



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 22 OF 2017

BETWEEN

CLEMENT KARURI.....APPELLANT

AND

KENYA PORTS AUTHORITY.....RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 17th February, 2017

in

Cause No. 283 of 2013)

JUDGMENT OF THE COURT

1. The relationship between **Kenya Ports Authority** (the respondent), and **Clement Karuri** (the appellant), was that of an employer/employee. Initially, the appellant entered into that relationship as a casual labourer on 9th March, 1998. Subsequently, he was appointed as a Security Private on a renewable contract term of 2 years, effective from 15th May, 2006 to 14th May, 2008. His duties entailed maintaining security around the respondent's premises. Midway into the contract, he was promoted to the position of a Senior Security Private. The said contract was later renewed on 16th May, 2008 for a further term of two years.
2. On 24th September, 2008 Mr. John Eboso, who was then employed as a driver by the respondent, was stopped by security personnel manning one of the exit gates for a routine inspection of the vehicle he was driving. Apparently, 10 boxes of assorted brands of whisky were discovered in the said vehicle. Upon inquiry, he was unable to produce the requisite authorisation for removal of the said alcohol from the Port.
3. He stated that the consignment belonged to the appellant who had instructed him to transport the same. It was the appellant who loaded the consignment from a duty free shop which was within the Port into the vehicle. The appellant alighted from the vehicle just as they were approaching the gate in question. However, the appellant's account differed with that of Mr. Eboso. While admitting that Mr. Eboso had called upon his assistance at the gate, he denied that the consignment belonged to him.
4. Be that as it may, the respondent suspected both of them of colluding to remove the consignment without payment of the requisite duty. Consequently, they were handed over to the police who commenced criminal investigations. In addition, vide a letter dated 7th October, 2008 the appellant was interdicted and asked to show cause why he should not be terminated, which he did. Meanwhile, criminal proceedings were only instituted against Mr. Eboso.
5. Thereafter, a disciplinary hearing was conducted and upon its conclusion, the respondent's committee of inquiry recommended the appellant's dismissal. The respondent adopted the recommendation and by a letter dated 1st April, 2009 summarily dismissed the appellant. The letter read in part as follows:-

“... The Committee that investigated your case found that you were guilty as charged. Consequently, Management has lost confidence in you as an officer and is of the opinion that you have lost interest in your work and have become more of a liability than an asset to the Authority.

Accordingly, and pursuant to section K.4 (iv), K.8 (u) of the Disciplinary Handbook 2008 and the Employment Act 2007 it has been decided that you be DISMISSED from the services of the Authority with immediate effect.”

6. As would be expected, the appellant was aggrieved by the dismissal and he appealed to the respondent’s Committee of Appeal. The Committee of Appeal dismissed the appeal and confirmed his dismissal. Once again, the appellant challenged the dismissal, this time around before the Employment and Labour Relations Court. In his view, his services were unfairly terminated since the allegations against him had not been proven. Towards that end, he sought a number of declarations and damages.

7. The trial court (**Rika, J.**) weighed the evidence before it and found that the appellant had not established his case. As a result, the suit was dismissed by a judgment dated 17th February, 2017. It is that decision that is the subject of the appeal before us. The appellant mainly complains that the learned Judge erred by failing to appreciate that firstly, the allegations against him were criminal in nature thus, required to be established beyond reasonable doubt. Secondly, that the appellant was bound to abide by the outcome of the criminal proceedings. Thirdly, that his services were unfairly terminated.

8. Mr. Gikandi, learned counsel for the appellant, submitted that the respondent should not have set up a disciplinary hearing because the criminal investigations by the police had absolved the appellant of any wrong doing. This was demonstrated by the fact that out of the two, only Mr. Ebozo was arraigned and charged in Court. By doing so, the respondent acted as the judge, jury and executioner contrary to the appellant’s right to a fair hearing. Counsel contended that the arrest of the appellant and the resulting disciplinary hearing were maliciously instigated by his then supervisor, Mr. Kioki who he differed with on several occasions.

9. He argued that the Committee of Inquiry as well as the Committee of Appeal were not impartial since their membership comprised of the respondent’s employees. To him, they were no more than what he termed as ‘kangaroo courts’ set up to rubber stamp the respondent’s decision. As such, there was no fair procedure as required by law. In totality, the respondent had failed to establish that the appellant’s dismissal was based on valid grounds and that the proper procedure had been followed rendering the dismissal unfair.

10. On her part, Ms. Wamuyu, learned counsel for the respondent, contended that the parties’ relationship was governed by an employment contract and the regulations incorporated therein. In particular, disciplinary procedures were regulated by the respondent’s Disciplinary Handbook, 2008. Moreover, disciplinary hearings conducted by employers are distinct from criminal proceedings. Buttressing that line of argument, she referred to this Court’s decision in ***Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR***.

11. In Ms. Wamuyu’s view, the respondent had followed the laid down procedure and established that the appellant had been terminated on valid grounds. Making reference to this Court’s decision in ***Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR***, she added that the learned Judge arrived at the right conclusion after taking into account the material placed before him.

12. We have considered the record, submissions by counsel and the law. There is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings. Internal disciplinary proceedings are anchored on the contract of employment and the burden of proof therein is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. See this Court’s decision in ***Teachers Service Commission vs. Joseph Wambugu Nderitu [2016] eKLR***.

13. It is also settled that the institution of criminal proceedings is not a bar to civil proceedings or disciplinary hearings on similar facts. See this Court’s decision in ***Geoffrey Kiragu Njogu vs. Public Service Commission & 2 Others [2015] eKLR***. With the foregoing in mind, we find that the respondent was not barred from commencing the disciplinary hearing in the manner it did.

14. In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer. See **Section 47(5) of the Employment Act**. Whether or not dismissal is considered fair will depend on whether the reason (s) for dismissal and the procedure for dismissal was fair. See ***CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR***.

15. Was the procedure adopted by the respondent fair? The right to a fair hearing is a fundamental aspect of the rule of law which is founded on the well-established principles of natural justice. It is this right that the legislature secured under **Section 41 of the Employment Act** :-

“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.”

16. In our view, it is clear from the record, that the respondent not only followed the procedure laid down in its disciplinary manual but also complied with the aforementioned section. In point of fact the appellant during cross examination admitted as much. There was nothing to suggest that the Committees charged with the responsibility of conducting the disciplinary hearing were not impartial as alleged by the appellant. Even if we were to accept that there was bad blood between the appellant and his immediate supervisor, Mr. Patrick Kioko, we cannot help but note that he was not a member of either of the Committees. Further, as the learned Judge correctly observed, the appellant never objected to the composition of those Committees when he appeared before them.

17. Delving into whether the reasons for the respondent’s termination were fair, we caution ourselves that we ought not to substitute our decision for that of an employer. Our duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. See this Court’s decision in ***Alfred Mutuku Muindi vs. Rift Valley Railways (Limited) [2015] eKLR***.

18. Having perused the record, we concur with the following findings by the learned Judge:

“The proceedings in either case show the claimant (appellant herein) met, and was in communication with Eboso. There were text messages, from the claimant to Eboso, advising Eboso ‘to come, the coast is clear.’ Even if the evidence of Eboso could be faulted in that Eboso was an accomplice, there were other witnesses, such as Hassan and Okello, who gave evidence on the claimant’s involvement ...

The claimant was not truthful in his evidence before this court. He denied texting Eboso, and telling Eboso, ‘mambo yako poa’. He stated he did not send any text messages. Questioned about (sic) page 37 of the disciplinary proceedings where he admitted to texting, the claimant told the court he could not recall what he said to Eboso. He met Eboso, but nothing transpired on the material day.

At the disciplinary hearing, he explained that he tested Eboso, asking him to come and pick a friendly loan of Kshs.3,000, Eboso requested for. Why was not the Claimant able to recall this reason for texting Eboso, while he gave evidence in court? Why did he go to the gate to assist Eboso, when Eboso was arrested? Why would a Security Officer with no interest in the subject, assist a suspect arrested attempting to remove unaccustomed goods from the port?”

19. In the circumstances, we find that the appellant had been dismissed on valid grounds. Our position is fortified by the sentiments of the Canadian Supreme Court in ***Mc Kinley vs. B.C.Tel. [2001] 2 S.C.R. 161*** thus:

“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.”

20. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 17th day of May, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR