



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**[CORAM: KARANJA, SICHALE & J. MOHAMMED, JJA]**

**CIVIL APPEAL NO. 229 OF 2018**

**BETWEEN**

**MUTHAIGA COUNTRY CLUB.....APPELLANT**

**AND**

**PETER NGAU NZIOKA.....RESPONDENT**

**(Being an appeal from the judgment of the Employment and Labour Relations Court (Nduma Nderi, J) dated 6<sup>th</sup> April, 2018**

**In**

**ELRC CAUSE NO. 847 OF 2011**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The respondent, **Peter Ngau Nzioka** filed an amended statement of claim dated 22<sup>nd</sup> April, 2013 alleging *inter alia* wrongful dismissal. He sought the following reliefs:

- “ (a) A declaration does issue that the respondent’s termination of the claimant’s employment was wrongful, unlawful and which act is unconscionable in law;**
- (b) Payment in lieu of Notice Kshs 269,500.00 x 3 = 808,500.00;**
- (c) Damages for wrongful and unlawful dismissal;**
- (d) Payment in respect of 15 years of service at the rate of Kshs 269,500... Kshs 4,042,500/=;**
- (e) Payment of provident fund contributions being 10% of monthly salary for the Notice period ... Kshs 80,850/=;**
- (f) Costs of this suit;**
- (g) Any other relief requisite in the circumstances as the court deems fit”.**

**Muthaiga Country Club**, the appellant herein was the then respondent. It filed an amended statement of response and counter-claim dated 19<sup>th</sup> May, 2014. The appellant’s defence was that the respondent’s dismissal was justified. In its counter-claim, the appellant sought to be paid a sum of **Kshs 272,502.95** allegedly owed to it by the respondent.

In a response dated 18<sup>th</sup> August, 2011, the respondent joined issue with the appellant and denied the alleged indebtedness of **Kshs 272,502.95** or at all.

The trial began in earnest before **Nduma Nderi, J** who recorded the respondent’s evidence and that of **Lilian Wambui Njongoro**, the appellant’s then Human Resource Manager.

In a judgment rendered on 6<sup>th</sup> April, 2018, the trial court awarded the respondent:

- “(a) Kshs 2,695,000 being equivalent of 10 months’ salary compensation**
- (b) Kshs 808,500 in lieu of three (3) months’ notice**
- (c) The award is payable with interest at court rates from date of judgment till payment in full.**
- (d) Costs to follow the outcome”**

The appellant was dissatisfied with this outcome and in a Memorandum of Appeal dated 9<sup>th</sup> July, 2018 listed 7 grounds of Appeal which can be summarized as follows:-

- (i) the award of 13 months’ salary for wrongful termination was above the statutory limit of 12 months
- (ii) the learned judge erred in shifting the burden to the appellant in finding that the appellant did not adduce evidence to show that the respondent contributed to the dismissal
- (iii) the learned judge applied a higher standard of proof in determining the appellant’s defence
- (iv) there was misdirection in the trial Court’s findings that the appellant had no valid reason to terminate the respondent
- (v) the learned judge erred in not finding that the appellant had proved its counter-claim which was not defended by the respondent.

On 22<sup>nd</sup> May, 2019, the appeal came before us for plenary hearing. Mr. Njuguna, learned counsel for the appellant highlighted the written submissions dated 23<sup>rd</sup> January, 2019 and relied on the appellant’s list of authorities of the same date. It was the appellant’s position that the termination was lawful and that there was due process; that the trial court failed to consider the appellant’s counter-claim of Kshs 272,502.95, yet it was not defended. It was their further position that the respondent was not entitled to ten (10) months’ salary by way of damages as the letter of appointment provided for 1 month’s salary in lieu of notice.

In opposing the appeal, Miss Maumo, learned counsel for the respondent relied on the respondent’s submissions and list of authorities both dated 25<sup>th</sup> March, 2019. She maintained that the respondent was summarily dismissed without any valid reason and secondly, that no due process was followed. She defended the award of ten (10) months’ salary for wrongful compensation and three (3) months’ salary in lieu of notice as being rightfully made. As regards the appellant’s counter-claim, it was her view that no evidence was adduced to back-up the claim.

The appeal before us is a first appeal. Our mandate under **Rule 29 (1) (a)** of the Court of Appeal rules is to re-appraise the evidence and arrive at our own independent conclusions. In so doing however, we have to accord the trial court some deference as we did not have the benefit of hearing and seeing the witnesses, unless, of course, the conclusions made are not supported by the evidence or the decision is bad in law. This Court’s mandate was aptly summed up in **Selle & Another vs. Associated Motor Boat Company Limited & Others [1968] E.A 123**, wherein, it was held:

**“ an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.**

**An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.**

**In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955)22 EACA 270”.**

We have considered the entire record, the rival oral and written submissions, the authorities cited and the law. We perceive three issues that call for our determination:

- (i) Whether the summary dismissal of the appellant was wrongful or substantially justified;
- (ii) Whether the procedure of dismissal was fair;
- (iii) Whether the damages awarded are justifiable.

It is common ground that the respondent was employed on **15<sup>th</sup> August, 1993** by the appellant. His position was that of a Chief Accountant. It is also common ground that in the year 2007, the appellant lost over **Kshs 4,000,000.00** through fraudulent dealings. Following the discovery of the loss of funds, on **5<sup>th</sup> May, 2008**, the respondent was placed on two weeks suspension which was further extended to **24<sup>th</sup> May, 2008** and subsequently to **31<sup>st</sup> May, 2008**. On **5<sup>th</sup> June, 2008**, the respondent was summarily dismissed.

In its judgment, the trial court found that the appellant “... **had no valid reason to summarily dismiss the claimant and did not follow a fair procedure in executing the summary dismissal of the claimant. The respondent violated section 41, 43 and 45 of the Employment Act 2007. The summary dismissal was wrongful and unfair. The court so finds**”.

On the issue of whether a summary dismissal is wrongful or substantially justified, this Court in the recent decision of **Postal Corporation of Kenya vrs. Andrew K. Tanui [2019] eKLR**, stated:

**“In the case of Pius Machafu Isindu vs. Lavington Security guards Limited [2017] eKLR this Court had the following to say on the burden of proof:**

**“there can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. ....”.**”

The record shows that the respondent was placed in a position of trust, being the head of the finance department. The onus was on the respondent to maintain a cheque control register. It is not denied that ten (10) cheques went missing under the respondent’s watch and were fraudulently encashed causing the appellant a loss of about Kshs 4.2 million. In our view, the employer was able to show that the respondent failed to comply with the internal control system to ensure safe custody of bank cheques, failed to monitor the appellant’s cash flow and daily monitoring of the bank balances, failed to carry out prompt and timely bank reconciliation, otherwise he would have detected the fraudulent encashment made between **4<sup>th</sup> – 28<sup>th</sup> March, 2008**. As this Court stated in **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwoma [2015] eKLR**, it is not for the Court to substitute its own “**reasonable grounds**” for those of the employer. The standard of proof was further considered in the case of **Bamburi Cement Limited vs. William Kilonzi [2016] eKLR** wherein this Court rendered itself as follows:

**“The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing**

**.... The test to be applied is now settled. In the case of the Judicial Service Commission vs. Gladys boss shollei, Civil Appeal No. 50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in Mc Kinley vrs. B.C. Tel. [2001] 2 S.C. 161.**

**“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”**”

In our view and as stated above, the appellant justified the dismissal by the fact that the respondent failed to ensure that monies were not fraudulently siphoned from the appellant by use of cheques, as it was his responsibility to ensure that all cheques were accounted for.

It is our view that the appellant was justified in dismissing the respondent.

#### **Was the procedure of dismissal fair?**

Admittedly, the respondent was vide the appellant’s letter of **5<sup>th</sup> May, 2008** asked to proceed on leave pending investigations. On **15<sup>th</sup> May, 2008**, the suspension was extended for a further period of two weeks before the summary dismissal on **5<sup>th</sup> June, 2008**.

Section 41 of the Employment Act, 2007 requires that allegations against an employee be made known to him and he /she be heard before termination. Such an employee is entitled to have another employee be present during the hearing. In **Kenya Revenue Authority vs. Menginya Salim Murgani C.A. No. 108 of 2010**, this Court held that under section 41, a hearing is not necessarily oral but one that will be determined on a case by case basis, depending on the circumstances of each case.

In **Postal Corporation of Kenya vrs. Andrew K. Tanui** (supra), it was held:

**“Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for “Notification and hearing before termination on grounds of misconduct” in the following manner:**

**“(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 chosen by the employee within Subsection (1) make”. ”**

In his evidence during cross-examination, the respondent is on record as having stated **“I was interviewed about the incident. I wrote a statement ...”** The respondent’s statement is dated **28<sup>th</sup> April, 2008**. The respondent is also on record as having stated: **“I was put on suspension. I was given reason for suspension”**.

Be that as it may, it is our view that there was no compliance with the provisions of section 41 of the Employment Act and whereas oral hearing need not necessarily be conducted, we think that the respondent was dealt with without due process as the minimum requirements as set out in Section 41 were not complied with.

**What is the respondent’s entitlement for the unlawful termination?**

We note that the respondent did not produce the letter of appointment, hence he did not prove that he was entitled to three (3) months’ notice. In view of the absence of a contract stipulating three (3) months’ notice, we substitute the three (3) months’ salary in lieu of notice with one (1) month’s salary in lieu of notice.

As for the unlawful termination, we think ten (10) months was excessive, given that the maximum is twelve (12) months. We reduce this to five (5) months.

On the appellant’s counter-claim, we find that no evidence was adduced to prove that it was owed this sum. It is not sufficient to merely plead and leave it at that. The appellant put forth a claim of a sum of **Kshs 272,502.95** but adduced no evidence to support its claim. We are of the view that the trial judge was right in rejecting this claim.

The upshot is that this appeal has partially succeeded to the extent stated above. In view of this partial success and given the past relationship of employer/employee between the two parties, we direct that each party shall bear his/its own costs of the appeal.

It is so ordered.

**Dated at Nairobi this 8th day of November, 2019.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**