



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KOOME & MURGOR, JJA)

CIVIL APPEAL NO. 47 OF 2019

BETWEEN

MINI BAKERIES (MSA) LIMITED.....APPELLANT

AND

ALI OMAR FARAJ.....RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour

Relations Court at Mombasa (Rika J.,) dated 10th November, 2017 in Mombasa ELRC No. 494 of 2014)

JUDGMENT OF THE COURT

[1] **Ali Omar Faraj** (respondent) was employed by **Mini Bakeries (MSA) Limited** (appellant) as a trainee manager, with effect from 1st June 2007, with a starting gross salary of Kshs.18,000 monthly. In the course of time, the respondent rose in rank to become the branch manager at the appellant's Likoni branch, earning a gross monthly salary of Kshs.70,000. He was however suspended on 4th December 2013, after the appellant's senior production manager visited the said Likoni branch and found some loaves of bread were not up to the set standard of production as they were underweight. Following that discovery, a stock-taking exercise was done which revealed that 185 loaves of bread were also missing. Although the respondent was surcharged for the said loss, what broke the camel's back was the fact that during the respondent's suspension, further sock-taking was done and it was found that a further 300 loaves of bread were missing.

[2] It also transpired that the said loaves went missing during the presence of the respondent who had asked his replacement, **Vincent Oloo**, to cover up the loss until he returned from suspension. As a result of this infraction or breach of trust, the respondent was summarily dismissed after a disciplinary hearing which took place on 18th December, 2013. The letter of summary dismissal is dated 19th December, 2013 the effective date of dismissal was stated to be 20th December 2013.

[3] The respondent was dissatisfied with the turn of events which he termed unfair, unlawful and he filed suit before the then Industrial Court (now Employment and Labour Relations court) seeking:-

“(a) 3 months’ salary in lieu of notice at Kshs. 210,000.

(b) Equivalent of 12 months’ salary in compensation for unfair termination at Kshs. 840,000

TOTAL..... Kshs. 1,050,000

(c) A declaration that termination was illegal.

(d) Costs and any other suitable relief.”

[4] Not accepting the claim, the appellant filed its statement of response generally conceding that the respondent was employed as a trainee bakery manager, on 23rd June, 2007 and he was subsequently posted as Likoni Branch Manager in October 2007. The appellant also admitted the respondent was summarily dismissed by the appellant through a letter dated 19th December, 2013 for reasons that while he was in charge of Likoni Branch, the assistant operations manager visited the branch on 4th December 2013 and discovered many loaves of bread

were underweight. The findings were recorded on the bread weight chart on the same date and the respondent was suspended. The following day, a stock verification exercise was carried out in the presence of the respondent whereby it was discovered that a number of goods and loaves of bread were missing from the bakery.

[5] A further stock-taking was carried out on 10th December 2013 and revealed a shortfall of over 300 loaves of bread. The trainee manager **Vincent Oloo** who was working under the respondent explained that he inherited the shortfall from the respondent who had requested him to cover up for him until he returned to work. The appellant invited the respondent to appear before the management for a disciplinary hearing on 18th December, 2013. The respondent was heard and a decision to summarily dismiss him was made. According to the appellant, the decision to terminate the respondent summarily was based on valid grounds, and was carried out fairly, he also signed a discharge voucher confirming that he had no further claim against the appellant.

[6] After considering the evidence by both sides the learned Judge found for the appellant and made the following orders, the subject matter of the instant appeal;

(a) It is declared termination was unfair.

(b) The Respondent shall pay to the Claimant the equivalent of 6½ months' salary in compensation for unfair termination at Kshs. 455,000 and 1 month salary in lieu of notice, at Kshs. 70,000- total Kshs.525,000.

(c) No order on the costs.

(d) Interest allowed at 14% per annum from the date of Judgment, till payment in full.

[7] Aggrieved by the aforesaid orders, the appellant has filed the instant appeal which is predicated on some 8 grounds of appeal which we may summarize as; the learned Judge erred in law and fact in finding that there was no valid reason(s) to warrant summary dismissal; that the appellant could not carry out investigations in the absence of the respondent; that the appellant ought not to have suspended and deducted wages from the respondent; imposing a duty on the appellant to inform the respondent of his duties under **Section 42** of the **Employment Act**; finding that the disciplinary proceedings were not well conducted solely because a charge sheet was not framed and read out to the respondent; awarding interest at the rate of 14% per annum when no such relief was sought by the respondent; and failing to make a ruling on the effect of a discharge voucher signed by the respondent discharging the appellant.

[6] This appeal was disposed of by way of written submissions. Counsel did not make any oral highlights during the plenary hearing, although counsel for the respondent did not attend Court despite having been served with the hearing notice. **Mr Kongere** learned counsel for the appellant was present but he also relied on his written submissions and a list of authorities. According to the appellant's counsel, the learned Judge properly analysed the evidence and correctly concluded that the respondent was dismissed because of the missing loaves; loss of employer's property and loss of trust. In this regard the **provisions of Section 44 (4) (g) of the Employment Act** were cited that provides for summary dismissal of an employee who is reasonably suspected of having committed a criminal offence to the detriment of his employer.

[7] The appellant went on to submit that there was adequate evidence that in addition to the 185 loaves of bread that were found missing on the 4th December, 2013 the appellant discovered a further shortfall of 300 loaves of bread while the appellant was on suspension and to make matters worse the respondent had connived with a junior employee to conceal the loss. This was confirmed by **Vincent Oloo** who took over from the respondent and who was categorical in his written explanation and evidence before the disciplinary committee that the respondent convinced him to cover the shortfall which was supported by the records of the loading books that were kept by the respondent and they had cancellations of the entries. Thus the Judge failed to consider the law that entitles an employer to dismiss an employee for gross misconduct. Counsel went on to submit that a reasonable person looking at the facts of this case would come to a conclusion that there were reasonable grounds to believe that the respondent had engaged in conduct that led to the loss of the appellant's property. In this context counsel cited the case of **Clement Karuri v Kenya Ports Authority [2018] e KLR** in which this Court explained the circumstances under which an employee can be terminated on the grounds of dishonesty which must be assessed on whether it gave rise to a breakdown of trust.

[8] In regard to the finding by the Judge that a fair procedure was not followed; counsel submitted that under **Section 41** of the **Act**, the respondent was duly informed of the charges he was facing, although the charges were not in writing the same did not invalidate a disciplinary hearing where he was given an opportunity to appear before the committee and his case was heard. In the case of **Kenya Ports Authority -v- Fadhil Juma Kisuwa [2017] eKLR**, it was stated that the duty to hear an employee is limited to the employer explaining to the employee clearly the nature of the accusations for which it was contemplated that his employment was to be terminated. Counsel reiterated that it was not a duty of the employer to notify the respondent of the right to have an employee or shop steward present. According to the appellant the procedure followed was fair, the respondent was present, he was aware of the specific complaints or charges that he faced and he was given an opportunity to respond.

[9] Counsel also submitted that the award of interest at 14% per annum was erroneous, as there was no prayer for interest; moreover, the Civil Procedure Act restricts the rate of interest that can be awarded by court at the rate of 12% per annum. Finally counsel urged us to consider the legal effect of the discharge voucher that was signed by the respondent on 18th February, 2014 declaring that he had no further claim against the appellant. This aspect was not deliberated on by the trial Judge; counsel urged us to find that failure by the trial Judge to give reasons, he abdicated his responsibility by saying nothing on the pleaded issue. Counsel for the appellant urged us to allow the appeal with costs.

[10] **Mr. Hezron Gekonde**, learned counsel for the respondent opposed this appeal by way of written submissions. He supported the impugned decision firstly because the appellant fully settled the decree. Secondly the judgment was supported by evidence that the respondent was dismissed from work on allegations of cheating by trying to hide the shortage of loaves of bread and there were 400 loaves of bread which was not indicated in the handing over report.

[11] The Judge found from the evidence that when the respondent was sent on suspension, a proper stock taking was done by his supervisor on 4th December, 2013 and proper handing over was also done. The respondent was also able to fully explain to the court the reasons why there was a shortage and underweight loaves of bread. The Judge believed the evidence of the respondent and disregarded the claims made by **Vincent Oloo**. Counsel urged us to find the respondent was dismissed in total disregard of a fair process after working for the appellants for more than 6 years and he was not given a proper explanation for his termination from employment. The meeting called by the appellant was irregularly convened because the respondent was not given any written communication of the charges that he was expected to answer, nor was he given an opportunity to be accompanied by a friend or a labour officer. For the aforesaid reasons counsel urged us to dismiss the appeal with cost.

[12] This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. In the case of; **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates** [2013] eKLR this Court stated as follows regarding the duty of first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind 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.”

[13] Bearing in mind the aforesaid parameters, we have deliberated on the grounds of appeal, the evidence before the trial court and the submissions filed by both counsel in support of their respective prepositions. The issues that fall for determination which are germane and cut across the eight grounds of appeal are; whether the claim by the respondent was proved and whether the learned Judge erred by finding that due procedure was not followed by the appellant; awarding the respondent an equivalent of six and half months pay in lieu of notice with interest at 14% per annum and finally the legal effect of the discharge voucher signed by the respondent upon his dismissal and payment of the terminal dues.

[14] The learned trial Judge made the following conclusions on analysing the evidence;-

“ The reason or reasons, for the decision is/are stated in the letter of summary dismissal- The Claimant was involved in cheating at the time he handed over to Oloo, on being suspended; there were 400 loaves of bread missing; the Claimant asked Oloo and Ali to cover up for him while on suspension; the Claimant misused Respondent’s property contrary to the rules and regulations of the Respondent, in violation of Clause 6 [b] [vii] of the CBA and Section 44 [4] [g] of the Employment Act 2007; and lastly that the Claimant’s behaviour resulted in loss of trust.

... The assertion that 400 loaves of bread were missing is similarly not borne out in the evidence given by Respondent’s Witnesses. The number given in the Statement of Response is 300 loaves of bread. When the Claimant took stocks on the date of suspension, there was no record made of 300 or 400 loaves of bread missing. The Claimant’s position is there was a shortfall of 185 loaves, over which he was surcharged. It cannot be said with certainty, that the Claimant concealed the loss of 400 loaves of bread as alleged by the Respondent. This was not ascertained at the time the Claimant handed over to Oloo, and the number has not been consistently shown by the Respondent. The stock-taking revealing the shortfall happened in the Claimant’s absence. The Respondent had no reason to believe what explanation Ali and Oloo gave in the absence of the Claimant. There is every chance bread went missing after the Claimant was suspended. It was not safe to carry out second stock-taking in the absence of the Claimant. He had been involved in the first exercise, and handed over, with specific stock levels.

...

The Court is not convinced that the Respondent had valid reasons, in dismissing the Claimant, after punitively suspending and surcharging him, only 7 days earlier, over the related issue of missing loaves of bread. Omar Salim in any event explained that Employees were allowed to eat a loaf of bread daily. Some ate more than their rightful share. Shortfall was usual. Why then assume that the Claimant was solely responsible for lost bread" Why did not the surcharge mechanism extend to the loaves discovered to be missing after the Claimant was suspended" The Court does not see why the Respondent resorted to the draconian sanction of summary dismissal, while the cost of 300 loaves of bread, or 400 loaves of bread if ascertained, lost or damaged in whichever way, could be recovered from the salary of a Branch Manager who earned Kshs. 70,000 monthly.

Was the procedure fair? The Claimant was suspended on 5th December 2013. He was to return to work after 7 days. Suspension as suggested above was not administrative suspension; it was a punishment for allegations the Claimant was presented with, on 4th December 2013. He was to return to work after 7 days, having served his time on suspension.

It is not clear from the minutes of 18th December 2013, if the meeting was intended to be a disciplinary hearing or an inquiry. Consolata Kabau is stated to have called the meeting in order that Ali Omar, Vincent Oloo and Abdulkadir confirm their statements which were recorded over the shortfall of loaves of bread. It was not indicated that the Claimant was under charge. No charges were read to the Claimant. It was not indicated if he was advised of his right to be accompanied to any disciplinary hearing by persons indentified under Section 41 of the Employment Act 2007. He was not accompanied by any such persons. At the end of the meeting the panel arrived at a conclusion. The conclusion was that the Claimant and Vincent Oloo were to write to the Respondent, showing cause why, they should not be dismissed. The letter to show cause followed the meeting of 18th

December 2013, which suggests to the Court that the meeting of 18th December 2013 was not in strict sense a disciplinary hearing, but an inquiry after which a disciplinary hearing would be held.”

[15] It is against these findings that we have been entreated by the appellant to find that the Judge erred by finding there was no basis to terminate the respondent on account of missing loaves of bread after he was disciplined by way of suspension from work without pay for seven (7) days for having been culpable of producing loaves of bread that were underweight. The gravamen here is whether the appellant breached the Employment law or procedures for carrying out a further inspection on the 5th December, 2013 when it was found that 185 loaves of bread were missing and for which he was surcharged for. What seems to have broken the camel's back was a further inspection and stock taking that took place while the respondent was on suspension and it turned out there was a further shortfall of 300 loaves of bread. For this the Judge faulted the appellant for what he termed as truncating the charges against the respondent by suspending him for seven (7) days, surcharging him for the shortfall of 187 loaves of bread and dismissing him for the shortfall of 300 loaves.

[16] It is common ground that the respondent was the production manager, he was supervising two employees at the time, that was **Omar Salim Abdilatif** and **Vincent Oloo**, who indicated in their written statements and maintained the same as evidence that they were asked by the respondent to cover for him by concealing a shortfall of 300 loaves of bread. This evidence was further supported by the information found in the loading book where it was confirmed that there was a manipulation of figures done by the respondent prior to leaving the place of work after the suspension.

[17] Based on the evidence that the respondent as production manager was involved in production of underweight loaves of bread; that he was found culpable of a shortfall of 185 loaves for which he was surcharged and hot on the heels a further shortfall of 300 loaves for which it was said he manipulated his juniors and the loading book records which were under his custody to conceal the loss, we find this evidence was not challenged at all. The Judge tried to reason that the loaves of bread could have been consumed by staff, which theory does not seem to make legal sense in view of the numbers of loaves of bread and the circumstances of the matter. In our own re-evaluation of the material before the trial court, we find the acts by the respondent would lead to a loss of trust between an employer and employee. It would also give rise to reasonable and sufficient grounds of the respondent having acted to the detriment of the appellant as the employer. We say so because it is obvious the Judge disregarded the investigative stock taking exercise carried out after the respondent was on suspension when he posited that it was wrong for the appellant to carry out stock taking in the absence of the respondent. This in our view would negate the idea behind suspension of an employee where it is necessary to carry out independent investigations without interference.

[18] This takes us to the next issue of whether there was procedural fairness. The respondent was not served with the notice requesting him to show cause or any form of charges drawn for him to answer as to why he should not be dismissed summarily. We agree with the Judge the meeting held on the 18th December, 2013 did not appear as a disciplinary proceedings against the respondent but more or less an investigation of incidences of shortfall of loaves of bread at the Likoni Bakery. This Court in **County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR** while discussing what a proper notice should contain expressed;

“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary.” Emphasis added.”

[19] The meeting held on the 18th December, 2013 looks like a deliberation on how there was a shortfall of loaves. It is not that we prescribe that minutes for disciplinary hearing should take a certain format but that it ought to be clear from the minutes that a disciplinary hearing was conducted; that the allegations were tabled before the disciplinary committee and the employee was given an opportunity to respond to the same. At the end of it all, that the disciplinary committee considered the evidence, one would presume, and rightly, so that the meeting in question was a meeting to investigate the shortfall of loaves of bread and the role played by the two members of staff, **Vincent Oloo** and **Abdi Kadhiri** in covering up for the respondent's shortcomings and not on the respondent's actions. In light of the foregoing, the appellant did not adhere to fair procedure as required under **Section 41** of the **Employment Act** in dismissing the respondent summarily. See **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR**. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing. The right to a fair hearing is encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is this right that the legislature secured under **Section 41** of the **Employment Act** which stipulates: -

“41

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.

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.”

On the issue of the discharge voucher, this matter was not canvassed before the trial court, apart from the fact that there is no opinion of the Judge, we are not persuaded it barred the respondent from pursuing the issues of unfair termination which are somehow fundamental rights.

[20] The upshot of the above analysis is that the award of damages, which included an aspect of illegal termination is hereby set aside and substituted with an award for unfair termination for failure by the appellant to follow due process.

As the respondent was paid one month's salary in lieu of notice we award him three months' salary for unfair termination being a sum of Ksh. 210000 (two hundred and ten thousand). Award of interest is within the discretion of the Judge and we do not see anything wrong with the rate of 14% awarded, we decline to interfere with the same.

[21] Award of interest is within the discretion of the Judge. However, if a higher interest rate which is not prayed for in the statement of claim is awarded, there must be reasons given. Unfortunately the Judge did not give reasons for awarding 14%. We interfere with the award of 14% and substitute it with 12% which is the court rate.

[22] In view of the partial success of this appeal and this being an employment relationship, where we do not wish to set these parties against each other any further, we order that each party shall bear their own costs in this appeal and the appellant shall bear the costs in the ELRC.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR