Kosgei v Metkei Multi-Purpose Company Limited (Civil Appeal 95 of 2017) [2021] KECA 140 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 140 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 95 OF 2017

AK MURGOR, M NGUGI & JW LESSIT, JJA

NOVEMBER 19, 2021

BETWEEN

EDWIN KOSGEI .... APPELLANT

AND

METKEI MULTI-PURPOSE COMPANY LIMITED .... RESPONDENT

(An appeal from the Judgement and Decree of the Employment and Labour Relations Court at Nakuru (Hon Justice Radido, J.) delivered on 8th April in ELRC Cause No. 574 of 2014)

JUDGMENT

1. The appeal before us arises from a claim that was lodged in the Employment and Labour Relations Court (ELRC) at Nakuru by Edwin Kosgei, the appellant herein, against Metkei Multi-Purpose Company Limited, the respondent.
2. According to the statement of claim dated 25th October 2014, filed in the ELRC, the appellant was employed by the respondent as a milk tanker driver on 23rd July, 2012 on a monthly salary of Kshs. 16,000/= but was summarily dismissed vide a letter dated 10th February, 2014. He stated that the dismissal was unfair and contrary to law for the following reasons:

    a. Procedural fairness as required by the provisions of section 41 of the *Employment Act*, 2007 was not followed.

    b. The termination was without justification as occurrence of a road traffic accident is not one of the lawful reasons for the effecting of a summary dismissal under the law.

    c. No notice of misconduct was given to the claimant.

d. No opportunity to be heard in the presence of a trade official or an employee of one's choice was accorded.

e. No certificate of service was given as required by law.

f. The respondent carried out collective punishment without according due consideration to individual culpability.

3. The appellant therefore prayed for an award against the respondent as hereunder:

a. Declaration that the termination of employment was unfair and unlawful.

b. Salary on account of notice pay @ 16,000/=

c. 12 months' salary as compensation Kshs192,000/=

d. 2 years' service pay @ Kshs. 16,000/= Kshs. 32,000/=

e. 2 years leave pay Kshs. 32,000/=

Kshs 272,000/=

f. Costs and interest of the claim.

4. In its statement of response dated 16th December, 2014 and lodged in court on 19th December, 2014, the respondent position was that the claimant absconded duty after causing a bad accident due to his own negligence, that he deserted the work station after being asked to appear before the board and submit a written accident report to the respondent, and that his services were lawfully, fairly and procedurally terminated after he was found to have been guilty of misconduct. For these reasons, the respondent denied that the appellant was entitled to any compensation and urged the court to dismiss the claim.

5. Following the hearing of the evidence in support of the appellant's claim, the defence of the respondent, and the contending submissions of the respective parties, the trial court dismissed the cause except for an award of Kshs. 32,000/= on account of accrued leave.

6. Aggrieved by the decision of the trial court, the appellant lodged this appeal against the judgement and award of the ELRC. In his memorandum of appeal, the appellant raised the following eigh grounds:

1. That the learned judge erred in law and fact in failing to find that the appellant's termination from employment was unfair and unlawful as the right to be accorded a hearing prior to termination of employment in the presence of a fellow employee of the appellant's choice or a trade union representative was not observed by the respondent as provided for in section 4(1) of the *Employment Act* 2007.

2. That the learned judge erred in law and fact in failing to find that the respondent failed to comply with section 41(2) of the *Employment Act* 2007 as no evidence of issuance of postage, or service of the notice to show cause why dismissal should not be effected and the reasons for which the employer was contemplating to terminate employment was given by the respondent and no evidence of postage or service of any letter inviting the appellant to a hearing prior to employment existed.

3. That the learned judge erred in law and fact in finding that the appellant had not discharged his onus of proof under section 47(5) of the *Employment Act* 2007 while the appellant had tendered evidence of the dismissal letter, explained that he had not been given alternative work and was denied access to the work place.

4. That the learned judge erred in law and fact in failing to find that the respondent had not discharged the onus of proof provided for an employer under section 47 of the *Employment Act* 2007.

5. That the learned judge erred in law and fact in failing to analyze the pleadings, the oral testimonies of the parties and the documentary evidence and failing to be guided by section 45 of the *Employment Act* 2007 in arriving at the decision rendered.

6. That the learned judge erred in law and fact in finding that no material had been placed before the court to establish entitlement to service pay while the onus of proof was upon the respondent to provide evidence of the existence of matters that would exclude the payment of service pay under Section 74 of the *Employment Act* 2007.

7. That the learned judge erred in law and fact in failing to award the relief sought in favour of the appellant and or quantifying the amount of compensation that was or would have been due to the appellant and in failing to comply with rule 28(2) of the *Employment and Labour Relations Court (procedure) Rules 2016* in preparing the judgement.

8. That the learned judge erred in law and fact in denying the appellant costs of the claim while the claim had partially succeeded, and in failing to be guided by section 12(4) of the *Employment and Labour Relations Court Act*, 2014.

7. The appeal was heard virtually, and Learned Counsel, Mr. Mugambi, appeared for the appellant. Mr. Chepkonga for the respondent did not appear for the hearing despite service upon him of the hearing date. The parties had agreed to file written submissions though only the appellant's submissions are on record. Mr. Mugambi relied entirely on his written submissions.

8. We have considered this appeal, the evidence of the parties, and their submissions in the ELRC, the appellant's submissions herein and the authorities cited. Under The Statute Law (Misc.) Amendments Act No. 18 of 2014, an appeal to this court from the Employment and Labour Relations Court, lies on matters of fact and law. From the memorandum of appeal, it is evident that the appeal is properly before us as it raises both issues of fact and law. However, in determining the appeal, we have an obligation to consider and re-evaluate the evidence and arrive at our conclusion, giving allowance to the fact that we did not have the benefit of seeing and assessing the demeanour of the witnesses.

   (See *Selle V Associated Motor Boat Company* (1968) EA 123).

9. The brief facts of this case are that the appellant was employed by the respondent as a milk tanker driver on 23rd July, 2012 on a monthly salary of Kshs. 16,000/=. He had an otherwise clean record until the events arising from a road traffic accident involving the respondent's motor vehicle registration no. KBQ 645 J on 9th December, 2013. The appellant was a co-driver to Wilfred Kipchirchir Rotich, his colleague at the time of the accident.

10. We are of the view that the following issues fall for our determination:

    1. Whether the appellant's dismissal was unfair and unlawful;
    2. Whether the dismissal of the appellant was justified;
    3. Whether the reliefs sought by the appellant are available to him;
    4. Whether the trial judge erred in denying the appellant costs despite the cause being partially successful;
    5. Who bears the costs of the appeal?

11. Regarding the issue whether the appellant's dismissal was unfair and unlawful, it was submitted by Mr. Mugambi on behalf of the appellant that the respondent effected summary dismissal of the appellant over events arising from a road traffic accident involving its motor vehicle KBQ 645 J on 9th December, 2013. He urged that the respondent failed to comply with the procedural fairness provisions embodied in Section 41 of the *Employment Act*, 2007 (hereinafter the Act) and fell short of the requirements of a fair hearing. It was further submitted that the respondent did not establish that the appellant was given an opportunity to show cause as to why summary dismissal should not be effected, or even given a hearing before the decision to dismiss him from employment was made. Mr. Mugambi stated that the basis of that argument was the fact the letters dated 10th December, 2013 and 13th January, 2014 alleged to have been posted to the appellant contain a postal address indicated as 24, Ainabkoi but that no evidence was led to establish that this was the appellant's postal address since the address contained in his appointment letter was P.O Box 746-30100, Eldoret.

12. Mr. Mugambi cited the case of *Benard Ngugi V G4S Security Services Kenya Limited* (2013) eKLR in support of his contention that the summary dismissal was unfair and unlawful.

    In the first cited case the ELR Court found that the primary cause of the accident for which the claimant had been summarily dismissed on grounds of negligence were beyond the claimant's scope of duties and were not attributable to his failures. It also found that the claimant was not accorded the hearing promised in the show cause letter and as envisaged in section 1 of the *Employment Act*.

13. Mr. Mugambi also cited the case of *Janet Nyandiko V Kenya Commercial Bank Limited*, (2017) eKLR for the proposition that the employer is enjoined in mandatory terms under Section 41 of the Act to ensure that before terminating an employee on grounds of misconduct, poor performance or physical incapacity the employer explains to the employee in a language he understands the reasons for which the employer is considering to terminate him.

14. Section 41(1) of the Act provides for the procedure to be followed before termination. This section provides for notification and hearing before termination on grounds of misconduct, poor performance and incapacity. There are clearly two stages set out in the section, and both are in mandatory terms. Under sub-section (1) the employer is required to give certain explanation to the employee as follows:

    "(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." (emphasis ours)

15. The second stage is provided under sub-section (2) in mandatory terms which requires the employer to hear the employee, and is as follows:

> "(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." (emphasis ours)

16. The respondent terminated the appellant's employment on grounds of gross misconduct and therefore the above section applies. The issue is whether the respondent met the requirements of this section. The respondent's view is that the letters he sent to the appellant covers it on these two issues. The explanation contemplated under the Act is an oral one, and should be given to the employee in the presence of another person of his choice, either a colleague or a shop floor representative. There was no such engagement between the appellant and the respondent. That notwithstanding, we have looked at the 2 letters, which are found at pages 24 and 25 of the record of appeal. They were appellant's Exhibits 2 and 3. The letter dated 10th December, 2013 was the letter demanding a written explanation of what happened thirty minutes to the accident. The letter dated 31st January, 2014 was an invitation to attend disciplinary meeting on 6th February, 2014.

17. The receipt of these two letters was contested by the appellant at the trial. It is clear from the judgment that the learned judge did not consider the issue of service of the two letters to the appellant, even though the appellant contested same in his evidence. What the court noted was that there were two inconsistent narrations as to whether the letters to the Claimant were delivered to him or not. The learned Judge concluded that the respondent's version was more plausible and therefore he found that the letters were sent out.

18. We have looked at the two letters and find that they were sent to P.O Box xx, Ainabkoi. We have also looked at the appellant's address given in his employment letter, which is at page 20 of the record. It is given as P. O. Box 746 – 30100, Eldoret. The burden of proof that the letters were sent to the appellant lies with the respondent. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies with the person who wishes the court to believe in its existence. In the first place, it is for the respondent to prove that indeed the letters were sent to the appellant. There was no certificate of posting to show the letters were posted, or any other proof of delivery of the letters. There was no allegation made that the appellant was served personally, nor was a return of service given. Secondly, the address used to send the letters has been shown to be different to the one in the appellant's letter of appointment. No explanation was given why a different address from the one in the appellant's letter of appointment was used. The appellant maintained that he did not get the letters as alleged. Even if the letters were posted to the address shown on them, it is difficult to find that they reached the appellant. On balance of probabilities, we find in favour of the appellant that the respondent did not prove service of the two letters demanding a written explanation of the accident and the other inviting him to a disciplinary meeting. Had the learned trial judge considered the address used in the two letters against the appellant's address as per his employment letter, we are certain he would have found differently.

19. We are in agreement that in view of the finding that the appellant did not receive the letter demanding a written explanation and the one inviting him to a disciplinary meeting which could have accorded him an opportunity to be heard, the respondent cannot be said to have met the mandatory dual requirements in Section 41 of the Act. The respondent did not give the appellant an explanation or notification that it was contemplating terminating his employment and the reasons for it. Further the

respondent did not accord the appellant a hearing. These two are fundamental rights of an employee under the Act which should not be overlooked. In fact, it is the duty of the court to protect employees from abuse of these rights. We find that the respondent failed to adhere to procedural and substantive requirements of the law before the decision to terminate the appellant's employment was made, thus failed to accord him fair administrative action.

20. The other issue is whether the appellant's dismissal was justified. Section 45 of the Act requires the employer to prove the reasons for a termination of an employee's employment, failure to which the termination will be regarded as unfair. The section requires the employer to prove that the reason for the termination was valid, that the reason for the termination is a fair reason in relation to his conduct, capacity and compatibility and based on the operational requirements of the employer.

    The section concludes that the employment should also have been termination in accordance with fair procedure.

21. The letter (Exhibit 3) inviting the appellant to the disciplinary meeting accused the appellant of two acts. The first being failure to provide a written explanation of how the accident occurred, and the second of desertion of duty. We have already dealt with the issue of failure to prove that the letter of 10th December 2013, which required a report of the accident from the appellant was received from him. We shall consider the issue of absconding duty.

22. The respondent's evidence was that the appellant was last seen at work on 9th December, 2013 and did not go to work again after that. He relied on the attendance list he produced as Exhibit 4 which shows that the appellant did not attend work on 7th to 10th December, 2021. At the same time the respondent testified that the appellant declined other duties allocated to him on 10th December, 2013.

23. The appellant testified that he went to work but was advised to stay at home until they called him upon getting another vehicle. He said that he was denied access to the work place on the orders of the Manager, the respondent's witness at the trial. He said that he was called on phone on the 12th February 2014 and that when he went to the respondent's place of work, he was served with the dismissal letter at the gate.

24. Mr. Mugambi took issue with the allegation of desertion of duty and submitted that the provisions of Section 44(4) of the Act, do not embody the term desertion and hence the term could not be implied into the contract. The allegations of desertion of duty, failing to give a report and failing to take up alternative duties when the vehicle got an accident were not established by the respondent who also failed to establish a fundamental breach of contract under Section 44(3) of the Act. Mr. Mugambi contended that an alternative sanction to summary dismissal exists under Section 19(1)(c) of the Act, and that if at all the appellant had absconded duty as alleged by the respondent, it had the option of deduction of wages for the absent days.

25. The terms desertion of duty and absconding duty were used interchangeably by the respondent. The letter of termination does not quote any provision of law as one invoked to terminate the appellant's employment. However, from the letter it is made clear that they found that the appellant had deserted his work station. That ground is in line with Section 44(4)(a) of the Act which uses the words 'absents himself from place appointed for the performance of his work". For that reason, we do not wish to go into the meaning of either term as that is semantics.

26. The complaint of desertion is related to the one accusing the appellant of declining to perform alternative duties. Regarding refusal to perform other duties, Mr. Mugambi submitted that the respondent never gave any details of the alternative work given and that since the employment contract was that the appellant was employed as a driver, any change in his work ought to have been after

consultations as provided in Section 10(1), (2) as read with (5) of the Act which was not done herein. Reliance was placed on the authority of *Board of Governors, Cardinal Otunga High School, Mosocho & 2 others v Elizabeth Kwamboka Khaemba*, (2016) eKLR.

27. Starting with the issue of absenteeism from the place of work, the attendance list relied upon by the respondent, Exhibit 4, does not aid it because it covers a period outside the one complained of. As for the 10th December, 2013, the evidence of the respondent's witness contradicts that list in that the witness claimed that the appellant did not go back to work after 9th. Then he also claimed that the appellant declined other duties on the 10th, one day later. This is confusing because it is not possible that the appellant last stepped at his place of work on the 9th December 2013, yet on the 10th December, the first day of his absence from duty, he is said to have declined other work. We find that had the learned trial Judge analysed this evidence, he would have rejected the respondent's case on that point for being untenable.

28. Mr. Mugambi for the appellant submitted that the respondent never gave any details of the alternative work given to the appellant, and that since the employment contract was that the appellant was employed as a driver, any change in his work ought to have been after consultations as provided in Section 10(1), (2) as read with (5) of the Act, which was not done herein. Reliance was made in the authority of Board of Governors Cardinal Otunga High School, Mosocho & 2 others v Elizabeth Kwamboka Khaemba, [2016] eKLR for the proposition that an employee must be consulted before assignment of new duties.

29. We have considered the appellant's job description as given to him by his employer. This is found at page 23 of the record. It sets out Tasks as:

    1. Transport milk on a regular and timely basis.
    2. Maintaining the vehicle in working order... this includes daily cleaning...
    3. Report all vehicle damages and repairs while in transit...
    4. Maintain the daily transportation logs.
    5. Ensure proper driving documents are maintained at all times.
    6. Maintain the quality of milk in the tank from the source to the point of destination.
    7. Follow and obey all the Kenya Traffic laws and regulations.

30. We shall quote here what we said in Eldoret Civil Appeal No. 94 of 2017 related to this case, as it is on all fours on this issue with this appeal:

> " From that list, which was an annexure to his contract of employment, the appellant's job description did not include any job outside of driving and maintaining vehicles. We noted that the respondent's witness was very casual about the alternative job the appellant declined to do because he did not state which job that was. The appellant denied being asked to do any job and denied he declined any.
>
> We have set out herein above the appellant's job description and his duties. Section 10 of the Act is very clear that an employee's duties cannot be changed or revised outside of consultation with the employee. The section requires there be consultation before change of duty, and consequently before assignment to such duties, and this is mandatory. In addition, it is the responsibility of the employer to revise the contract to reflect the change, and then

notify the employee in writing. What the respondent needed to do is demonstrate that it held consultation with the appellant before assigning him the duties it now alleges he declined to perform. Without proof of consultation, and without proof of the change in the appellant's terms of service having been done in writing and served upon the appellant, the respondent cannot be heard to say that the appellant failed to perform other duties."

31. We adopt that finding in this matter and find that the respondent had no valid reason to terminate the appellant's employment; and that it had no fair reason to terminate in relation to the appellant's conduct, capacity and compatibility, and operational requirements of the respondent. In addition, the respondent did not terminate the appellant's employment in accordance with fair procedure. In all the circumstances of the case, the respondent acted unfairly and the termination was not justified. The learned judge fell into error when he concluded that the respondent's action was fair and just.

32. Mr. Mugambi contended that the trial judge erred in depriving the appellant costs of the claim for failure to file submissions on time as the guiding consideration in Section 12(4) of the *Employment and Labour Relations Court Act*, cap 234 B is the justice of the case. The appellant asserted that the reason advanced by the judge was not embodied in the statute of the court or its procedure rules hence the learned judge did not exercise his discretion judicially and acted on wrong principles. Mr. Mugambi relied on the authority in *Kiska Ltd v De Angels* (1969) E.A 6 where the predecessor of this court stated at page 8, as follows;

> " Thus, where a trial court has exercised its discretion on costs, an Appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles where it gives reasons for its discretion the Appellate court will interfere if it considers that those reasons do not constitute "good reasons" within the meaning of the rule". The court was urged to allow the appeal with costs plus the costs in the superior court."

33. We see no need to go into the issue of costs as we have come to the conclusion that the appellants appeal has merit and we shall be awarding costs. Before we do that we shall determine whether the appellant was entitled to the reliefs sought. Section 49 (1) as read with Section 50 of the Act provides for remedies for wrongful dismissal and unfair termination. We have taken into account both provisions.

34. The appellant sought salary on account of notice pay @ 16,000/=. This claim was proved, the respondent terminated the appellant summarily without notice and without one month'snpay as per the contract of employment. The appellant also claimed 12 months' salary as compensation. The law allows a maximum compensation equivalent to 12 months' pay. We have considered that the appellant had only worked for one year and six months at the time of the termination from employment. He had a clean record. In addition, we noted the he was not the one driving the respondent's vehicle at the time of accident. In the circumstances, we are of the view that compensation in the equivalent sum of four months' salary will be fair.

35. In support of the claim for 2 years' service pay @ Kshs.16,000/=. The appellant did not cross-examine the respondent or tender evidence on whether the respondent had or had not enrolled the appellant with a pension scheme or provident fund. The claim under that head is not proved. As for the claim for 2 years leave pay, the learned trial judge gave judgment to the appellant for this sum. He does not deserve that claim before this court.

36. The appellant's claim before the trial court included a request for an order directing the respondent to issue a certificate of service. We noted that the learned judge did not address this issue in his judgment.

It deserved attention because under Section 51 of the Act an employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. The appellant had served for a period longer that four weeks.

37. We find that the learned trial judge erred in law and in fact in failing to find that the appellant's dismissal was devoid of a valid reason, was unfair and unjustified. In the result we set aside the judgement of the learned judge, saving the finding in favour of the appellant for an award of Kshs 32, 000/= for accrued leave; and in substitution order as follows:

   a. Declaration is hereby made that the termination of employment was unfair and unlawful.

   b. The respondent does issue the appellant with a Certificate of Service.

   c. The appellant is entitled to the following payments:

      i. One month's salary in lieu of notice in sum of Kshs. 16,000/=;

      ii. Compensation for unlawful termination in the equivalent sum of 4 month's salary @ Kshs. 16,000/= total Kshs. 64,000/=;

      iii. One month's salary for work done in the month of December 2013 and not paid, in the sum of Kshs. 16, 000/=;

      iv. Costs of this appeal and of the case before the ELRC; and,

      v. Interest at court rates.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

A.K. MURGOR

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copyy of the original

Signed

DEPUTY REGISTRAR