Airtel Networks (Kenya Limited) v Muema (Civil Appeal 50 of 2018) [2022] KECA 433 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 433 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 50 OF 2018

DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA

MARCH 4, 2022

BETWEEN

AIRTEL NETWORKS (KENYA LIMITED) ..... APPELLANT

AND

ANTHONY KELLY MUEMA ..... RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kericho (D. K. Marete, J.) delivered on 21st February, 2017 in ELRC Cause No. 15 of 2016)

JUDGMENT

1. This appeal is against the judgment of Marete, J. in Kericho Employment and Labour Relations Court (ELRC) Cause No. 15 of 2016. The factual background is that the respondent was an employee of the appellant vide a contract of employment dated 1st April, 2007. The contract of employment was governed by, amongst others, the contract itself; the appellant's Human Resource Policy and the Disciplinary and Consequence Management Policy. Needless to state the employment contract was also subject to the relevant Employment and Labour Laws of the country.

2. The respondent's contract of employment was terminated by the appellant vide a letter dated 28th December, 2015. Prior to the termination of employment, the respondent had been served with a show cause letter dated 7th December 2015 for unauthorized absenteeism from office for three days. He was required to submit a formal written statement explaining why he absented himself from work from 30th November to 2nd December 2015. The respondent replied by stating that on Saturday 28th November 2015 he travelled to his upcountry home in Kitui, hoping to return back to Nairobi on Sunday the 29th November 2015 and resume work the following Monday. Unfortunately, torrential rains that pounded the area caused overflooding of River Nzeu which washed away the only bridge that connects the remote village to the local town and therefore he was stranded at his home village over that period of time. He further stated that he was not able to communicate because his mobile

phone had ran out of power and he had left it charging in a shopping centre on the other side of the river. When he eventually managed to cross the river after the water subsided, he communicated with his employer about his predicament.

3. The respondent attended a disciplinary hearing on 24th December 2015 where he tendered the above explanation for his absenteeism but the same was not accepted. In the termination letter, the appellant stated that the panel reviewed his statement and the facts of the case and found that at no time did he try to contact his line manager to inform him of his absence; and that Call Detail Records (CDRs) and call logs of his mobile telephone number 0735 554 940 were inconsistent with his account as given in his show cause letter. The appellant therefore concluded that the respondent had not advanced any valid justification for his absence and proceeded to terminate his employment contract with effect from 28th December 2015. The appellant indicated that the respondent would be paid his terminal dues being salary up to and including 28th December 2015; accrued leave and one month's salary in lieu of notice. The respondent was further notified that he had a right of appeal within a period of seven days from the date of the termination letter.

4. Being aggrieved by that decision, the respondent vide a letter dated 4th January 2016 addressed to appellant's Human Resources Director appealed against the termination of his employment contract. He stated, inter alia, that the findings of the Disciplinary Committee were erroneous because the committee was improperly constituted, given that the party who had complained against him was a member of the same; the committee had intruded into his privacy by extraction of CDRs and call logs of his personal line without his consent; the committee ambushed him with information of its alleged investigations into his personal line without prior communication in the letter dated 22nd December 2015; the committee demanded that he responds to its findings of the alleged investigations without giving him a copy of the CDRs and call logs; the committee ignored and or failed to take into account his explanation for the absence and also ignored his history with the appellant spanning eight years without any disciplinary issue. The appellant summarily rejected the respondent's appeal thus prompting him to file the suit that gave rise to the appeal.

5. In his memorandum of claim, the respondent averred that the termination of his contract of employment was unfair and sought compensation for unfair termination in the sum of Kshs.1,094,494/= being the equivalent of his twelve (12) months' salary; Kshs.182,416/= being two (2) months' salary in lieu of termination notice; compensation for 17 days untaken leave equivalent to Kshs.51,685/= plus costs of the suit.

6. In its memorandum of defence, the appellant denied the respondent's claim and stated that the respondent's contract of employment was terminated because of his absence from duty from 30th December 2015 to 2nd January 2016 (sic) without any explanation for his absence; that the respondent was subjected to a fair disciplinary hearing before the termination of the services; and all his lawful terminal benefits were paid to him.

7. The appellant further stated that it observed rules of natural justice while conducting the disciplinary proceedings in that the respondent was informed of the details of his misconduct; that he was given an opportunity to explain his position and to provide any evidence that he intended to rely on; that he was accorded an opportunity to attend the hearing with a colleague; and that the disciplinary hearing was conducted by an impartial internal panel.

8. During the hearing before the trial court the respondent testified in terms of his statement of claim but did not call any witness.

9. Likewise, the appellant called only one witness, Ann Njoka, the Human Resources Officer.

10. In the impugned judgment, the learned judge framed two issues for determination that is, whether termination of the respondent's employment was wrongful, unfair and unlawful; and whether the respondent was entitled to the reliefs sought. The learned judge observed that the respondent sought to rely on section 43 (1) of the *Employment Act, 2007* which states that:

> "(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."
>
> Section 45 (2) provides that termination of employment is unfair if the employer fails to prove, inter alia, that the reasons for termination are valid.

11. In finding that the termination of the respondent's contract of employment was unfair, the learned judge stated that the termination letter dated 28th December 2015 gave the following as the grounds for termination:

    i. That the respondent did not try to reach his line manager during the period he was away;

    ii. That the CDRs and call logs of the respondent's mobile number showed that he was not in his rural home as alleged in his response to the notice and therefore the respondent had not provided justifiable explanation for his absence.

12. The learned judge further held that the CDRs and call logs were not availed to the respondent and neither were they presented in court and were thus unreliable as evidence. In his view, therefore, there was no rebuttal of the respondent's evidence that he was stuck at his rural home in Kitui.

13. The learned judge further held that the respondent's appeal was summarily dismissed contrary to paragraph 7.5 of the Disciplinary Procedure and Consequence Management Policy which states, inter alia, that "the appeal hearing shall be held within five days of the receipt of the appeal letter by a panel of three members of the senior management one of whom will be selected by the employee...".

14. The trial court held that there was substantive and procedural unfairness on the part of the appellant and awarded the respondent 12 months' compensation for unlawful termination of employment (Kshs.1,094,949/=), one month's salary in lieu of notice (Kshs.91,208/=) and 17 days untaken leave (Kshs.51,685/=) totaling Kshs.1,237,387/=.

15. In its memorandum of appeal, the appellant faults the learned judge for holding that the termination of the respondent's employment was substantively and procedurally unfair; for failing to find that the appellant had valid and justifiable reasons to terminate the respondent's employment; and for failing to find that the disciplinary process employed against the respondent was adequate.

16. The appellant further contended that there were no reasonable or justifiable grounds for the award of compensation to the respondent; that in awarding compensation to the respondent the learned judge did not apply his discretion judiciously; that the learned judge erred in law and fact by awarding the respondent notice and leave pay, and that the learned judge failed to consider the weight of evidence placed before him by the appellant.

17. For those reasons, the appellant urged this Court to allow the appeal, set aside the trial court's judgment and dismiss the respondent's suit with costs to it. The appellant further prayed for costs of the appeal.

18. When this appeal came up for hearing there was no appearance for the appellant, though served with a hearing notice, but the appellant's advocates, Coulson Harney LLP, had filed submissions and a case

digest on 27th October 2021. Mr. Juma of Julius Juma and Company Advocates appeared for the respondents and sought to rely on his written submissions dated 17th November 2021 which he briefly highlighted.

19. We have carefully perused the record of appeal as well as the submissions filed by both parties and the digest of authorities. In our view, the only issues that arise for our determination in this appeal are whether the learned trial judge erred in law in finding that there was substantive and procedural unfairness in the termination of the respondent's employment, and whether the learned judge erred in granting the remedies as sought by the respondent.

20. In determining the first issue, we must consider whether there were good and justifiable reasons for termination of the respondent's contract of employment and whether the disciplinary process that led to the termination was properly conducted in accordance with the provision of his contract of employment and the relevant law. We have already stated that under section 43 (1) of the Employment Act an employer is under an obligation to show that there were valid reasons for terminating employment. As per that section of the law, the reason must be related to the employee's conduct, capacity or compatibility or based on the employer's operational requirements.

21. Section 41 (2) of the Employment Act requires an employer to accord an employee facing disciplinary proceedings a fair opportunity to be heard before terminating his services. In *Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR* this Court in considering what amounts to a fair opportunity for an employee to be heard before termination of employment stated as follows:

> " Four elements must thus be discernable for the procedure to pass muster:-
>
> (i) An explanation of the grounds of termination in a language understood by the employee;
>
> (ii) The reason for which the employer is considering termination;
>
> (iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds termination is made for hearing and considering any representations made by the employee and the person chosen by the employee."

22. It is not in dispute that the respondent absented himself from work from 29th November to 2nd December 2015. The appellant in his letter of 22nd December 2015 required the respondent to show cause why disciplinary action could not be taken against him for such absence.

23. Section 47 (5) of the Employment Act states that:

> " For any complaint of an unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of the employment or wrongful dismissal shall rest on the employer".
>
> The respondent therefore was obliged to demonstrate that the appellant acted wrongfully in terminating his services, and in this regard he needed to show that there were good and valid reasons for his absence, and that the disciplinary process was conducted unfairly.

24. As regards the validity of his reasons for his absence from duty, the learned judge delivered himself as hereunder:

> " I find the claimant's case as being overwhelmingly upfront on the respondent's. His case resoundingly comes out better than the respondent's. The claimant brings out a case of substantive and unprocedural unfairness in his termination of employment and the respondent is not able to contradict this despite concerted efforts. The respondent's resort to calling the claimant's wife and the futility of the same ends as such. It does not contradict the claimant's evidence that he was out of reach and stranded at his home in Kitui."

25. The only fool-proof evidence the appellant would have adduced to discount the respondent's explanation that he was stranded at his rural home due to an act of God and was not in Nairobi would have been the CDRs and call logs which the appellant alleged showed that the respondent was within Nairobi on the days when he was absent from duty. However, the appellant did not avail to the respondent the CDRs and the call logs to enable him respond to the same, if at all the appellant's contention was true. Likewise, the CDRs and call logs were not produced before the trial court. One wonders why the appellant could not avail its best evidence in such circumstances if indeed it wanted the court to believe that the respondent was less than candid in saying that he was stranded at his rural home due to the unexpected downpour that washed away the only bridge he could use to get out of his home.

26. We agree with the respondent that an employer is obligated to supply an employee with all evidence and material in the employer's possession upon which the accusations against the employee are based. In Postal Corporation of Kenya vs Andrew K. Tanui (supra) this Court held as follows:

> " At the board meeting, there is no evidence that an explanation of the grounds of termination was made to the respondent, and if so in what language. The board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting".

27. Similarly, we respectfully agree with Ndolo, J. in *Rebecca Anne Maina & 2 Others vs Jomo Kenyatta University of Science and Technology [2014] eKLR* that:

> "... In order for an employee to respond to allegations made
>
> against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which will assist them in preparing their defence".

28. This position finds support in the appellant's Disciplinary Procedure and Consequence Management Policy, paragraph 6 which states that:

> " the employee should be given a chance to explain his position and any evidence relied on against him produced to him for his views".

We therefore reiterate that the appellant's failure to avail to the respondent the CDRs and call logs denied the respondent opportunity to comment on them, considering that the appellant used such evidence as its basis for terminating the respondent's contract of employment. There was also no explanation why the said evidence was not produced before the trial court.

29. Turning to the handling of the respondent's appeal, it was done contrary to the appellant's disciplinary manual as no appellate committee was constituted to hear the appeal. Instead the appeal was summarily dismissed through the appellant's letter dated 18th January 2016.

30. For the above reasons, we are unable to fault the learned judge's finding that there was substantive and procedural unfairness in termination of the respondent's contract of employment.

31. We now turn to consider whether the respondent was entitled to the awards that were made by the trial court. The learned judge awarded the respondent 12 months' salary as compensation for unfair termination of his employment as prayed by the respondent. In considering whether to award the maximum statutory compensation of 12 months' salary, under section 49 (1) of the Employment Act as opposed to any other remedies provided for thereunder, a trial court should be guided by the provisions of section 49 (4) of the Act - see *CMC Aviation Limited vs Captain Mohammed Noor [2015] eKLR*. In thisparticular case we think the provisions of section 49 (4) (b) relating to the circumstances in which the termination took place, the extent to which the respondent caused or contributed to the termination and section 49 (4) (k) relating to the conduct of the respondent which, to any extent caused or contributed to the termination were relevant considerations.

32. The learned trial judge did not state the factor(s) that he took into consideration in awarding the respondent the maximum compensation of 12 months' salary. In our view, the award made by the trial court was excessive in the circumstances of the case and we hereby reduce the same to 6 month's salary.

33. Regarding the award for notice and leave pay, we are satisfied that the learned judge failed to consider that the appellant had duly paid the aforesaid terminal benefits to the respondent. That was clearly stated in the termination letter. These payments were even reflected in the respondent's terminal payslip issued to him in January 2016. The appellant so admitted in his cross examination before the trial court. The said awards of Kshs.91,208/= and Kshs.51,685/= must therefore be subtracted from the final award made by the trial court.

34. To the extent that we have reduced the amount of compensation awarded to the respondent for unfair termination from 12 months' salary to six months' salary, and set aside the awards of Kshs.91,208/= and Kshs.51,685/= being one month's salary in lieu of notice and 17 days untaken leave respectively, this appeal partially succeeds. We hereby set aside the award of Kshs.1,237,387/= and substitute therefor an award of Kshs.547,248/= being 6 months' salary as compensation for unfair termination of employment. That sum shall accrue interest at court rates from 21st February, 2017 when the impugned judgment was delivered. As to costs, we order that each party bears its own costs of the proceedings before the trial court and of this appeal.

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

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR