IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & WARSAME JJ.A)

CIVIL APPEAL NO. 373 OF 2017

BETWEEN

RODGERS TITUS WASIKE……..…….…….....….....APPELLANT

AND

GENERAL MOTORS EAST AFRICA LIMITED...…...……..RESPONDENT

*(Being an appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nairobi (**Lady Justice M. Mbaru**) dated 23rd March, 2017* **in ELRC NO. 1322 of 2014)**

JUDGMENT OF THE COURT

1. This is an appeal against the judgment of the Employment and Labour Relations Court (ELRC) wherein the learned Judge dismissed the appellant's claim for unlawful termination.

2. The appellant, **Rodgers Titus Wasike** was employed as a receiving clerk by the respondent, **General Motors East Africa Limited** on 8th November, 2004 with a starting salary of Kshs. 25,000/=. He ultimately rose up the ranks to the position of Part Sales Executive earning Kshs. 102,516/=. In a letter dated 11th July 2014, he was summarily dismissed from employment with effect from 9th July 2014, for gross misconduct involving unauthorized absenteeism and absconding from duty. He was further informed that his terminal dues which included days worked up to and including 8th July 2014 and any leave due and not taken, would be paid upon complying with the company's clearing procedure. According to the respondent, their decision was informed by the fact that the appellant fled from the work place from 9th to 16th July 2014 when there was an incident of theft of spare parts in their warehouse on 8th July 2014. He only called his supervisor on 15th July 2014 to inform him that he was attending to personal matters and appeared in the office on 16th July 2014 wanting to fill in leave forms after the fact.

3. It was the appellant's case that at the material time he was unwell and had to leave work early on 8th July, 2014 and was consequently treated at Avenue Health Care, a respondent appointed clinic. He alleges that he was not afforded an opportunity to be heard, and that there was no proof of wrong doing on his part. The appellant thus filed a claim against the appellant and sought inter alia: a declaration that his termination was unlawful as the reasons given were invalid and he was not accorded a fair hearing; twelve (12) months' salary of Kshs 1,230,192/=; salary for each month worked over ten (10) years at Kshs. 1,025,160/=; special damages for lost years at Kshs. 2, 665,416/= and costs of the suit.

4. In a judgment dated 23rd March, 2017, the learned Judge concluded that the appellant was the architect of his own dismissal by his conduct and failure to attend work as required and also by failure to communicate to the employer about his circumstances if indeed he was sick. Consequently,the court found that his termination was lawful, his terminal dues as calculated by the respondent were sufficient, a claim for compensation in a lawful termination did not arise and a claim for wrongful termination was similarly unavailable.

5. The appellant, being aggrieved by the said decision, preferred an appeal to this Court premised on eight (8) grounds of appeal. In summary he faulted the learned Judge for:

i. Finding that the respondent's actions were lawful;

ii. Failing to consider that the appellant was condemned unheard and that the respondent acted contrary to Section 45 of the Employment Act without investigation or proof;

iii. Failing to consider that the appellant was lawfully absent from his duties as shown in the medical report and that his superiors were aware of his absence from duty.

6. **Mr. Wachakana,** for the appellant filed submissions and in highlighting them, he stated that the appellant's dismissal was procedurally flawed since the provisions of **Section 41(2)** of the Employment Act were not complied with. In his view, the respondent condemned the appellant unheard by failing to refer the matter to the internal management of the board to determine whether the appellant was hospitalized during the period in question and whether he informed his immediate supervisor. It was further contended that the respondent had failed to provide cogent evidence and valid reasons for summarily dismissing the appellant as required under **Section 43** of the Act. Lastly, he urged the court to find that the appellant's dismissal was unfair.

7. On its part, the respondent represented by **Mr. Ogonjo** adopted its submissions and concurred with the determination of the learned Judge that the appellant's dismissal was justified. According to the respondent, their code of conduct provided for disciplinary action upon committing certain acts of misconduct such as absenteeism without cause or permission. It was contended that the appellant was given several opportunities to explain his absence from the work place but was unreachable during his 7 day absence and upon his return on 16th July 2014, declined to explain his whereabouts to management and produced court documents which allegedly barred the respondent from disciplining him. Given that the appellant's lack of cooperation, he was dismissed for gross misconduct negating the application of **Section 45** of the Employment Act.

8. This being a first appeal, our duty is to reconsider the evidence, undertake a re-evaluation of such evidence and reach our own decision, bearing in mind that we neither saw nor heard the witnesses. (See ***Selle vs. Associated Motor Boat Co. [1968] EA 123***). In our view two germane issues arise for our consideration: - whether the appellant's summary dismissal was wrongful or justified and whether the dismissal was procedurally fair.

9. From the record, it is clear that the appellant was summarily dismissed vide the respondent's letter dated 11th July, 2014 for gross misconduct involving unauthorized absenteeism from the work place. The Employment Act spells out circumstances when an employee may be summarily dismissed. Relevant to this case is **Section 44 (4)** which sums up the issues in this case and states as follows:

> ***(4) 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) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;***

10. From his testimony, the appellant acknowledged that he was indeed absent from his workplace from 3.30 p.m. on 8th July, 2014 when he was taken ill to 15th July, 2014. By his own admission: nobody at the respondent knew where he was; his supervisor Mr. Ikenye tried to call him but he was unavailable; he did not communicate with anybody from the respondent Company until 15th July, 2014 when he told his supervisor Mr. Ikenye that he was attending to a personal matter; he had no permission to attend to any personal matters; he was not admitted in hospital and he did not have any documents before the court to support his claim that he was sick. The appellant further testified that during his absence, he had received word that the respondent wanted to have him arrested; he admitted that he was absent from work because he was sick and also because he was afraid of arrest.

11. In justifying the grounds for dismissal, the respondent called three witnesses. Its first witness, Mr. Ikenye who was the appellant's supervisor, provided a screen shot of his phone's call log to prove that he had tried to reach the appellant on 9th July, 2014 and inquire about his absence. As required by company procedure, he reported the appellant's absence to the Human Resource Manager in an email dated 10th July, 2014 and copied the same to his supervisor and the Managing Director. On 16th July, 2014, when the appellant resurfaced seeking to apply for leave, he referred him to the Human Resource Department.

12. Mr. Fred Wasike, the respondent's General Manager, testified that on 16th July, 2014 the Security Manager, the Human Resource Manager and the appellant were before him. He gave the appellant a chance to explain himself but instead, he produced court documents which allegedly precluded him from undergoing disciplinary action. In reality, the bundle of documents was an application for an injunction and not injunction orders. The appellant was allowed to call his advocate and refused to participate in the process unless his advocate was present. Given the lack of cooperation, the appellant was dismissed for absconding duty.

13. From the facts presented before the Court to the effect that the appellant left his station for 8 days without explanation, cause or communication, we are of the considered opinion that there was proof and substantive reason to warrant the sanction of summary dismissal of the appellant. The burden of proving that a wrongful dismissal has occurred rests with an employee. The appellant was well aware that under the respondent's code of conduct he was to inform the respondent of any absence or sickness. He neglected to do so despite the respondent's incessant attempts to locate him. Furthermore, lack of medical evidence to support his illness casts doubt on his tale. His allegation that there are no timelines on communicating the reason for one's absence simply cannot hold and is negated by his deliberate actions of engaging the service of an Advocate and filing **Civil Case No. 4059 of 2014** on 14th July, 2014 where it is stated that the injunctive orders were urgent given that the respondent wanted to summarily dismiss him without giving him a chance to defend himself against the allegation of theft. This was the true reason for the appellant's cryptic disappearance. He cannot turn around and claim that the respondent's decision to dismiss him was not justified. We fully agree with the sentiments of the trial Judge that:

"The Claimant by his conduct on or before his termination does not speak well of him. A diligent and honest employee, even when faced with illness does not attend court to stop termination as (sic) instead such an employee should attend at the workplace and explain their whereabouts to the employer. Nothing stopped the Claimant from sending a text message, sending a relative, calling his supervisor with information of his ill-health"

14. Wrongdoing on the part of the appellant having been proved, we turn our focus to the procedure used in summarily dismissing him.

15. As stated under **Section 44(4)** of the Act, the decision of an employer to dismiss an employee summarily does not preclude an employer

or an employee from respectively alleging or disputing whether the facts giving rise to the same constitute lawful grounds for the dismissal. **Section 41(2)** provides for the procedure before an employee can be summarily dismissed and 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),".

16. From the evidence on record, the General Manager Mr. Wasike, gave the appellant the opportunity to explain himself when he came to the work place on 16th July, 2014. This came after extensive efforts by the appellant's supervisor to procure an explanation from the appellant for his absence as evident in supervisor's messages from the 9th July, 2014.

When the appellant refused to explain the reason for his 8 day absence or to participate in the disciplinary action, the respondent took the decision to serve the appellant with the dismissal letter. In light of the foregoing, the appellant's argument that the respondent condemned him unheard by failing to refer the matter to the internal management of the board is untenable. It is clear that the respondent made attempts to reach the appellant through the only means provided and offered him an opportunity to explain himself. However, the appellant did not avail himself and was unresponsive. Furthermore, the appellant was given another opportunity by the respondent on 16th July, 2014 to respond to the allegations made on his conduct before his colleagues but he chose to remain mum and serve the application for injunction.

17. It is clear from the evidence on record, that the appellant acknowledged that he left his work place on 8th July, 2014 before the designated departure time of 4.00 p.m. without permission from the respondent. Secondly, even after absconding duty he continued to be absent from work for a period of 8 days without leave from the respondent. More importantly, no one from the respondent knew where he was or the reason for his absence. Perhaps, it is also fundamental to state that the appellant knew or ought to have known that his conduct would attract disciplinary action which included summary dismissal. Consequently, and having addressed our mind to the issues raised, we are persuaded that the respondent was justified to dismiss the appellant. As was stated in ***R vs. Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481***:-

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed…"

18. In the end, we conclude and find that the appellant's summary dismissal, in the circumstances, was in accordance with the law and consequently, the appeal lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 10th day of July, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR