



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 87 OF 2015

BETWEEN

PAUL BILLY NYAGILO.....APPELLANT

AND

EAST AFRICAN PORTLAND CEMENT CO. LTD..... RESPONDENT

(Being an appeal from the Award of the Industrial Court of Kenya at Nairobi

(Nzioki wa Makau J.) delivered on 3rd February, 2015

in

Industrial Cause No., 1543 of 2013)

JUDGMENT OF GITHINJI, JA

[1] This is an appeal from the judgment of the Employment and Labour Relations Court (**Court**) (**Makau, J.**) dismissing the appellant's claim against the respondent with costs.

[2] By a letter dated 18th November 2010, the appellant was summarily dismissed from his employment with the respondent with immediate effect. The dismissal letter stated in part that the appellant had abused the responsibility bestowed on him and lost the company cement worth Kshs. 4,155,200/- which came to his possession by virtue of duty and which he could not account for.

On 25th September, 2013, the appellant filed a memorandum of claim alleging that the summary dismissal was substantively and procedurally unfair and unlawful and claimed:

- i. Shs. 581,568/00 being three months salary in lieu of notice
- ii. Shs. 775,524/00 being salary for months of August to November, 2010
- iii. Shs. 9,305,088/00 being gratuity at 25% from 1993 to 2009 (16 years).
- iv. Shs. 58,156/80 – leave allowance for year 2010.

v. Shs.2,326,272/00 being damages for unfair termination for 12 months and

vi. Exemplary/punitive damages.

The total monetary claim was Shs. 13,046,608/80.

The respondent filed a memorandum of defence denying the claim. The appellant filed a reply.

[3] At the hearing of the claim, the appellant gave evidence and called one witness, Ishmael Otieno Ondigo (Ishmael). On its part the respondent called four witnesses, Andrew Collins Abongo – Depot Supervisor, Purity Wairimu Gichumu (Purity) who was the Credit Manager at the material time, Daniel Kipyator Kiprono (Kiprono), a senior Internal Auditor and John ole Kimanjoi, the head of Human Resource Department.

[4] After the hearing, the learned judge reached the following conclusion:

“It is simply clear that the claimant and CW2 were involved in some racket regarding the cement held at Kisumu depot. The two knew of the missing bags and offered an explanation. The claimant even went as far as report the depot clerk missing but did not reveal the missing bags. He was dishonest in his testimony before court. If at all there was an error even in the audits the explanations given for the bags missing was inconsistent. The claimant was accorded fair procedure as he was heard, he was given opportunity to respond and in the final analysis found culpable in the loss. The blank cheque was held from 2006 without it being revealed to the respondent. The only amount that would have fallen due would have been the half salary due as provided for in the law for officers on suspension which would have been Kshs. 220,000/- but he will not recover this.”

[5] The appellant appeals against that finding on 23 grounds which were consolidated into three grounds at the hearing of the appeal. The relevant facts were as follows:

[6] The appellant was working as depot supervisor in charge of Kisumu depot of the East African Portland Cement company Limited (Company) from 2007 to 2009. Ishmael Otieno Ondigo (Ishmael) worked under him as a depot clerk until 2008. In 2008, Ishmael was promoted to depot supervisor and took over from the appellant. The appellant was promoted to Regional Sales Executive in charge of Nyanza. Later, the appellant was transferred to Nairobi to work in the same capacity. In about February, 2010, Andrew Collins Abongo took over from Ishmael as Depot Supervisor after Ishmael was promoted to Regional Sales Executive in the same region to take over from the appellant.

In June 2010, Purity who was in charge of Company’s depots countrywide, visited Kisumu Depot and carried out surprise stock checks. She found the depot virtually empty and there was barely any visible stock. The physical stock did not correspond with the records. Ishmael explained that the deficit occurred at the time the claimant was the depot manager and explained that some cement was sold to cover depot expenses and some supplied to distributors who had issued a cheque. She was given a copy of the cheque.

She made a report and recommended that an audit be done by a different person. In July, 2010, Kiprono carried out an independent audit and found that 5,600 bags of cement could not be accounted for and that the company did not receive payment for the cement.

[7] By a letter dated 14th July 2010, the appellant was suspended from employment and asked to show cause why stern disciplinary action should not be taken against him. The suspension letter alleged that the loss of 5600 bags of cement valued at Shs. 4,155,200 occurred during his tenure at Kisumu as Depot Supervisor and was directly responsible and accountable for the loss.

The appellant by a letter dated 23rd July 2010 explained the alleged loss. He explained in brief that the bags of cement in issue should be 5,400 and not 5,600, that out of the 5,400 bags, 2,000 bags were sold to

meet depot expenses incurred by High Bound Distributors. The balance of 3,400 bags were sold to High Bound Distributors by Mr. Awino the depot clerk during his one week absence, who later absconded duty and that High Bound Distributors gave a blank cheque on the understanding that the cheque was to be banked upon reconciliation of the accounts between the distributor and the company.

Thereafter, the appellant was invited for hearing before the disciplinary committee and appeared on two occasions.

[8] The disciplinary committee ultimately recommended that the appellant be summarily dismissed on account of defrauding the company.

The disciplinary committee made several observations which led to the decision viz;

“(I) Appellant was an experienced depot supervisor with a thorough knowledge of depot operations. However, his was a case of gross and blatant violation of the company’s policies.

(II) He failed to report the shortfall of 3,400 bags and instead chose to deliberately conceal the loss under the account of guaranteed customer. He never at one time reported the loss to his supervisor or to the credit controller.

(III) It is not practically possible that the 3,400 bags were collected in one week when he was away. It was noted that the clerk and himself were privy to the loss but chose to deliberately conceal the truth from his supervisors.

(IV) He failed to report the disappearance of the clerk - Mr. Duncan Owino and instead misled the head office regarding his absence leading to his dismissal on account of desertion of duties rather than the loss of 3,400 bags of cement.

(V) It was noted that the Kshs. 1.5 m apparently spent on petty cash cannot be verified and there is no documentary evidence to support this expenditure. Payment of rebates and commission due to the distributor was done at the depot instead of at Head Office as is the procedure. This was being misused to explain noted shortage of cement.

(VI) To balance the reconciliation during subsequent stock takes, it was observed that Mr. Nyangito lied that the missing cement was under the account of a guaranteed customer (High Bound Distributors) while it was not the case.”

The appellant appealed against the decision by a letter dated 29th March 2011 requesting that the decision to terminate his services be rescinded and be replaced with early retirement and that he be paid full salary for the five months he was under suspension.

[9] **Mr. Wesonga**, the learned counsel for the appellant submitted that the reason for termination was not valid because the alleged loss which occurred in 2007 was dealt with in 2007 and put to rest; the stock taking reports for the years 2007 to 2010 were concealed and not produced by the company during the disciplinary proceedings; it was not possible that 5,600 bags of cement could go missing without being discovered by the management from 2007 to 2010 since the finance department received records daily from the depot clerk; it was not possible that the proceeds of 5,600 bags would be hidden from the Finance Department for all those years; there was no claim that any of the clerks colluded with the appellant or was accused of falsifying depot records; the company failed to contact High Bound Distributors in respect of all cheques to ascertain the veracity of the appellant’s statement. It was also submitted that the company could not have promoted the appellant if he had no clean record and that the company had not taken any steps to recover the value of the cement from the appellant or report the matter to police.

On the issue of procedural fairness, the counsel for the appellant submitted that the appellant was not accorded a fair opportunity to defend himself and that his appeal was not determined.

The learned counsel for the appellant further faulted the judgment of the court for failing to consider the appellant's written submissions and for ignoring the evidence and thereby arriving at erroneous finding without any basis.

[10] On the other hand, **Mr. Oyombe**, learned counsel for the respondent referred to the applicable law and submitted, amongst other things, that the company was not aware of the loss until the surprise audit was done; that there was no evidence that the issue was dealt with in 2007 and put to rest; that the decision to summarily dismiss the appellant was reasonable based on the findings of the surprise audit; that Ishmael exposed the appellant as the one responsible; appellant admitted that he was aware of the deficit and on lack of satisfactory explanation and belated attempt to produce undated and unsigned blank cheque to account for the missing bags. Counsel further submitted that the minutes of the disciplinary committee showed that the appellant was given a fair hearing.

[11] I have considered the ground of appeal and the respective submissions of the counsel.

By section 44 of the Employment Act (Act), the company had power to summarily dismiss the appellant for gross misconduct. The grounds on which employment was terminated constitute misconduct as specified in section 44(4) of the Act. However, the reason for summary dismissal must be a valid and fair reason and further, the termination must be in accordance with a fair procedure - (Section 45). By section 43(2), the reason or reasons for termination are the matters that the employer at the time of termination genuinely believed to exist and which caused the employer to terminate the services of the employee. Thus, the reasonableness of the decision of the employer is not to be judged by what the court thinks should have been a reasonable decision, but on whether the particular decision was a decision that a reasonable employer could have taken in the particular circumstances of the case. In other words, the court should not step into the shoes of an employer and impose its own standard of reasonableness.

[12] The appellant admitted that the deficit of at least 5,400 bags of cement occurred in 2007 when he was the Depot Supervisor. He gave an explanation that he was short of money to pay casual workers and that the sales money for 2000 bags was used to pay expenditure incurred by High Bound Distributors.

The disciplinary committee found that the Shs. 1.5 million spent on petty cash could not be verified as there was no documentary evidence to support the expenditure. The committee further found that the rebates and commissions due to a distributor were to be done at the head office and not at the depot.

The disciplinary committee also rejected the explanation for the deficit of 3,400 bags for the reasons stated in the minutes of the proceedings. The findings of the disciplinary committee were supported by the evidence of Purity and Kiprono. The copy of the blank cheque issued by High Bound Distributors Limited allegedly to account for deficit of 3,400 bags was produced at the trial. It has only the name of the company as the payee and two signatures. It is not dated and does not specify the amount to be paid.

[13] As both Purity and Kiprono explained at the trial, there were no documents to support the cheque such as delivery notes to show that the distributor received the cement. The two witnesses also explained that the cheque had no basis and could not be banked. Certainly this cheque without a date and without specifying the amount payable, was not a valid cheque and it was not an acknowledgement that High Bound Distributors Limited had received 3,400 bags of cement.

The disciplinary proceedings were not criminal proceedings charging the appellant with the theft of the cement or the proceeds of cement, thus requiring a high degree of proof. It is clear in this case that the employer established on balance of probabilities that the appellant's negligence or breach of duty caused it to incur substantial loss.

[14] It is true that the trial Judge did not consider the appellant's written submissions. However, the decision was not solely based on the written submissions. It was based on the detailed memorandum of claim, the detailed defence and the oral evidence tendered at the trial. Failure to consider the contents of the written submissions, which I have considered, did not cause any prejudice to the appellant.

[15] On the question of fair procedure, the appellant was informed in writing to show cause why disciplinary proceedings should not be taken against him. He duly filed a detailed defence. In addition, the appellant was afforded an oral hearing. The minutes of the disciplinary committee show that the committee considered the evidence in great detail and gave detailed reasons for its decision.

It is true that the appeal was not considered. However, the appeal specifically related to reversal of the decision from summary dismissal to early retirement and not to the reasons for termination.

[16] On my consideration of the evidence, I am satisfied that the company established that it incurred a loss of substantial amount of cement and financial loss and that the company had a valid and fair reason related to the appellant's conduct justifying the summary termination of the appellant's services. In addition, the appellant was dismissed in accordance with a fair procedure. It follows, and I find, that the appellant's appeal against unlawful termination of his employment has no merit.

[17] Regarding the monetary claims made by the appellant, having found that the employment was lawfully terminated the claim for salary, damages for unfair dismissal and exemplary damages cannot stand.

However, it is apparent from the judgment that the trial Judge did not consider the claim for gratuity and leave allowance. As for the claim for the salary when the appellant was on suspension, the learned Judge made a finding that the appellant was entitled to half salary for total sum of Shs. 222,000 but declined to make the award without giving any reasons.

The claim for gratuity was a substantial claim. The appellant claimed that he had worked for the company, as depot clerk as a casual labourer since 1993 until he was appointed as a Sales Assistant in 2003. The company's witness John ole Kimanjoi stated that the appellant was prior to 2003 employed on intermittent terms on temporary basis till February 2003 when he was employed under unionisable terms as a Sales Assistant and upgraded in 2009 as a Regional Sales Executive. The appellant admitted that he was paid pension for the period he joined the management cadre but not for the period prior to year 2009.

He, however, did not offer any evidence to support his computation of gratuity nor any evidence to show that he was continuously employed by the company.

[18] Section 37 of the Act provides for conversion of casual employment to contract terms in the circumstances specified therein. There was no sufficient evidence on the basis of which I can determine whether or not the appellant earned gratuity and if so how much. It is just in the circumstances that the issue of gratuity and other allowances claimed should be remitted to the trial court for re-hearing. This is in view of the provisions of section 18(4) of the Act that entitles an employee to some benefits notwithstanding a lawful summary dismissal.

[19] For the foregoing reasons, the appeal against the termination of employment is dismissed together with claim for notice pay and damages with no orders as to costs. The decision of the trial Judge that the appellant was only entitled to half salary in the sum of Kshs. 220,000 only is set aside.

The appellant's entire claim for salary during suspension, gratuity and leave allowances is remitted for re-hearing on liability and quantum by a different Judge.

[20] As **G.B.M. Kariuki, JA** agrees, the judgment of the Court is in terms of paragraphs [19] above. This judgment has been delivered under Rule 32(3) Court of Appeal Rules, **Azangalala, JA** having ceased to hold office.

Dated and Delivered at Nairobi this 16th day of June, 2017.

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR