costs.

Determination

16. This is an appeal from a superiorCourt acting in exercise of its original jurisdiction. In short, it is a first appeal. Under rule 29 of this Court's Rules, we have, inter alia, power to re-appraise the evidence and to draw inferences of fact and to confirm, reverse or vary the decision of the superior court. In effect, we are enjoined to give the parties a retrial. We also have power to remit the proceedings to the superior court with appropriate directions or to order new trial and to make any necessary, incidental or consequential orders, including orders as to costs.

The issues in contest in this appeal are in relation to the questions -

i. whetherit is the Human Resource Handbook of 1994 or 2013 that applied to the respondents'

employment;

ii. whether there was discrimination;

iii. whether there was redundancy and whether termination was wrongful;

iv. whether the trial court erred in awarding as damages 10 months' salaries.

17. On issue No. (i) relating to Human Resource Manual or Handbook, the evidence in the record of appeal shows that the respondents did not sign the 1994 Handbook which they contended governed the terms of their employment. But there is evidence to show that the appellant subsequently did promulgate 2013 Handbook and the only issue is whether it was brought to the respondents' attention and whether the respondents were bound by the 2013 Handbook or by the 1994 Handbook. It is axiomatic that companies as employers do from time to time come up with new Staff Handbooks or Staff Manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff Handbooks as forming part of the terms of employment. In the instant appeal, there is evidence that each respondent's contract made provision for obedience of lawful orders of the appellant as an employer that may be given from time to time. The respondents contend that unless they have accepted and/or signed such orders, they are not bound by them. The employment contract of each respondent had a clause to the effect that orders or directions given by the appellant from time to time would be obeyed. It is clear that by dint of that clause both 1994 and 2013 handbooks became an integral part of the contract of employment of each respondent. The record of appeal shows that none of the Staff Manual (1994 and 2013) was signed by the respondents. There is no evidence that the respondents were required to sign any of the Staff Manuals or Handbooks nor does the evidence show that any respondent was exempt from compliance if he/she had not signed such Staff Manual or Handbook. The fact that the contract of each respondent contained a clause to the effect that orders or directions issued from time to time through theStaff Manuals or Handbook would be obeyed meant that the terms of such staff manual or Handbook were incorporated in the contract of employment and did not need the signature of an employee to bind him or her. Indeed, the 1994 Handbook that is said by the respondents to be applicable was not shown to have been signed by the respondents. It is not in contest that the 2013 Handbook was the latest and there is evidence that the respondents were well aware of it. Once one is brought on board as an employee whose contract has a general clause requiring obedience of employer's lawful orders and directionscontained in or later issued in a Human Resource Manual, the employee was bound by the order or direction.It is not necessary for an employee to sign or indicate acceptance every time a Staff Manual is issued. The responsibility of the employer is to bring it to the attention of the employee. An employee who objects to the terms or such direction or order of the employer is at liberty to challenge it, and the trade union to which he or she is a member would normally take up the responsibility. In the instant appeal, the 1994 Handbook prescribed 30 days' notice of termination and the 2013 Handbook issued in July 2013 brought the period from 30 days to 15 days. The record of appeal shows that the latest Human Resource Manual was that of July 2013. The record of appeal also shows that the 2013 Human Resource Policy was put in place and published to the respondentsand the respondents were expected to abide by it. Nowhere in the record of Appeal has the 2013 Handbook been alleged not to exist. Yet it would not be plausible that the two Handbooks (1994 and 2013) remained in place side by side. There was no allegation that the respondents were not aware of the existence of the 2013 Handbook, nor that there was failure on the part of the appellant to inform any of the respondents. The preponderance of the evidence shows that the Handbook in force was that issued in July 2013. We so find.

18. As regards issue (ii) namely, whether there was discrimination; the record shows that no evidence was led to establish violation of any constitutional rights and none of the Articles of the Constitution was

alluded to. In effect, discrimination was not proved.

19. Was the termination of the respondents wrongful" Under the terms of employment, termination was by notice of one month or payment in lieu of notice. There is nothing in the evidence tendered to prove that the redundancy was fake. The respondents were paid in lieu of notice. The termination, being in accordance with the terms of employment could not be said to be wrongful, and therefore the question of damages did not arise. That also answers issue no (iv).

20. As the respondents had been paid for severance under S.40 of the Employment Act for 15 days for each year worked in accordance with the terms of the contract and in compliance with the Human Resource Manual (Handbook), it seems to us that the appellant had complied with the law. There was no justification for additional payment of compensation for ten (10) months under section 49 of the Employment Act.

21. In our view, this appeal has merit. We allow it. We set aside the judgment of the Employment and Labour Relations Court delivered on 7th April 2016 in case No.781 of 2015. Although costs follow the event, we decline to condemn the respondents to costs seeing that they are out of employment and will lose the awards they had anticipated from the appellant.

Dated and delivered at Nairobi this 20th day of December, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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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