Mukoma v Cannon Assurance Limited (Civil Appeal 366 of 2017)
[2022] KECA 86 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 86 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 366 OF 2017

PO KIAGE, F SICHALE & S OLE KANTAI, JJA

FEBRUARY 4, 2022

BETWEEN

MAINA MUKOMA ..... APPELLANT

AND

CANNON ASSURANCE LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Abuodha, J) dated 30th September 2016 in (ELRC Cause No. 1428 of 2013))

JUDGMENT

1. On 3rd October 2016, Maina Mukoma (the appellant herein)filed an appeal against the judgment of Abuodha, J dated 30th September 2016.

2. The appeal stems from a Memorandum of Claim filed in the High Court at Nairobi by the appellant (the then claimant) on 4th September 2013, in which he sought the following orders:

> "a) The suspension issued to the claimant on 18th April 2013 be quashed and declared null and void.
>
> b) A declaration that the claimant's suspension, leave and subsequent dismissal from employment was unlawful, unfair and wrongful.
>
> c) An order reinstating the claimant to his previous employment/position with the respondent company without any loss of benefits.
>
> d) In the alternative, payment to the claimant of all his respective benefits as set out above at paragraph 15.
>
> e) An order for maximum compensation by way of damages to the claimant.

f) Payment of the interest and costs of this claim".

3. The matter was heard by Abuodha J who in a judgment delivered on 30th September 2016, dismissed the same with no order as to costs holding *inter alia* that:

> "In conclusion the court finds and holds that there existed valid and justifiable reasons to dismiss the claimant summarily and that the dismissal was carried through a fair procedure. The claim is therefore found without merit and is hereby dismissed. The claim having been dismissed the court will not consider the issue of the remedies sought."

4. The appellant was aggrieved with the findings of the Honourable Judge and in a Memorandum of Appeal dated 30th October 2017**, listed 5 grounds of appeal faulting the learned judge for dismissing the claim as follows:

   a) The Learned Trial Judge erred in law in finding and holding that there existed valid and justifiable reasons to terminate the appellant's contract of service summarily as he was guilty of misconduct.

   b) The Learned Trial Judge erred in law in finding and holding that the procedure followed in dismissing the appellant was proper and fair when the appellant had not been adequately informed of any pending decision to terminate him from service.

   c) The Learned Judge erred in law in finding that there was nothing to investigate as the appellant and the respondent were fully aware of the Arusha Skyline issue and the only question left for determination was whether the appellant as the Chief Executive Officer should bear the blame for the projects failure.

   d) The Learned Judge erred in law and in fact in dismissing the appellant's claim on the basis of lacking merit contrary to the evidence adduced before the Honourable Court.

   e) The Learned Trial Judge erred in law and in fact in finding and holding that the respondent could not be faulted the summary dismissal of the appellant without giving valid and proven reasons for so doing.

5. The brief facts in this appeal are as follows; at all material times relating to this suit, the appellant was the respondent's managing director. In May 2007, the respondent was appointed by a company called Arusha Skylines as project insurance underwriters during construction of a hotel and requested to provide a bank guarantee facility in the sum of USD 945,000. Following negotiations between the parties, Chase Bank offered the respondent credit facility in the sum of USD 945,000 by a letter of offer dated 30th May 2007 which was accepted by the respondent on 12th June 2007, vide a board resolution of the respondent dated 12th June 2007 which approved, confirmed and ratified the terms and conditions of the offer letter which lapsed in 2008, without any financial demand being issued or accepted.

6. On or about 23rd April 2010, Chase bank debited the respondent's fixed deposit account No. xxxx with a sum of 448,000 Euros purportedly in enforcement of a guarantee allegedly called by Exim Bank Tanzania and it was only then that the respondent's board of directors allegedly became aware that the appellant had apparently given instructions to Chase Bank via emails exchanged with Chase Bank and other third parties for issuance of a guarantee for 448,000 Euros in favour of Exim Bank. This was without the knowledge and approval of the respondent's board and without informing the board of directors of the issuance of the purported guarantee, whereupon the appellant was suspended from employment by the respondent vide a letter dated 18th April 2013 and subsequently thereafter

summarily dismissed from employment vide a letter dated 20th August 2013 thus provoking the instant suit.

7. The appeal came up for hearing on 23rd June 2021. Ms. Guserwa, learned counsel for the appellant and Mr. Muthui learned counsel for the respondent sought to wholly rely on their written submissions.

8. With regards to grounds 1,3 and 5 of appeal, it was submitted for the appellant that the trial court erred in finding and holding that there existed valid and justifiable reasons to terminate the appellant's contract of service summarily, as he was guilty of gross misconduct and that the appellant in his evidence stated that he carried out instructions on the directions of the chairman of the board of directors of the respondent; that he could only commit the respondent to the extent authorized by the board and that nowhere in the evidence did he state that he proceeded to process the 2nd guarantee without approval from the Board of Directors.

9. It was thus submitted with respect to this evidence that the trial judge failed to consider its value and bearing the allegations that were raised against the appellant and hence totally ignored it thus arriving at the wrong finding.

10. With regard to ground 2, it was submitted that the trial court did not appreciate the fact that the respondent did not follow the procedure set out at Section 41 (1) of the *Employment Act*. It was contended that the respondent failed to give the appellant any fair or reasonable hearing despite his humble request and proceeded to dismiss him without complying with the provisions of Section 41 (2) of the *Employment Act* and that as such, the appellant suffered procedural impropriety at the hands of the respondent resulting in unfair and unlawful dismissal by the respondent.

11. Finally, with regard to ground 4, it was submitted that there was no justification for the dismissal as there was no merit in the allegations brought against the appellant. Consequently, the appellant urged the Court to find that the dismissal was in error and premised on wrong findings and without merit.

12. On the other hand, it was submitted for the respondent that the appellant's termination from employment was both substantively and procedurally fair and in accordance with the law and that the appellant was not entitled to any of the orders sought.

13. With regard to ground one and as to whether there existed valid and justifiable reasons to terminate the appellant's contract of service, it was submitted that it was not disputed that the appellant in his capacity as the respondent's managing director was directly involved in the negotiations towards the issuance of bank guarantees; that he had admitted that the first guarantee of US$ 945,000 expired in June 2008 and that upon expiry of the same, it ceased to have any legal/contractual effect; that accordingly there was nothing to be continued/extended and that the respondent's letter dated 22nd January 2009, to Chase Bank acknowledging that the guarantees of US $ 945,000 expired in June 2008, was written by the appellant; that the appellant being aware of the procedures that were followed in respect of the first guarantee, and that the guarantee having expired, the appellant was well aware that there ought to have been a facility agreement or a letter of offer from Chase Bank, acceptance of the offer by the respondent and a board resolution authorizing the issuance of a guarantee for 448,000 Euros before he could issue instructions for issuance of the guarantee. Further, that the appellant had admitted that there were no board minutes or resolutions for issuance of the guarantee for 448,000 Euros to Chase Bank in favour of Standard Bank or Exim Bank and that the board only became aware of the issuance of the second guarantee of 448,000 Euros in favour of Exim Bank when the respondent's account was debited with the sum of 448,000 Euros purportedly in enforcement of the guarantee.

14. It was thus submitted for the respondent that in the circumstances, it had valid reasons to summarily terminate the appellant's employment and had therefore discharged its burden as required by Sections 43 and 45 (2) of the *Employment Act*.

15. With regards to grounds 2,3,4 and 5 of appeal, it was submitted that by a letter dated 12th August 2013, the respondent invited the appellant for a disciplinary hearing on 20th August 2013, to show cause why his employment should not be terminated; that the grounds on which the respondent was considering termination of the appellant's employment contract were specifically and clearly particularized in the letter; that the appellant was also informed that he was entitled to bring an employee of his choice to the disciplinary hearing whereupon he responded to the show cause letter through his advocates indicating that he would not attend the disciplinary hearing because he had not received an investigation report. Following the appellant's refusal to attend the disciplinary hearing, the respondent argued that it was entitled to proceed with the meeting and summarily dismiss the appellant from employment.

16. It was thus submitted that in the circumstances, the respondent complied with the provisions of Section 41 of the *Employment Act* 2007, by giving him an opportunity to attend the disciplinary hearing and raise any queries or produce any contrary evidence to the allegations levelled against him but he squandered this opportunity by refusing to attend the disciplinary hearing and was thus estopped from contending that he was not given a hearing.

17. We have anxiously considered the record, the rival written submissions by the parties, the cited authorities and the law.

18. The appeal before us is a first appeal. Our mandate as a first appellate court is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123* wherein it was stated:

> "I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally".

19. An appeal to this court from a trial by the High Court is by way of a 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 witnesses and should make due allowance in this respect.

20. We consider the facts of this matter to be fairly straight forward. With regard ground 1, 3 and 5 of appeal, the trial court was faulted for *inter alia* finding and holding that there existed valid and justifiable reasons to terminate the appellant's contract of service summarily, as he was guilty of misconduct and that nowhere in his evidence did the appellant state that he proceeded to process the 2nd guarantee with approval from the board of directors.

21. It is indeed not in dispute that the appellant was served with a letter dated 12th August 2013, by the respondent where he was informed that the respondent was considering terminating his contract of employment on the grounds of misconduct in regards to matters *inter alia:*

> "a) in the matter of Arusha Skyline
>
> 1. Your actions were detrimental to the interest of the company as you did not act with the due care and diligence expected of you as the Company's Managing Director. For example;

A). You failed to conduct ant or reasonable due diligence on any parties involved in this transaction."

22. When the appellant was put in cross examination regarding this transaction, he stated *inter alia* as follows:

> "I was dealing with Arusha skyline issue but not alone. I was coordinating I was in charge jointly with the chairman. The 1st guarantee expired in 2008." (Emphasis added.)

Probed further, the appellant stated as follows:

> "I sought professional advice from lawyers and bankers. The letter relates to the 1st guarantee. The guarantee lapsed in June 2008. I do not have any other letter from Waweru Gatonye on second guarantee..... The chairman approval was as good as the board's..... I have not produced consent of the board to the court. I have also not produced a legal opinion. I am aware the respondents accounts at Chase bank –A/C No. xxxx-fixed deposit account was debited with 448,000 Euros." (Emphasis added.)

23. The High Court while considering whether there were valid or justifiable reasons to summarily dismiss the appellant at para 40 of the judgment stated thus:

> "one of the main reasons for which the claimant was summarily dismissed by the respondent was that he committed respondent to a financial guarantee without approval of the respondent's board and second, that he advanced to himself loans over and above the one approved by the board without first seeking and obtaining additional authority from the board. The claimant denied these accusations and insisted his actions were above board and that he sought and obtained the necessary approvals. The board minutes attached to the claimant's memorandum of claim and marked as MM9 (page 20) concerned the first guarantee for USD 945,000. The minutes were dated 12th June, 2007 and signed by the respondent's chairman Mr. Talwar and the claimant as the managing director. At page 22 of the claimant's bundle of documents was a promissory note dated 12th June 2007 for USD945,000. It was again signed by the respondent's chairman Mr. Talwar and the claimant as the managing director. From the pleadings, documents filed in support of respective parties and oral evidence in court, it was not in dispute that the above mentioned financial facility lapsed in June 2008, without any draw down occurring."

24. At para 48 of the judgment, the trial court further stated as follows:

> "to begin, the initial guarantee for USD945,000 which lapsed in June 2008 was sanctioned by the respondent's board and there was evidence on record to that effect. The evidence of sanction by the respondent's board of the second transaction does not seem to be documented. The claimant contended that this was not necessary because the initial guarantee was still good. But this is contradictory because his own letter of 2nd January 2009, referred to earlier acknowledges that the first guarantee expired in June 2008. How can something expired be reinstated? But assuming reinstatement was possible, considering the level of financial exposure involved any reasonable chief executive officer would not act on assumption but would have had the issue reconfirmed by the board of directors. The fact that Arusha skyline hotel at any critical stage in the transaction resorted to its board of directors for a resolution could have triggered the claimant to act the same way and sought the respondent's board's approval or reconfirmation. Therefore, without considering other reasons for suspension and eventual dismissal, the court hereby finds that there existed valid

and justifiable reasons to terminate the claimant's contract of service summarily as he was guilty of gross misconduct." (Emphasis added.)

25. Nobody could have said better than the learned trial judge who had the chance of seeing the witnesses testify. From the circumstances of this case and from the evidence on record, we have no reason to fault the finding arrived at by the trial court that indeed, there existed valid and justifiable reasons to terminate the appellant's contract of service summarily as he was guilty of gross misconduct as he clearly never sought the board's approval/authority in respect of the 2nd guarantee.

26. The appellant's evidence in the trial court was contradictory as at one point, he testified thus: "There was a board resolution earlier. There were no board minutes regarding the second guarantee even the first guarantee had no board minutes. There was no time the board sat on their guarantees."

27. As was rightly observed by the trial court, there was clear evidence that there was a board resolution of the respondent with regard to the first guarantee for USD 945,000 dated 12th June 2007 signed by the respondent's chairman and the appellant as the respondent's managing director. This was contrary to the appellant's evidence that there was no board resolution in respect of both transactions. There was however no evidence to show that the second transaction for 448,000 Euros was supported by any board resolution of the respondent.

28. From the circumstances of this case and in light of the colossal amount involved in respect of the 2nd guarantee to wit, 448,000 Euros and the same having not been sanctioned by the board of the respondent, it is our considered opinion that the appellant did not act with due diligence as would be expected of a person in his position. In view of the colossal amount involved in respect of the 2nd guarantee, a prudent diligent managing director in the position same as the appellant would have sought approval/ authority of the board before issuance of the said guarantee. Consequently, we hold and find that this ground alone was a valid and justifiable reason to initiate disciplinary proceedings against him. Indeed, the appellant admitted in his evidence that he was aware that the respondent's bank account No. xxxx at Chase Bank was debited with 448,000 Euros purportedly in enforcement of the 2nd guarantee.

29. More so and coincidentally, even though none of the parties addressed us on this issue, the respondent contended that the appellant had irregularly acquired unauthorized loan disbursements for additional sums totaling Kshs 20,674,532 and that as at 31st July 2013, the appellant's mortgage exposure was in excess of Kshs 21,000,000 against approximately Kshs 4,000,000 secured by a charge over his apartment. The appellant indeed admitted in cross examination that he had no board approval for the additional loans. Clearly this was breach of trust on part of the appellant and again this was a valid and justifiable reason to initiate disciplinary proceedings against him.

30. Consequently, nothing turns on these grounds of appeal.

31. The trial court was further faulted for not following the requirements of Section 43 (1) of the *Employment Act* which places duty of proof of valid reasons for dismissal in the employer.

32. In the instant case the appellant vide letter dated 12th August 2013 referenced: "your employment contract" was clearly informed that the company/respondent was considering terminating his employment contract on the grounds of gross misconduct in relation to 3 broad matters namely: "in the matter of Arusha Skyline, in the matter of Mr. Anthony Thuo Kanai. the Company's Legal Manager and in the matter of Personal Mortgage". The same issues were subsequently replicated in the summary dismissal letter dated 20th August 2013. Clearly, the appellant's contention that he was not provided with valid reasons for dismissal is without basis since even in cross examination he admitted

that he was told why his dismissal was being contemplated. In the case of *Kenya Power & Lighting Company Limited v Aggrey Wasike [2017] eKLR* this Court (differently constituted) stated as follows:

> "Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist," causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.
>
> Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. There were.
>
> It bears repeating that the standard of proof an employer needs to be satisfied about an alleged act of criminality on the part of an employee is the lesser one of balance of probabilities (Emphasis added)"

33. We need not say more regarding this ground of appeal.

34. The trial court was further faulted for not appreciating the fact that the respondent did not follow the procedure set out at Section 41 (1) of the *Employment Act* in terminating his contract of employment and that thus he suffered procedural impropriety at the hands of the respondent resulting in unfair and unlawful dismissal. It is indeed not in dispute that the appellant vide a letter dated 12th August 2013 was informed by the respondent that the respondent was considering terminating his contract of employment on the grounds of misconduct in regard to matters that had been enumerated in the aforesaid letter and invited for a disciplinary hearing on 20th August 2013. It is also not in dispute that the appellant was accorded an opportunity to be accompanied by another employee during the disciplinary hearing. It is also not in dispute that vide a letter dated 19thAugust 2013, the appellant through his advocates intimated to the respondent that he would not be in a position to attend the aforesaid disciplinary hearing scheduled 20th August 2013** pending receipt of an investigation. It should be noted that this was one day prior to the aforesaid scheduled hearing and the letter inviting him to the disciplinary hearing made no mention of any investigations report.

35. The trial court while addressing this issue at paragraph 50 of the judgment stated as follows:

> "regarding procedure adopted in the claimant's dismissal, the court has carefully reviewed and considered the suspension letter dated 18th April 2013, the show cause letter 12th August 2013 and is reasonably persuaded that they fully informed the claimant of the charges against him for which the respondent was contemplating terminating his services. The claimant was a senior officer of the respondent and actively interacted with the issue of

skyline hotel besides the accusations against him were clearly laid out and all was required of him was to respond. He instead asked to be furnished with an investigation report. What was there to be investigated if at all yet both the claimant and the respondent were fully aware of the Arusha skyline issue and the only question left was whether the claimant as the chief executive officer should bear responsibility? All he needed at this juncture was to appear before the disciplinary panel and give his side of the story but he did not. The respondent cannot be faulted for dismissing him thereafter. In conclusion the court finds and holds that there existed valid and justifiable reasons to dismiss the claimant summarily and that the dismissal was carried through a fair procedure. The claim is therefore found without merit and is hereby dismissed."

36. In the instant case and the appellant having been served with the allegations against him vide the letter 12th August 2013 and having been given an opportunity for disciplinary hearing and have failed to attend the same he is estopped from saying that he was not given a chance to be heard and can now not be heard to say the same. At this point one may pose the question; what investigation report did the appellant expect from the respondent? Consequently, nothing turns on this ground of appeal and the same must as well fail.

37. We think we have said enough to demonstrate why this appeal is devoid of merit. Accordingly, the appellant's appeal is hereby dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022

P.O KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole Kantai

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR