IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 184 OF 2015

BETWEEN

MUTHAIGA COUNTRY CLUB……APPELLANT

AND

KUDHEIHA WORKERS……..……..RESPONDENT

(Being an appeal from the Judgment and Award of the Employment and Labour Relations Court of Kenya at Nairobi (Linet Ndolo, J.), dated 9th July, 2014

in

ELR Cause No.1270 of 2010

****

JUDGMENT OF THE COURT

[1] The appeal before us arises from a claim that was lodged in the Employment and Labour Relations Court at Nairobi by Kudheiha Workers, a Trade Union registered under the Labour Relations Act ("the Union"). The claim was lodged against Muthaiga Country Club that is a members' Club offering sports, catering and room accommodation to members of the club, ("the Club").

[2] According to the statement of claim filed in the Employment and Labour Relations Court on 15th October, 2010, the Union, which had a valid recognition and bargaining agreement with the Club, filed the claim in regard to a dispute involving what it termed "wrongful and unfair mass dismissal" of nineteen employees of the Club who were members of the Union. The 19 employees (grievants) were all summarily dismissed by the Club. The union contended that the dismissal was unlawful and unfair as none of the grievants were involved in a strike/sit-in at the Club on 5th December, 2009, as alleged by the Club. The Union therefore prayed for reinstatement of all the 19 grievants or alternatively to have their summary dismissal reduced to normal termination with 12 months' salary compensation.

[3] In its statement of response filed on 1st November, 2010, the Club maintained that the 19 grievants participated in an illegal strike which disrupted the Club's operations; that the conduct of the grievants amounted to absenting themselves from their appointed place of work and failing to obey a lawful command; that this was gross misconduct under **Section 44(4)** of the Employment Act 2007; and that the 19 employees were justifiably, lawfully and properly dismissed after the Club conducted investigations and heard each of the employees. The Club further contended that the memorandum of claim was fatally

defective. For these reasons, the Club urged the Court to dismiss the claims.

[4] Following the hearing of the evidence in support of the Union's claim, the defence of the respondent, and the contending submissions of the respective parties, the trial judge (Ndolo, J.), dismissed the claim in regard to two of the grievants, Anthony Koyaa and Joseph Mose Nyanchoka. This was because the trial judge found that the claim for unlawful and unfair termination involving the two grievants had not been proven, as the respondent had valid reasons for terminating their employment, and the grievants were given a fair hearing before the dismissal.

[5] In regard to the remaining 17 grievants, the trial judge made a finding that the respondent did not have a valid reason to justify their summary dismissal and the respondent was therefore liable for unfair termination of their employment. The trial judge therefore gave an award in favour of the Union and the 17 grievants and ordered the Club to pay each of the 17 grievants salary in lieu of notice in accordance with the collective bargaining agreement; and various amounts as compensation for unfair termination.

[6] Being aggrieved, the Club lodged this appeal against the judgment and award of the Employment and Labour Relations Court. In its memorandum of appeal, the Club, that we hereinafter refer to, as the appellant, has raised four grounds as follows:

> (i) The learned judge erred in law in relying on allegations contained in the claimant pleadings and submissions which had no probative value as no evidence was called or produced in support thereof by the claimants.
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> (ii) The learned judge applied a higher standard of proof than balance of probabilities in determining the respondent's defence.
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> (iii) The learned judge having found that indeed there was a strike and the respondent followed due procedure in terminating the 1st to 17th claimants (sic) erred in law in awarding damages for unlawful termination plus paid notice.
>
> (iv) The learned judge in finding that there was no valid reason for dismissal of the 1st to 17 claimants (sic) is so much against the weight of the evidence on record as to amount to misdirection in law.

[7] Hearing of the appeal proceeded by way of written submissions that were duly filed by the parties, and highlighted in Court. Njuguna & Partners Advocates represented the appellant in the appeal, while Nyabena Nyakundi & Company Advocates represented the Union and the grievants (hereinafter referred to as respondent).

[8] It was submitted on behalf of the appellant that the trial court relied on the respondent's pleadings and submissions that were not supported by any evidence; that the court drew a wrong inference from the memorandum of claim in finding that the grievants had given detailed account of their activities on the material day; and this led to a wrong conclusion that the appellant had failed to establish a valid reason for the dismissal of the grievants. It was argued that the respondent's mere assertions had no probative value as they were not supported by any evidence; and that the learned judge erred by applying the wrong standard of proof in weighing the evidence for the appellant against the respondent's mere assertions.

[9] Referring to **Section 47(5)** of the Employment Act, No 11 of 2007 (herein referred to as "the Act"), it was submitted that the law places the burden of proving unfair termination on the employee, and the burden of justifying the grounds of termination on the employer; that the grievants were dismissed for acts that amounted to gross misconduct, that justified summary dismissal under **Section 44** of the Act; that the appellant complied with the provisions of the Act that required an employer to explain the reasons for termination to the employee and accord the employee an opportunity to be heard in the presence of a representative; and that the Act does not require notice to be given where an employee is summarily terminated on grounds of gross misconduct.

[10] Further, it was asserted that the appellant discharged the burden under **Section 47(5)** of the Act by justifying the reason for the greivants' termination of employment as failure to obey a lawful order to resume work; that fair procedure was followed and the grievants given an opportunity to be heard; and that the claimants did not call any evidence to controvert the fact that an alleged strike took place, nor did they demonstrate that they did not participate in the strike. The Court was therefore urged to allow the appeal, set aside the awards of the trial judge in regard to the 17 claimants, and substitute therefor an order dismissing the claim.

[11] For the respondents, it was submitted that the parties were bound by their pleadings and no extrinsic deviation from the pleadings should be entertained; that the learned judge came to the correct conclusion that no valid reason existed for the dismissal of the grievants; that the grievants adduced evidence that confirmed that they were each at their respective places of work on the material day; and that evidence on oath was adduced by one of the grievants in support of the respondent's contention, and that this was in accordance with **Rule 9** of the Employment and Labour Relations Court (Procedure) Rules 2010.

[12] In addition, it was submitted that the appellant's evidence alleging that the grievants refused to work was contradictory and based on hearsay as the appellant's main witness contradicted his evidence in chief when he stated in cross-examination that it was in fact his managers who identified the 17 claimants who were on strike.

[13] Referring to **Section 47** of the Act that requires the employer to justify the grounds of termination, **Section 43** of the Act under which the employer has to prove the reasons for termination, **Section 45(2) (a)** & **(b)** of the Act that requires an employer to prove that the reasons for termination were valid and fair reasons, and **Section 41(2) of** the Act that obligates the employer to hear and consider any representations an employee may wish to make where summary dismissal is envisaged for fundamental breach of contractual obligation or gross misconduct; the respondent submitted that the appellant did not discharge its obligations under the Act.

[14] The respondents maintained that there was no strike on the alleged day, and that there were no reasons or misconduct to justify the greivants' dismissal. It was argued that in awarding damages, the trial judge was properly guided by **Section 50** and **49** of the Act, under which awards for damages for unfair termination is provided.

[15] Finally, the respondent dismissed the appellant's contention that the decision of the learned judge was against the weight of evidence, maintaining that the decision was consistent with **Section 43** of the Employment Act that required an employer to prove the reason or reasons for the termination of employment. The Court was therefore urged to dismiss the appeal and uphold the judgment of the Employment and Labour Relations Court.

[16] We have considered this appeal, the submissions made by parties and the authorities cited. Under the **Statute Law (Misc.) Amendments Act No.18 of 2014,** an appeal to this Court from the Employment and Labour Relations Court, lies on matters of fact and law. From the memorandum of appeal, it is evident that the appeal is properly before us as it raises both issues of fact and law. Secondly, in determining the appeal, this Court has an obligation to consider and re-evaluate the evidence and arrive at its own conclusion, giving allowance to the fact that it has not had the benefit of seeing and assessing the demeanor of the witnesses. (***Selle v Associated Motor Boat Company** [1968] EA 123*).

[17] From the statement of claim and the response thereto, it was not disputed that the 19 grievants were summarily dismissed by the appellant. The grievants' claim was one for wrongful and unfair termination. The learned judge's finding upholding the dismissal of two of the grievants is not an issue in this appeal as there is no appeal or cross-appeal against that finding. The issues that arise in this appeal, are whether the respondent discharged its burden of proof in establishing that unfair termination of employment had occurred in regard to the 17 grievants, and if so, whether the appellant discharged the burden of justifying the grounds for termination of the employment, and finally whether the learned judge properly evaluated the evidence and arrived at the correct conclusion regarding the wrongful and unfair termination of the employment of the 17 grievants.

[18] The relevant law that deals with unfair termination is the Employment Act. In regard to the burden of proof, the following provisions from that Act are pertinent:

> ***"43. Proof of reason for termination***
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> > ***(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.***
> >
> > **…….**
>
> ***47. Complaint of summary dismissal and unfair termination***
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> > ***(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of the employment or wrongful dismissal shall rest on the employer."***

[19] In their statement of claim, the respondent annexed letters that were written to the 17 grievants suspending them from employment; letters inviting them to appear before the appellant's personnel officer to show cause why they should not be summarily dismissed; and letters dismissing the grievants summarily. The grievants also adduced evidence through Joseph Josiah Opunga (Opunga), who was the 12th grievant. Opunga testified that the 17 grievants were suspended from employment on 9th December, 2009, and that they were later summarily dismissed. Opunga maintained that there was no strike or sit-in on 5th December, 2009, as alleged by the appellant. Save for the strike, the evidence of Opunga was consistent with the evidence adduced by the appellant through their Chief Officer, Stewart Donald Granville Vetch, who confirmed having issued letters of suspension to the 17 grievants; forming a panel to investigate the alleged strike; and subsequently issuing the grievants with letters of summary dismissal.

[20] From the letters and the evidence that was adduced before the trial court, the reasons upon which the 17 grievants' employment was terminated was given as: participation in an illegal strike/sit-in on 5th December, 2009; insubordinate conduct by failing to obey a lawful command from senior managers to return to work; absence from the place appointed for performance of duty without lawful cause; and inciting other staff to join an illegal strike.

[21] As noted above, the fact that the grievants' employment was terminated through summary dismissal was not denied. The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under **Section 47(5)** of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play **Section 43(1)** and **47(5)** of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment.

[22] Under **Section 43(2)** of the Act,

> ***"43(2) 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."***

[23] The evidence before the trial court discloses that although the grievants were accused of participating in an illegal strike/sit-in, this was denied by the grievants. The appellant's witness, the Chief Executive Officer, who ought to have shed light on this, conceded that he was only called from his house and informed that there was a problem with the staff. He found the staff sitting down. He addressed the staff, who were courteous and listened to him. The staff explained their problem that they were aggrieved by the dismissal of two staff members, and were unhappy with the Deputy Chief Executive Officer. The Chief Executive Officer addressed the staff and told them to go back to work. He testified of a waiter who refused to work but did not identify that waiter. Under cross-examination, the witness explained that the

employees were about 220 and that it is the "managers" who identified the 17 grievants as having refused to go to work. The witness did not identify these managers nor was any of them called to testify.

[24] Under **Section 44(3)** of the Act, an employer can summarily dismiss an employee:

> ***"When the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service."***

[25] The evidence of the appellant disclosed that there was some confrontation between employees of the appellant and the Deputy Chief Executive. However, the identity of the employees who were actively involved in the confrontation was not established. In addition, although the letters of dismissal gave clear reasons why the grievants were summarily dismissed from employment, the evidence adduced was not sufficient to prove that there was a strike or sit in on 5th December 2009 as alleged; nor was evidence adduced that any of the 17 grievants incited other staff to join an illegal strike, or absented themselves from the places appointed for the performance of their work as alleged in their letters of summary dismissal.

[26] We come to the conclusion that there was no evidence that could lead to a conclusion that each of the grievants had by their conduct fundamentally breached their obligations under their contract of service. Thus the finding of the trial judge that the appellant failed to establish a valid reason for dismissal of the 17 grievants cannot be faulted, as the appellant did not discharge the burden of proving the reasons that justified the termination of the grievants' employment. The termination of the grievants' employment was not only unlawful because there was no notice given, but also unfair as provided under **Section 45** of the Act because there was no valid reason.

[27] Consequently, we find no substance in this appeal. We uphold the judgment of the trial court and dismiss the appeal in its entirety. We award costs of the appeal to the respondent.

Dated and delivered at Nairobi this 29th day of September, 2017

H. M. OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR