



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KARANJA, & KIAGE, JJ.A)

CIVIL APPEAL NO. 79 OF 2016

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

AND

AGGREY LUKORITO WASIKERESPONDENT

(Appeal from the Judgment of the Employment & Labour Relations

Court of Kenya at Nyeri (Ongaya, J.) dated 13th May, 2016

in

E.L.R.C. No. 109 of 2015)

JUDGMENT OF THE COURT

This appeal is a challenge by the appellant **Kenya Power & Lighting Company Ltd** (KPLC) against the judgment and decree of the Employment and Labour Relations Court at Nyeri (Ongaya, J) delivered on 13th may 2016 by which KPLC was ordered to reinstate **Aggrey Lukorito Wasike** (Wasike) to his position as a store man in KPLC's employment, and from which he had been terminated with effect from 22nd October 2013. It is not in dispute that the termination was preceded by a notification of the charges facing Wasike and a disciplinary hearing at which he was present with a witness of his choice. The proceedings thereof were minuted and signed by the Chairman of the session, Wasike and his witness one Gideon Malumbe who was his union representative.

Wasike was accused of attempting to steal copper cables in cahoots with one Dakika Contractors at KPLC's King'ong'o Stores in Nyeri. He was acquitted of related criminal charges that had been levelled against him at the Magistrate's Court in Nyeri. Following the termination he was paid two month's salary *in lieu* of notice, salary up to his last working day as well as accumulated leave days.

KPLC faults the learned Judge's decision on the basis that he erred by;

- ***Failing to find that KPLC had made out a proper case for lawful termination for reasons properly believed***

- ***Holding that Wasike was lawfully terminated even after finding that he was suspected of and charged with theft in Criminal Case No. 702 of 2013***
- ***Failing to acknowledge that Wasike was subjected to proper procedure under employment law before termination***
- ***Taking into consideration extraneous matters such as Wasike's acquittal and the purported vacancy of the position Wasike occupied.***
- ***Ordering reinstatement without objective consideration of Sections 49 and 50 of the Employment Act on the subject.***
- ***Failing to consider the practicability of reinstatement which ought to be granted only exceptionally.***

It prayed that the judgment be set aside with costs.

At the hearing of the appeal learned counsel **Mr. Sigei** appeared for KPLC. He submitted that the learned Judge misapplied the law on termination of employment when he held that Wasike's termination was without reason yet there was credible evidence that he had loaded some 300 metres of cable wire which was not supposed to leave the premises and was only discovered when a hawk-eyed gateman inspected the vehicle that was conveying them. Counsel submitted that Wasike had definitely attempted to steal the said cables from KPLC. The disciplinary hearing that was mounted confirmed the attempted theft and KPLC reasonably believed that it had reason to terminate as no employer could ever condone that kind of conduct.

Citing **Section 44(4)** of the Employment Act, counsel submitted that KPLC had every reason to terminate Wasike and it did so through a disciplinary process that was fair as confirmed by Wasike himself who signed the record of the same. The termination was also not unfair. He cited the case of **AVRIL ELIZABETH HOME FOR THE MENTALLY HANDICAPPED vs. CCMA & OTHERS [2006] 9BLLR 833(LC)** where the South African Labour Court held that in disciplinary proceedings, all an employer needs do is conduct investigation, give the employee or his representative reasonable opportunity to respond to the allegations after a reasonable period, and take a decision with notice to the employee. Moreover, and significantly, if an employee is charged with misconduct for being an accomplice in theft, the standard of proof is on a balance of probabilities.

Turning to the available remedies even had Wasike succeeded, **Mr. Sigei** stated that these had to be either contractual or statutory. He then criticized the learned Judge for not considering **Section 49(1)(c)** and **(2)** of the Employment Act and in particular not considering that the twelve month-pay is the maximum compensation. Further, the learned Judge ignored **Section 49(4)** as read with **Section 50** of the Employment Act with the effect that he did not exercise his discretion to order reinstatement within the law as he was bound to do. He cited this Court's decision in **KENYA AIRWAYS LIMITED vs. AVIATION & ALLIED WORKERS UNION KENYA & 3 OTHERS [2014] eKLR** which held that reinstatement, though available as a remedy, is not automatic and is grantable only in exceptional circumstances with each case being decided on its peculiar facts and the court being called upon to consider the practicalities of such an order and compensation being an alternative remedy in appropriate cases.

He concluded that the discharge and acquittal of Wasike on the criminal charge was not a bar to the taking of disciplinary action by KPLC.

Resisting the appeal, **Mr. Govi**, learned counsel for the respondent boldly asserted that "**this is one of the clearest cases, of unlawful termination,**" which he was to repeat during his address to us. He denied that Wasike was involved in actual or attempted theft, stating that the cables in question were part of what was legitimately leaving the store. He attempted to cast doubt on what Wasike's own representative told the disciplinary committee confirming the attempted debt, by pointing to Wasike's and the Contractor's

acquittal of the criminal charge. He then contended that the fact that the position Wasike held was still vacant was a special circumstance warranting his reinstatement and which would in no way prejudice KPLC. Counsel defended the learned Judge's order for payment to Wasike for the time he was out of employment up to his ordered reinstatement, as well as the damages ordered.

