Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)
[2022] KECA 540 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 540 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 185 OF 2017

W KARANJA, J MOHAMMED & S OLE KANTAI, JJA

MAY 13, 2022

BETWEEN

MICHAEL OTIENO OYOMBE ..... APPELLANT

AND

ECO BANK LIMITED ..... RESPONDENT

(This was an appeal from the judgment and decree of the Employment and Labour Relations Court at Kericho (D.K.N. Marete, J.) dated 26th of April 2017 in ELRC Cause No. 137 of 2015)

JUDGMENT

1. By a Memorandum of claim dated May 15, 2015, Michael Otieno Oyombe (the appellant) moved the Employment and Labour Relations Court (ELRC) claiming several reliefs following termination of this employment by his employer, Eco Bank Limited (the Bank) (the respondent). It was the appellant's case that he was an employee of the Bank for a period of three years having been employed on the February 1, 2009. He averred that he was unlawfully and without notice terminated on March 7, 2013 on accusations of involvement in fraudulent activities which led to loss of money from the Bank. He averred that at the time of termination he was aged 30 years and he could have worked until he attained 60 years of age. He was the head teller earning Ksh. 81,561 per month. It was his claim further that the respondent with malice caused him to be arrested and charged in Kisii Criminal Case No. 246 of 2013 with offences of stealing by servant and conspiracy to defraud, whereby he was acquitted on both counts under Section 215 of the *Criminal Procedure Code* vide a judgment dated March 25, 2015.

2. The appellant contends that his termination following these alleged events was contrary to mandatory provisions of the law and specifically Section 35, 41,44,45,49 and 51 of the *Employment Act 2007*. It is on account of these alleged violations of the legal imperatives of the *Employment Act 2007* that the appellant lodged the memorandum of claim aforementioned seeking, inter alia, reliefs as follows;

    a. Terminal dues; - last Gross salary *15/30 * 4years

b. Leave days not taken for 4 years (81,561*4years) Ksh. 326,244

c. Compensation under Section 49 (c)

d. One Month's Gross Salary in lieu of notice Ksh. 81,561

e. Prospective future earnings (81,561*12*30) Ksh. 29,361,960

Total Ksh. 29,932,887

f. Certificate of service

3. The respondent in its response to the memorandum of claim dated 29th July, 2015 denied the allegations levelled against it. It averred that the appellant was terminated vide a letter dated 7th March, 2013 and that there were investigations conducted between 5th October, 2011 and 18th February, 2013 in respect of funds lost, which revealed sufficient evidence to charge the appellant with criminal offences. It was the respondent's case that the investigations conducted disclosed gross misconduct against the appellant who was found to have engaged in acts that had compromised his integrity and caused loss of funds to the respondent. The respondent maintained that following the results of the investigations, there were sufficient reasons to summarily dismiss the appellant. The Court was urged to dismiss the claim with costs.

4. Parties agreed by consent under rule 21 of the Employment and Labour Relations Rules 2016 to have the matter determined based on parties filed pleadings, affidavits, statements and written submissions. Upon evaluating the contents in the said documents, the learned Judge was satisfied that the respondent's case overwhelmed that of the appellant; that the appellant had admitted having been involved in fraudulent acts which cost his employer money and that the termination was not unlawful. The learned Judge dismissed the appellant's claim with costs to the respondent.

5. Aggrieved by this outcome, the appellant filed a Notice of appeal and memorandum of appeal citing grounds that; the learned Judge erred in law and fact by failing to consider the evidence of the claimant and critically analyse the same and accord it due weight to the extent that the claimant was able to prove his case; in purporting to put into perspective material and facts not contained in the pleadings, evidence, exhibits and submissions of parties; applying his own theory in assessing the pleadings; in holding that the appellant had established a prima facie case based on the pleadings on the record and evidence but failed to award as per the prayers sought, and finally that the learned Judge erred in law by failing to contextualize the provisions of Section 41(2), 44(3) & (4), 45 and 49 of the *Employment Act* No. 11 of 2007 and thereby arrived at an unlawful finding.

6. When the appeal came up for virtual plenary hearing, learned counsel Mr. Oyombe and Mr. Kahiga Waitindi appeared for the appellant and the respondent respectively. They both informed the Court that they would rely on the submissions already filed and made no oral highlights.

7. In his submissions, the appellant condensed the above grounds into one broad ground that the learned Judge erred in law and in fact in failing to find in favour of the appellant based on the facts set out on the memorandum of claim, the affidavits and the law. The Appellant principally centred his case on the legal procedures on how summary dismissal is to be carried out as per the *Employment Act*. He referred this Court to the decision in Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited, Cause No. 74 of 2013 which held that whatever reasons for an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the *Employment Act*. It is his submission that an employer had the choice to either subject the employee to an internal disciplinary process or invoke the external justice system by making a criminal complaint. It was his case that summary dismissal of an employee did not take away the

application of rules of natural justice as he was required to be subjected to a fair hearing process which would include being given an opportunity to defend himself.

