



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 67 OF 2015**

**BETWEEN**

**GEOFFREY GIKONYO MATHU .....APPELLANT**

**AND**

**INTEX CONSTRUCTION COMPANY LTD ..... RESPONDENT**

*(Appeal from the judgment and decree of the Employment and Labour Relations Court at Nyeri (Ongaya, J.) dated 8<sup>th</sup> May, 2015*

in

**ELRC CAUSE NO. 68 OF 2013**

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**JUDGMENT OF THE COURT**

**GEOFFREY GIKONYO MATHU** (hereinafter ‘the appellant’) brings this first appeal against Intex Construction Company Limited (hereinafter ‘the respondent’) following the dismissal of his suit by the Employment and Labour Relations Court (hereinafter ‘the ELRC’). The facts as we can see from the record were that the appellant who was employed by the respondent as a driver earning a salary of **Ksh 30, 357** was summarily dismissed from employment on **4<sup>th</sup> October, 2012**.

On **3<sup>rd</sup> October, 2012** the appellant reported to work at 8a.m. and was assigned a Lorry (**Make: Tata Tipper**) Registration Number **KAZ 931 B** by the respondent’s administrator namely:- **MR MUNENE (MUNENE)**. As he approached the garage where the motor vehicle was parked, he noted that it had worn out tyres. Upon entering the Vehicle’s cabin and starting the engine, he heard air coming out of its hydraulic braking system in a manner suggesting that there was a defect. Out of abundance of caution, the appellant tested the brakes and confirmed that indeed air was leaking from the system. He alerted **MUNENE** on his findings but was informed that the Lorry’s brakes had been working in the condition that the appellant found them. The appellant’s efforts to implore **MUNENE** to have the Lorry’s brakes repaired before he set off for Kilometer (KM) 12 along the Gathuthi-Kwandobi road where the respondent was carrying out road works fell on deaf ears. Instead, he was ordered to drive to the said location and carry out his tasks for the day. Fearing reprisals in the event that he disobeyed his employer’s

orders, the appellant drove the Lorry to the construction site ('the site') as ordered.

Upon arrival at the site the Lorry was loaded with soil, which the appellant ferried for 2 trips. However, on the 3<sup>rd</sup> trip, while loading, the Lorry's brakes failed causing it to ram into a tractor which was parked behind it. The tractor's headlights and grill were damaged as a result of the collision. Thereafter, the appellant rang *MUNENE* and briefed him on what had transpired. On his part *MUNENE* instructed the appellant to see to it that the two motor vehicles were not interfered with.

Later, he arrived at the site accompanied by two police officers who examined the Lorry and found that the brake pipes were leaking in addition to other defects. An inspection report was prepared by the said police officers and subsequently filed in court; with its main finding being that the Lorry was defective and unroadworthy. Upon finishing their brief, the police officers ordered that the Lorry be towed to the police station, which instruction was not heeded by *MUNENE*. Instead, a mechanic was called to adjust the brakes, during which interval one *MR AMITAL* who was one of the respondent's managers arrived at the scene and allegedly ordered *MUNENE* to sack the appellant. As soon as the brakes had been adjusted, the appellant was ordered to drive the Lorry to the respondent's workshop.

Subsequently, *MUNENE* requested the appellant to write a letter explaining how the accident occurred, which he did, only to be served with a letter of dismissal dated **4<sup>th</sup> October, 2012** as he delivered the same. Apart from being dismissed, the appellant was prosecuted for a traffic offence of driving an unroadworthy motor vehicle on a Road contrary to **Section 55 (1)** as read with **Section 58 (1)** of the **Traffic Act**. The case was assigned a reference number namely: - **NYERI TRAFFIC CASE NO 543 OF 2012** wherein the appellant was convicted and fined **Ksh 10, 000**. He remained incarcerated in prison for a month as he was unable to pay the said fine. *MUNENE* was also charged alongside the appellant with the offence of allowing the use of an un-roadworthy motor vehicle on a road contrary to **Section 55 (1)** as read with **Section 58 (1)** of the **Traffic Act** vide **NYERI TRAFFIC CASE NO 542 OF 2012**, which charge he admitted, causing him to be convicted and fined the sum of **Ksh 20,000**. The same was promptly paid by the respondent company.

The hearing before the trial court was a one-sided affair as the respondent lodged its reply to the appellant's memorandum of claim but failed, refused or neglected to attend trial or file written submissions for that matter, even after being duly served as ordered by the trial court. From the appellant's testimony we are able to surmise that the appellant's complaint thereat was that his dismissal had been primarily occasioned by the respondent's errors of commission and omission; that is: - ordering him to drive an un-roadworthy motor vehicle and failure to maintain the said motor vehicle in the first place. Another pertinent aspect of the appellant's testimony brought out albeit indirectly, was the lack of a hearing prior to his dismissal.

The respondent's reply to the appellant's memorandum of claim spoke for itself so to speak and advanced a defence to the effect that:- the accident in question was not attributable to the Lorry's mechanical condition; that in any event the respondent maintained its Motor Vehicles and kept them in roadworthy conditions; that the appellant did not report the defects he had noted on the Lorry namely:- worn out tyres and faulty brakes; and that the appellant was the author of his misfortune for failing to abide by rules, regulations and the law as a whole.

After considering the pleadings, the evidence and the final submissions filed by the appellant, the learned Judge (Ongaya, J.) found that the appellant had not given an explanation as to why he had agreed to drive the un-roadworthy Lorry; and held that the appellant had made a conscious decision to drive the Lorry which led to an accident as confirmed by the appellant's conviction for a traffic offence. He also found that the appellant had been given an opportunity to tender an explanation as to the events of the material day; and that the appellant was found guilty and convicted by the traffic court. In the circumstances the respondent had valid reasons to dismiss the appellant as provided at **Section 43** of the **Employment Act**. The learned Judge's finding was that the appellant's dismissal was not unfair. Accordingly, he dismissed the appellant's suit.

Aggrieved by the judgment in its entirety, the appellant now brings this appeal advancing 9 grounds to the

effect that:-

- *The learned trial Judge erred in law and in fact by misdirecting himself and finding that the respondent had a valid reason to dismiss the appellant.*
- *The learned trial Judge erred in law and in fact by concluding that the appellant had been given an opportunity by his supervisor to explain the accident; which finding misled the learned Judge to arrive at the misconceived deduction that the appellant had been given a chance to be heard before dismissal.*
- *The learned trial Judge erred in law and in fact by making a finding that the appellant made a conscious decision to drive the lorry that ended up in the accident, while the appellant gave an explanation of how he was compelled to obey his supervisor and drive the lorry, its defects notwithstanding.*
- *The learned trial Judge erred in law and in fact by ignoring the motor vehicle inspection report which explicitly outlined that the lorry had defects which rendered it unroadworthy and thus the appellant could not be blamed for being negligent in causing the accident.*
- *The learned trial Judge erred in law and in fact by disregarding the appellant's submissions despite the respondent not having filed their submissions thereby occasioning a miscarriage of justice.*
- *The learned trial Judge erred in law and in fact by placing reliance for his finding that the dismissal had valid reasons, on the conviction of the appellant in the traffic court for driving an unroadworthy vehicle as if the conviction was one for careless driving.*
- *The learned trial Judge erred in law and in fact in failing to apply the principle of parity of reasoning by ignoring the fact that the respondent's supervisor was accused and convicted as a result of the accident and based on the same facts.*
- *The learned trial Judge erred in law and in fact by basing his judgment on matters which were neither pleaded nor framed thereby occasioning a grave miscarriage of justice.*
- *The reasoning of the learned Judge as outlined in the judgment vis a vis the evidence heard is bluntly wrong and erroneous.*

Mr. Paul Ng'arua, learned counsel who appeared for the appellant at the hearing collapsed the foregoing grounds into two tranches covering: - the validity of the termination (Grounds 1, 3, 4, 5, 6, 7, 8 & 9); and fair procedure (Ground 2), which was not followed. He submitted on the first tranche as follows: - that the appellant was forced to drive the motor vehicle leading to the accident; that he was told to hurriedly prepare a notice to show cause and was dismissed summarily; that the trial Judge wrongly concluded that the appellant could not satisfactorily explain why he drove the vehicle; that the trial Judge should have understood the power dynamics; and that there was the danger of being charged with insubordination.

Regarding procedure it was submitted that the same was unfair as the appellant was not given an opportunity to call a member of staff to come and assist him. Counsel urged us to follow the reasoning of this Court in ***CMC AVIATION V MOHAMMED NOOR [2015] eKLR*** wherein it was held inter alia that irrespective of the type of termination, the provisions of **Section 41** of the **Employment Act** are mandatory and should be adhered to. Mr. Ng'arua went on to submit that the procedural irregularity herein was for one of the respondent's managers one Amital to tell Munene to dismiss the appellant. To buttress his submission counsel urged us to be guided by the persuasive case of ***SHANKAR SAKLANI V DHL GLOBAL FORWARDING (K) LIMITED [2012] eKLR*** in which the court set out the proper procedure to be followed in cases of summary dismissal.

We were also addressed on the subject of representation where counsel submitted that an employer should allow an employee to have a person in authority to represent him. On the question of the traffic case counsel submitted that the ensuing prosecution and conviction was for driving an unroadworthy vehicle not that of careless driving. In any event, the respondent had also been charged with the same offence. In conclusion, counsel urged us to find that the appellant's dismissal was unlawful and having so found; award him a year's salary in addition to contractual dues owed plus costs.

In reply, Mr. Munoko, learned counsel who appeared for the respondent submitted that the appellant had pleaded guilty to driving an unroadworthy vehicle; that the appellant ought to have informed his employer

that the Lorry was overloaded; that its tyres were worn out; and that the brakes were not functional.

He also submitted that the appellant's union advised the respondent to pay the appellant's dues, which payment was effected. Counsel opined that the termination was not unfair as due process was followed. Learned counsel sought to distinguish the appellant's authorities from the present appeal by submitting that in NANDWA V KENYA KAZI LTD-CIVIL APPEAL NO 91 OF 1987 the driver found that the Motor Vehicle had a defect after taking it from another driver; while in CMC AVIATION LIMITED V MOHAMMED NOOR [2015] eKLR the affected employee was not given an opportunity to be heard; and in HEMA HOSPITAL V WILSON MAKONGO MARWA [2015] eKLR, the affected employee was verbally dismissed in stark contrast to the present appeal where a letter of dismissal was issued. In conclusion, counsel submitted that **Section 41** of the **Employment Act** did not impose a duty on an employer to advise an employee of the right to have a fellow employee or someone else present at the disciplinary hearing.

We are of the considered view that this appeal is wholly predicated upon the subject of summary dismissal, but specifically turns on the question of whether the requisite procedural requirements preceding the dismissal were taken. Whereas **Section 44** of the **Employment Act** reserves summary dismissal for instances where an employee has, by his or her conduct fundamentally breached his obligations arising under the contract of service: it is only misconduct that is gross in nature that will entitle the employer to invoke it. The following grounds are recognized in law to warrant summary dismissal of an employee:-

*(i) Absenteeism from work without leave or other lawful cause;*

*(ii) Intoxication to the extent of being incapable of performing his or her duties during working hours;*

*(iii) Willful neglect to perform his / her work or doing so carelessly and improperly;*

*(iv) Using abusive or insulting language towards his or her employer or supervisor;*

*(v) Failing or refusing to obey lawful commands issued within the scope of his or her employment by his or her employer or a person placed in authority over him / her by the employer;*

*(vi) If arrested for a cognizable offence punishable by imprisonment and is not released on bail or bond or otherwise lawfully set at liberty within 14 days, or;*

*(vii) If an employee commits or, on reasonable and sufficient grounds, is suspected of having committed a criminal offence against or to the substantial detriment of the employer or the employer's property.*

This list is not exhaustive as **Section 44 (4)** of the **Employment Act** allows an employer to further make regulations expanding the grounds that may constitute gross misconduct.

To determine whether the respondent granted the appellant a hearing we must evaluate the evidence presented to the trial court afresh in order to arrive at our own independent conclusion. In doing so, we must bear in mind that unlike the trial court we have neither seen nor heard the witnesses and must make due allowance for it. See SELLE VS ASSOCIATED MOTOR BOAT CO LTD (1968) E.A. 123

A portion of the appellant's testimony before the trial court which we find compelling, and an excerpt of which we reproduce herein, marks the start of our inquiry:-

***“He is Mr. Amital. He told Munene to sack me on the spot. Munene told me to write a letter to explain how accident (sic) had occurred. I wrote the letter. Upon handing him my letter, I was served with the dismissal letter”***

Our attention is also drawn to the letter dated **4<sup>th</sup> October, 2012** written by the respondent and addressed to the appellant conveying the decision to summarily dismiss him. The reason for the dismissal was an accident which occurred on **3<sup>rd</sup> October, 2012** for which; the appellant was blamed.

**Section 41 (1) and (2) of the Employment Act** states as follows:-

**“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. (Emphasis ours).***

We cannot help but notice the haste with which the respondent dismissed the appellant from employment. Not only were the provisions of **Section 41** set out hereinabove flagrantly disregarded, the alleged offence of careless driving which caused the appellant’s dismissal was yet to be formally proved in a court of law as at **4<sup>th</sup> October, 2012**.

We say so in view of, **Section 47 A** of the **Evidence Act** which provides as follows:-

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”.***

It is therefore our finding that as at **4<sup>th</sup> October, 2012** the Traffic court was yet to make a finding on the culpability or otherwise of the appellant on the said charge; or that of driving an unroadworthy motor vehicle which he was eventually charged with. In any event the appellant took plea for the latter offence on **12<sup>th</sup> November, 2012**. What is the import of the foregoing?

**Section 43** of the **Employment Act** states as follows:-

***“43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

...

***(3) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***

We find and hold in line with the above provisions that whereas as at **4<sup>th</sup> October, 2012**; a conclusive finding was yet to be made on the appellant’s alleged careless driving as by law required, and the question would end up in the Traffic court, the respondent did not, in the circumstances of this case “genuinely believe” in the appellant’s culpability. Accordingly, it is our finding that the respondent had no valid reason to summarily dismiss the appellant.

But even if the reasons advanced by the respondent had been valid, the dismissal herein would stand impugned for want of a hearing in line with **Section 41 (2)** of the **Employment Act** set out hereinabove. We note that the appellant was merely asked to provide a written account of the events of the material date to his supervisor Munene, who in turn served him with a letter informing him of the decision to dismiss him summarily. Would the foregoing action amount to a hearing? We think not as the said approach ought to be in addition to and not in substitution to a hearing as envisaged in **Section 41** of the **Employment Act**. In **KENFREIGHT (E.A.) LTD V BENSON K. NGUTI [2016] eKLR** this Court observed as follows:-

*“The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts”.*

The **KENFREIGHT** decision affirms the right to be heard which was disregarded by the respondent herein, in favour of dismissal at will. We are able to discern inter alia: - the absence of a specific charge framed for the appellant to respond to; the absence of findings as to demonstrate that the respondent had directed its mind to the case; and the absence of a formal notice to show cause which would have set the disciplinary process in motion. We are also persuaded by the reasoning of this Court in **HEMA HOSPITAL V WILSON MAKONGO MARWA [2015] eKLR** and in **CMC AVIATION LIMITED V MOHAMMED NOOR [2015] eKLR** with regard to the right to be heard. Accordingly, we find and hold that the appellant was not given a fair hearing which would have attached the stamp of legality to the termination of the appellant’s employment for cause.

We conclude this judgment by noting that apart from filing a memorandum in reply to the appellant’s memorandum of claim, the respondent did not participate in the subsequent proceedings. Consequently, the evidence of the appellant before the trial court went unchallenged and is the basis for our findings herein. In the premises this appeal is allowed. The judgement of the superior court is hereby set aside; and in its place judgment is entered for the appellant in terms of prayer (a), (b), (c) and (d) of the Memorandum of Claim; save that general damages sought at prayer (b) is pegged at eight months. The appellant shall also have the costs of this appeal.

***Dated and delivered at Nyeri this 1<sup>st</sup> day of March, 2017***

**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**