Mr. Sigei rejoined briefly by reiterating that Wasike's acquittal did not render the disciplinary proceedings unlawful and that the standard of proof in that process was the lower one of a balance of probabilities. He also maintained that it was erroneous for the learned Judge to order that Wasike be paid for the period of time that he did not work.

As this is a first appeal we have, consistent with our duty as set out in **Rule 29** of the Court of Appeal Rules, and restated in many decisions of this Court, proceeded by way of rehearing in which we exhaustively re-evaluate, re-analyse and reassess all the evidence on record with a view to drawing our own independent inferences of fact. We do so alive to the fact that we have not seen or heard the witnesses as they testified, an advantage the trial Judge enjoyed. Accordingly, we do give due respect to the findings of fact made by the trial Judge but will not hesitate to differ if the said findings are based on no evidence, proceed from a misapprehension of the evidence or are otherwise plainly wrong. See **SELLE vs. ASSOCIATED MOTOR BOAT CO. [1969] EA 123**; **EPHANTUS MWANGI & ANOR vs. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278**.

Having considered the matter before us, we are left in no doubt whatsoever that Wasike was accorded a fair hearing before he was terminated. He was notified of the charge. He was invited to attend. He was advised of his right to have a representative present. He attended with such representative. Both made representations. He was notified of the decision. We are convinced that there was substantial if not full compliance with the requirement for a hearing under **Section 41**, of the Employment Act which provides 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.”

Under **Section 43** of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he **“genuinely believed to exist,”** causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. There were.

It bears repeating that the standard of proof an employer needs to be satisfied about an alleged act of criminality on the part of an employee is the lesser one of balance of probabilities. In the **AVRIL ELIZABETH** case (supra) which we find persuasive, the court held that video evidence showing an employee talking to a person who was stealing the employer's goods was found to have been sufficient to prove on a balance of probabilities, that the employee was an accomplice to the theft. It thus reversed the decision of the Labour Commissioner who had employed the criminal standard of beyond reasonable doubt to hold that the video footage did not conclusively prove the employee's involvement.

The learned Judge herein took umbrage under the fact that Wasike was acquitted of the criminal charge. With respect, that was the wrong approach and perpetuated the criminal standard of proof error. The outcome of the criminal case should have had no effect whatsoever on the learned Judge's approach since the two processes are separate and distinct, with different rules to engagement and standards of proof. This Court has said as much in a number of cases. In **NELSON MWANGI KIBE vs. ATTORNEY-GENERAL [2003] eKLR**, for instance, the employee had complained that having been acquitted on a charge of theft, he ought not to have been dismissed for negligence but this Court dealt with the issue in this manner;

“ ... the appellant in failing to alert the cashier or assistant to lock the door had neglected the duty he had been employed to perform. Notwithstanding the acquittal in the criminal trial, an award of punishment, including dismissal as had happened, may still be imposed to discipline him.

... the dismissal was not founded on the criminal culpability of the appellant. It was based on his being liable for neglect of duty.”

See also; **ATTORNEY-GENERAL & ANOR vs. ANDREW MAINA GITHINJI & ANOR [2016] eKLR**.

Whereas our finding that KPLC did have valid cause for terminating the employment of Wasike suffices to dispose of this appeal, we were addressed on the competing merits of the order of reinstatement made by the learned Judge and we deem it appropriate to express ourselves on it because we are of opinion that the learned Judge fell into error in ordering it.

Reinstatement is provided for under **Section 49(3) (a)** of the Employment Act as one of the remedies that a Court, by virtue of **Section 50**, shall be guided by. It is couched in mandatory terms and requires the court to take into account any of the following matters set out in **Section 49(4) (a) to (m)** before it can order reinstatement;

- 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 reasonably 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.”*

A striking feature of the learned Judge’s award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in **(d)**, the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made **except in very exceptional circumstances**. At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute.

This Court has authoritatively spoken on this subject in several judgments and we do no more than reiterate the same. In the *KENYA AIRWAYS LTD* case (supra) Githinji, J.A expressed himself thus;

“(27) The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be offered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer.”

This was echoed in the same case by Maraga JA (now CJ);

“68. As I have said in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the Employment Act and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them.”

The learned Judge cited with approval the decision of the Court of Appeal down under in the case of *NEW ZEALAND EDUCATIONAL INSTITUTE vs. BOARD OF TRUSTEES OF AUCKLAND NORMAL INTERMEDIATE SCHOOL* [1994]2 ERNZ 414 CA stated as follows;

“Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justice of the cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.”

With respect, we agree.

We think that in all respects the learned Judge got it all wrong. Where, as here, an employer has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay *in lieu* of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders such as issued in the instant case be given. Much as courts are right to be solicitous of the interests of the employee, they must remain *fora* where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway.

The totality of our consideration of this appeal is that it succeeds. The judgment and decree is set aside and substituted with an order dismissing the memorandum of claim in its entirety. As costs lie in our discretion, we order that each party do bear its own.

Dated and delivered at Nyeri this 7th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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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