8. The appellant further submits that the respondent's actions of choosing a disciplinary process outside its administrative actions meant that it stood bound by any outcome emanating from such a process. Therefore, having been exonerated of the charges mounted against him by the complainant in Criminal Case No. 246 of 2013, Republic v Justine Onyisi Mangera & Michael Otieno Oyombe; the employer was bound by the findings of the criminal court and the employee could not be punished or subjected to disciplinary proceedings on account of allegations substantially similar or similar to those in the criminal court proceedings. He therefore urged that his termination was unlawful and he is, therefore, entitled to the reliefs sought. In support of this position, the appellant referred us to the decision in Mathew Kipchumba Koskei v Baringo Teachers Sacco [2013] eKLR and the case of Joshua Muindi Maingi v National Police Service Commission & 2 others [2015] eKLR.

   The appellant submits that the respondent failed the substantive and procedural test in summarily dismissing him while the criminal case was still pending in court. Finally, he prays that the appeal be allowed.

9. On its part, the respondent through submissions dated 21st June, 2021, opposed the appeal. Learned counsel for the respondent maintains that the learned Judge considered the parties' pleadings and evidence before making the final determination; that the learned Judge applied the right provisions of the law before arriving at his decision; and more importantly, that the appellant's dismissal from employment was valid and lawful. In regard to whether the appellant had been given a fair hearing, the respondent maintains that the appellant had been the subject of various cautionary and warning letters in respect of theft and investigations were carried out which revealed that the theft occurred as a result of the appellant's negligence of duty and fraud. Several letters ranging from August, 2011 to March 2013 were produced in evidence, and so were excerpts of the damning report. There were also letters from the appellant admitting fault. The respondent urged the Court to dismiss this appeal with costs.

10. We have considered the record of appeal, the rival submissions by the parties the authorities relied on and the law. In our view the only issue for our determination is whether the trial court was justified in finding the appellant's termination procedurally and substantively lawful.

11. This being a first appeal, this Court has a duty to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212* this Court espoused that mandate or duty 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."

We have considered the record before us in its entirety like we are enjoined to do by Rule 29(1)(a) of the *Rules* of this Court and as outlined above. We have also considered the rival submissions by both counsel and the relevant law. It is not in dispute that the appellant was summarily dismissed but what he contends is the procedural unfairness of the process.

12. Pertinent to the issues before us, an employee may be dismissed summarily for gross misconduct for doing or omitting to do any of the things set out in Section 44 of the *Employment Act* which provides as follows:-

> " Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
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> (a) ...
>
> (b) ...
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> (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly, ...
>
> (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. (Emphasis supplied) from its nature it was his duty, under his contract, to have performed carefully and properly,
>
> ...
>
> (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property." (Emphasis ours)

It is within the scope of the provisions of Section 44 of the *Employment Act* that the summary dismissal letter to the appellant from the respondent dated March 7, 2013 ought to be considered. We may need to emphasise at this point that a cursory reading of the above sections show that an employee does not have to be convicted for a criminal offence for gross misconduct to be demonstrated. Reasonable and sufficient grounds to suspect that a criminal offence has been committed to the detriment of the employer suffices to demonstrate or establish gross misconduct. We shall advert to that point later.

13. The respondent in response to the claimant's Memorandum of claim gave a narrative of the events that led to the claimant's dismissal. It averred that the decision to relieve the claimant of his duties was premised on an investigation report which was carried out in respect to the loss of funds to the tune of eight hundred thousand, nine hundred and eighty-six (Kshs. 800,986). Following the conduct of this investigation it became apparently clear to the Bank that the appellant was negligent in the manner upon which he executed his duties which led to the loss of funds. The audit investigations further led to the mounting of criminal charges against the appellant being Criminal Case No. 246 of 2013. Further, the respondent equally produced to cautionary letter dated August 25, 2011 and March 5, 2012 indicating that the appellant had been cited previously for negligent behaviour in appropriation of funds and had been warned that in the event of similar action then the Bank would not hesitate taking action against him. The appellant has disputed the existence of these facts.

14. Section 41(2) provides for the procedure to be adhered to before an employee can be summarily dismissed. It states that;

> "(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". (Our emphasis).

The respondent in its letter dated March 7, 2013 informed the appellant that following investigations carried out by the Audit Department he was found to have been involved in theft of funds from Dados Hotel Account No. 00...561 between October 5, 2012 and February 13, 2013. He was consequently summarily dismissed from employment with effect from March 6, 2013. The appellant argues that he was not given a fair hearing, as seen from the letter the respondent filed. The respondent subjected the appellant to a criminal case, and at the same time dismissed him from employment. The respondent being the employer had to demonstrate to the court that it had observed the dictates of procedural fairness. Further the appellant had the right to be informed of the charges and he be given an opportunity to prepare and be heard and to present his case in person, or in writing or through a representative or a union representative if possible. Lastly the employer had a responsibility to hear and consider any representations by the employee before making the decision to dismiss or give other sanctions. Section 41 of the *Employment Act* requires the respondent in a claim for unfair termination or wrongful dismissal to demonstrate that it observed the dictates of procedural fairness.

15. The respondent produced the two cautioning letters which were in regard to other misconduct the appellant is alleged to have committed. These nonetheless involved acts of financial impropriety which had cost the bank money and good reputation. In the last letter, the appellant had been warned that a repeat of such conduct in future would cause him to be summarily dismissed for Gross misconduct. The learned Judge found that the appellant had admitted being involved in acts of fraud. The learned Judge also found that the appellant had been taken through the appropriate disciplinary process. The learned Judge does not spell out clearly the steps taken by the respondent which led him to the conclusion that due process was followed. On the other hand, the learned Judge appears to have been persuaded by his finding that the evidence adduced by the respondent overwhelmed that of the appellant.

16. It is not disputed, however, that an investigation was opened whose conclusion was that the appellant be charged with the criminal offences that were later preferred against him. We have not seen the said report in the record, nor has it come out from the evidence whether the appellant was given a chance to give his side of the story to the investigating team before the damning report was prepared.

17. We note that the appellant was dismissed before the criminal trial was concluded. In this case the outcome of the criminal case did not therefore impact on the decision taken to dismiss him. The law requires that he should have been subjected to the internal disciplinary mechanisms as provided under the *Employment Act*. From the record we, like the learned Judge, are satisfied that the respondent had good cause to terminate the appellant's employment. He was no doubt not a very compliant employee and his actions caused the employer to lose money. We find that there was sufficient evidence against him to justify his sacking. We accordingly find that there was substantive fairness in the appellant's dismissal.

18. What concerns us now is whether there was procedural fairness in the dismissal process. As pointed out earlier, it is evident that the learned Judge did not consider the aspect of procedural fairness. In determining this issue, we must be guided by Section 41 of the *Employment Act* which provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee. The said section provides for notification and hearing before termination on grounds of misconduct in the following way:-

> "(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 in capacity 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, chosen by the employee within subsection (1) make."

Under this Section, four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -

a) An explanation of the grounds of termination in a language understood by the employee;

b) The reason for which the employer is considering termination;

c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;

d) Hearing and considering any representation made by the employee and the representative chosen by the employee.

This provision was extensively discussed in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR thus:-

> "Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for "Notification and hearing before termination on grounds of misconduct" in the following manner:-
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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 in capacity 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 employer or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person, chosen by the employee within subsection (1) make."

Section 42 (1) referred to in Sub-section (1) relates to employees on probation.

The four elements must thus be discernible for the procedure to pass muster.

19. Were the four ingredients listed above satisfied in this case? The answer is a resounding "No". Whereas it can be argued that the appellant was informed of the reasons for his dismissal in the termination letter, there is no modicum of evidence to show that the appellant was asked to show cause why he should not be terminated, or even summoned before a disciplinary committee to explain his side of the story. As stated earlier, there was no indication whether the audit committee that came up with the recommendation that the appellant be charged with criminal charges ever gave him a chance to be heard. Section 44 of the *Employment Act* must be considered along with section 41 and cannot be considered in isolation regardless of the nature and gravity of the alleged misconduct imputed on an employee. See this Court's recent decision in *Maasai Mara University v William Morogo Muto & 3 others*, Civil Appeal No. 33 of 2016.

20. We are satisfied that there was no procedural fairness in this matter and the learned Judge erred in failing to find that section 41 of the *Employment Act* was not complied with. In view of this finding, we find that the appellant ought to have been compensated for the procedural unfairness notwithstanding the fact that the reasons for his dismissal were justified and fair. Accordingly, we are minded to interfere with the findings of the learned Judge with the result that we allow the appeal and set aside the orders of the learned Judge dismissing the appellant's claim and substitute therefor an order partially allowing the appellant's claim and awarding him 2 months' salary under prayer (c) of his statement of claim. All other reliefs sought are declined. In view of this outcome, we award the appellant 50% costs of the suit before the ELRC and of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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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