Echwa v Kenya Airports Authority (Civil Appeal E099 of 2021) [2024] KECA 828 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 828 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E099 OF 2021

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 12, 2024

BETWEEN

MOSES ECHWA .... APPELLANT

AND

KENYA AIRPORTS AUTHORITY .... RESPONDENT

(Being an appeal from part of the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Mombasa (Byram Ongaya, J.) delivered on 21st May 2021 in ELRC Cause No. 302 of 2016) Judgment of the Court)

JUDGMENT

1. By a statement of claim dated 13th April 2016, the appellant, Moses Echwa, sued the respondent, Kenya Airports Authority, in the Employment and Labour Relations Court at Mombasa in Cause No. 302 of 2016 praying for: a declaration that his dismissal on 9th July 2015 was unfair for want of due procedure; an order compelling the respondent to reinstate him to the position which he held prior to his dismissal; damages for unlawful termination at the rate of Kshs. 131,373/10 per month; interest at 12% per annum from the date of filing suit until payment in full; general damages; and costs.

2. The appellant's case was that he was employed as a security warden on 16th October 1996; that he served the respondent diligently for 17 years; that on or about 14th May 2014, he was falsely accused of allegedly plucking off official documents relating to fuel spillage, and of conspiracy to defraud the respondent as appears from the notice to show cause of even date; that he denied the allegations vide his letter dated 15th May 2014; that the respondent dismissed him from employment on 8th July 2014 without according him an opportunity to be heard; that no disciplinary committee meeting was held on 8th July 2014 as alleged in the letter of dismissal; that the respondent alleged that the appellant was guilty of gross misconduct as a result of which he was summarily dismissed; that the termination was unfair and amounted to wrongful dismissal; that, in consequence of his dismissal, he was deprived of

Kshs. 131,373/10 per month; and that he was traumatised and suffered mental stress for which he was entitled to general damages.

3. In its memorandum of reply dated 16th August 2016, the respondent denied the appellant's claim and stated that the appellant was dismissed for disciplinary issues; that, on diverse dates between January 2012 and March 2014, the appellant, jointly with others, unlawfully used 12 spillage forms to invoice operators whose aircrafts spilled fuel or oil at the Wilson Airport; that the respondent lost revenue in the sum of Kshs. 379,125 by reason of the fact that the appellant, jointly with others, did not submit duplicate spillage forms to the finance department; that the appellant was charged jointly with others vide the charge sheet dated 23rd April 2014; that the appellant and his co-accused were invited to and attended a disciplinary hearing conducted on 8th July 2014 after which a decision was made to terminate him vide a letter dated 9th July 2014; that he appealed the decision vide a letter dated 14th September 2014 and, after due consideration, his appeal was dismissed vide a memorandum dated 7th October 2014; that the procedure laid in the Human Resource Manual was followed; and that he was accorded a hearing in accordance with section 41 of the *Employment Act*, 2007 (the Act). It urged the trial court to dismiss his claim with costs.

4. Only the appellant testified in support of his case stating that, even though he attended the disciplinary committee's hearing on 8th July 2014, he was not given a hearing but was instead told to go out by the Chairman who threatened to call the police; that he was never served with a charge sheet; that, prior to the disciplinary proceedings, he received a show cause letter but was afforded no other opportunity to reply to the allegations; that he appealed and the appeal was rejected; that an investigation was initially carried out following the disappearance of some fuel spillage forms, including Form Serial No. 016 for SAX Aviation indicating a penalty of Kshs. 37,000; that he wrote a statement in the course of the investigations indicating that he went to the said airline's apron only for normal inspection and later collected Kshs. 20,000 from his friend Mohamed, an engineer working with Fly 540, which was a friendly loan that he signed for on a piece of paper and later repaid; and that that he never received money from SAX Airlines.

5. In addition to his oral testimony, the appellant adopted his witness statement dated 13th April 2016 in which he stated that the proceedings of the disciplinary committee did not adhere to the principles of natural justice in that no charges were served on him contrary to Clause N.9 (i) of the HR Manual; that the proceedings took place before his right to make a reply through his immediate supervisor had been made contrary to Clause N.9 (i) of the HR Manual; that he was not given a chance to present any documentary evidence to exonerate himself from the allegations, contrary to Clause N.9 (iv) of the HR Manual; and in that he was not supplied with a record of the proceedings of the disciplinary committee meeting.

6. On its part, the respondent called two witnesses. Newton Kithuka, the respondent's security officer and the investigating officer, testified as RW1 and produced the investigation report which he compiled after completing investigation and fully relied thereon. He also adopted his witness statement dated 7th December 2017.

7. The gist of his witness statement and report was that, on 5th March 2014, a fuel spillage form Serial No. 016 had been filled out with respect to fuel spillage by an aircraft operated by SAX Airlines; that the form was later found plucked off from the book while duplicate copies had not been given to the relevant sections as required; that, when RW1 visited SAX Airlines to investigate the matter, he established that the appellant, who was not authorised to collect revenue for the respondent, signed a petty cash voucher amounting to Kshs. 20,000 in respect of the fuel spillage payment, but that the amount was not remitted to the respondent's cash office, and no receipt was issued to the operator;

that the appellant acknowledged signing for the money but categorically denied the act of plucking and disappearance of the forms; and that the investigation pointed to culpability of the respondent, and RW1 made a report to that effect.

8. On cross-examination, RW1 admitted that the petty cash voucher was not filed, but stated that it had been enclosed with the investigation report.

9. Lydia Cheruto Chelimo, the respondent's Staff Welfare Officer, testified as RW2 and adopted her witness statement dated 7th December 2017. The gist of the statement was that, after investigations were conducted into the loss of documents relating to fuel spillage penalty and loss of the respondent's revenue, the appellant was found to have a case to answer jointly with others, and a show-cause letter issued to them; that a disciplinary committee was formed to hear and determine the matter where by the sitting was held at the respondent's head office; that the appellant appeared before the disciplinary committee whereupon the charges were read to him; that, in his response, the appellant admitted before the panel that he signed for Kshs. 20,000 from SAX Airline (Fly 540) and appended his signature in the petty cash voucher on 11th March 2014 as payment for oil spillage; that, in the disciplinary committee findings, the appellant was found guilty of unauthorised collection on behalf of the respondent, which was not remitted to the Finance Department; that the disciplinary committee unanimously recommended the appellant's summary dismissal for gross misconduct as provided for in the HR Manual; that the appellant was issued with a summary dismissal letter; that the appellant thereafter appealed the decision; and that the appeal committee considered his appeal and upheld the decision.

10. On cross-examination, RW2 admitted that the Charge sheet was not served as set out in Clause N.9 (i) of the HR Manual, but contended that the provision was complied with as the charge sheet and show cause letter are one and the same. RW2 also admitted that the show cause letter dated 14th May 2014 and forwarded on 15th May 2014 indicated that the appellant was to reply by 16th May 2014, and yet Clause N.9 (i) of the HR Manual provided that he was to reply in 7 days; and that the show cause letter made no reference to the sum of Kshs. 20,000 allegedly collected from SAX Airlines.

11. On 21st May 2021, the ELRC (Byram Ongaya, J.) entered judgment for the appellant in terms of a declaration that his dismissal was unfair for want of strict compliance with clause N.9(i) of the respondent's Human Resource Manual and ordered each party to bear their own costs.

12. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on appeal on the grounds that:

> " 1. The learned judge erred in law and in fact in finding that the Appellant was undeserving of compensation for unfair termination as provided for under section 49 of the *Act* despite having found that termination of the Appellant's employment was procedurally unfair.
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> 2. The learned judge, in denying the Appellant compensation for unfair termination on the basis that there existed a valid reason to dismiss the Appellant, erred in law and fact by elevating the substantive justification test above the equally important test of procedural fairness in effecting termination.
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> 2. The learned judge erred in law and in fact by denying the Appellant compensation on the basis that the Appellant contributed to his dismissal

yet that was only a relevant factor in determining the Court's discretion in assessing the quantum of compensation.

3. The learned judge exercised his discretion injudiciously in holding that each party should bear its own costs of the suit despite the Appellant having succeeded in proving his case that termination of his employment was procedurally unfair.

4. The learned judge erred in law and in fact in finding that there can be substantial compliance with due procedure by an employer, a test which is not grounded in any law as the law only envisages compliance with procedural fairness in effecting termination.

2. The learned judge erred in law and in fact in arriving at a decision that was against the weight of the evidence and the law."

13. In support of the appeal, learned counsel for the appellant, M/s. Gikandi & Company, filed written submissions and a list of authorities dated 27th February 2024 citing 9 judicial authorities the relevant ones of which we have taken to mind.

14. On their part, learned counsel for the respondent, M/s.Cootow & Associates, filed their written submissions dated 15th June 2023. Opposing the appeal, counsel cited 2 judicial authorities, which we have also considered.

15. This being a first appeal, this Court's mandate was espoused in *Ng'ati Farmers' Co-Operative Society Ltd. vs. Ledidi & 15 Others* [2009] KLR 331 as follows:

> "An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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 demeanour of a witness is inconsistent with the evidence in the case generally."

16. This mandate was reiterated in the case of *Kenya Ports Authority vs.Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

17. We are, however, conscious as cautioned by the predecessor to this Court in *Peters vs. Sunday Post Ltd* [1958] EA 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to

determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

18. In our considered view, the three main issues that fall for our determination are: (i) whether the disciplinary procedures and the procedural infractions complained of amounted to unfair termination; (ii) whether the appellant was entitled to compensation and other reliefs sought in his statement of claim; and (iii) what orders ought we to make in determination of this appeal, including orders on costs.

19. On the 1st issue, the appellant contended that termination of his employment was unjustified and procedurally unfair. According to him, the disciplinary proceedings did not adhere to the principles of natural justice in that he was not accorded a fair hearing or given the opportunity to respond to the allegations levelled against him. He faulted the learned Judge for "elevating the substantive justification test above the equally important test of procedural fairness," and for upholding his termination against the weight of evidence adduced in his defence. It is noteworthy, though, that the appellant admitted receiving Kshs. 20,000 from an engineer at SAX Airlines in the face of allegations that he was guilty of failure to account for revenue collected on account of fuel spillage, and of mutilating the fuel spillage form relating thereto.

20. Testifying in the respondent's defence, RW1 and RW2 reiterated that the appellant was responsible for mutilating fuel spillage forms and for wrongfully collecting revenue for which he failed to account. According to RW2, the appellant was duly informed of the charges levied against him and given the opportunity to present his case in accordance with the procedure prescribed in the respondent's HR manual, and in accordance with which he was found guilty of gross misconduct. In conclusion, they contended that, the appellant having failed to show cause why he should not be dismissed, his summary dismissal was justified despite minor procedural infractions with regard to the requirements set out in the respondent's HR manual with regard, for instance, to the brevity of the notice which did not comprehensively set out the case against him, and the shorter period within which the appellant was required to show cause.

21. The *Employment Act* defines unfair termination in section 45 thus:

    45. Unfair termination

        1. No employer shall terminate the employment of an employee unfairly.

        2. A termination of employment by an employer is unfair if the employer fails to prove—

            a. that the reason for the termination is valid;

            b. that the reason for the termination is a fair reason—

                i. related to the employees conduct, capacity or compatibility; or

                ii. based on the operational requirements of the employer; and

                c. that the employment was terminated in accordance with fair procedure.

        4. A termination of employment shall be unfair for the purposes of this Part where—

            a. the termination is for one of the reasons specified in section 46; or

b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Employment and Labour Relations Court shall consider—

   a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

   b. the conduct and capability of the employee up to the date of termination;

   c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

   d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

   e. the existence of any previous warning letters issued to the employee.

22. As the learned Judge correctly held, the reasons for which the appellant was summarily dismissed were substantively justified. However, we are not persuaded that the procedure adopted in reaching that decision was unfair on account of minor infractions on account of the allegedly short period within which he was required to show cause, which did not by any means render the termination unfair within the meaning of section 45 of the *Act*. The record as put to us clearly shows that: (a) the reason for the termination was valid; and (b) that the reason for the termination was a fair reason in relation to his conduct.

23. Section 41 of the *Act* sets out the basic procedural requirements that ought to be complied with before termination in the following words:

> " 41. Notification and hearing before termination on grounds of misconduct
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> 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.
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> 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".

24. With regard to the requirement that termination be on valid grounds, Section 43 of the *Act* provides:

43. Proof of reason for termination

"(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".

25. But for the minor procedural infractions complained of, it is noteworthy that the appellant was notified of the reasons for termination; that he was given notice to show cause why his employment should not be terminated; that he was taken through the disciplinary hearing in accordance with the procedure set out in the respondent's HR manual albeit with some lapses that did not by any means invalidate the process or offend the provisions of section 41 of the *Act*; that he presented his defence; that he was notified of the ensuing decision made to summarily dismiss him on grounds of gross misconduct; that he was accorded the opportunity to appeal, and his appeal considered; and that the ultimate decision made to terminate his employment was for good reason.

26. In conclusion, we find nothing to fault the learned Judge for finding that, even though the disciplinary procedure revealed what is termed as "lapses", such "lapses" did not render the termination unfair within the meaning of section 45 of the *Act*. Indeed, there was substantive justification therefor, and the procedure adopted did not substantially offend the provisions of section 41 of the *Act*. The learned Judge found, and we agree, that the appellant was properly found guilty of gross misconduct for which he was summarily dismissed and was undeserving of compensation as claimed.

27. We form this view taking to mind the decision in *Overdrive Consultants (K) Ltd vs. Mazhar Sumra* [2020] eKLR where this Court held that:

"For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

28. In the same vein, this Court in *Ndugu Transport Company Limited vs. Sewe* [2024] KECA 127 (KLR) held that the question of whether or not a termination is unfair is dependent on whether or not an employer has adhered to the twin requirements of due procedure and substantive justification. As the Court observed, adhering to one and contravening the other renders the dismissal wrongful.

29. To our mind, the twin requirement aforementioned was satisfied. The respondent did not only establish gross misconduct on the part of the appellant, but also gave him the opportunity to give a defence. In *Cooperative Bank of Kenya Limited vs. Yator* [2021] KECA 95 (KLR), this Court had this to say on the issue of procedural fairness:

"33. … even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is

undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence."

30. Having found that the appellant's dismissal was by no means unfair, we form the view that nothing turns on the 2nd issue as to whether the appellant was entitled to the reliefs sought, or whether the trial Judge was at fault in declining to award compensation. Accordingly, we need not say more.

31. As to whether the learned Judge acted injudiciously by directing that each party bears their own costs, we think not. We form this view mindful of the High Court's decision in *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR where Odunga, J. (as he then was) correctly observed that:

> " ...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion..."

32. Likewise, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, the Supreme Court stated that:

> " [14] So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [*Judicial Hints on Civil Procedure*, at p.94]:
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> '[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure...Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.'
>
> [15] It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the- event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure."

33. While the learned Judge did not find for the appellant on his claim for unfair termination, he nonetheless formed the view that the disciplinary procedure fell short of certain requirements under the respondent's HR manual which, in any event, did not of themselves invalidate the procedure of render the termination unfair. In our view, he was not at fault in directing that the parties bear their own costs.

34. Having come thus far, what then are the orders that we ought to make in determination of this appeal? Having concluded that (i) the appellant's summary dismissal was by no means unfair; (ii) that he was not entitled to compensation as prayed; and (iii) that the learned Judge was not at fault in directing that the parties bear their own costs of the suit, we find that this appeal fails and is hereby dismissed. On our part, we are enjoined to apply the principle that costs follow the event. The event being that

the appeal fails as having been needlessly instituted, the respondent shall have the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR