



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO.358 OF 2014

BETWEEN

BRAMUEL DIBONDO MUSUNDI.....APPELLANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

(Appeal from the Judgment/Award and decree of the Industrial Court of Kenya at Nairobi (Nzioki wa Makau, J.) Dated 1st July, 2014

in

Cause No. 936 of 2012)

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the Industrial Court of Kenya Nairobi (as it was then known) now the Employment and Labour Relations Court (ELRC), **Hon. Nzioki Wa Makau, J.** delivered on the 1st day of July, 2014, dismissing the appellant's claim against the respondent.

The background to the appeal is that the appellant was an employee of the respondent. He was arrested and charged, on the 30th day of May, 2003 in Criminal Case No. 2840 of 2003 before the Anti-Corruption Court with various offences. Following the aforesaid arrest and prosecution, the respondent suspended him from its employment effective 7th day of July, 2003. He was subsequently dismissed from his employment with loss of benefits effective 7th July, 2004, following internal disciplinary committee proceedings which found him culpable for gross misconduct in violation of the employment Code of conduct (the Code). He lodged an appeal against that dismissal, which was never determined. He was subsequently acquitted of all the criminal charges on the 29th day of May, 2009. He sought reinstatement to his employment; which request the respondent declined, prompting the filing of the claim against the respondent dated the 4th day of June, 2012, seeking special damages of Kshs. 7,129,728.00 being the salary he would have earned had he continued with his employment upto his retirement; salary incremental credits; terminal benefits; general and exemplary damages; interest at Court rates and the costs of the claim.

The respondent resisted the claim vide a response dated the 4th day of July, 2012, contending *inter alia* that besides the criminal charges that the appellant faced before the Anti corruption Court; the respondent also carried out its own internal investigations into the matter, which disclosed the appellant's gross misconduct in violation of the Code resulting in his dismissal.

At the conclusion of the trial, the Judge evaluated the record and dismissed claim, prompting this appeal. The appellant raised four grounds of appeal, which learned counsel **Mr. P.R. Amuga** instructed by the firm of **Amuga & Company Advocates**, compressed into two. These may be paraphrased that the learned Judge erred both in law and fact:-

(1) When he failed to find that the respondent flouted its own Code and the Rules of Natural Justice and thereby arrived at a wrong conclusion on the matter.

(2) When he failed to find that the reasons given by the respondent for the dismissal of the appellant from its employment and subsequent refusal to reinstate him back into the said employment were not valid and that the dismissal was therefore wrongful and unfair.

In support of ground 1, **Mr. Amuga**, submitted that the letter of suspension dated the 7th day of July, 2003; and that of dismissal dated the 7th day of July, 2004 did not specify the charges for which the appellant was found culpable and in respect of which he was dismissed, as the letter of suspension simply stated that he was being suspended for violating sections **3.4.3** and **3.6.1** of the Code; while that of dismissal simply stated that the appellant was found guilty of gross misconduct contrary to sections **3.5.1; 3.5.4, 3.5.14** and **3.5.43** of the Code. In counsel's view, the sections of the Code allegedly breached by the appellant were merely policy statements. It was counsel's view that, the law and best practices on internal disciplinary procedures obligated the respondent to spell out the specific transgressions committed by the appellant against each of the above policy statements; and then put them to the appellant to respond to at each stage of the disciplinary proceedings. In failing to do so, the respondent flouted not only its own Code, but also the law on fair administrative action. The appellant's dismissal in this regard was therefore not only wrongful but also unfair.

On the right of appeal, counsel submitted that it is entrenched in the respondent's own Code, vide sections **3.4.3** and **3.4.6**; that the letter of dismissal dated the 7th day of July, 2014 accorded the appellant his right of appeal exercisable within thirty days of the date of that letter, which the appellant exercised by timeously lodging his appeal, but which appeal the respondent failed to expeditiously determine or at all. The failure to determine the appeal, in counsels' view, is another ground for asserting that in all the circumstances displayed on the record, the appellant's dismissal was not only unlawful but also unfair; notwithstanding that the said dismissal also stood vitiated by lack of the authentication of the dismissal letter by the Commissioner of Income Tax as required by both the KRA and the provisions of the Code.

In support of ground 2, learned counsel submitted that the appellant had laid before the trial Judge sufficient basis to warrant a conversion of the appellant's dismissal into a normal termination with full benefits.

To buttress the above submissions, learned counsel cited **Laban Wahome Matiru versus the Hon. Attorney General [2013] eKLR** for the proposition that, an employer's failure to comply with internal disciplinary regulations renders employees' dismissal illegitimate; **Sophia Wanjiku Ngugi versus Saida Ali & 2 others [2013] eKLR**, that a dismissal reached without giving an employee a reasonable opportunity to defend himself is wrongful; and lastly **Gad David Ojuando versus Prof. Nimrod Bwibo & 2 others Civil Appeal No. 336 of 2005** that the Court has power either to assess the requisite damages payable to the appellant or remit the matter to the superior court to carry out that exercise.

Rising to oppose the appeal, learned counsel **Miss J.K. Lavuna** instructed by the firm of **J.K Lavuna Advocates** first submitted that the respondents' adduced valid and fair reasons before the internal disciplinary committee to warrant the appellant's dismissal, as it was not disputed that he was required to collect revenue and remit it to the employer; but instead, he converted the revenue collected to his own use which, in counsels' view, amounted to a serious breach of the Code.

On ground 2, learned counsel urged that the letter of suspension required the appellant to be reporting to his Head of Department at least once a month or at such other specified intervals, but the appellant failed to comply, prompting his Head of Department to recommend his dismissal from his employment on account of lack of integrity and honesty. The respondent therefore in this regard, lost confidence in him as an employee and was justified in dismissing him. In counsel's view, this decision was taken independently and was not in anticipation of any ultimate outcome of the criminal charges then pending against the appellant before the Anti-Corruption Court. Lastly, the appellant's letter of dismissal was properly authenticated by **Mrs. L.M. Malinda** on behalf of the Commissioner of Income Tax as a duly Authorized Officer, acting under delegated powers donated to her in that respect under section **13** of the Kenya Revenue Authority Act No.2 of 1995 (the KRA Act).

This is a first appeal. Our mandate as set out in Rule 29 (1) of the Rules of Court, is to re-appraise the record and draw our own conclusions on the matter. It is in the nature of a retrial See **Selle versus Associated Motor Boat Co. Ltd [1968] EA 123**, and **Mariara versus Kenya Bus Service (MBS) [1987] KLR 440**. In the discharge of the mandate, we are slow to interfere with the findings of fact made by the trial court. We interfere only where satisfied that there is no evidence to support a particular conclusion; or that the trial Judge failed to properly appreciate the evidence tendered; or alternatively, that on the basis of the record as a whole, the trial court plainly went wrong. See **Peters versus Sunday Post Limited [1958] EA 424**.

We have considered the record in the light of the rival submissions set out above. The issues that fall for our determination are as follows:

1. Whether the respondent flouted its own Code in the conduct of its internal disciplinary proceedings against the appellant.
2. Whether the appellant's dismissal from his employment stood vitiated by reason of the authentication of his letter of dismissal by Mrs. L.N. Malinda.
3. Whether the respondent had valid reasons for suspending and then subsequently dismissing the appellant from its employment.

The applicable standard of proof for an alleged breach of a contractual obligation is one of "**on a balance of probability.**" This principle is enshrined in sections **107, 108, 109** and **112** of the Evidence Act Cap 80 Laws of Kenya. Under section **107**, it is the duty of the party who asserts the existence of facts upon which he desires the court to give judgment in his /her favour as to any legal right or liability, to prove the existence of those facts. Under section **108** the burden of proof in a civil suit lies on the party who would fail if no evidence at all were given by either party. See **Toyota Kenya) Limited versus Express Kenya Limited [2013] eKLR**. Under section **109**, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under section **112** when the fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

The letter of suspension is explicit that the appellant was suspended from duty on account of the criminal charges he faced before the Anti-Corruption Court which according to the respondent amounted to a violation of sections **3.5.43** and **3.6.1** of the code. Those were the same charges that the respondent invited the appellant to respond to, and he did infact respond to them vide his letter of response dated the 23rd

day of May, 2003.

Learned counsel, **Miss Lavuna**, in her submissions before us, correctly contended that before the internal disciplinary proceedings were conducted against the appellant, the respondent carried out its own internal investigations into the alleged stealing by person (s) employed in the Public Service, contrary to section **280** of the Penal Code, involving the appellant and another. This is borne out by the findings contained in an internal memo dated the 30th day of March, 2004, by the Head of Revenue Protection Services. It was in response to a memo from the Commissioner of Customs and Excise dated the 25th day of March, 2004, and was forwarded to the Deputy Commissioner Human Resource and training vide a memo dated the 22nd day of April, 2004.

We agree with counsel's submission that the provisions of the Code mandated the respondent to institute internal disciplinary proceedings against the appellant as its employee notwithstanding the pendency or outcome of any criminal proceedings he may have faced. The only caveat was that the respondent was obligated to comply with the provisions of its own Code to which both the respondent as the employer and the appellant as the employee had subscribed.

The internal investigations preceded the respondents' letter dated the 17th day of May, 2004 inviting the appellant to appear before the internal disciplinary committee. As submitted by **Miss Lavuna**, the respondent intended the findings on the internal investigations to form part of the disciplinary proceedings. This being the position, the respondent was therefore obligated to comply with sections **3.2.1**, **3.2.2**, **3.2.3**, **3.2.4** and **3.2.5** of the Code before inviting the appellant to appear before the internal disciplinary committee, if they desired that the findings of the said internal investigation were to form part of the accusations he was to be called upon to respond to during the internal disciplinary proceedings.

The provisions obligated the respondent's Head of Department to gather evidence on the basis of which the Chief Human Resource Administrative Manager would frame charges against the appellant reflective of violations of sections **3.5.43** and **3.6.1** of the Code as per the letter of suspension and sections 3.5.1, 3.5.4, 3.5.14 and 3.5.43 as per the letter of dismissal, together with the penalties for each violation. The respondent did not do so in its letter of suspension. It simply lifted the criminal charges the appellant faced before the Anti-Corruption Court in a blanket form and stated that they offended sections **3.5.43** and **3.6.1** of the Code to justify its suspension, and sections **3.5.1**, **3.5.4**, **3.5.4** and **3.5.43** to justify the dismissal. It is our finding that section **3.2.2** of the Code was flouted by the respondent by its failure to frame its own charges for the violations of the above mentioned sections, which it was obligated to do, even before the appellant appeared before the disciplinary committee.

The summary of the disciplinary committee proceedings minutes reflect the appellant's employment grade then as KRA 12. He therefore fell outside the Jurisdiction of the internal disciplinary committee as provided for in sections **3.3.1** and **3.3.2**. The procedure provided for under section **6(6) (c)** of the Act was the appropriate forum that ought to have handled the appellant's internal disciplinary proceedings. The said minutes do not disclose the composition of the disciplinary panel. There is therefore nothing to show that the appellant appeared before the Board of Directors which in law and by virtue of his job grade was the proper organ legally mandated to conduct any internal disciplinary proceedings against him. Sections **3.2.2** and **3.3.4** of the Code were therefore violated in so far as the appellant was not accorded an opportunity to appear before a properly constituted internal disciplinary organ. Section **3.3.3** of the Code required the recommendations of the disciplinary committee to be forwarded to the Commissioner General of Income Tax which he could either affirm or vary. All that we have on record is an internal memo dated the 2nd day of July, 2004, under the hand of a **Mr. M.A. Onyura**, Senior Deputy Commissioner, Human Resource, addressed to the Commissioner General of Income Tax, conveying the recommendations of the internal disciplinary committee held on the 24th of June, 2004. We find that the respondent also violated its own Code for its failure to accord the appellant an opportunity to have his case reviewed and either affirmed or varied by the Commissioner of Income Tax.

With regard to issue number 2, on the mandate of **Mrs. L.M. Malinda** to sign the letter of dismissal on behalf of the Commissioner General of Income Tax, learned counsel, **Miss Lavuna** referred us to section **13** of the KRA Act as providing such authority. Section **11(4)** of the Act provides as follows:-

“(4) The Commissioner General may, with the approval of the Board, by notice in the Kenya Gazette, delegate any of his powers or functions under this Act or any other written law to a Commissioner.”

Appointment of Commissioner (s) which is vested in the Board is provided for under section **13(1)** of the KRA Act. Section **13(5)** thereof provides as follows:-

“(5) Except as may otherwise be determined by the Board in any particular case, an officer referred to in sub section (1) or in his absence, the immediate deputy, shall be entitled to attend and participate in the deliberations of any meeting of the Board but shall have no right to vote.”

Our construction of section **13(5)** is that, the delegated power donated by the Commissioner General of Income Tax, is limited to the donee's power to attend Board meetings on behalf of the Commissioner General of Income Tax, but with no right to vote. When considered in the light of section **11(4)** (supra), it is our view that, in order for **Mrs. L.M. Malinda's** signing of the appellant's letter of dismissal to be valid it had to be demonstrated that at the material time, she was an officer referred to in section **11(1)** of the KRA Act, and had delegated powers to discharge the functions of the Commissioner of Income Tax through a gazette notice. It was not. The action of **L.M. Malinda (Mrs.)** or of the Senior Deputy Commissioner, Human Resource on whose behalf she appended her signature on the appellant's letter of dismissal, was therefore not properly anchored in section **11(4)** of the KRA Act, and stood vitiated. It violated section **3.3.3** of the Code and was therefore invalid, null and void, rendering the appellant's dismissal ineffective.

