Wanyagah v Market Development Trust t/a Kenya Markers Trust (Civil Appeal 356 of 2017) [2023] KECA 998 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 998 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 356 OF 2017

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JULY 28, 2023

BETWEEN

PAUL WANYAGAH ..... APPELLANT

AND

MARKET DEVELOPMENT TRUST T/A KENYA MARKERS TRUST ..... RESPONDENT

(Being an appeal against the Judgment and Orders of the Employment & Labour Relations Court at Nairobi (Mbaru, J.) dated 10th August 2017 in ELRC Cause No. 2300 of 2016)

JUDGMENT

1. Before this court is an appeal against the judgment of the Employment and Labour Relations Court (ELRC) at Nairobi dated August 10, 2017 in ELRC Cause No 2300 of 2016.

2. The dispute culminating in the appeal stems from an employer-employee relationship enjoyed by the parties. The appellant was employed by the respondent as its Chief Executive Officer (CEO).His contract of service was for a period of 2 years commencing February 2, 2015 at a gross monthly salary of Kshs 1,080,000/=. In January 2016, the appellant's contract of service was revised from two to three years at a gross monthly salary of Kshs 1,472,285/=.

3. The appellant's suit before the ELRC was that, on July 19, 2016, while outside the country on a study programme, the respondent's board of directors held a meeting at which a report prepared by KPMG relating to an audit of the respondent's operations between January 2014 and March 2016 was discussed. The report had been prepared upon the request of the Department for International Development (DFID), the respondent's main donor. The appellant alleged that he protested the discussion of the report as it had no input from the management, but that he was denied access to the meeting, which he had intended to attend via a virtual platform known as Skype.

4. On July 26, 2014, the appellant returned to the country whereupon he was called by the respondent's chairperson of the board, who asked him to resign on the basis of the KPMG report. The appellant protested against the demand on the ground that he had not seen the report. He was sent on compulsory leave for 2 weeks pending investigations on the report and its findings. On August 3, 2016, the respondent's chairperson wrote an email to the appellant offering him 4 months' pay as amicable settlement in return for his resignation. The appellant countered that offer. He said that he ought to be paid for the remainder of his contract term, a period of 27 months, as he had not done any wrong to justify resignation. The chairperson of the respondent sent another email to the appellant offering 4 months' pay upon his resignation and informed him that, unless the offer was accepted, the respondent would commence termination proceedings.

5. Vide a letter dated August 12, 2016, the appellant was invited by the respondent to attend a disciplinary meeting on August 24, 2016 based on four allegations drawn from the KPMG report. The appellant contended that he requested for documents in support of those charges, but that the respondent failed to provide the requested documents. The appellant wrote to the respondent indicating that the report was not a forensic or legal audit and could not be used as a basis of charging anyone; and that he could not respond to the allegations against him as the respondent had failed to supply the requested documents.

6. The appellant claimed that he was invited to a disciplinary meeting on October 24, 2016 but that, when he arrived at the venue, he was informed by a security officer that there was no meeting scheduled for that day; and that there were conflicting notices and dates for the disciplinary meeting. He stated that he received a letter dated October 25, 2016 informing him that he had been terminated from his employment with the respondent.

7. The appellant's claim against the respondent was his salary for the month of October 2016; salary for 24 months being the remainder of the contract period; and employer's pension contribution for 24 months being the remainder of the contract period at 10% of his gross salary, all totalling to Kshs 38,686,324/=

8. The respondent's case was that the said KPMG report raised specific issues and concerns in relation to procurement and fee arrangements with specific consultants; that there were several weaknesses in the purchase and use of programme assets and the appellant's leadership in relation to employment issues; that the appellant bullied and abused staff, resulting in severe staff demotivation; that the respondent's board was concerned with the findings of the report and requested further investigations on the issues raised; that the respondent's board chairperson met with the appellant, but that he did not ask him to resign but, rather, informed him of the adverse findings in the report, and the fact that the board was considering taking the relevant steps; that the board resolved to send the appellant on compulsory leave with full pay so as to facilitate investigations; and that the chairperson engaged the appellant in discussions on a without prejudice basis in an effort to achieve amicable resolution of the underlying issues.

9. The respondent's contention was that further investigations following the KPMG report revealed that the appellant as the CEO of the respondent had failed to take into consideration value for money in procurement; that there was a weakness in controlling the use of programme funds; that programme funds were used to meet costs of imports and customs duties contrary to the memorandum of understanding (MOU) with the DFID; and that the appellant constantly interfered with and micromanaged the staff. The board invited the appellant for a discussion on the issues made against him vide a letter dated August 12, 2016, which the appellant refused to accept. The appellant declined service via DHL and also failed to pick up the parcel at Village Market despite an agreement with him to

do so. The appellant was granted access to his office and emails to be able to respond to the allegations against him at a meeting that was rescheduled to August 26, 2016. The appellant demanded supply of further documents, all of which were availed to him.

10. According to the respondent, the appellant failed to respond to the allegations against him whereupon the board decided to convene a disciplinary hearing and invited him to attend. The respondent contended that the initial letter sent to the appellant inadvertently indicated that the meeting was on October 24, 2016, but that the same was corrected by the chairperson of the board and one Ms Nyokabi as being on October 25, 2016. The appellant nevertheless failed to attend the hearing. Upon failure on the appellant's part to present himself at the hearing, the respondent's board considered the allegations against him and decided to terminate his contract of employment in accordance with its policy and clause 10.1.1 of his employment contract. The appellant was to be paid his terminal dues on return of the respondent's property, but he was yet to complete the handover.

11. The matter went to full hearing with the appellant testifying as the sole witness on behalf of the claimant. The gist of his testimony was that the respondent terminated his employment services without valid reasons, and without affording him a fair hearing as contemplated under the law. He testified that the termination of his employment services was premeditated and without any justifiable reasons and that, therefore, he was entitled to the reliefs sought in his memorandum of claim.

12. Dr Caesar Mwangi, the chairperson of the respondent's board of directors, testified on behalf of the respondent. In summary, his testimony was that there were valid reasons for termination of the appellant's employment as was evident from the report prepared by KPMG and the investigations undertaken thereafter; that the appellant was made aware of the charges levelled against him, and was given an opportunity and sufficient time to prepare his response and defence; that all the necessary documents requested by the appellant were availed to him to enable him prepare his defence; and that he was invited to a disciplinary hearing, which he declined to attend. The respondent's position was that the appellant's employment was terminated in accordance with the applicable provisions of the *Employment Act, 2007* ('the Act') and that, in the circumstances, he was not entitled to any of the reliefs sought.

13. The trial court rendered its decision on August 10, 2017 and made the following key findings:

    a. "A series of correspondence ensued between the appellant and the chairperson after the appellant was sent on leave, culminating in the chairperson confirming to the appellant all the documents shared with him and offering to accompany the appellant to his office to access more documents, which the appellant declined. The appellant was then invited to the disciplinary hearing to be held on October 24, 2016. Another email was sent indicating that the hearing would be on October 25, 2016. The appellant attended on October 24, 2016 and found no meeting and decided to ignore the notice for October 25, 2016. On October 25, 2016, the board met and decided to terminate the appellant from employment.

    b. The offer by the respondent to have the appellant visit the office to access all records, documents and emails that he required so as to respond to the allegations against him was reasonable and generous of the respondent. The appellant declined and made conditions to have unrestricted access. The respondent and its chairperson then felt exasperated to make a decision as efforts to ensure procedural justice to the appellant had failed.

    c. The appellant's attitude and approach towards his employer and the requirement that he addresses allegations against him so as to have the matter addressed at the earliest was manifested and apparent in the events of October 24, 2016. Once he learnt that there was no meeting that day, nothing stopped the appellant from seeking clarification from the

respondent. The appellant instead decided to drive away and go to the country side and thereby squandered his chance and right to a fair hearing.

d. The claim that there was unfair termination could not stand."

14. The trial court dismissed the claim, save that the salary due for October 2016 was to be paid, less the value of the respondent's property that the appellant had not surrendered.

15. Dissatisfied with the said judgment, the appellant preferred this appeal on grounds that the learned judge erred in: failing to find that the respondent's meeting decided to terminate the appellant without affording the appellant an opportunity to be heard; failing to appreciate the fact that the respondent relied upon a KPMG report that was a qualified confidential document that had not sought the input of the appellant or other senior managers, and which was meant for the sole use of its commissioner, DFID; failing to appreciate that the respondent's actions through its chairperson were biased against the appellant; failing to find that the respondent's letter of 12th August to the effect that the appellant's management style was totally incompatible with the needs of the organization, and that it was detrimental to the wellbeing of the respondent amounted to constructive termination of the appellant and raised fresh charges against the respondent; failing to appreciate that the letter notifying the appellant of the hearing date of October 24, 2016 was never formally changed by the respondent; not finding that the two conflicting dates and schedules of 24th and October 25, 2016 for the disciplinary hearing were a deliberate ploy by the respondent to confuse, frustrate and drive the appellant to despair and to avoid giving him a fair hearing; and in failing to find and to hold that the respondent had not proved any of the grounds on which it had terminated the appellant's employment.

16. At the hearing of this appeal, learned counsel Mr Onsando appeared for the appellant while learned counsel Mr Ndung'u appeared for the respondent. Highlighting the appellant's written submissions dated February 14, 2018, Mr Onsando submitted that the appellant's termination was premeditated, and that the appellant was not accorded a fair hearing. He contended that the respondent, through its chairperson of the board of directors, pressurized the appellant to resign and, when he declined, the respondent unfairly instituted termination proceedings against him. Counsel further contended that the unfairness in the termination proceedings was evident from the respondent's conduct of serving the appellant with two conflicting dates for the disciplinary hearing to wit, October 24, 2016 and October 25, 2016. According to counsel, the conflict in the dates was a deliberate ploy by the respondent to confuse and frustrate the appellant with the sole purpose of denying him a fair hearing.

17. On the respondent's compliance with the provisions of section 41(1) of the Act, it is contended that a valid notice of the grounds upon which the appellant's employment was to be terminated was not issued and served upon him; and that the purported notices which were served upon the appellant dated August 12, 2016 and October 19, 2016 respectively contained different charges against the appellant.

18. It was further submitted that the respondent violated the provisions of section 41(2) of the Act by not availing the necessary documents to the appellant to enable him to prepare his response and defence, and also by giving him conflicting dates for the disciplinary hearing. In this regard, counsel submitted that the respondent did not allow the appellant to respond to the allegations against him, or to present his defence at the hearing.

19. As regards the question as to whether the respondent proved the reasons for termination of the appellant's employment, counsel submitted that KPMG, who prepared the report which formed the basis for the investigations leading to the appellant's termination, was not a party to the suit, and nor was the author of the said report called to testify. Related to this is the submission that DFID who had commissioned the said report was not a party to the claim before the trial court. In this regard,

the appellant contends that the respondent, by terminating his employment, violated the provisions of section 43 of the Act.

20. Lastly, it was contended that the termination of the appellant's services went against the provisions of section 45 of the Act. The learned trial judge was faulted for making a finding that there was evidence to justify termination of the appellant. We were urged to allow the appeal with costs.

21. On its part, the respondent, in its written submissions dated March 25, 2019, contended that there were valid and reasonable grounds for termination of the appellant's employment, which were set out on the face of the termination letter served upon him and that, therefore, the respondent discharged the burden of proving the reasons for the appellant's termination as required under sections 43 and 45(2) (a) of the Act.

22. Regarding the question as to whether the process leading to termination of the appellant's contract of service was fair and lawful, the respondent's counsel submitted that it was; that the appellant was given a notification of the charges he was facing; he was provided with copies of all the documents that he requested for and was granted access to his work emails and to his office; that he was given ample time to prepare his defence; that he was invited to a disciplinary hearing, which he declined to attend; and, finally, that termination of his services was after due consideration of all the relevant matters by the respondent. According to counsel, termination of the appellant's employment services was in accordance with the provisions of sections 41, 45(2) (c), 45(4) and (5) of the Act.

23. On the issue of the conflicting dates of the disciplinary hearing, the respondent submitted that, indeed, there was a conflict, but insists that the correct date was October 25, 2016 as contained in the two emails sent to the appellant. The respondent takes issue with the appellant's failure to clarify the correct date amidst the apparent conflict, which was not known to the respondent as of then, and submitted that his conduct of going for the hearing on October 24, 2016 and his failure to visit the respondent's office to clarify the correct date was a confirmation that he had no intention of participating in the disciplinary hearing.

24. As regards the soundness of the decision delivered by the trial court, it was submitted that the decision was based on both fact and law and, therefore, should not be interfered with. Lastly, counsel submitted that the trial court made the correct determination in terms of the reliefs sought by the appellant which, according to the respondent, he was underserving of as the termination of his services was within the law and therefore justified.

25. We have considered the appeal, the submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the *Rules of this Court* is to reappraise the evidence and draw our own conclusions. In *Peters vs Sunday Post Limited* [1958] EA 424, the predecessor of this court, the Court of Appeal for Eastern Africa, stated that:

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

26. This appeal stands or falls upon our determination of the following three issues:

    i. Whether the appellant was given reasons for the termination of his employment.

    ii. Whether the termination process was substantively and procedurally fair.

iii. Whether the appellant was entitled to any of the reliefs sought.

27. The provisions of section 43 of the Act makes it mandatory for an employer to give an employee reasons for the termination of his employment. Section 43 provides as follows:

> "(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."

28. It is evident from the provisions of section 43 that, where an employer does not give reasons for termination of an employee's contract of employment, then such termination amounts to unfair termination of employment as contemplated under section 45 of the Act.

29. The appellant contends that termination of his employment was pre-meditated, and that there were no valid reasons provided by the respondent for the termination. This certainly is, in our view, not the correct position. It is evident from the correspondence exchanged between the appellant and the respondent that the former's termination related to findings of a report prepared by KPMG at the request of DFID, the respondent's main donor. The appellant, vide a letter dated July 29, 2016, was sent on compulsory leave. The respondent stated in the aforesaid letter that "the report raised specific concerns in relation to *inter alia* the procurement of and fee arrangements with specific consultants, as well as various weakness in the purchase and use of programme assets."

30. It is clear from the letter by which the appellant was sent on compulsory leave that he had information that his performance vis-à-vis the findings contained in the KMPG report was being scrutinized. In fact, the reason why he was placed on compulsory leave was to allow further investigations into the allegations contained in the said report.

31. The appellant would, thereafter, exchange numerous letters and emails with the respondent through its board chairperson on the same subject matter, culminating in the letter dated October 19, 2016, whose subject was "Notification to appear at a disciplinary hearing." The allegations levelled against the appellants in the said letter were, in summary, as follows:

    a. failure to take into consideration value for money and, in particular, during the procurement of, and fee arrangements with Power Talks Limited for team building facilitation fees in October 2015;

    b. weakness in ensuring control of the use of programme funds;

    c. use of programme funds to meet cost of import and custom duties and similar fees contrary to the memorandum of understanding between KMT and DFID; and,

    d. the appellant's constant interference with, and micromanagement of staff who in turn complained that they needed to be empowered and be allowed to make decisions.

32. It is evident that, at all times, the appellant was given reasons why his employment could potentially be terminated. The letter dated October 19, 2016 expressly laid down the allegations against the appellant, which he was required to defend. The allegations related to the appellant's performance as the respondent's Chief Executive Officer, which resonated with his job objectives as contained in his

job description, which were, *inter alia*, to be responsible for the respondent's long term organisation development so as to position the institution to deliver its mandate and achieve set targets; to provide oversight to the financial management function, ensuring that systems and reporting processes were optimal, ensure the effective management and utilization of the respondent's financial resources; and to lead, manage, motivate and develop the respondent's staff, encouraging their commitment to corporate objectives, and meeting their personal development needs.

33. The termination of the appellant's employment services was communicated to him through a letter dated October 31, 2016. We have perused the said letter and note that various reasons for the appellant's termination were given. Those included failure to take into consideration value for money, particularly in the procurement of, and in making the arrangements with Power Talks Limited for team building and staff motivation session facilitation in October 2015; failing to respect the roles played by employees in the organisation; applying the organisation's policies in a discriminatory manner; and for acting in unprofessional and disrespectful manner towards employees, and by using threats, abusive and insensitive language while addressing them.

34. It is clear to us that the appellant was made aware of the reasons for which termination of his employment was being considered through the letter inviting him for the disciplinary hearing where he was required to appear and defend himself. At the conclusion of the disciplinary hearing, the appellant was duly informed of the reasons for the termination of his employment through the termination letter dated October 31, 2016. The reasons provided by the respondent aligned properly with the appellant's job description. In our considered view, the respondent followed the provisions of section 43 of the Act before terminating the appellant's employment.

35. Turning to the second issue as to whether the appellant's termination was fair and in accordance with due procedure, we take the view that this issue is two-pronged. The first limb is whether the appellant was allowed access to the relevant documentation to enable him mount a proper defence. The second limb is whether he was altogether given a fair hearing.

36. The provisions of section 41 of the Act are couched in mandatory terms. It provides that:

> "(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."

37. As regards the issue of documentation, numerous email correspondence were exchanged between the appellant and the respondent through its board chairperson on the various documents requested by the appellant in order to answer to the allegations leveled against him. The appellant, by his various emails, detailed the specific documents which he required from the respondent. We note from the correspondence that some of the documents were delivered directly to the appellant's house through courier, while he collected others at Java restaurant along Waiyaki Way. The appellant was also granted

access to his work emails in order to access the relevant documentation which he required. In this connection, it is noteworthy that the appellant had possession of his office laptop by which he could access his work emails at all times. He also requested to have access to his office so that he could retrieve the relevant documents required to mount his defence. Upon grant of access to his office, he shifted goal posts and stated that he must first get the documents he had requested for prior to the invitation in order for him to determine what other documents he required from his office.

38. The numerous emails exchanged between the appellant and the respondent on the issue of documentation clearly reveal that the appellant was intent on frustrating and/or delaying the disciplinary hearing process. It is evident that when the respondent availed the specific documents requested for by the appellant, the latter would shift goal posts and request for additional and/or totally new documents altogether. The appellant requested for these documents piecemeal, which can only be interpreted to mean that he was intent on delaying the hearing process. It is not lost on us that the appellant had on several occasions access to his work email from where he could retrieve some of the documents he had requested for. Even assuming that some of the documents were not available on email, he was given access to his office so that he could retrieve the necessary documents, but chose not to visit the office.

39. From the totality of the circumstances herein, the appellant was given access to all the relevant information and material to enable him mount a reasonable defence to the allegations leveled against him. However, he was intent on delaying the process. We agree with the findings of the trial court that the appellant sought to prolong the disciplinary process with pleasure, which cannot be allowed in fair labour relations.

40. Turning to the issue of fair hearing, it is the appellant's argument that he was given conflicting dates for the disciplinary hearing, which was meant to frustrate and prevent him from attending the said hearing. It is a fact that, whereas the respondent's letter dated October 19, 2016 inviting the appellant to the disciplinary hearing indicated that the disciplinary hearing would take place on Monday October 24, 2016 at 10.00 a.m. at the Dusit Hotel, two subsequent emails sent to the appellant on October 20, 2016 by the board chairperson and by one Ms Nyokabi on the instructions of the board chairperson indicated that the hearing was to take place on October 25, 2016 at 10.00 a.m. The venue remained unchanged. There was no evidence that the appellant did not receive the subsequent emails advising him of the change of date.

41. The appellant contends that the conflict in the dates was well orchestrated to deny him an opportunity to present his case at the hearing. On the other hand, the respondent's position was that the date (October 24, 2016) contained in its letter dated October 19, 2016 was erroneous, and that the correct date was as contained in the two subsequent emails sent to the appellant.

42. The appellant does not deny receiving the letter dated October 19, 2016 inviting him for the disciplinary hearing and the two subsequent emails sent to him on October 20, 2016 on the same subject matter. The appellant was in direct and regular communication with the respondent's board chairperson on email on various issues. It is strange that, upon notification of the conflicting hearing dates, he did not seek any clarification from the board chairperson, or from the respondent on the correct date for the hearing.

43. It is worth noting that when the appellant went to the Dusit Hotel on October 24, 2016 for the disciplinary hearing, he was allegedly informed by one of the security guards that no such hearing/meeting was schedule to take place. It is inconceivable that a security guard would have access to such high-level information. The appellant, as a reasonable man, ought to have gone to the offices of the respondent, which are located in the same premises, and enquired about the intended disciplinary

hearing. It is only the respondent's officers who would have access to such information, and not a security guard stationed at the door. Better still, the appellant could have gotten in touch with the respondent's board chairperson with whom he was in regular communication and sought clarification. We agree with the views expressed by the respondent that the appellant, by his conduct, did not intend to participate in the disciplinary hearing.

44. In sum, the appellant, having been given valid reasons for his termination, and having been invited to defend himself, both in writing and in person, which options he declined to take up, he cannot be heard to say that his termination process was procedurally unfair and against the law. The respondent observed both substantive and procedural fairness prior to terminating the appellant's employment.

45. Turning to the issue of the reliefs sought by the appellant, we are in full agreement with the findings of the trial court that reinstatement does not avail to him as the termination of his services was fair. The same position obtains in respect of the claim for salaries due for the remainder of the contract period for reason that the termination of his employment was justified and in accordance with the law.

46. In conclusion, we find this appeal wanting in merit. Accordingly, we hereby dismiss it in its entirety. The appellant shall bear the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY JULY, 2023.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR