Case Number:	Civil Appeal 163 of 2017
Date Delivered:	20 Dec 2019
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Martha Karambu Koome, Hannah Magondi Okwengu, Sankale ole Kantai
Citation:	New Kenya Co-op Creameries Limited v Olga Auma Adede [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Industrial Cause No. 87 of 2011)
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, H. OKWENGU & KANTAI JJ.A) CIVIL APPEAL NO. 163 OF 2017

BETWEEN

NEW KENYA CO-OP CREAMERIES LIMITED.....APPELLANT

AND

OLGA AUMA ADEDE.....RESPONDENT

(An appeal against the Judgment and Decree of the Employment and Labour Relations Court

*(formerly Industrial Court) at Nairobi (**Maureen Onyango, J**) dated 9th May, 2014*

in

Industrial Cause No. 87 of 2011)

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JUDGMENT OF THE COURT

[**1**] This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC), (**Maureen Onyango, J**.), in which the court found that the employment of **Olga Auma Adede** (respondent), with New Kenya Co-operative Creameries Limited was unfairly terminated and proceeded to award her Kshs. 1,590,000 as six months' compensation for the unfair termination and Kshs. 739,350 as gratuity for the period of the contract served.

[**2**] The appellant who is dissatisfied with the judgment has lodged an appeal in which it faults ELRC in finding that the respondent's termination was unfair or that she was not given a hearing before her services were terminated, when the evidence before the court, was clear that she had been given ample opportunity to defend herself before her services were terminated. The appellant also faulted the award of gratuity to the respondent contending that the contract of service entered into between the appellant and the respondent did not entitle her to any payment of gratuity as she had not completed one year of service under the current contract.

[**3**] In the respondent's memorandum of claim, the appellant had claimed for a total of Kshs.15,472,983.32, but conceded having been paid a sum of Kshs. 1,261,224.40 and therefore, prayed for the balance of Kshs.14,211,758.92 being the outstanding remuneration and terminal dues.

[**4**] The appellant filed a response to the claim maintaining that it lawfully terminated the respondent's employment in accordance with the contract of service, Employment Act and all relevant laws, and that the respondent was paid her lawful dues which amounted to Kshs.1,261,224.45.

[**5**] During the trial, it was not disputed that the respondent was employed by the appellant and that her employment had been renewed on a three year contract which ran from 1st December 2009 to 30th November, 2012 but that her employment was terminated on 1st September, 2010. It was also conceded that the appellant served the respondent with a letter of suspension on 7th June, 2010 and that there was exchange of correspondences before the respondent's services were finally terminated on 1st September, 2010. The respondent also admitted having received a sum of Kshs. 1,262,224.

[**6**] The main issue in dispute was whether the termination of the respondent's employment was unfair. In this regard, the trial Judge rendered herself as follows:

"The claimant testified that the termination of her employment was unfair as she was never given an opportunity to appear before the respondent's disciplinary committee, the respondent did not comply with the government circular dated 24th

May 2010 and the reasons given in her letter of suspension, the letter to show cause and the letter of dismissal were all different. She further denied that she was guilty of any wrongdoing, that she was accused of selling powdered milk which she did regularly with the approval of RW1 who was then Acting Managing Director. She further submitted that she was never charged in court with any criminal offence.

The respondent on the other hand submitted that the claimant's termination was lawful, that she was given an explanation of the reasons for suspension and termination at the time of handing over the letters to her by the acting Managing Director, that she appeared before the disciplinary Committee and also defended herself in her response to the letter to show cause. The respondent further submitted that the claimant's contract provided for termination of her employment by either party and did not provide for giving reasons for termination provided either notice was given on payment made in lieu of notice.

Section 26 of the Employment Act provides that the terms and conditions in the Act constitute basic minimum terms and conditions of service and any terms agreed by the parties in a collective bargaining agreement or contract may only replace those in the Act where they are more favourable.

Section 41 of the Employment Act provides that an employer must given (sic) an employees (sic) a hearing where it is contemplated to terminate or dismiss the employment of the employee. The hearing must be with notification in writing and the employee must be given an opportunity to be accompanied by either a union shop floor official or a fellow employee.

The claimant in this case was never given a hearing in terms of section 41. The Board sat on its own, considered the report of the investigation committee and then handed down the sentence through the Managing Director without giving the employee any specific charges against her or giving her an opportunity to defend herself before the Board. The argument that the claimant's contract did not provide for giving reasons is against the provisions of section 41. Section 26 only allows variation of the law where the variation introduces terms better than what the law provides.

For these reasons, I find that the termination of the claimant's employment was unfair as she was never given an opportunity to defend herself as provided in section 41 of the Employment Act."

[**7**] It is appropriate to reproduce section 41 of the Employment Act. It states as follows:

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 the 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 subsection (1), make.

(Emphasis added).

[**8**] The repeated use of the word "**shall**" in section 41 makes it clear that the section is a mandatory provision. The use of the words "**present during this explanation"** in **section 41(1)** places an obligation on the employer that the explanation for which the employer is considering the termination be given in an oral explanation where the employee and another person chosen by the employee is present. **Section 41(2)** requires that both the employee and the other person present be given an opportunity to make representations which representations should be considered by the employer in making his decision. In our view, section 41 provides for a physical interaction in the disciplinary process and therefore, the hearing provided under section 41 of the Employment Act which is a mandatory provision, must be an oral hearing.

[**9**] In this case, other than the letter dated 7th June, 2010 through which the respondent was suspended from duty, and advised that investigations had commenced in regard to several questioned transactions involving her, and the exchange of correspondences ensuing therefrom, there appears to have been no physical interaction in the process leading to the respondent's termination.

[**10**] In the letter dated 7th June, 2010, the appellant was suspended from employment and informed of various allegations concerning the sale of 1000 bags of milk powder that the company was inquiring into. The respondent in a letter dated 21st July, 2010 provided her explanation on the issue of sale of powdered milk. In a letter dated 9th August, 2010, the appellant required the respondent to show cause as to why disciplinary action should not be taken against her for failing to perform and/or neglecting to perform her obligations as head of department. The respondent in a letter dated 11th August, 2010 denied the allegations maintaining that throughout her appointment as the head of Sales and Marketing, the appellant company had enjoyed growth in sales, customer and market share. This was followed by a letter of termination dated 1st September, 2010 signed by the appellant's Acting Managing Director in which it was stated, *inter alia*:

"Your explanation to the issues raised in the show cause notice was carefully considered but found unsatisfactory in that you failed to execute your duties diligently, hence exposing the company to loss of funds and resources.

This letter now serves to advise you of your termination from employment with immediate effect in accordance with the provisions of your employment contract dated 4th December 2009."

[**11**] During the trial, **Milka Gathoni Mugo**, who was the appellant's Company Secretary, testified. She stated that there was a committee that was investigating the allegations made against the respondent, and that the respondent was interviewed by that committee, and that this committee gave a report to the Board which made a decision based on that report. A forensic audit report dated August 2010 was annexed to the appellant's response to the respondent's claim, and this is apparently the report that the Company Secretary was referring to. Although the appellant's action to terminate the respondent's employment appears to have been based on the audit report and the respondent's letter dated 11th August, 2010 in which she responded to the notice to show case dated 9th August 2010, no attempt was made to provide a forum to explain to the respondent the reason for the intended termination, nor was the respondent given an opportunity to have another employee or a union representative present during such explanation.

[**12**] The decision to terminate the respondent's services was a decision that could only be taken by the Board and not the investigation committee. Thus, it was for the Board or a properly designated disciplinary committee to explain the reason for the intended termination and to listen to any representations that the respondent or her nominee may have wished to make before making the final decision to terminate the respondent's employment.

[**13**] In **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** this Court stated:

"It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. Section 43 specifically places the burden to prove that the termination was fair on the employer. It provides;

'43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.'

The burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer."

[**14**] In the more recent case of **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, this Court explained the importance of **section 41** of the Employment Act as follows:

"It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with…four elements must thus be discernible for the procedure to pass muster: -

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee."

[**15**] In **CMC Aviation Limited v Mohammed Noor [2015] eKLR**, this Court made it clear that:

"Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's services, but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination."

[**16**] Needless to state that the appellant not having complied with section 41 of the Employment Act, the respondent's termination was unfair as the procedure adopted was not in accordance with the law.

[**17**] In **Kenfreight EA Limited v Benson K. Nguti [2019] eKLR**, the Supreme Court, addressing the question of what an award of damages should be based on, stated as follows;

"[38] What then should the correct award on damages be based on" Having keenly perused the provisions of Section 49 of the Employment Act, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, *what is the appropriate remedy"* The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies.

…

[49] …we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the Employment Act. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m)."

[**18**] The learned Judge awarded the respondent Kshs. 1,590,000 as compensation for the unfair termination. This was six months' gross monthly wages. In our view, in coming to that award, the learned Judge properly exercised her discretion in assessing the compensation. It is now settled that this Court can only interfere with the exercise of discretion by a Judge of the lower court where it is satisfied that the Judge misdirected herself, on the law or the facts, or took into account some irrelevant consideration, or failed to take into account relevant consideration, or that the decision is plainly wrong. (See **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR, Mbogo v Shah [1968] EA 93, Kenya Shell Co. Ltd. V Charles [2003] eKLR).** None of these factors has been established before us. There is therefore, no justification for us to interfere with the exercise of the discretion of the learned Judge in awarding and assessing compensation for unfair dismissal.

[**19**] The second issue that arises from this appeal is the payment of gratuity. The appellant's argument is that the contract between itself and the respondent commenced on the 1st December, 2009 and provided that gratuity would only be payable in the event that

the contract was terminated after completion of at least one year of service, and that since the contract was terminated on 1st of September 2010, the respondent was not entitled to any gratuity. [**20**] This Court in the case of **Bamburi Cement Limited v William Kilonzi [2016] eKLR** defined gratuity as:

"… **gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment.** (*Emphasis added*)

[**21**] In addressing the issue of gratuity, the learned Judge stated as follows:

"Gratuity was payable upon completion of the contract or termination after completion of 12 months' service under the contract. I find that since the claimant was serving on a second term of her contract, she had actually worked for more than 3 years and is therefore entitled to gratuity for the period for which gratuity had not been paid from 1st December, 2009 to 30th August 2010."

[**22**] Our evaluation of the facts that were adduced before the trial court, reveal that the contract dated 1st December, 2009 was actually a second contract. It is also clear that the termination of the respondent's employment was not a voluntary action by the respondent, but was an action on the part of the appellant, resulting in unfair termination of the respondent's employment. In the circumstances, it would neither be fair nor just to deny the respondent what she would have been otherwise entitled to. We find that the gratuity payment was proper.

[**23**] For the above reasons, we find no merit in this appeal. It is accordingly dismissed with costs

Dated and delivered at Nairobi this 20th day of December, 2019.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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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