With regard to the right of appeal, this is entrenched in section **3.4.1** of the Code and the letter of dismissal drew the appellant's attention to

it. As correctly submitted, the appellant, timeously exercised it but, his appeal was neither processed nor determined. This inaction on the part of the respondent was in violation of sections 3.4.1., 3.4.3 and 3.4.6 of the Code.

Turning to issue number 3, **Miss Lavuna**, submitted that since the appellant failed to obey the reporting instructions as highlighted in the remarks of both the Head of the Department, and the Chief Human Administrative Manager, the respondent was entitled to find him lacking in integrity and honesty. On that account alone, she urged, the respondent was entitled to find that the appellant's conduct amounted to gross misconduct and sufficient justification for dismissal.

If that were so, the Code to which both parties subscribed required the respondent to follow due process when dealing with those alleged breaches on the part of the appellant. We find nothing on the record as per the suspension letter that the alleged breach was brought to the appellant's attention; and second, that he was notified that this breach too formed part of the disciplinary proceedings he faced when he appeared before the internal disciplinary committee. We therefore find merit in the appellant's complaint that this too was a violation of the respondent's Code.

It is our finding that by reason of the respondent's violation of its own Code in the manner it processed the appellant through its internal disciplinary procedure and subsequently dismissed him from employment, there were sufficient grounds for the Judge to have arrived at the only logical conclusion on the matter that the dismissal of the appellant from employment was not only unlawful but also unfair. The learned Judge with respect failed to appreciate the facts and the provisions of the Code, and there is a proper basis for interference with his decision. Accordingly, we set aside the order dismissing the appellant's claim in its entirety, and substitute therefor an order allowing the appellant's claim. The dismissal of the appellant is converted to normal termination of employment with full benefits as per the contract of employment.

The appellant's counsel while relying on **Gad Davido Ojuado versus Prof. Nimrod Bwibo & 2 others** (supra) invited us to either carry out the assessment of the appropriate award ourselves or remit the matter to the Court below for assessment of the appropriate award. **Miss Lavuna** on the other hand referred us to sections 41 and 45 of the Employment Act, 2007 as the appropriate guide. We however note that, although the appellant filed his claim in 2012, the cause of action arose in the year 2003. Neither party addressed us on the mode of assessment of the appropriate award under the Employment Act, Cap 226, and the Trade Disputes Act. Cap 234 (both repealed) which were applicable at the time.

What is more, although the appellant has furnished copies of pay slips, the contract governing his terms of engagement with the respondent was not availed, as all we have on the record is a standard form contract, devoid of any details pertaining to the appellant. The above highlighted challenges notwithstanding, the appellant as a successful party is entitled to a remedy.

When faced with a similar challenge in **Kenya Ports Authority versus Silas Obengele [2008] eKLR**, this Court, differently constituted, remitted the matter back to the High Court for the assessment of damages payable to the successful party but with guidelines on the particular items that were to form the basis for such assessment. We are minded to adopt the same approach herein.

In the result, we allow the appeal, set aside the orders made on the 1st day of July, 2014 and substitute therefor an order partially allowing the appellant's claim on the following terms;

1. A declaration be and is hereby granted that the dismissal of the appellant from the employment of the respondent effective from 7th day of July, 2004 was not only unlawful but unfair.
2. The said dismissal shall be and is hereby reversed and converted to a normal termination with full terminal benefits.
3. The matter is remitted back to the ELRC for the assessment of the award as hereunder;
 - (a) Salary in lieu of notice as per the contract of employment.
 - (b) 4 months' salary as compensation for the unlawful and unfair termination.
 - (c) Salary from the date of suspension on 7th July, 2003 to the date of dismissal of 7th July, 2004 (if not already paid).
 - (d) Full terminal benefits as per the contract of employment.
4. The claim for special damages for Kshs. 7,129,728.00, salary incremental credits and General and exemplary damages are disallowed.
5. Interest on the sums awarded and assessed will be at court rates from the date of Judgment in the ELRC, that is 1st July, 2014.
6. The appellant shall have costs of both this appeal and the Court below.

Dated at Nairobi this 25th day of May, 2018.

P.N.WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

Deputy Registrar.