



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 229 OF 2017

BETWEEN

THE ETHICS AND ANTI CORRUPTION COMMISSION...1ST APPELLANT
MUMO MATEMU.....2ND APPELLANT
MS IRENE KEINO.....3RD APPELLANT
JANE ONSONGO.....4TH APPELLANT
HALAKHE WAQO.....5TH APPELLANT
MICHAEL KAMAU MUBEA.....6TH APPELLANT

AND

HENRY MORARA ONGWENYI.....1ST RESPONDENT
DIRECTOR OF CRIMINAL
INVESTIGATIONS DEPARTMENT.....2ND RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT
HON. ATTORNEY GENERAL.....4TH RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Maureen Onyango, J.) dated on 19th August, 2015

in

Industrial Court Petition No. 51 of 2014)

JUDGMENT OF THE COURT

The 1st appellant on 25th July, 2014 summarily dismissed the 1st respondent, its employee serving in the position of Education Officer I in its office at Nyeri for gross misconduct.

It was alleged that on 18th May and 14th July, 2014 some persons using the email addresses kiliohaki@yahoo.com and hongombali@yahoo.com sent confidential documents from the 1st appellant to third parties containing malicious allegations about the Commission, its commissioners and members of staff. The said documents were also sent to media houses and consequently published in some local dailies.

By a letter dated 26th May, 2014, the 1st appellant wrote to the 2nd respondent requesting him to investigate the source of the documents and the author of the said emails. The 2nd respondent conducted its investigations and forwarded its report dated 23rd July 2014. In a special meeting held the next day on 24th July, 2014 the 1st appellant considered the report which purportedly linked the 1st respondent with the emails in question. As a result, the 1st appellant being convinced that the 1st respondent was responsible for the breach wrote to him on 25th July, 2014, conveying its decision to summarily dismiss him for gross misconduct.

Aggrieved by this decision, the 1st respondent petitioned the High Court to challenge his dismissal. The petition was subsequently transferred to the Employment and Labour Relations Court (ELRC), that ultimately entered judgment in favour of the 1st respondent and ordered his reinstatement to his position of Education Officer I without loss of benefits. The Judge also directed that he be restored to the 1st appellant's payroll as if he had not left employment.

The appellants have lodged this appeal on 12 grounds contending that the learned Judge erred by: failing to appreciate that the dispute was purely an employer-employee and/or a contractual dispute between the 1st respondent and the 1st appellant and that the 2nd to 6th appellants ought not to have been sued; failing to appreciate that the 2nd to 6th appellants were protected from personal liability by **Article 250(9)** of the Constitution and **section 20** of the Ethics and Anti-Corruption Commission Act; completely ignoring the investigation report from the 2nd respondent presented by the appellants and finding that no report was ever availed to the court for consideration; finding that the dismissal of the 1st respondent was unfair; finding that there was collusion between the appellants and the 2nd respondent and that the appellants used state machinery to intimidate the 1st respondent without any basis or submission before the court; finding that the appellants violated the 1st respondent's freedom; failing to take into consideration the provisions of **section 49(4)(c)** of the Employment Act in ordering the reinstatement of the 1st respondent; failing to consider **section 49(4)(d)** of the Employment Act and failing to uphold the common law principle that there should be no order for specific performance in contract for service except in exceptional circumstances; holding that the 1st respondent's case presented exceptional circumstances warranting an order of reinstatement and in ignoring the alternative remedy of damages sought by the respondent; and ordering the reinstatement of the 1st respondent without considering the nature of the constitutional and statutory obligations of the 1st appellant which requires significant level of trust, integrity and confidence between the 1st appellant and its employees.

We heard submissions based on these grounds, condensed into three by Mr. Ouma, learned counsel for the 1st appellant. He argued, first, that there was a misjoinder of the 2nd to 6th appellants; that the 1st respondent was an employee of the 1st appellant which ought to have been the body to be sued; that his employment was terminated by the 1st appellant and not by the 2nd to 6th appellants who are protected from personal liability.

On the second issue, the appellants submitted that in dismissing the 1st respondent, the 1st appellant had valid and lawful grounds based on independent investigations which implicated him in the offending emails.

On the third and final issue, it was contended that under **section 49** of the Employment Act, the remedy of reinstatement ought to be awarded sparingly and only in very exceptional circumstances and on specific strictures; that the Judge ought to have considered the practicability of reinstatement as doing so was likely to compromise the constitutional and statutory obligations of the 1st appellant in so far as secrecy, trust, integrity and confidentiality in relation to its staff was concerned; and finally that the only remedy the court could grant was 30 days salary in lieu of notice.

Mr. Ndubi, learned counsel representing the 1st respondent did not agree with those submissions and argued on his part that the 1st respondent was not subjected to due process of being heard before his dismissal; that even after investigations by P.C Chumba which involved search of his offices and houses both in Nyeri and Nairobi, nothing relating to the matters being investigated was recovered; that no information linking the 1st respondent to the offending material was availed; that contrary to **section 43** of the Employment Act no reasons for termination were furnished for dismissal; and that there was no proof that the 1st respondent was the author of the emails.

On the joinder of the 2nd to 6th appellants, counsel submitted that since the officials acted in bad faith, they were equally liable; that according to **Order 1 Rule 9** of the Civil Procedure Rules joinder of a wrong party or non-joinder of a party cannot of itself defeat a cause; and that under **Article 159(2)(d)** of the Constitution, procedural technicalities must give way to substantive justice. Finally, the 1st respondent insisted that reinstatement was justified as it was the most appropriate remedy in the circumstances and in accordance with **section 49** of the Employment Act. Counsel pointed out to us that as far back as October 2017 the 1st respondent was reinstated by the 1st appellant to the position he held before his dismissal.

This being a first appeal, the primary duty of this Court is to re-evaluate the evidence on the record in order to come to its own independent conclusions based 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 three main issues that fall for determination are, whether the 2nd to 6th respondents were improperly joined in the suit; whether the summary dismissal of the 1st respondent was valid; and lastly, whether the learned Judge properly exercised her discretion in granting an award for reinstatement.

In terms of **section 18** of the Ethics and Anti-Corruption Commission Act, the 1st respondent was an employee of the 1st appellant. But when the former instituted the action in the court below, he joined the appellant's chairperson, vice-chairperson, a commissioner, the secretary and deputy secretary as the 2nd to 6th respondents in their personal capacities.

In her determination of this question, the learned Judge, after making reference to **Article 250(a)** of the Constitution and **section 20** of the

Ethics and Anti-Corruption Commission Act, expressed the view that the 2nd to 6th appellants could only be liable if they acted in bad faith in the performance of their functions; and that from the definition of “**employer**” in **section 2** of the Employment Act, the 2nd to 6th appellants were employers and were therefore properly made parties. But by a strange turn, the Judge then proceeded to concluded that;

“This however does not mean that should the court find in favour of the Petitioner the 2nd to 6th Respondents would be personally liable. The 1st Respondent would ultimately bear liability in a vicarious capacity”.

What would be the purpose of joining the six appellants as employers only to find one liable? We may ask.

Article 250(9) aforesaid provides that;

“A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office”.

Section 20 of the the Ethics and Anti-Corruption Commission Act, on the other hand states that;

“Nothing done by a member of the Commission or by any person working under the instructions of the Commission shall, if done in good faith for the purpose of executing the powers, functions or duties of the Commission under the Constitution or this Act, render such member or officer personally liable for any action, claim or demand.”

There was no allegation that the five appellants had acted in bad faith in the performance of their functions to warrant the institution of a suit against them. Their joinder was therefore improper and unnecessary, we so determine.

We turn to the crux of this appeal; whether there was justification for the 1st respondent’s summary dismissal. As a general rule, no employer can terminate a contract of service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. There are however exceptions to this. Under section 44 of the Employment Act an employee may be dismissed summarily for gross misconduct if;

“(3) the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4)

(f) an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(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.”

No doubt after the anonymous scandalous emails sending confidential documents from the 1st appellant to third parties emerged, the 1st respondent was treated as a suspect and investigations launched by Directorate of Criminal Investigations led by Police Constable Hannington Chumba, (P.C. Chumba). But he was never arrested.

After obtaining a warrant of search from the Chief Magistrate Court at Nairobi in C.M.Misc. Case No. 2030 of 2014, P.C. Chumba and other officers searched the 1st respondent’s houses in Buruburu, Nairobi and in Nyeri in futility. From his office in Nyeri a computer hard drive and 2 flash disks were carted away. No mention of them was made in the investigation report. Indeed nothing of incriminating nature seems to have come from the search.

According to an affidavit sworn by P.C Chumba, after retrieving and analysis of email headers from the anonymous accounts, and after identifying the I.P. address used in sending the emails, they contacted the service provider, Telkom Kenya (Orange Telkom) for login details of the I.P address for the period in question; that the inquiry confirmed that the address belonged to Richard Odhiambo Agutu of Buruburu; that I.P address is assigned to a cyber cafe in Buruburu Shopping Centre; that forensic examination of seven computers and one found to have received a scanned *pdf* document from an electronic storage media; and that further investigations of subscriber numbers around the cyber cafe revealed that one of the numbers belonged to the 1st respondent. A report dated 23rd July,2014 containing this finding was forwarded to the 1st appellant.

In a special meeting held on 24th July, 2014, the 1st appellant considered the said report and on the basis of its findings was satisfied that the 1st respondent had breached his contract of employment and the confidentiality agreement as well as the 1st appellant’s Human Resource Manual and the Code of Conduct and Ethics. It was on the basis of the report that the decision to dismiss the 1st respondent was reached. On that day, having been summoned to the 1st appellant’s offices in Nairobi, he was merely served with the letter of dismissal and was not granted an opportunity to defend himself.

The letter stated in part that;

“On 11th May, 2014 at 5.15pm, you, without any lawful or justifiable reason and contrary to the Employment Act and

Leadership and Integrity Act, you caused or sent an email through an email address kilio haki [kiliohaki@yahoo.com] to: mmatemu@integrity.go.ke, and copied to *inter alia*; everyone@integrity.go.ke, info@ombudsman.go.ke, News Desk, info@nssfkenya.co.ke; transparency@tikenya.org, info@iebc.co.ke, info@src.co.ke, dpp@odpp.go.ke, sales@gazeti.co.ke, info@nairobiawmonthly.com and copied the same to *inter alia*, everyone@integrity.go.ke.

The contents of the email were not only false, malicious and abusive of the Commission and its leadership but also gross. You annexed and circulated confidential documents contrary to good work ethics and the law. This email was published and circulated by the Weekly Citizen thereby further damaging the image of the Commission in the eyes of members of the public, fully aware that the contents were grossly false and damaging to the Commission.

.....

The investigations undertaken have established that you were the sender of the defamatory and injurious emails.

Your aforesaid act amounts to gross misconduct and you are hereby summarily dismissed from the service of the Commission with immediate effect pursuant to clause 9.16.1 (iv) and (vii) of the EACC Code of Conduct as read with Section 44 (1) (d) and (g) of the Employment Act, 2007.”

The 1st respondent maintained that at the point of his dismissal, the investigations report was not shared with him, neither was he heard on the allegations against him. Applying the foregoing facts to **section 44** of the Employment Act, reproduced in the preceding paragraphs, we find no proof of fundamental breach by the 1st respondent of his obligations arising under the contract of service. There was no reasonable or sufficient ground for suspecting the 1st respondent of having committed a criminal offence. He was never arrested for any disclosed offence, and the investigations report did not explicitly link him with the emails or leakage of confidential information. In our view it was not sufficient to conclude that it must have been the 1st respondent who sent the emails or leaked confidential information by the mere fact that his mobile number was one of the many numbers in the vicinity of the cyber cafe. That evidence did not meet the balance or preponderance of probabilities threshold. The I.P address belonged to one Richard Odhiambo Agutu. Nothing was said about him or the person who operated the cyber cafe. Yet by **section 43** of the Employment Act the 1st appellant was required to;

“...prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45”.

The 1st appellant failed to discharge its burden.

Furthermore, by **Section 41(1) and (2)** of the Employment Act before it could lawfully summarily dismiss the 1st respondent the 1st appellant was enjoined to;

“....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”

and to;

“....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”.

This failure was in violation of 1st appellant’s own Human Resource Manual that provides a disciplinary procedure. From the minutes of the 1st appellant it is clear that while one Commissioner (the 4th appellant) favoured the summoning of the 1st respondent to explain his role, if any, in the leakage all the other Commissioners were unanimous that there was no need to do so.

Like the learned Judge we are persuaded from the totality of the pleadings and evidence that there was no basis in summarily dismissing the 1st respondent and secondly that the 1st appellant did not accord the former a fair hearing.

Having ourselves been persuaded that the dismissal of the 1st respondent was unfair both substantively and procedurally, we turn to consider whether reinstatement was an appropriate remedy. The learned Judge took into account the circumstances under which the 1st respondent’s employment was terminated, the length of service and the conduct of the appellants. She was of the view that an award of damages for loss of employment would not adequately compensate the 1st respondent for the tribulations he was subjected to; and that the facts of the case presented very exceptional circumstances leaving an order for reinstatement as the only viable and just remedy.

Again, with respect we could not agree more. We can do no better than to quote the following passage from the case of **Kenya Airways Limited V. Aviation Allied Workers Union Kenya & 3 Others** Civil Appeal No. 46 of 2013, where this Court expressed itself thus:

“The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49 (4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employee with the interest of the employer.....”.

One of the remedies for wrongful dismissal and unfair termination of employment is reinstatement of an employee and to treat him or her in all respects as if the employment had not been terminated. In deciding whether to grant reinstatement the court takes into account *inter alia* —

“(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee’s length of service with the employer

.....”

See **section 49 (4)** of the Employment Act.

In granting reinstatement of the 1st respondent the learned Judge was exercising her discretion in accordance with **section 49(4)** set out above. It has not been demonstrated that she took into account irrelevant consideration or that she failed to take into account relevant consideration. There is no basis for us to interfere with the exercise of her discretion and with her conclusion that the circumstances in this case were very exceptional in light of both the substantive and procedural lapse in the dismissal of the 1st respondent. In any case, we were told that the 1st respondent has been on duty having been reinstated in October, 2017.

For the foregoing reasons, this appeal partly succeeds on the ground of joinder of the 2nd to 6th appellants. On merit, however, the appeal lacks substance and is accordingly dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 6th day of August, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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