



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), SICHALE & ODEK, J.J.A)

CIVIL APPEAL NO. 121 OF 2017

BETWEEN

JACOB ORIANDO OCHANDA.....APPELLANT

AND

KENYA HOSPITAL ASSOCIATION LTD

T/A THE NAIROBI HOSPITAL..... RESPONDENT

(Appeal against the Judgment of the Employment and Labour Relations Court at Nairobi (M. Mbaru, J.) dated 6th October, 2016

in

E&LRC No. 1636 of 2013

Consolidated with

E&LRC NO. 636 of 2014)

JUDGMENT OF THE COURT

It is a common factor that the appellant was employed by the respondent on 18th of January, 1989 as a carpenter. He rose through the ranks to the position of maintenance supervisor.

It was alleged that on 17th July, 2018 the appellant together with two other employees of the respondent (John Ng'ang'a and Julius Olendo) were implicated in a scam to defraud the respondent; that would place orders for the supply of fuel when there was no immediate requirement. The excess supply of fuel, it was alleged would be converted by John Ng'ang'a and Julius Olendo and the proceeds of the transactions shared among the conspirators for personal financial gain. For this reason, they were arrested and charged in Criminal Case No. 2450 of 2013. The criminal charges were subsequently withdrawn. However, the respondent continued to pursue the matter. On 19th July, 2013, it issued the appellant with a notice to show cause. The appellant's response to the show cause letter was unsatisfactory as a result of which, he was suspended with pay from 19th July, 2013 to 2nd August, 2013 to enable the respondent conclude investigations. The suspension was extended to 6th August, 2013. Following the conclusion of those investigations, a report dated 22nd July, 2013 was made and a disciplinary hearing conducted on 23rd July, 2013. In its report, the disciplinary panel recommended that the appellant and his two accomplices be dismissed. The respondent, guided by that report issued a letter dated 7th August, 2013 to the appellant and his colleagues summarily dismissing them.

Aggrieved, the appellant and John Ng'ang'a Ngigi moved to the Employment and Labour Relations Court. The appellant complained that he was unlawfully and unfairly dismissed from employment without any caution or notice; and that the criminal charges against him were unjustified, hence his acquittal. For these reasons, he asked the court to declare that his dismissal was unlawful; that the respondent was in

breach of the employment contract; that his rights to fair labour practices were infringed; and that the termination was unlawful. The appellant also applied for compensation in the net sum of Kshs. 10,000,000/= and an order directing the respondent to remit to the Kenya Revenue Authority such tax that may be payable in respect of the appellant's claim.

The appellant's and John Nganga Ngigi's claims were consolidated before Mbaru, J. who in her determination of the dispute expressed the opinion that the respondent procedurally dismissed the appellant; that he was served with show cause letters and subsequently subjected to internal disciplinary hearings; that based on the evidence and defence tendered, he was found culpable for neglecting his duties as an employee of the respondent; that the appellant was involved in signing delivery for products that were never delivered in the amount and qualities requisitioned; that, by signing the documents in acknowledgement of the disputed transaction, he was careless. With that, the learned Judge dismissed the claim.

Being aggrieved by this decision, the appellant has now lodged this appeal. Because this appeal does not involve John Ng'ang'a Ngigi, we make no further reference to him. The appeal has been brought on nine (9) grounds, to the effect that the learned Judge erred by: concluding that the appellant was dismissed for valid reasons; not appreciating the fact that the appellant was acquitted of the criminal charges leveled against him; failing to consider the appellant's submissions; disregarding and failing to address the issues raised by the appellant in evidence; and by failing to take into account relevant facts and taking into account irrelevant facts.

Submitting on these grounds, the appellant argued that since the respondent did not file a response to his claim for an award of Kshs. 10 million in damages, the Judge ought to have granted the claim; that it was erroneous for the Judge to delve into the issue of fraud as a basis of rejecting his claim to damages and compensation for unlawful termination; and that the court ought to have considered whether or not the procedure followed in dismissing the appellant was lawful. He also faulted the learned Judge for making findings that were not supported by evidence. For instance, it was submitted that there was no material to show that the appellant had ordered the fuel with the intention of stealing or that he participated in the disciplinary hearing. This, in his opinion, was contrary to the weight of evidence before the court. Based on these submissions, the appellant urged us to allow the appeal and award him damages as sought in the claim.

In opposition to the appeal, the respondent concurred with the determination of the learned Judge that the dismissal was deserved and contended that the appellant negligently signed documents which were used in a series of fraudulent transactions; and that the Judge properly applied **section 44** of the Employment Act.

This is a first appeal from the decision of the Industrial Court, as it was known then. It is our primary duty to re-evaluate the evidence on the record in order to come to our own independent conclusions on that evidence and the law. See: **Abok James Odera T/A A.J Odera & Associates V. John Patrick Machira T/A Machira & Co. Advocates**, Civil Appeal No. 161 of 1999.

The main or only issues in this appeal are: whether the appellant was unfairly dismissed; and whether the learned Judge properly exercised her discretion in failing to award him damages for unlawful termination.

It is plain that the appellant was summarily dismissed, according to the respondent's letter dated 7th August, 2013, for negligence. 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; namely;

(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—

(a)

(b)

(c) an employee willfully 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)

The appellant and his colleagues were charged as explained earlier. The charges were read to them on 25th July 2013 and pleaded not guilty. The hearing was slated to commence on 10th September, 2013. Between the date of the plea and 15th January, 2014, for a period of nearly 6 months, only 2 witnesses had testified for the prosecution. On that date (15th January, 2014), the prosecution, having failed several times to procure the attendance of other witnesses, and the trial magistrate having rejected an application for adjournment, the prosecution elected to withdraw the charges pursuant to **section 87(a)** of the Criminal Procedure Code, as a result of which the appellant was discharged. That being the case, it must be remembered that by dint of **section 87(a)** aforesaid, the discharge of the appellant in itself was not proof of his

innocence and could not operate as a bar to subsequent proceedings against him on account of the same facts. At the same time, there was no finding of guilty or a conviction. In Nelson Mwangi Kibe V. Attorney General, Civil Appeal No. 164 of 2000, cited with approval by Waki J.A in the case of the Hon. The

Attorney General and another V. Maina Githinji & Another, Nyeri Civil of

Appeal No. 21 of 2015 (UR), this Court was categorical that:

“An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee going against the outcome does not by itself render the employer’s decision wrongful or unfair”.

On the facts presented before the court below to the effect that the appellant casually and negligently dealt with the delivery of fuel leading to loss by the respondent, we are of the considered opinion that there were reasonable and sufficient grounds for suspecting that the appellant participated in the commission of a crime; and that through willful neglect, he failed to diligently perform his work or did so carelessly by failing to alert the Senior Accountant who, in the hierarchy of things needed to be involved.

Transgression on the part of the appellant having been proved, we turn our focus to the procedure used in summarily dismissing him. After a show cause letter had been addressed to the appellant, he was, by a letter dated 20th July, 2013, invited to attend a disciplinary committee hearing on 23rd July, 2013.

Section 41(2) provides for the procedure 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).

It is not in contention that the appellant was served with a notice to show cause; that the reasons for his termination were explained to him; and that he understood those reasons upon which the respondent considered his termination. From the record, it is equally evident that the disciplinary hearings took place on 23rd July, 2013 from 11.00am to 7.00pm as stated in the Disciplinary Committee Report dated 6th August 2013. This report shows the composition of the panel and confirms that submissions were received from the appellant. Though present in person, the appellant opted not to be accompanied by a colleague. He fully participated in the disciplinary hearing and in fact shed light on the events that took place on the day material to the inquiry. According to the said report the panel made recommendations, including one that the appellant be summarily dismissed for negligence and colluding with a supplier to defraud the respondent.

In light of the foregoing we do not understand the appellant’s argument that there was no oral hearing. But even if this was true, the Court has repeatedly said that the right to be heard does not necessarily entail an oral hearing only. Such was the opinion of the English Court of Appeal in R.V. Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481 where it was held:-

“The hearing does not necessarily have to be an oral hearing in all cases. 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 and there is no rule that fairness always requires an oral hearing.....Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ...”

We cite one more decision to buttress this point. In the case of Kenya Revenue Authority V. Menginya Salim Murgani, Civil Appeal 108 of 2009, this

Court pronounced itself as follows:

“However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. In the case of LOCAL GOVERNMENT BOARD vs ARLIDGE [1915] A.C. 120, 132-133, SELVARAJAN vs RACE RELATIONS BOARD [1975] I WLR 1686, 1694, and in R vs IMMIGRATION APPEAL TRIBUNAL ex-parte JONES [1988] I WLR 477, 481 it was held:- “the hearing does not necessarily have to be an oral hearing in all cases. 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 and there is no rule that fairness always requires an oral hearing.” Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ...”

With our determination, in agreement with the learned Judge, that the appellant's summary dismissal was lawful and procedural, we find no point of considering the other grounds that have now been subsumed in that determination.

There is no merit in the appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 8th day of March, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR