IN THE COURT OF APPPEAL

AT NAIROBI

(CORAM: VISRAM, G. B. M. KARIUKI & SICHALE, JJ.A)

CIVIL APPEAL NO. 239 OF 2012

BETWEEN

JOHN MUGHAILU TANYA …… APPELLANT

AND

TELKOM KENYA LIMITED …… RESPONDENT

(Being an Appeal from the Award and Decree of the Industrial Court of Kenya at Nairobi (Mukunya, J) dated 28th June, 2012

in

CIVIL CASE NO. 689 OF 2011*)*

****

JUDGMENT OF THE COURT

The appellant, **JOHN MUGHAILU TANYA** filed an appeal against an award of the then Industrial Court dated 28th June, 2012 made by Mukunya J. Telkom Kenya was the respondent in the Industrial Court as well as in this appeal. The learned judge of the Industrial Court dismissed the appellant's claim and ordered each party to bear its own costs.

A brief background to this appeal is that the appellant filed a suit against the respondent for unlawful termination. The appellant averred that he was employed by the respondent in 1983 as a technician. He rose through the ranks to the level of a Section Engineer. He was relieved of his duties in October, 2009 on the allegations of having stolen cables belonging to the respondent and using the respondent's motor-vehicle without authority. He challenged the termination on the basis that it was unlawful and further that he was not given a hearing before the termination. In his statement of claim he sought the following orders:-

> ***"1. THAT the Claimant's termination of his services by the Respondent on 29th September 2009 was unlawful, unfair as the reason given was invalid.***
>
> ***2. THAT, the Respondent, Telkom Kenya Ltd be ordered to pay:-***
>
> ***(i) A sum of kshs. 65,513 x 12 months = Kshs. 786,156/= a requirement under the Labour***

Institution Act.

(ii) A further sum of Kshs. 65,513 x 27 years = Kshs. 1,768,851/= as special damages.

(iii) THAT, in the alternative the Court orders reinstatement of the Applicant.

(iv) THAT, the Respondent be ordered to pay the costs of this claim."

In its response dated 30th June, 2011 the respondent maintained that the appellant's termination was not unlawful as he was found to have stolen cables belonging to the respondent and that he used the respondent's motor-vehicle without authority. The respondent further maintained that the appellant was given a hearing before termination.

The dispute between the two was heard by Mukunya J who, as stated above, dismissed the appellant's claim with an order that each party was to bear its own costs. The appellant was dissatisfied with the said outcome, hence this appeal.

In a memorandum of appeal dated 18th September, 2012 the appellant listed 5 grounds of appeal. These can be summarized as follows:-

(i) The learned trial judge erred in not finding that the appellant's use of the respondent's vehicle was lawful.

(ii) The learned trial judge erred in determining the claim against the appellant on hearsay evidence which is inadmissible.

(iii) The learned trial judge misinterpreted and wrongly applied Section 22 (4)

(g) of the Employment Act.

The appeal came before us for plenary hearing on 15th February, 2017. Mr. Wachana and Mr. Nyaburi learned counsel for the appellant and respondent respectively opted to rely on their written submissions and did not wish to highlight them. The appellant's submissions dated 25th October, 2016 were filed on the same day, whilst his authorities dated 25th September, 2015 were filed on 24th September, 2016. On the other hand, the respondent's submission as well as its list of authorities were dated and filed on 9th November 2016. In his written submissions, the appellant faulted the award of the Industrial Court in finding that his termination was lawful; and in failing to find that the appellant was entitled to fair labour practices, to wit, use of the respondent's motor-vehicle; that the evidence of Kiili Munyao against the appellant was hearsay evidence and finally that the trial judge wrongfully applied and misinterpreted Section 22 (4) (g) of the Employment Act. He relied on this Court's decision in **Telkom Kenya Ltd. v Paul Ngutwa Nairobi CiviL Appeal No. 56 of 2011** for the interpretation of Section 22 (4) & Section 45 of the Employment Act. The appellant further cited this Court's decision in **Telkom Kenya Ltd. v Ericsson Edeyangwa Bared Nairobi Civil Appeal No. 152 of 2011** on what constitutes unlawful termination.

In response the respondent contended that the appellant's employment was terminated on account of theft of copper cables belonging to the respondent and unauthorized use of the respondent's motor-vehicle. It was the respondent's case that there was sufficient evidence of the theft as the appellant himself admitted to removing the cables from the respondent's yard and ferrying them to his residential home. Further, that the use of the respondent's vehicle was unauthorized. The appellant relied on the authority of **Mwanasokoni v Kenya Bus Services Ltd. & Others [1982 – 88] 1 KAR** for the proposition that this

Court is not to interfere with the trial court's finding of fact unless it is shown that it was based on no evidence or a misapprehension of the evidence or that the court acted on wrong principles of law. On the issue that the respondent was obliged to provide the appellant with transport, the respondent's counsel

submitted that this was not the case. To bolster his argument, counsel pointed out that this assertion was lacking in the statement of claim. He relied on the authority of **Chumo Arap Songok v David Kibiego Rotich Nakuru Civil Appeal No. 141 of 2004** for the proposition that parties are bound by their pleadings. The appellant's complaint that the learned judge failed to recognize that the appellant had permission to use the respondent's motor-vehicle was countered by the respondent who pointed out that such authority cannot be obtained from one's junior. The appellant in his evidence had told the trial court that although his immediate boss was one Mr. Murila, he had obtained permission from his junior, one Mr. Musasia.

Finally, the respondent maintained that the appellant's summary dismissal was justifiable and in-keeping with the Employment Act. The respondent saw no relevance of Section 22 (4) of the Employment Act which was relied upon by the appellant.

We have considered the record, the rival written submissions and the authorities cited by both the appellant and respondent as well as the law. This being a first appeal our role is to re-evaluate and re-analyze the evidence and then determine whether the findings of the trial court hold sway. **In Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212** this Court inter alia, held that:-

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt by with the parties in the evidence."***

It is common ground that there existed a relationship of an employer/employee between the appellant and the respondent. It is also common ground that the appellant was summarily dismissed vide a letter dated 29th September, 2009 issued by the respondent. Section 44 (4) of the Employment Act provides for instances of when an employer may summarily dismiss an employee. It states:-

> ***"Any of the following matters may amount to gross misconduct as to justify the summary dismissal of an employee for lawful cause,***
>
> > *but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal 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 his employer or his employer's property"***
> > >
> > > (Emphasis added)

It was the respondent's case that it was entitled to summarily dismiss the appellant on account of theft of copper cables belonging to the respondent and for the unauthorized use of the appellant's motor-vehicle.

In arriving at the conclusion that the appellant had stolen the respondent's cables, the trial court relied on the evidence of PW2 Mr. Boniface Mwendo who compiled an investigative report which was produced in court. It was the appellant's contention that this was hearsay evidence. Whereas that may have been so, we note as pointed out by the respondent's counsel that no objection was made at the time the investigative report was produced in court. However, be that as it may and of much more greater significance is the fact that the appellant himself owned up to removing the cables from the respondent's yard. He admitted that he off-loaded them at his residence in order to use the respondent's motor-vehicle to transport his household goods. He contended that the cables were at his residence temporarily whilst

enroute to the respondent's premises in Athi River. Why would the respondent take his employer's property to his private residence? Section 268 of the Penal Code defines theft as follows:-

> "(1) ***A person who fraudulently and without claim of right takes anything***

capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

> ***(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does with any of the following intents,*** that is to say-
>
> *(a)* ***an intent to permanently deprive the general or special owner of the thing of it;***
>
> (b) an intent to use the thing as a pledge or security;
>
> *(c)* ***an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;***
>
> *(d)* ***an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;***
>
> (Emphasis added)

The learned trial judge found the appellant's actions of carting away the respondent's copper cables was theft. We, too are in agreement that the appellant's actions were well within the definition of theft under the provisions of Section 268 of the Penal Code. We also find that the assertion by the appellant that he had authority to use the respondent's motor-vehicle does not hold water. It was the appellant's own evidence that he sought authority from Mr. Musasia who was his junior and not from his immediate boss, one Mr. Murila. The appellant's assertion on this is strange as one does not get authority from his junior but from his senior, or immediate supervisor. It was also explained by Stellum Nasimiyu Ndirangu (R2) that such authority must be sought and given in writing. The appellant was not armed with such written authority. On evaluation of this aspect of the evidence, we too have come to the conclusion that the appellant's use of the respondent's motor-vehicle was without authority.

The appellant further faulted the trial judge in failing to find that he was not given a fair hearing. It is on record that the respondent wrote to the appellant on 25th

September, 2009 and informed him of the allegations of theft against him. Thereafter an investigative team was constituted. The appellant duly made his representations before the investigative team. He was thereafter terminated vide the respondent's letter of 29th September, 2009. Undeterred, the appellant made an appeal by his letter of 9th

October, 2009 to the respondent's appeals committee. The appellant appeared before the appeals committee and testified to the effect that he took the cables to his residence with the intention of ferrying them to Athi River. It was his further testimony that although he did not take the cables to Athi River, he did not immediately return them to the respondent as they were not needed urgently. In view of the above, we find that the appellant was given a right of hearing. The appellant may be aggrieved because his explanations were rejected but not because he was not given a fair hearing.

In view of the foregoing, we find that the appeal is without merit. It is dismissed with costs.

Dated and delivered at Nairobi this 12th day of May, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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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