



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & SICHALE, JJ.A)

CIVIL APPEAL NO. 209 OF 2013

BETWEEN

SAMUEL KALOMIT MURKOMEN APPELLANT

AND

TELKOM KENYA LIMITED RESPONDENT

(An appeal from the award of the Industrial Court of Kenya at Nairobi (Rika, J.) dated 7th June, 2013

in

Industrial Cause No. 1949 of 2011)

JUDGMENT OF THE COURT

1. Every employee whose services have been terminated has the right under **Section 35(4)** of the **Employment Act** to dispute the lawfulness or fairness of the termination of employment. What is considered as an unlawful or unfair reason for termination is set out though not exhaustively in **Section 46** of the **Employment Act**. It is also instructive to note that in any complaint of unfair termination of employment, the burden of proving the same rests on the employee, while the burden of justifying the grounds for the termination of employment lies with the employer. See **Section 47(5)** of the **Employment Act**.

2. The appellant found himself in such a predicament after his services were terminated by the respondent vide a letter dated 28th October, 2011. A brief background of this matter will help to place this appeal in perspective. The appellant was employed on 23rd January, 1990 as a technician trainee by the respondent's predecessor, the Kenya Posts and Telecommunications Corporation. Over the years he rose up the ranks to the position of a Manager in charge of Optic Cable Networks which position he held until his termination. His duties included installation, restoration and maintaining office fiber cables.

3. Sometime in the year 2011, the respondent advertised a tender for the supply of 100 closure kits worth Kshs. 6,550,000/=. The kits were integral to the respondent's business as they enclosed optic cables. Agrosmart Technologies Ltd. (hereinafter referred to as the company) being the successful bidder was awarded the tender. However, instead of delivering all the kits at once, the company made piecemeal deliveries. Furthermore, the kits were delivered in worn out cartons. Perturbed by the company's conduct,

the respondent's logistics department which was tasked with the duty of receiving deliveries and verifying their quality, begun affixing discreet marks on each kit it received.

4. Apparently, while inspecting a subsequent delivery, the staff at the logistics department noticed that seven kits bore similar markings as the kits which had been received earlier by the department. The implication was that kits which were already in the respondent's possession had somehow found their way back to the company and had been resold to the respondent. Due to the foregoing circumstances, the staff at the logistics department agreed not to release kits which the appellant had requisitioned for his team pending further investigation.

5. According to Morris Ouma Osodo, the then material resource planner attached to the logistics department, the appellant was informed that there were some irregularities with regard to the kits hence, they could not be released to his team until the issue was resolved. On his part, the appellant maintained that he was never informed of the same. Following the requisition for the kits, the logistics department delayed in releasing the same to his team despite the fact that the same had been approved by the Manager of Fixed Access Network, Joseph Chepkwony. As a result the appellant intervened by calling the head of the logistics department and sought the assistance of Mr. Joseph Chepkwony for the release of the same. He went a step further by writing an email on 20th April, 2011 to the Head of the Regional Technical Unit, Eng. Andrew Kemosi complaining about the logistics department's conduct. The email read in part as follows: -

Subject: OFC CLOSURES

Sir,

I wish to register my disappointment regarding the management of the above items as we have none at had and materials planning together with stores team are very uncooperative [sic]. I had sent a team yesterday morning to collect the few that were delivered but they were not issued and no communication was given to that effect. In the afternoon, when Nairobi-Westlands OFC was cut I tried several times to get the items through Mr. Osodo but in vain and this is the 3rd time we are receiving similar treatment. We had to look for recoveries all over and that is why there was some delay in resolving the cable problem.

Embakasi- RSU, JKIA OFC has been reported out of service and still we do not have the closures. For us to serve customers well, all teams must be concerned.

Kindly intervene.

The staff at the logistics department perceived the appellant's conduct of involving their superiors as intimidating. Consequently, they gave into the pressure and released the closure kits to the appellant's team despite the irregularities.

6. Nevertheless, an investigation on the whole issue was commenced by the respondent. In his report, Christopher Kandie, the respondent's investigator, concluded that not only was the appellant unable to account for the closure kits collected by his team from logistics but that his conduct with regard to the issue casted doubt on his integrity. He recommended for disciplinary action to be taken against the appellant and other officers. Thereafter, by a letter dated 15th September, 2011 the appellant was informed that he was being charged with negligence of duty and abetting of an offence. He was given an opportunity to defend himself in writing which he did.

7. In his defence, he maintained that he was never informed of any irregularities with kits. In fact, he learnt of the same after the kits had been released to his team and utilized for the specific projects for which they had been requisitioned. Moreover, it was the logistics department's duty to verify the kits which were delivered by the company.

8. The matter proceeded to a disciplinary hearing which took place on diverse dates. Ultimately, the

disciplinary committee was convinced that the appellant was negligent in his duty by allowing closure kits which were in his custody to be resold to the respondent. At the end of disciplinary hearing the disciplinary committee resolved to terminate the appellant's services which was done vide a letter dated 28th October, 2011.

9. It is that termination that the appellant challenged by filing suit in the Industrial Court. To him, there was no justification for his termination. He sought *inter alia*,

- ***Declaration that his termination was unlawful on the ground that the reasons given were not valid.***
- ***Damages amounting to Kshs. 3,300,000 made up as herein under: -***

i. One month salary for every year worked being terminal dues payable being Kshs. 100,000 x 21 years =Kshs. 2,100,000/=.

ii. Twelve months salary being Kshs. 100,000 x 12= Kshs. 1,200,000/=.

- ***Reinstatement.***
- ***Exemplary and aggravated damages.***

10. The trial court weighed the evidence before it and found that the appellant's services had been terminated on valid grounds save that the procedure which was followed had some anomalies. As such, the trial Judge in an award dated 7th June, 2013, found that the appellant's termination was unfair on account of procedural defects and granted him one month salary of Kshs. 100,000/= as compensation. Aggrieved with the decision, the appellant filed the appeal before us mainly complaining that the learned Judge erred in law and fact by-

- ***Finding that his termination was based on valid reasons.***
- ***Awarding on a month salary of Kshs. 100,000/= as compensation for unfair termination.***

11. At the hearing of the appeal, Mr. Wachakana appeared for the appellant while Ms. Were appeared for the respondent. By consent the appeal was disposed of by written submissions filed on behalf of the respective parties.

12. The appellant supported the trial Judge's finding that the procedure adopted by the respondent in terminating his services was unfair. However, he faulted the learned Judge for failing to appreciate that the respondent had violated **Section 43(1)** of the **Employment Act** by not proving the reasons for his termination. In the appellant's opinion, the learned Judge ought to have granted the damages as prayed. It was submitted that the learned Judge considered extraneous matters causing him to make an erroneous decision.

13. In opposing the appeal, the respondent argued that the appellant had not demonstrated any reason to warrant this Court to interfere with the findings of fact by the trial court. In support of that line of argument, the case of

Mercy Kirito Mutegi –vs- Beatrice Nkatha Nyaga & 2 others [2013] eKLR

was cited. The respondent reiterated that the trial court was correct in holding that the appellant had been terminated for valid reasons. Elaborating further, it was contended that the trial Judge appreciated the appellant's role as the leader of his team and properly found that he had failed to discharge his responsibility to safeguard the respondent's property.

14. Acknowledging that the learned Judge found that the investigation report was incomplete in certain aspects, the respondent submitted that the learned Judge went ahead to consider the evidence of Mr. Osondo who he deemed as a credible witness. His evidence established that the appellant was informed of the irregularities with the kits before he pushed for the release of the same to his team.

15. On the damages awarded, the respondent maintained that it was purely discretionary and this Court could only interfere with the same on the basis of well settled principles. There was no indication that the trial Judge misdirected himself in granting the award in issue.

16. We have considered the appeal, the written submissions and the law. Our role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach our own conclusion. However, we are conscious of the fact that unlike the trial court, we did not have the benefit of observing the witnesses as they testified. Accordingly, we ought not to interfere lightly with findings of fact by the trial court. This much was appreciated by this Court in *J. S. M. v E. N. B. [2015] eKLR* -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact

because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

The appeal herein turns on two issues namely, whether the appellant’s termination was based on valid/fair reasons and whether the damages awarded by the trial Judge were proper.

17. In determining whether termination of an employee was fair, a court ought not to substitute its decision for that of an employer. Its duty is to determine whether the decision to dismiss was valid and fair within the circumstances of the employer. See *Alfred Mutuku Muindi –vs- Rift Valley Railways (limited) [2015] eKLR*.

18. It is not in dispute that the respondent was able to establish that some of the closure kits which had been delivered by the company had been recycled. The bone of contention was whether the same was attributable to the appellant.

19. The trial Judge found that the appellant as the head of his team was responsible for the safety of the respondent’s property which was in the custody of his team. This included closure kits which had been released to his team. In the learned Judge’s opinion, the evidence of the investigator that the appellant was unable to account for 40 closure kits which had been released to his team was uncontroverted. The learned Judge agreed with the disciplinary committee that the only logical conclusion for the failure to account for the kits was that the kits which had been recycled came from the appellant’s team. Furthermore, the learned Judge found Mr. Osondo a credible witness and accepted his evidence, that the appellant had been informed of the irregularities before he began pushing for their release. It therefore followed that the appellant in pressurizing the logistic department to release the kits was simply trying to conceal the underhand dealings which were about to surface. There was ample evidence of the appellant’s negligence. On our part, we see no reason to interfere with the foregoing finding of facts by the trial Judge.

20. We cannot help but note that both the disciplinary committee and the trial Judge took into consideration the appellant’s disciplinary record. It appears that the appellant had faced two separate disciplinary actions in connection with loss of the respondent’s property prior to the matter at hand. In light of his track record the disciplinary committee found, and the trial Judge agreed, that there was no longer trust and confidence between the appellant and the respondent. Consequently, the termination of the appellant was reasonable in the circumstances. We tend to agree. The Canadian Supreme Court decision in *Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161* in its own words articulated that-

“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."

21. It is not in dispute that in as much as the respondent substantially followed the laid down procedure in disciplinary process there were some procedural anomalies. These anomalies arose during the disciplinary hearings. During the third disciplinary hearing which was held on 18th October, 2011, the disciplinary committee tasked the investigations office, the legal department and human resources department to meet with the suspects who included the appellant and establish firstly: any conversations that had taken place with regard to the kits; and secondly, the extent and accountability of the suspects. The trial Judge appreciated that apart from the sweeping statement in the minutes that the aforementioned departments met and deliberated on the issues, there was no evidence that the appellant was present during the said deliberations or that he made any representations. It was equally not clear whether the appellant had been accompanied by a co-employee of his choice during the disciplinary hearing in accordance with **Section 41** of the **Employment Act**. Thus, to the extent that the respondent did not follow the statutory procedure the dismissal was unfair.

22. This takes us to the next issue of whether the damages awarded were adequate. In **Peter M. Kariuki vs. Attorney General [2014] eKLR** it was stated by this Court that:

"It is trite that this Court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a large sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

23. **Section 49** of the **Employment Act** sets out the remedies for both wrongful dismissal and unfair termination. It states as follows:

1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, a labour officer may recommend to the employer to pay to the employee or all any of the following –

a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b) where dismissal terminates the contract before the completion of any service upon the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

24. On the other hand, **Section 49 (4)** of the **Employment Act** sets out several factors which a labour officer or a court has to take into account in deciding whether to recommend the remedies specified above. They are as follows:

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;*
- f) *the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*
- g) *the opportunities available to the employee for securing comparable or suitable employment with another employer;*
- h) *the value of any severance payable by law;*
- i) *the right to press claims or any unpaid wages, expenses or other claims owing to the employee;*
- j) *any expenses reasonably incurred by the employee as a consequence of the termination;*
- k) *any conduct of the employee which to any extent caused or contributed to the termination;*
- l) *any failure by the employee to reasonable mitigate the losses attributable to the unjustified termination; and*
- m) *any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.” (Emphasis added).*

25. It is quite clear that in determining which remedy to grant an employee whose termination is deemed unfair, the court exercises its discretion. In this case, the trial Judge deemed the award of one month's salary being Kshs. 100,000/= as adequate. Taking into consideration the circumstances of the case and the conduct of the appellant, we think that he was not entitled to twelve months gross pay, exemplary or aggravated damages as compensation. More so, because his termination was based on valid grounds albeit that the procedure followed was flawed. We see no misdirection on the part of the trial Judge to justify the interference with the damages awarded.

26. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR