



IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: VISRAM, KARANJA & KOOME, JJ.A)
CIVIL APPEAL NO. 97 OF 2016
BETWEEN
REUBEN IKATWA & SEVETEEN OTHERS.....APPELLANTS
AND
THE COMMANDING OFFICER
BRITISH ARMY TRAINING UNIT KENYA.....1ST RESPONDENT
BRITISH ARMY TRAINING UNIT KENYA.....2ND RESPONDENT
(An appeal from the judgment of the Employment and Labour Relations
Court at Nairobi (Makau, J.) dated 2nd November, 2015

in

E.L.R.C No. 866 of 2013)

JUDGMENT OF THE COURT

1. The appellants were employed on divers dates as Locally Engaged Civilians (LECs) by the 2nd respondent. They were engaged as drivers and mechanics under indefinite contracts which were regulated by the 2nd respondent's standing orders, the locally engaged civilian regulations (the regulations) and the Kenyan law. On aggregate, the appellants had served for a period ranging between 3 years and 15 years prior to their dismissal.
2. It appears that the LECs had issues with the 2nd respondent's Chief of Staff, one Major Strudwick, who they complained was high handed. Through their union, the Works Council, and the LECs on 10th May, 2012 petitioned for the removal of Major Strudwick from office. The 1st respondent vide a response dated 24th October, 2012 indicated that the claims against the said officer were unsubstantiated and dismissed the petition.
3. According to the appellants, that was the beginning of their woes. By a letter dated 12th February, 2013

Major Strudwick informed 46 LECs who included the appellants, that a financial audit had revealed that they had submitted fraudulent claims for subsistence allowance. In particular, they had presented forged receipts from Upways Hotel. He called upon them to attend an investigatory hearing on diverse dates. The letter in question read in part as follows:-

“Following a recent financial audit, a number of irregularities have been identified pertaining to LEC claims....

Having audited this and other claims, there is evidence suggesting you may knowingly have submitted a fraudulent claim. This may easily be explained and it is therefore essential this matter is further investigated.

You are therefore required to attend the above meeting in order to explain your actions pertaining to the submission of the above mentioned claim. This is not a disciplinary hearing however; you may wish to be represented by a member of the Works Council or a colleague of your choice.

Should this matter not be resolved in a satisfactory manner at the investigatory hearing, disciplinary action may be instigated.”

4. The appellants were perturbed by the foregoing and refused to attend the investigatory hearing. They communicated as much to the 2nd respondent by a letter dated 18th February, 2013 written on their behalf by the Works Council. Subsequently, the 2nd respondent through its Civil Labour Officer advised the appellants’ that failure to attend such a hearing would amount to gross misconduct.

5. Be that as it may, tension amongst the LECs and the 2nd respondent’s management continued to escalate culminating in a walk out by the LECs on 26th February, 2013. They registered their grievances with the Laikipia County labour officer who summoned the 2nd respondent’s officers. Apparently, following lengthy discussions with the Labour Officer a return to work agreement was executed by the Works Council and the 2nd respondent’s officers.

6. Thereafter, on 7th March 2013 and 8th March, 2013 the 46 LECs were served with notices of disciplinary hearings and the charges against them. They were all charged with submitting false claims for subsistence allowance and failing to attend the investigatory hearing contrary to management instructions. Reuben Ikatwa and Mr. Isaac Mugi being the chariman and member respectively of the Works Council faced additional charges of inciting LECs to disregard management instructions relating to compulsory attendance of the investigatory hearings and inciting industrial action.

7. Upon the conclusion of the disciplinary hearings, the appellants were summarily dismissed for gross misconduct vide letters dated 20th March, 2013. The 2nd respondent also took the position that by virtue of summary dismissal the appellants had forfeited their gratuity. The appellants lodged an appeal against their dismissal with the 2nd respondent which was rejected.

8. Unrelenting, the appellants filed suit in the Employment and Labour Relations Court (E.L.R.C) claiming that their services had been wrongfully terminated. They averred that the respondents had not followed the proper procedure in terminating their services and there were no valid reason(s) for their termination. They sought *inter alia*;

- ***A declaration that the summary dismissal of the claimants (the appellants) was both unlawful and wrongful.***
- ***Accrued benefits and underpayments for the claimants who were made to serve unwarranted periods as casuals.***
- ***One month salary in lieu of notice.***
- ***Accrued gratuity.***

- ***Compensation for unlawful/wrongful dismissal for twelve months.***
- ***Lost earnings from the date of dismissal to the date of the award.***
- ***Exemplary and punitive damages for wrongful dismissal and tarnishing of the claimants names.***

9. In their defence, the respondents maintained that they had followed the proper procedure in terminating the appellants' services. There was evidence that the appellants had submitted fraudulent claims. In addition, the walkout on 26th February, 2013 was not only illegal but was also aimed at frustrating the scheduled investigatory hearings. None of the appellants attended the investigatory hearings. As such, according to the respondents the appellants were guilty of gross misconduct warranting summary dismissal. The respondents also counter-claimed for the amounts of money the appellants had allegedly received in respect of claims that they believed were made fraudulently.

10. The trial court in its judgment dated 2nd November, 2015 partly allowed the appellants' claim and dismissed the counter-claim. In doing so, the learned Judge (Makau, J.) held that in as much as Major Strudwick participated in the disciplinary hearing, the appellants were accorded a modicum of a fair trial within the terms of **Section 41** of the **Employment Act**. There was a proper basis for the appellants termination, *to wit*, they had failed to account for expenditure received. The walkout by the LECs was illegal. He also found that there was no basis for the respondents to withhold the gratuity which was due to the appellants.

11. It is that decision that has provoked the appeal before us which is predicated on the grounds that the learned Judge erred in law and fact by-

- a. Failing to find that there was no procedure for investigatory hearing in the 2nd respondent's standing orders and regulations.***
- b. Failing to hold that the failure to attend an investigatory hearing could not constitute an offence of gross misconduct.***
- c. Failing to make a finding on whether the appellants were summarily dismissed for producing false receipts or for failure to attend investigatory hearing or both.***
- d. Failing to appreciate that despite 46LECs facing the similar charges the respondents selectively dismissed the appellants and exonerated others.***
- e. Failing to find that the respondents made unilateral amendments to the subsistence allowance form to include the introduction of receipts without the authority or mandate of the Local Pay Review Board.***
- f. Failing to make a finding that as per the final police report, it was the hotel's staff that were suspected of fraud and not the appellants.***
- g. Failing to take into consideration the advice of the Lakipia County Labour Officer that subsistence allowance did not require production of receipts.***
- h. Finding that the appellants out of the 270 LECs had participated in an alleged unlawful walk out or unprotected strike whereas there was a return to work agreement where it was agreed there would be no victimization of the LECs.***
- i. Failing to find that the respondent had selectively charged the officials of the Works Council with additional charges.***
- j. Finding that the appellants had been accorded a modicum of a fair trial despite holding that Major Strudwick ought not to have participated in the hearing.***

12. The appeal was disposed of by written submissions as well as oral highlights. Mr. Kubai appeared for the appellants while Mr. Makori appeared for the respondents.

13. It was the appellants' submissions that in line with the 2nd respondent's standing orders, LECs were entitled to subsistence allowance every time they undertook overnight duties outside their stations. The claim form for subsistence allowance for LECs before July, 2012 was standardized. All that was required was authorization and confirmation of overnight duties from respective supervisors. The respondents amended the claim forms without the authorization of the Pay Review Board contrary to the regulations. In any event, the learned Judge ignored the advice of the Lakipia County Labour Officer, Mr. Bedan Maota. According to him, subsistence allowances were not accountable since they were initiated by the employers as opposed to impost initiated by the employee.

14. Moreover, the learned Judge ignored the findings of the police investigation absolving the appellants from the fraudulent claims. In Mr. Kubai's view, once the process of investigation by the police kicked off, the respondents ought not to have conducted a parallel disciplinary hearing and should have waited for the conclusion of the criminal proceedings. In the end, there was no basis for finding that the appellants were guilty for submitting fraudulent subsistence receipts.

15. Mr. Kubai urged that the process which followed was flawed. Elaborating further, he contended that contrary to the regulations, the record of the disciplinary hearing was not availed to the appellants for verification. Instead, the appellants were verbally informed of their dismissals on the very same day of the disciplinary hearing. Similarly, their respective appeals were rejected summarily contrary to the regulations.

16. The appellants took issue with what they termed as selective punishment meted out to the 46 LECs who allegedly submitted fraudulent claims. Out of the 46 LECs, 16 were summarily dismissed, 23 dismissed with notice and 7 were awarded final warnings. Following the appeal process, 17 of the 23 dismissed with notice were reinstated with final warnings while the appellants' appeals were dismissed. As far as they were concerned, the selective treatment imputed discrimination against the appellants contrary to **Article 27(1)** of the **Constitution** and **Section 5** of the **Employment Act**.

17. The learned Judge was also faulted for holding that the walk out was illegal in total disregard to the return to work agreement executed by the parties. Besides, the appellants were exercising their rights to assemble, demonstrate, picket and petition under **Article 37** of the **Constitution**. Mr. Kubai urged us to allow the appeal on those grounds.

18. On the respondents' part, they maintained that the learned Judge correctly found that there was a valid reason for termination of the appellants namely, they failed to account for the subsistence allowance they had claimed. Furthermore, the learned Judge found that the walkout was illegal and warranted disciplinary action. Expounding on the same, Mr. Makori contended that the charges against the appellants constituted gross misconduct as stipulated in the 2nd respondent's standing orders and the regulations.

19. While admitting that different disciplinary actions were taken against the 46 LECs, Mr. Makori submitted that each case was considered on its own merit. Appellants were dismissed once the respondents were satisfied that there was gross misconduct.

20. It was argued that the respondents were never bound by the police investigations since the pertinent question in the disciplinary hearing was whether there was sufficient reason to believe that the appellants had knowingly submitted false receipt. Nevertheless, criminal process and the 2nd respondent's disciplinary process were independent of each other. Buttressing that line of argument, this Court's decision in **Geoffrey Kiragu Njogu vs. Public Service Commission & 2 Others [2015] eKLR** was cited.

21. It was contended that even if the claim form for subsistence allowance did not initially have the requirement to attach receipts, Clause 63 of the 2nd respondent's standing order always provided that-

“An LEC is entitled to expense whilst on detached duty.

Receipts must be submitted with all claims.”

Thus, the appellants’ contention that the introduction of receipts was unilateral was unfounded. Besides, the appellants did not object to the introduction of receipts in the claim form. Mr. Makori added that the amendment of requiring attachment of receipts did not require the approval of the Pay Review Team. This was because firstly, the requirement arose from the 2nd respondent’s standing order and not the regulations which could only be reviewed with the approval of the Pay Review Team. Secondly, subsistence allowance was not a regular allowance envisaged under **Section 10(5)** of the **Employment Act** hence there was no requirement for the respondent to consult the LECs. All in all an employer has authority to determine how to run its operations which would otherwise grind to a halt if an employee had to concur with change introduced by an employer.

22. It was submitted that the right to strike as guaranteed under **Article 41(2)** of the **Constitution** was subject to limitation under **Article 24(5)(d)** of the **Constitution**. The legislation contemplated under **Article 24(5)(d)** is the **Labour Relations Act** which provides at **Section 76** – **“A person may participate in a strike or lock-out if—**

a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;

b) the trade dispute is unresolved after conciliation—

i. under this Act;

ii. or as specified in a registered collective agreement that provides for the private conciliation of disputes; and

c. seven days written notice of the strike or lock-out has been given to the other parties and to the Minister by the authorised representative of—

i. the trade union, in the case of a strike;

ii. the employer, group of employers of employers’ organisation, in the case of a lock-out.”
Emphasis added.

It was not in dispute that the appellants had not issued a written notice of the walk out pursuant to **Section 76(c)** of the **Labour Relations Act**. It followed therefore that the walk out in question not protected.

23. Maintaining that the disciplinary hearings were fairly conducted, the respondents urged that the same was conducted before-

a. A Lt. Col Jordan, Royal Military Police who was deployed as the deciding officer. He was independent and had no affiliation to the 2nd respondent’s chain of command. He was the one who presided over the hearings.

b. A BATUK military clerk who recorded the proceedings.

c. Major Strudwick who was the presenting officer as he had identified the alleged fraud.

24. Mr. Makori argued that contrary to the appellants’ allegations, the proceedings of the hearing were availed to them for verification but they refused to verify the same. Consequently, the appellants’ appeal lacked merit.

25. We have considered the record, submissions by counsel and the law. This being a first appeal we are

cognizant of our primary role to reassess and re-evaluate the evidence tendered before the trial court and reach our own conclusions bearing in mind we neither saw nor heard the witnesses. This much was restated by this Court in *Musera –vs- Mwechelesi & Another (2007) KLR 159* ;

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge’s findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”

26. In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See **Section 47(5)** of the **Employment Act**. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR**.

27. Due process is a fundamental aspect of the rule of law. The right to a fair hearing is encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is secured under **Section 41** of the **Employment Act** which stipulates: -

“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.”

28. Like the learned Judge (Makau, J.), we find that the respondents followed the proper procedure right from the point of notifying the appellants of the charges against them up to the disciplinary hearings. Equally, we find that the respondent followed the proper procedure in the appeals. With regard to the attendance of Major Strudwick in the disciplinary hearing, unlike the learned Judge, we find that the same did not vitiate a fair hearing. This is because he appeared in his capacity as the presenting officer, that is, as the officer who had charged the appellants. In no way did he make a determination on the disciplinary hearing. As evidenced by the disciplinary proceedings determinations were made by the deciding officer, one Lt. Col Jordan from the Royal Military Police who in our view was independent and impartial.

29. The charges against the appellants were for failure to attend investigatory hearings and submission of fraudulent claims. There were additional charges against two of the appellants which will be discussed later on in this judgment.

30. It is not in dispute that the appellants were summoned by the 2nd respondent to attend what was termed as investigatory hearings and they refused to do so. As per regulation 903 of the regulations, the 2nd respondent is empowered to conduct inquiries into disciplinary matters or to take statements or evidence as part of the investigations. As such, the investigatory hearings were part and parcel of the investigations sought to be carried out by the 2nd respondent. Failure by the appellants to attend such hearings as rightly observed by the learned Judge amounted to non-compliance with lawful order/instructions by the employer. This went to the root of the contract of employment.

31. On the issue of fraudulent claims, it is our view that whether or not the requirement of attachment of receipts to the claim form was unilaterally introduced by the 2nd respondent is neither here nor there. It is instructive to note that none of the appellants alleged that they had failed to produce receipts in support of their subsistence claims on account that they were unaware of the requirement. In fact all the appellants seemed to have produced receipts in support of their claims. Of relevance was whether the appellants had knowingly produced fake receipts hence making fraudulent subsistence claims.

32. It is not disputed that receipts in question were alleged to have been issued by Upways Hotel. It was the uncontroverted evidence of Mr. John Njoroge, a Director of Upways Hotel that the said receipts were not genuine. The fact that the police investigations with respect to the fraudulent receipts were ongoing did not bar the commencement and conclusion of the disciplinary hearings. Likewise, the findings by the police investigation that fraud could not be proved against the appellants and was attributable to the hotel's staff only did not affect the concluded disciplinary hearings. This is simply because there is a distinction between the internal disciplinary proceedings of an employer and criminal proceedings. Internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.

33. This Court in *Kibe vs. Attorney General - Civil Appeal No 164 of 2000 (ur)* held that an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The E.L.R.C in *David O. Owino vs. Kenya Institute Of Special Education[2013] eKLR* in discussing the above mentioned case aptly stated,

“The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”

Those sentiments were adopted by this Court in *Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR*.

34. While we agree with the learned Judge that the walkout was illegal due to lack of the requisite notice, there was no evidence on record singling out the two appellants namely, Reuben Ikatwa and Mr. Isaac Mugi as the instigators of the same. We also find there was no evidence which demonstrated that the said appellants had incited the rest not to attend the investigatory hearings.

35. Based on the foregoing, we find that the 2nd respondent had valid reasons to summarily dismiss the appellants on the grounds of failing to attend the investigatory hearing and submitting false claims all of which amounted to gross misconduct under the regulations.

36. Last but not least, on the issue of selective disciplinary action taken against the LECs, we are guided by *CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR* wherein this Court quoted with approval *Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642* which provides:-

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

In our view, there is nothing to suggest that the respondents acted discriminatorily or unreasonably in issuing the disciplinary action against the appellants.

37. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed with costs.

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

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR