



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 151 OF 2014

BETWEEN

CHARLES APUT OTIENO APPELLANT

VERSUS

TELKOM KENYA LIMITED RESPONDENT

(An Appeal from the Award and Decree of the Industrial Court of Kenya at Nairobi, (J. Rika, J.) dated 22nd January, 2014

in

HCC NO. 689 OF 2011)

JUDGMENT OF THE COURT

1. In an Award delivered on 22nd January 2014, the Industrial Court, (Rika, J.) dismissed the appellant's claim for compensation or alternatively for reinstatement. That claim was based on the grounds that the termination of the appellant's employment by the respondent was unlawful and unfair.
2. The appellant complains that the Judge misdirected himself and failed to consider the evidence in dismissing his claim; and that the Judge did not appreciate that the reasons given for his termination were not valid in light of Section 43(1) of the Employment Act.

Background

3. In his claim before the Industrial Court, the appellant averred that he was employed by Kenya Posts and Telecommunications Corporation, the forerunner to the respondent, on 19th January 1983 as a technician; that on 15th February 2008 he was promoted to the position of Sectional Engineer earning a salary of Kshs. 49,760.00 per month; that he was arbitrarily, unfairly, unlawfully and wrongfully dismissed from employment on 8th June 2010; that his dismissal was based on unfounded allegations that he was involved in illegal dumping of international telephone traffic (calls) at Milimani Exchange and leaked information to those involved when investigations commenced. He accordingly sought a declaration that the termination of his employment was unlawful and unfair as the reason given for his termination was invalid; payment of 12 months' salary and a further sum of Kshs.1,343,520.00 as special

damages. In the alternative, he sought an order of reinstatement.

4. respondent denied the appellant's claim and pleaded that on 8th April 2010 it discovered that there was illegal international traffic originated from Milimani Exchange being dumped into its network through its Nairobi Toll 2 at Extelcoms House; that at the time, the appellant, as the controlling officer, was in charge of the Nairobi Area switches including Milimani Exchange; that the appellant failed to carry out investigations into the illegal calls after being tasked to do so and leaked information to other persons thereby thwarting the investigations; that investigations carried out by the respondent revealed that the appellant was involved in the illegal dumping of calls and sabotaging investigations by leaking information to culprits occasioning loss and damage to the respondent.

5. According to the respondent, the appellant breached his obligations in that he failed to report the illegal dumping of international telephone traffic into the respondent's network; he failed to take steps to stop or prevent the same; he failed to take action on reports made to him; and was negligent and careless in the performance of his duties. In those circumstances, the respondent contended, the appellant was guilty of gross misconduct and his dismissal was justified.

6. The respondent asserted that due process was followed in dismissing the appellant; he was given an opportunity to show cause why disciplinary action should not be taken against him; he was accorded a hearing; and was accorded, and he exercised his right of appeal. According to the respondent, the decision to dismiss the appellant was valid, fair and in accordance with the set procedures and the appellant was paid his full entitlements.

7. In his testimony before the court, the appellant narrated his employment history of 27 years with the respondent. He stated that by the time he was summarily dismissed from employment in terms of the respondent's letter dated 8th June 2010, he was a team leader in charge of Nairobi switches; that his dismissal from employment was based on allegations of dumping of international traffic into the respondent's network; that there was no evidence of his involvement; that he was in fact exonerated in a forensic report undertaken in that regard; that on appealing the respondent's decision to dismiss him, further investigation was required to have been undertaken, but this was not done; that he did not leak any information as alleged by the respondent and his dismissal was unfair and the reasons given for his dismissal were invalid.

8. The respondent called three witnesses. Francis Matu, (DW3), a technician with the respondent for over 25 years who was at the material time manning the national telephone exchange. He was in charge of maintenance and supervision. On 5th March 2010, he was working with a technician from Safaricom repairing a link to Safaricom when he detected illegal traffic on the respondent's network; an international call irregularly came through the links they were repairing. He traced the illegal call and found that it came through Milimani telephone Exchange. He continued monitoring and discovered that there were many such calls. He informed the maintenance officer at Milimani Exchange as well as the appellant who was his team leader. The appellant was assigned the duty to investigate and thereafter the calls stopped.

9. Christopher K. Kandie, (DW1), an investigator with the respondent since 1991 carried out investigations into the report dated 15th April 2010. He stated that on learning of the dumping, he interviewed a switch technician, one Mr. Mati, (DW3), who informed him that he had detected illegal international calls; that Mr. Mati informed him that he had reported the matter to the appellant. On enquiring from the appellant what action he had taken, the appellant informed him that he had called in an expert, a Mr. Onyango, and together they had visited Milimani Exchange where they were to programme the calls with a view to establishing the source; that the appellant then went to Milimani Exchange alone after which the calls immediately stopped. According to the witness, "something must have been done at Milimani to stop the calls."

10. Stella Ndirangu, (DW2), stated that she had worked in the respondent's human resource department for 20 years; that she was involved in employee relations and staff welfare; that on receiving an investigation report relating to dumping of international calls that implicated the appellant and another

employee, a letter dated 20th May 2010 was addressed to the appellant requesting him to show cause why disciplinary action should not be taken against him; that the appellant unsuccessfully defended himself and was dismissed from employment; and that the appellant's appeal against that decision to the appeals committee was also unsuccessful. According to the witness, the termination followed due process.

11. After reviewing the evidence the learned trial Judge was satisfied that the appellant had reason to conclude that the appellant had committed employment offences under section 44 (4)(c) and (g) of the Employment Act by neglecting to perform his duty, or performing his duty carelessly and improperly or committed, or on reasonable and sufficient grounds was suspected of having committed a criminal offence against, or to the substantial detriment of his employer, or employer's property and that these would form valid grounds justifying the termination decision.

12. With regard to the process, the court found that the same was in conformity with the minimum statutory disciplinary procedure. In the end, the court concluded that "the termination was fair and that there were valid grounds, to justify termination; and that the decision was arrived at following a fair procedure." With that, the court dismissed the appellant's claim.

13. Aggrieved, the appellant lodged the present appeal.

The appeal and submissions by counsel

14. In support of the grounds of appeal set out in the appellant's memorandum of appeal, learned counsel Mr. Wachakana relied on the appellant's written submissions and urged that the learned trial Judge failed to appreciate that a second and further investigation regarding the allegations against the appellant on the basis of which he was dismissed from employment, that should have been undertaken, was not in fact undertaken; that the Judge had no basis for concluding that the appellant's dismissal from employment was valid and fair; that the Judge also failed to have proper regard to the evidence that established that there was procedural unfairness in the manner in which the appellant was dismissed.

15. According to counsel, the trial court should have awarded the appellant the equivalent of twelve months' salary; one month's salary in lieu of notice and special damages at the rate of one month's salary for each of the 27 years that the appellant worked for the respondent. In support, counsel referred us to the decisions of this Court in **Telkom Kenya Limited v Ericsson Edeyangwa Band, Civil Appeal No. 152 of 2011** and **Telkom Kenya Ltd v Paul Ngotwa Civil Appeal No. 52 of 2011**.

16. Opposing the appeal, Mr. Martin Munyu, learned counsel for the respondent submitted that this Court should be slow to interfere with the findings of the trial court. Relying on the decision of the Court in **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013] eKLR**, counsel urged that we should only interfere with the trial court decision if it is not based on evidence, or is based on a misapprehension of the evidence, or if it is demonstrated that the court acted on wrong principles.

17. Referring us to his written submissions, counsel argued that the trial Judge properly concluded, on the material placed before him, that there were justifiable grounds, under the provisions of the Employment Act, for finding gross misconduct on the part of the appellant. He argued that the appellant was the person in charge; that as soon as the flag was raised regarding the dumping of international calls on the respondent's network, the dumping ceased; that faith inherent in the work relationship between the parties was breached by the appellant, and the respondent had just cause in dismissing him. In that regard, counsel invited us to be guided by the decision of this Court in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR**.

Determination

18. We have considered the appeal and the submissions by counsel. There are two questions for determination. The first, is whether the trial court was right to conclude, as it did, that there were valid reasons for terminating the appellant's employment. The second question is whether the decision to

terminate the appellant's employment was arrived at following a fair procedure as held by the trial court.

19. As regards the question whether there were valid grounds for terminating the appellant's employment, the complaint by the respondent against the appellant was twofold. First, that the appellant was involved in illegal dumping of international traffic at Milimani Exchange. Secondly, that the appellant leaked information to those involved when investigations commenced.

20. Based on the evidence presented before the trial court, there is no doubt that there was dumping of international traffic (calls) into the respondent's network.

21. The discovery that there was dumping of international calls on the respondent's network was happenstance. Francis Matu, (DW3), stated that he discovered this when repairing a link to Safaricom on 5th March 2010 when a caller in America made a call to a recipient in Kenya. He said that he traced and found the call had gone through Milimani Telephone Exchange and that as he continued monitoring he established that the calls were many. He said that he informed the maintenance officer at Milimani Telephone exchange as well as the appellant, his team leader and that after the appellant was assigned the duty to investigate, the calls stopped.

22. In his evidence, Christopher Kandie, (DW1), the respondent's internal investigator stated that he was tasked by the respondent's Chief Executive Officer on 8th April 2010 "to investigate suspected case of illegal traffic originating from Milimani Exchange through Toll 2 at Extelcoms House to Safaricom subscribers". He produced his report dated 15th April 2010 as an exhibit.

23. His findings as captured in that report include the finding that "illegal long duration international calls was detected at the toll two switch at Extelecoms house but ceased on commencement of investigations carried out by the network team comprising of Mr. Peter Kimani, Mr. Charles Aput, Mr. Thomas Onyango and Christopher Buttuk..." and that "the illegal long duration calls ceased after information was leaked out by one of the Technical Staff branded above as suspects." The appellant was one of the "branded suspects" mentioned in the report.

24. In the same investigation report, the witness alluded to "a similar case in December 2009 where illegal traffic was detected at the carrier room at telephone house but the said calls immediately ceased when network staff, including [the appellant] commenced investigations and long before investigators were informed."

25. DW3 also reported that, "investigations could not conclusively narrow down the specific person since the calls ceased but, "it is evident that the staff mentioned above knew this ongoing." (sic). The appellant was one of the mentioned staff. DW3's recommendation was that the appellant, among others, "should explain to management how this would have happened."

26. In his testimony before the trial court, the appellant acknowledged that he was the team leader, Nairobi switches, when the dumping of international traffic was discovered. He accepted that such dumping resulted in loss of revenue for the respondent. In his words, "when calls do not pass through one international switch, Telkom would lose money."

27. In his report, the investigator (DW3) left no doubt that he considered that the appellant was complicit. In our view, the learned trial Judge was in the circumstances entitled to hold, as he did, that the respondent had reasonable and sufficient grounds, within the meaning of Section 44(4)(g) of the Employment Act, for suspecting that the appellant had committed an offence to its substantial detriment and therefore had justifiable grounds for terminating his employment. The evidence supported that finding.

28. As to whether, the procedure in terminating the employment was fair, evidence was produced that by a letter dated 12th May 2010, the appellant was informed of the specific complaints made against him and that the respondent intended to take "appropriate disciplinary action...which may include dismissal"

against him; that before doing so, he was requested to offer his defence. He was thereafter heard before the decision to summarily dismiss him in terms of the respondent's letter dated 8th June 2010 was issued. Thereafter the appellant appealed. We are therefore in agreement with the trial Judge when he stated in his award that:

“...the court finds the procedure was in conformity to the minimum statutory disciplinary procedure. There were investigations carried out, a report prepared recommending the [appellant] and...be called to explain the dumping. The [appellant] was informed of the specific allegations against him; he was called to respond; responded; was given a hearing; a decision made; and was given the opportunity to appeal, appealed and was heard, and appeal dismissed.”

29. We do not have any basis for interfering with the findings by the Judge. In our judgment therefore, there is no merit in the appeal. It is dismissed in its entirety with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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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