Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK) (Civil Appeal 62 of 2018) [2022] KECA 1360 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1360 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 62 OF 2018

DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA

DECEMBER 2, 2022

BETWEEN

NEBERT MANDALA OMBAJO ..... APPELLANT

AND

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK) ..... RESPONDENT

(An appeal arising from the Judgment of the Employment and Labour Relations Court of Kenya at Nakuru (Radido, J) delivered on 8th December 2017 in ELRC No. 224 of 2014)

JUDGMENT

1. Nebert Mandala Ombajo (appellant), was employed by the Institute of Certified Public Accountants of Kenya (ICPAK) as a Chief Officer, Corporate Supply Services through a letter dated April 1, 2009.

2. On February 17, 2004, the appellant received a letter dated February 12, 2014 asking him to show cause as to why disciplinary action should not be taken against him for gross negligence under section 44(4) (c) and (g) of the *Employment Act* 2007. The particulars of the allegations of negligence made against him, were stated in the letter. In a letter dated February 18, 2014 the appellant responded to the allegations, following which at the request of the respondent vide a letter dated March 3, 2014, he appeared before a disciplinary committee of ICPAK on March 4, 2014 for disciplinary hearing. The respondent then wrote to the appellant a letter dated March 5, 2014 informing him of its decision terminating his services under section 44(4)(c) of the *Employment Act*.

3. Being aggrieved, the appellant lodged a claim in the Employment and Labour Relations Court (ELRC), for wrongful/unfair termination of employment. The respondent filed a defence to the claim, which was later amended to include: a counterclaim of Kshs 1,080,000 being the balance of salary advance paid to the appellant; Kshs 85,000 irregularly paid to the appellant as consultancy services; and return of a laptop and mobile phone that had been issued to the appellant by the respondent.

4. Upon hearing the matter, the ELRC (Radido, J), found that although the appellant had only two days to respond to the notice to show cause, and had only a day's notice of the disciplinary hearing, he did not suffer any prejudice or injustice. The learned Judge therefore held that the respondent had substantially complied with the statutory essentials of procedural justice.

5. With regard to substantive fairness, the learned Judge found two of the allegations made against the appellant proved. The learned Judge also found the respondent's counter-claim in regard to the salary advance and the irregular payment of Kshs 85,000 established. Consequently, the learned Judge dismissed the appellant's claim and entered judgment in favour of the respondent for the counter-claim of Kshs 1,165,000 and ordered each party to bear their own costs.

6. In his memorandum of appeal, the appellant challenged the appeal on 19 grounds which were argued in his written submissions as three main issues. That is; whether the respondent's disciplinary process was flawed before terminating the appellant's employment; whether the termination of the employment was justified; and whether the appellant was entitled to the reliefs sought against the respondent as envisaged in the statement of claim.

7. The appellant submitted that the disciplinary process was flawed from the outset, as the notice to show cause did not give him adequate time to respond. The appellant faulted the learned Judge for failing to note that he had through an email dated February 18, 2014 complained of the short notice and requested for a further 7 days, but that his request for additional time was ignored and this resulted in denial of his right to a fair hearing. In this regard, the appellant relied on *Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) & Anor [2015] eKLR*. (Patrick Abuya case)

8. The appellant submitted that the hearing notice served on him at 3.00 pm. to attend a disciplinary hearing the following day at 9.30 a.m. was extremely short, unreasonable, and rushed, and the reference in the letter to disciplinary "action" instead of "hearing" was an indication that the respondent had already made up its mind to terminate his employment, and the invitation for disciplinary "action" was a mere formality.

9. The appellant complained that he was not given any opportunity to have any representative during the disciplinary hearing. He faulted the learned Judge for failing to find that section 41 of the *Employment Act* was not complied with, and argued that the respondent had no justifiable reason to terminate his employment. He urged that the allegation regarding Tritek Consulting Limited was not proved against him, as he was not a shareholder at the time of the alleged trading, nor was he under a duty to transfer the shares of the company, as the duty was upon the transferee of the shares.

10. On the allegation that he had approved payment to China Jiangxi without proper authority, the appellant contended that the allegation was not proved. This was because in his capacity as Director of Strategy & Shared Services, he had no authority to approve such a payment as all payments above Kshs 500,000 had to be approved by the Chief Executive, and the transfer of funds form produced in evidence showed that the transfer of funds was authorised by the Chief Executive Officer, Caroline Kigen. In addition, the financial policy did not require approval by the project manager or the Council of the respondent.

11. The appellant submitted that none of the charges levelled against him justified summary dismissal under section 44(4)(c) of the *Employment Act* 2007. He reiterated that he was unfairly terminated and was therefore entitled to three months' notice or 3 months' salary in lieu of notice in accordance with his terms and conditions of service.

12. The respondent also filed written submissions in which it compressed the appellant's 19 grounds of appeal into 5 issues. These were: whether it followed due process in terminating the appellant's

employment; whether there was proof of fair and valid reasons for termination of the appellant's employment; whether the learned Judge erred in allowing the respondent's counter- claim for a refund of Kshs 85,000; whether the learned Judge disregarded any evidence or considered extraneous matters in its judgment; and whether there was any basis for the reliefs that the appellant had sought.

13. As regards due process, the respondent explained that it wrote the notice to show cause letter on February 12, 2014 assuming that the appellant who had travelled to South Africa, and was expected back by February 8, 2014, had come back. However, the appellant did not come back from South Africa until February 17, 2014, and was served with the letter on the same day. The respondent argued that the learned Judge properly considered the notice period and was satisfied that the appellant was not prejudiced, as he was able to give an elaborate and comprehensive response.

14. On the notice period for the disciplinary hearing, the respondent maintained that the appellant was not prejudiced by the short notice; that he never protested or requested for more time to prepare for the disciplinary hearing; and that the appellant indicated that he did not require the presence of any other person during the disciplinary hearing.

15. The respondent relied on *Kalpana H. Rawal, Philip Tunoi, and David A. Onyancha v Judicial Service Commission & Judiciary [2016] eKLR*, for the proposition that allegations of bias must be proved in order to show that the decision-maker did not approach the matter with an open mind. It submitted that the appellant did not prove any claims of bias and urged the Court to find that the requirements of section 41 of the *Employment Act* were complied with, and that contrary to the appellant's contention, the minutes of the disciplinary hearing were signed.

16. The respondent reiterated that it had fair and valid reasons for terminating the appellant's employment. This included establishing that there was an undeclared conflict of interest and breach of company policies as the appellant and his wife were Directors of Tritek Consulting Limited when the company traded with the respondent, which fact the appellant failed to disclose.

17. In addition, the respondent maintained that it proved that the appellant made an advance payment to China Jiangxi without approval, and this was in breach of the respondent's finance controls. As regards the counterclaim of Kshs 85,000, the respondent urged that the appellant did not rebut the evidence adduced that he irregularly paid himself that amount.

18. The respondent argued that all the findings of the trial court were anchored on evidence that was produced by the parties, and no extraneous evidence was considered. Finally, the respondent urged that the appellant having failed to prove his claims of unfair termination, there was no basis for granting the reliefs that he claimed. The respondent, therefore, urged the Court to dismiss the appeal.

19. We have carefully considered the record of appeal, the parties' rival submissions, and the authorities cited. As a first appellate court, our duty is to reconsider and evaluate the evidence which was adduced before the trial court and come to our own conclusion, giving allowance to the fact that we have not had the advantage of seeing and assessing the demeanour of the witnesses who testified, and should therefore defer to the findings of the trial court. (See *Selle & Anor v Associated Motor Boat Co. & Others [1968] EA 123*; *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*).

20. In our view, there are four main issues that arise in this appeal. First, is whether there was procedural fairness in the disciplinary process undertaken by the respondent. Second, is whether there was substantive fairness in the decision arrived at by the respondent in terminating the appellant's employment. Third, is whether the appellant was entitled to the reliefs sought, and finally, is whether the counterclaim of Kshs 85,000 was proved.

21. As regards the issue of procedural fairness, it is not disputed that the appellant received the notice to show cause dated February 12, 2014 on February 17, 2014. This notice required him to respond within 7 days from the date of the notice. As the response was expected by February 19, 2014, the appellant had barely two days to respond to the notice. Obviously, this was a very short time. Although the respondent explained why the letter was served late, there is no explanation why the due date of the response to the letter was not adjusted to give the appellant the 7 days that was intended. Again, it is not disputed that the respondent served the appellant with a letter on March 3, 2014 at 3.00 pm. for a disciplinary hearing that was to take place the next day at 9.30 am. This notice was also extremely short and no reason was given for this.

22. Section 41 of the *Employment Act* states as follows on notification and hearing before termination of employment on grounds of misconduct.

> "(i) Subject to subsection 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 that 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.
>
> (ii) 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 with subsection one, make."

23. While the section provides for notification and hearing before termination, it does not provide for a specific period that the employee should have before responding to the allegations made against him, or the period that the employee should have before the disciplinary hearing. Our understanding is that such period must be reasonable as to give the employee the opportunity to cross-check and get all information pertaining to the allegations made against him, and to prepare for the hearing by getting all necessary advice and assistance.

24. On his part, the learned Judge rendered himself on this issue as follows:

> "27. Determination of whether an employee has been afforded sufficient or adequate time to respond to allegations in the course of disciplinary proceedings can only be made on a case by case basis, putting into consideration the unique circumstances obtaining.
>
> 28. However, in my view, at the core of that determination should be the consideration whether the time granted to respond led to prejudice or injustice to the employee.
>
> 29. In the instant case, although the Claimant complained of inadequate time, he did not ask for more time but he gave a substantive response to the show cause. He also did not demonstrate in Court that there were documents or information he required to access in order to make the response within the limited time.

30. And if any prejudice was occasioned to the Claimant, he had the time between the response and the oral hearing to request for and/or access any documents or information he would have needed.

31. On the question of the Disciplinary Committee serving as complainant, prosecutor and jury, the view of the Court is that generally the nature of the employment relationship demands that the employer can raise a complaint against the employee and hear the responses to the allegations and make a decision.

32. Unless there are express contractual provisions to the contrary, such a hearing while strictly against the classic theory of natural justice, is still lawful under the doctrine of procedural fairness.

33. In fact, in employment law the focus is on procedural fairness which does not always equate to natural justice.

34. On the allegations of bias against the Chair, the Claimant did not lay any evidential foundation to the allegations.

35. The Court can therefore conclude that because no prejudice or injustice was visited upon the Claimant because of the short notice he had to respond to the show cause and appear before the Disciplinary Committee, the Respondent substantially complied with the statutory essentials of procedural fairness."

25. The appellant has relied on the Patrick Abuya case (supra), where Radido, J held that procedural fairness requires not only an advance and reasonable notice of the steps to be taken, but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood. It is interesting to note that the circumstances of this case were identical with those of the appellant. The plaintiff Patrick Abuya was served on February 17, 2014 with the notice to show cause dated February 12, 2014, and given seven days from the date of that notice, to respond. Subsequently, he was served on March 4, 2014 with a letter dated March 3, 2014 to appear before a disciplinary committee for a hearing on March 4, 2014 at 9.30 am. The only distinction is that the appellant was served with a disciplinary letter on March 3, 2014 at 3.00 pm, to appear for the disciplinary hearing on March 4, 2014 at 9.30 am.

26. While we agree with the learned Judge that determination of whether an employee has been afforded sufficient or adequate time to respond to allegations in the course of disciplinary proceedings should be made on a case-by-case basis, taking into account the unique circumstances of the case, we do not see any justification for the clear departure by the learned Judge from his decision in the Patrick Abuya case.

27. The learned Judge rightly stated that in employment matters, the issue of procedural fairness is critical. The fact that in appearing for the disciplinary hearing, the appellant had a few hours more than Patrick Abuya, did not make his situation any different from that of Patrick Abuya. Both the appellant and Patrick Abuya were not given sufficient and adequate time to respond to the allegations or prepare for the disciplinary proceedings. The respondent has not justified the urgency in undertaking the disciplinary proceedings on the March 4, 2014 when the letters were only written on March 3, 2014.

28. Disciplinary proceedings are a grave matter for an employee as the consequences may be catastrophic to the employee's life. In the case of the appellant, the complaints against him were serious, and there is no doubt that he needed sufficient time to prepare psychologically, and if need be, get the best advice

that he could. Any prejudice to the respondent by having the appellant in his place of work could easily have been addressed by sending the appellant on compulsory leave, or interdicting him during the pendency of the disciplinary hearing, so that both the appellant and the respondent would have had time to reflect on and prepare to address the issues arising in the disciplinary process.

29. The fact that the appellant nonetheless, did his best to respond to the allegations made against him and attended the disciplinary proceedings on the due date, did not ameliorate the prejudice that was caused to him by the inadequate notice. It was oppressive, unfair, and unjust, for the respondent to serve the appellant with a letter for a disciplinary hearing that was to take place the next morning. Such haste reduced the disciplinary hearing to a mere formality to achieve that which the respondent had already predetermined. There was no procedural justice and this vitiated the whole disciplinary process.

30. Consequently, we find that the appellant was unfairly terminated as the respondent did not act in accordance with justice and equity in the disciplinary process. For the above reasons we allow the appeal and refer the matter back to the trial court to address the issue of damages for unfair termination.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

D K MUSINGA (P)

.....

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