IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

CORAM: AKUFFO JSC (MS), (PRESIDING)

BAFFOE - BONNIE, JSC

AKOTO – BAMFO (MRS),JSC

APPAU, JSC

PWAMANG, JSC.

CIVIL APPEAL

NO: J4/58/2014

9TH MARCH 2016

MOSES OKRAH ------ PLAINTIFF/RESPONDENT/APPELLANT

VRS.

AGRICULTURAL DEVELOPMENT BANK ----- DEFENDANT/APPELLANT/ RESPONDENT

JUDGMENT

YAW APPAU, JSC:

The bone of contention in this appeal is basically on damages. How much is the Appellant entitled to as damages for having been wrongfully dismissed from his employment? The trial High Court made an assessment which was

varied by the Court of Appeal on appeal by the Respondent. The Appellant is here praying for a further intervention from us and the relief sought in his notice of appeal, filed on 24/04/2013, is as follows:

"To vary the judgment or decision of the Court of Appeal dated 25/01/2013 to reflect the current and prevailing salary and allowances of similar employees of defendant/appellant/respondent in the light of the deliberate delay strategy of defendant/appellant/respondent to have the suit travel for more than ten (10) years in the High Court and about 2 years 6 months in the Court of Appeal".

The facts in brief are that the Appellant was an employee of the Respondent for a period of thirteen (13) years. He was employed somewhere in 1986. On the 6th day of April 1999, the Respondent summarily dismissed him from its employment. Appellant took the matter up in the High Court for a declaration that his dismissal was wrongful and for damages for wrongful dismissal. He succeeded in the High Court with the following awards made in his favour:

(a) Loss of salary and allowances calculated from the date of his dismissal which took effect from 6th April 1999 including his lunch allowances, fuel and kids allowances;
(b) Payment of three month's salary in lieu of proper notice;
(c) All plaintiff's end of service benefits calculated from the date of his dismissal;
(d) SSNIT arrears and provident fund of which he is a contributor;
(e) GHc30,000.00 for prospective loss of promotion or loss of employment;
(f) Interest on all the amounts above at the prevailing bank rate from the date of dismissal to date of judgment;
(g) Costs of GHc5,000.00.

The Respondent appealed against the decision of the trial High Court on seven grounds. However, in its written submissions, Respondent abandoned all the grounds of appeal with the exception of ground **(f)** on damages. The ground read: ***"The Damages awarded by the learned trial judge was unduly excessive"***

The Court of Appeal on 25th January 2013 allowed the appeal and varied the award made in favour of the Appellant by the trial High Court, with reference

to the decision of this Court in STANDARD CHARTERED BANK LTD v NELSON [1998-99] SCGLR 810. The Court of Appeal in arriving at the varied awards spoke in the following words:

"In the instant case, it is unfortunate that although the trial judge appreciated the principles that should govern the award of damages in such a case, i.e. that the plaintiff is duty bound to mitigate his loss, nevertheless allowed himself to be swayed by extraneous matters. For example, the judge took into consideration the number of children that the plaintiff had and the criminal charges which were preferred against him culminating in a trial which was struck out for want of prosecution when there was no claim for damages for wrongful prosecution. The trial judge had the discretion as to the estimate of the damages but which discretion must be exercised judicially. Clearly, the award of damages in the instant case is extremely high. Thus in Standard Charted Bank vrs Nelson [1998-99] SCGLR 810, the Supreme Court cited with approval the reasoning and decision in Zik's Press Ltd vrs Ikoku [1951] 13 WACA. Especially relevant is the portion at page 823 of the report which quotes Greer LJ in FLINT vrs LOVELL as follows: ***'in order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced (either) that the judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court an entirely erroneous estimate of the damage to which the plaintiff is entitled.'****Under the circumstances, I deem it proper that this Court interferes with the damages by varying same as follows:*

(1) the plaintiff be entitled to his salary and allowances for fifteen (15) months from 6th April 1999 when he was summarily dismissed.

(2) his contribution for SSNIT and provident fund for fifteen (15) months from 6th April 1999 including any outstanding arrears.

(3) one month salary in lieu of notice instead of three (3) months' salary awarded by the trial court to the plaintiff.

I would however maintain the cost of GHc5,000.00 awarded in favour of the plaintiff by the trial court.

The award of GHc30,000.00 for prospective loss of employment is set aside as the plaintiff has been adequately awarded for 15 months entitlements etc. and also the fact that no evidence was led to prove that he lost an equal opportunity employment as a result of his dismissal…"

The Court of Appeal was of the view that the assessment was based on extraneous matters that are too remote, making the final award too high or excessive. This was what the trial judge said in arriving at the heads of damages awarded:

"Although the plaintiff seemed not to mitigate his loss, there is no doubt that he should be given reasonable and substantial damages for his sufferings for the past 11 years or so. I hereby make the following orders taking into consideration the fact that the plaintiff has four children as per his evidence. Plaintiff is entitled to the following: - ……"

From the above, it is quite clear that the trial judge was influenced by the fact that Appellant had four children in deciding on how much to award as damages for wrongful dismissal when the number of children a worker has, has nothing to do with the computation of what he is legitimately entitled to as damages when found to have been wrongfully dismissed.

The grounds of appeal Appellant relied on in the appeal before us were:

- ***a.*** *The judgment is against the weight of evidence;*
- ***b.*** *The variation of the judgment of the trial court to the disadvantage of plaintiff was unfair since it was defendant who deliberately delayed the trial ;*
- ***c.*** *The Court of Appeal erred when it said plaintiff did not mitigate his losses by finding an alternative means of employment when plaintiff was emphatic in his evidence that he was a trader.*

Submissions on grounds of appeal; (a), (b) and (c)

On the first ground; i.e. **(a)**, Appellant's concern was that the Court of Appeal did not analyse the entire record of appeal in arriving at the damages it awarded after varying that of the trial High Court. For this reason, the judgment of the Court of Appeal was against the weight of evidence adduced at the trial; citing the case of TUAKWA v BOSOM [2001-2002] SCGLR 65.

Instances Appellant gave as factors that influenced the trial court's award but which the Court of Appeal ignored were; his arrest and failed prosecution at the instance of the Respondent, the failure of the Respondent to attend court regularly and unnecessary applications for trial de novo and stay of execution which delayed the trial for eleven years.

As the Respondent rightly answered in its written submissions, the appeal before us does not call for such a ground since the Court of Appeal did not wade into the findings of fact made by the trial court.

The Court of Appeal did not vary the judgment of the trial High Court which said that the dismissal of the Appellant was wrongful. This was because the Respondent abandoned its grounds of appeal against the judgment and only challenged the award of damages. The Court of Appeal only dealt with the issue of quantum of damages to be awarded, which is a question of law and did not arrive at any judgment different from that of the trial High Court on the substantive claim.

Again, it was wrong for the trial High Court to take into consideration the family size of the Appellant and the fact of his arrest and failed prosecution in enhancing the damages awarded him for wrongful dismissal. As the Court of Appeal rightly asserted, if the Appellant thought his arrest and prosecution was wrongful, he should have sued for or asked for a separate relief of damages for malicious prosecution which is a tort that stands on its own. One can only earn damages on this tort if one establishes that one's prosecution was malicious. Malicious prosecution was not a claim before the trial court and the mere fact that Appellant's prosecution was truncated midstream is no proof that it was malicious. Ground **(a)** is therefore of no substance. It is accordingly dismissed.

Appellant's arguments in support of ground **(b)** which he marked as ground **(c)** follow the same pattern as in ground **(a)**. The gravamen of that argument was that while the trial High Court took into consideration his arrest, harassment and failed prosecution by the Respondent plus the delay caused by the Respondent in the completion of the trial in arriving at the damages awarded in his favour, the Court of Appeal ignored all these and reduced the damages earned in the trial court.

It must be emphasized that a claim for damages for wrongful dismissal is a relief that falls basically under contract of employment. It is not a tort. As this Court rightly held in KLAH v PHOENIX INSURANCE LTD [2012] 2 SCGLR 1139; *"Where an employer wrongfully dismisses an employee…, the measure of damages is calculated largely on the basis of the principles applicable to action for breach of contract as enunciated in HARDLEY v BAXENDALE [1854] 9 EX 341 @ 354-355;*

'where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e. in the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it'.

The principle is to place the injured party as far as money could do so in the position he would have been but for the breach".

This is the principle known by the Latin maxim; *restitutio in integrum*. The purpose of damages in law is to put the party who has suffered as a result of the breach in nearly the same position that he would have been had the other party not broken the contract. In assessing damages for breach of contract therefore, the court considers two main factors: **(i)** the measure of damages; i.e. the quantum or the amount of money or lump sum that must be awarded and **(ii)** remoteness of damages; i.e. the proximate cause of the breach.

By remoteness is meant; the courts would not award damages that are remote to the breach. The number of children Appellant had at the time of his dismissal has nothing to do with his earnings. Again, the fact that he was arrested but could not be prosecuted to finality also has nothing to do with his loss of earnings arising from the breach; i.e. his wrongful dismissal. That is a tort standing on its own, as explained earlier. These two issues are therefore too remote to be factored into the computation of damages for Respondent's breach of the contract it had with the Appellant.

On the alleged delay by the Respondent in the early prosecution of the civil action, we wish to stress that every court of law is supposed to be managed by

the presiding judge or magistrate. Parties and their lawyers do not control the courts. It has not been established that the delay in the trial High Court and the Court of Appeal was attributed to the delay tactics of the Respondent for which damages against it must be enhanced out of proportion. The record before us shows clearly that this case passed through the hands of about seven (7) trial judges before completion as a result of frequent transfers of the judges by the authorities of the Service. This could have contributed immensely to the delay in the trial and the Respondent cannot be blamed for that.

It is the duty of every judge or magistrate to manage his/her court to ensure speedy trial and/or disposal of cases. If a trial is delayed because of the ineffective management of the court by the trial judge, it cannot be blamed on one party. If a party is fond of absenting himself, herself or itself from court and the trial judge condones such practice without applying the rules of court as required, the absenting party cannot be blamed for the delay. A court cannot therefore enhance what is legitimately due to a party on the principle of *restitutio in integrum* just because the trial was delayed due to the trial courts inertia in properly applying the rules of court. In this case for instance, the trial court awarded costs in favour of the Appellant on several of the occasions when Respondent absented itself from court, to compensate the Appellant.

Looking at some of the awards made by the trial court, it appears that the trial court was not specific on what the Appellant was actually entitled to. On the first award, the trial court granted Appellant loss of salary and allowances calculated from the date of his dismissal (i.e. 6th April 1999) including his lunch, fuel and kids allowances. In the first place, throughout his evidence, Appellant never said anywhere that he was enjoying lunch, kids and fuel allowances when he was a junior staff in the employment of the Respondent Bank for the court to make such an award.

Again, the trial court did not indicate a terminating point for the calculation of his salary and allowances. This means that Appellant was to be paid all his salaries and allowances from the date of his dismissal to the date of the trial court's judgment; i.e. from 6th April 1999 to 6th May 2010; a period of eleven (11) years. It appears the trial judge was overwhelmed by the decision of the High Court per Osei-Hwere, JA (sitting as an Additional High Court Judge) in

ARKORFUL v STATE FISHING CORPORATION [1991] 2 GLR 348. In fact, almost all the awards the trial court made were influenced by Osei-Hwere's decision in the said case.

In deciding to award Appellant all his salaries calculated from the date of his interdiction to the date of judgment, the trial judge in the *Arkorful case* (supra) said he was relying on decided authorities and mentioned the cases of NARKO v BANK OF GHANA [1973] 1 GLR 70; BLAY-MORKEH v GHANA AIRWAYS CORP. [1972] 2 GLR 254 and OWUSU-AFRIYIE v STATE HOTELS CORPORATION [1976] 1 GLR 247.

This was what the judge said in his judgment before making the award in the *Arkorful case* (supra):

"Our decided authorities are all at one that where a servant has been wrongfully dismissed from his contract of employment damages are to be measured by the amount of salary which the servant has been prevented from earning by reason of the wrongful dismissal; see Narko v Bank of Ghana [1973] 1 GLR 70; Blay-Morkeh v Ghana Airways Corporation [1972] 2 GLR 254 and Owusu-Afriyie v State Hotels Corporation [1976] 1 GLR 247. Accordingly the plaintiff must be entitled to all his salaries thrown away, calculated from the date of his interdiction up to the date of judgment".

It must be noted that the decision of the High Court in the *Narko case* cited (supra) was set aside by the Court of Appeal on 9th July 1973 in BANK OF GHANA v NARKO & Another [1973] 2 GLR 265. I have also read the cases of *Blay-Morkeh v Ghana Airways Corp* (supra) and *Owusu-Afriyie v State Hotels Corp (*supra) several times and nowhere in those two cases was it laid down that in wrongful dismissal cases, a plaintiff is entitled to all his salaries calculated from the date of his dismissal to the date of judgment.

In the Blay-Morkeh case, it was counsel for the plaintiff who prayed the trial court to grant his client his salaries for ten years calculated from the date of his wrongful termination since he could have been in the employment of the Ghana Airways Corporation for ten years had it not been his wrongful dismissal. But Coussey, J. who delivered the judgment had this to say:

"In view of the contrary views expressed on what considerations should influence the award of damages for wrongful dismissal, I hold the view that damages should be awarded up to such reasonable time that perhaps the dismissed servant can very well find alternative employment taking into consideration the employment situation in the country. It is well-known these days that jobs are not easy to come by. The plaintiff has not indicated also that he made efforts to find employment. It is so easy for some to think that the longer they stayed out of work the more would be the damages to be obtained". {Emphasis added}

In the *Owusu-Afriyie case* also relied on by Osei-Hwere, JA, the case was fought on the then Industrial Relations Act of 1965, where there was a provision to the effect that an industrial tribunal could order for the re-instatement of an employee whose employment had been wrongfully terminated with full benefits.

It is therefore not the case that in wrongful dismissal cases, a plaintiff is entitled to all his salaries from the date of the wrongful dismissal to the date of judgment. The *Blay-Morkeh case* which Osei-Hwere, JA relied on in the *Arkorful case* and which influenced the trial judge in the instant case, even frowned upon that when the judge stated; ***"it is easy for some to think that the longer they stayed out of work the more would be the damages to be obtained"***. The criteria is that, damages should be awarded up to such reasonable time that perhaps the dismissed servant can very well find alternative employment.

This Court, speaking with one voice through Date-Bah, JSC, in the recent case of **ASHUN v ACCRA BREWERY LTD [2009] SCGLR 81 @ 82**, with reference to its own decision in **NARTEY-TOKOLI v VALCO [1987-88] 2 GLR 532**, stated clearly the principles that govern the award of damages in cases of wrongful dismissal. The Court said: -

"In principle, in the absence of any statutory or contractual provision, the measure of damages for wrongful termination of employment, (which includes wrongful dismissal) under the common law of Ghana, was compensation based on the employee's current salary and other conditions of service for a reasonable period within which the aggrieved party was expected to find

alternative employment. In other words, the measure of damages was the quantum of what the aggrieved party would have earned from his employment during such reasonable period, determinable by the court, after which the employee should have found alternative employment".

This was the same principle enunciated in the *Blay-Morkeh case* (supra).

In the earlier case of KOBI v GHANA MANGANESE CO. LTD [2007-2008] SCGLR 771 @ 772, this Court reiterated the point that the award of damages for loss of salary in such cases has ranged between one year and two years accumulated salaries. This Court held in holding 2 as follows:

"In assessing damages for wrongful dismissal, the court must have regard to all the circumstances of the case considered as fair and reasonable. In the instant case, considering the specialised nature of the plaintiff's employment, which would make it difficult to obtain alternative employment; the general unemployment problem in the country and the abrupt end of their careers and all the circumstances of the case; and bearing in mind that judicial discretion should not be out of joint with the general trend on the matter and the fact that the award of damages in these matters has ranged between <u>two years to one year</u>, the court would award the plaintiffs damages based on fifteen months' salary as at the date of their wrongful dismissal".

In the instant case, Appellant was a junior officer in the Respondent Bank. He did not hold any specialised position that required endurance in obtaining alternative means of employment. In his own evidence, he said he mitigated his losses when he secured for himself an alternative job as a trader when he was dismissed. According to him, when he initiated this action for damages for wrongful dismissal in January 2000, he was arrested at his work place and put before court on a criminal charge with the intention of coercing him to curtail his action but he failed to budge.

This means that at the time of his arrest, he had secured an alternative employment as a trader, which from the record, was less than a year after his dismissal. It was therefore wrong for the trial court to assert that; ***"Although the plaintiff seemed not to mitigate his loss, there is no doubt that he should be given reasonable and substantial damages for <u>his suffering for the past eleven (11) years or so</u>…"*** {Emphasis mine}

Appellant did not state anywhere in his evidence that he suffered financially for the whole period of eleven (11) years that the trial was going on. According to him, he resorted to trading. So if Appellant mitigated his losses by finding alternative means of employment in less than a year of his dismissal, why should he be paid salaries he would have earned had he not been dismissed from the date of dismissal to the date of judgment, which is about eleven years? Such a calculation or computation by the trial judge was not justified in law. The Court of Appeal was therefore right when it interfered with the award on the ground that the quantum was extremely high as it was based on extraneous matters. *Standard Chartered Bank v Nelson* (supra) applies.

The relief Appellant is seeking from us is; *"to vary the decision of the Court of Appeal to reflect the current and prevailing salary and allowances of similar employees of defendant in the light of the deliberate delay strategy of defendant to have the suit travel for more than 10 years in the High Court and about 2 years 6 months in the Court of Appeal".*

We do not understand what Appellant meant by; **"to vary the decision of the Court of Appeal to reflect the current and prevailing salary and allowances of similar employees of defendant."** Is Appellant saying that the computation of the 15 months' salary and allowances should be based on the current salaries and allowances earned by employees of the Respondent bank holding the same position Appellant was holding at the time of his dismissal?

This relief being sought is reminiscent of a similar claim advanced by counsel for the plaintiff in the *Arkorful case* (supra) which the trial court rejected in the following words: *"In spite of the damages to his pocket which the plaintiff is claiming, his counsel, with much industry, argues that he is entitled, in addition, to the estimated current value of the salaries lost. His argument, as far as I could understand him, proceeded on the premises that if say in 1976 the plaintiff's salary of c10 per month could buy say ten bottles of whisky then if there should be a refund to him today of the said salary then that lost salary must be reckoned by the value of ten bottles of whisky today…I do not think that this court can admit such a claim which, if entertained, will open the floodgates to embrace such an economic loss as a new head in assessing damages in breach of contract. I think that the invitation is dangerous and I reject it".*

Just like the position Osei-Hwere, JA took as recounted above; this Court finds dangerous and unwelcome Appellant's invitation to use the current salaries being earned by employees of Respondent bank in the same position Appellant held in 1999, to compute the 15 months salaries awarded by the Court of Appeal. This is contrary to the *restitutio in integrum* principle, which guides the courts in determining the quantum or measure of damages in breach of contract cases.

We find reasonable the award to Appellant by the Court of Appeal his salary and allowances for a period of fifteen months, beginning from the date of his dismissal; i.e. 6th April 1999 as adequate damages for his wrongful dismissal. This should be computed on the basis of salaries and allowances he would have earned in the fifteen (15) months following the month of dismissal; i.e. from 6th April 1999 to 5th July 2000.

The Court of Appeal also ordered that Appellant's SSNIT contributions and Provident Fund for fifteen months from 6th April 1999, including any outstanding arrears be paid. We do not think the order meant that the SSNIT contributions be paid to him personally since that is not done. By that order, his SSNIT contributions for the fifteen months following his dismissal must be deducted and paid to SSNIT as his contributions towards his retirement benefits, which he could access after the attainment of sixty (60) years. This includes the employer's; (i.e. Respondent's) portion for the same period, which must similarly be paid to SSNIT.

Aside from this, we are of the view that it was not fair for the Court of Appeal to limit the payment of other entitlements to the provident fund alone. As was held by this Court in the *Nartey-Tokoli* and *Kobi cases* (supra), the measure of damages for wrongful dismissal from employment is not confined to loss of wages or salary only. In addition, the affected worker is to receive his entitlements under the contract of employment due or earned but unpaid by the employer. These would include leave allowance, bonus, long service awards (if any) and all other benefits the worker enjoyed during his tenure of employment. Appellant is therefore to be paid all other earnings, entitlements or remuneration he was entitled to for the period of fifteen (15) months after his wrongful dismissal, including his accrued provident fund.

We are also of the view that the Court of Appeal should not have substituted the award of three (3) months' salary in lieu of notice with one (1) month's salary without assigning any reason for such interference. The Court of Appeal did not assign any reason for doing so. In interfering with the award made by a trial court, the criterion is not what the appellate court would have awarded if the case had been tried by it. So long as the trial judge exercised his discretion within the law in arriving at the 3 months' salary in lieu of notice, that decision should not have been disturbed. The payment of three months' salary in lieu of notice as ordered by the trial High Court is hereby restored.

Taking into consideration the instability of the cedi and the erosion of its real value over time, it is not out of place to order the Respondent to pay interest on the fifteen months accrued salaries and allowances from the date of the High Court Judgment (i.e. 6th May 2010) to this date of judgment on the basis of the Court (Award of Interest) Law, C. I. 52/2005. The award of interest by the trial High Court is hereby restored but varied as above.

Other awards and variations made by the Court of Appeal but not mentioned herein (including costs) remain undisturbed. The appeal is therefore, allowed in part.

(SGD) YAW APPAU

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE- BONNIE

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