IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO, & MURGOR, JJ.A)

CIVIL APPEAL NO. 85 OF 2013

BETWEEN

KENYATTA UNIVERSITY ……..……...1ST APPELLANT

KENYATTA UNIVERSITY COUNCIL……..2ND APPELLANT

VERSUS

FRED OBARE……...…….RESPONDENT

(Appeal from a Judgment of the Industrial Court at Nairobi (Makau J), dated 14th December, 2012

in

Cause No. 240 of 2009)

****

JUDGMENT OF THE COURT

From our reading of the Employment Act, 2007, there cannot be any doubt that the law imposes expressly in employment contracts the need for mutual trust and confidence in such a relationship. This means that employers and employees must not conduct themselves in a way that is likely to undermine, damage or destroy the employment relationship and the trust and confidence between the parties to that relationship.

This appeal brings out the reaction by one party to allegations that the other party has violated the trust and confidence. The respondent was employed by the 2nd appellant, a body within the 1st appellant, as a Senior Records Officer in the Catering and Accommodation Services Department. It was alleged that while in the course of that employment, the respondent was permitted to use his private car for official business, whereupon he filed fictitious mileage claims by forging the signature of the Head of Department in order to give credibility to the claims. On 21st January, 2009, the respondent was suspended on those allegations.

Following the suspension, the respondent was put on half salary and medical cover restricted to health services provided at the 1st appellant's health unit. The respondent was then invited to appear before the disciplinary board on 27th February 2009, but declined to attend and instead instructed an advocate who explained that he would not attend the hearing because, as far as he was concerned, the board was

improperly constituted. The 2nd appellant treated this conduct as insubordination and proceeded to cancel the respondent's half salary and medical entitlements on 3rd March 2009 until the respondent was found to be innocent. The letter that conveyed this decision ended with the words, **"The University will get back to you in due course".**

Aggrieved by this decision, the respondent moved the Employment and Labour Relations Court for the following reliefs:

> **i. Declaration that the suspension and subsequent stoppage of monthly half salary and medical cover entitlements while on suspension was wrongful and unlawful.**
>
> **ii. Reinstatement of the Respondent's monthly half salary and the arrears of 5 months of Kshs. 118,250 and reinstatement of his medical cover.**
>
> **iii. Damages for wrongful suspension, pain and injury".**

He denied knowledge of the reasons for his suspension and confirmed that he was never charged for fraud; that the payment vouchers, the basis of the disciplinary action were made in accordance with his job group, properly filed and certified by the Head of Department (HOD). He denied forging any signature of any of his superiors. He faulted the appellants for requiring him to appear before the Junior Board of Discipline which had no jurisdiction over him due to his rank instead of the Senior Board of Discipline.

On behalf of the appellants, **Joel Ole Leshao** (RW1), a Senior Registrar in charge of personnel, maintained that the respondent was procedurally suspended and and granted half pay, which was later withheld after he failed to attend a disciplinary hearing. He clarified that the suspension letters in question erroneously made reference to **Section 6.3** as opposed to **Section 5.3** of Terms of Service for Senior Clerical, Catering, Administrative and Technical Staff as the provision under which the respondent suspended. He also stated that the aforesaid letters further erroneously indicated that the hearing would be before the Junior Disciplinary Board instead of the Senior Disciplinary Board. He informed the court that the disciplinary hearing was scheduled for 27th March 2009, which was within the 3 months provided for under the 1st appellant's regulations. He however insisted that the 2nd appellant was still ready and willing to hear the respondent by the time the suit was instituted.

The learned Judge considered the pleadings and the foregoing summarised evidence presented before him and framed the following two issues for determination:

> (i) Whether the suspension of the respondent from employment by the appellants and the subsequent stoppage of salary and medical cover was unlawful and unfair.
>
> (ii) Whether the respondent was entitled to reinstatement of his salary and full medical benefits.

In determining the first issue, the learned Judge considered the provisions of the Collective Bargaining Agreement (CBA) and the appellants' Procedures and Policies on Administration. He found that clause 5.2 (a) of the CBA entitled the appellantto suspend the respondent pending investigations into allegations of misconduct. While the learned Judge was of the view that it was improper for the respondent to reject the invitation to defend himself before his employer in an internal forum and that it was premature for him to allege bias against the disciplinary forum, by a strange turn the learned Judge came to this conclusion;

> **"In my view, he should have attended and raised the issue there. Failure to do that opened a way for the employer to deem that the claimant had no good defence to offer or to make any other conclusion at his peril. Luckily for him, his employer only made an illegal decision extending the suspension indefinitely and stopping any further payment of salary to the claimant. By such an error, the hunter became the hunted……..The question in my mind is,**

why would an employer refuse to dismiss an employee on grounds of misconduct and retain him in his establishment without pay. I find it an act of recklessness for an employer to say that it will hear the employee's disciplinary when an employee is willing to be heard. Consequently, I declare the indefinite suspension of the claimant without pay and medical cover unfair, wrongful and unlawful. In addition, I hereby lift the said suspension and direct the claimant to report to his work station within 7 days of this judgement for deployment."

The learned Judge further opined that the appellant was at liberty to constitute a board and conduct a fresh disciplinary hearing against the respondent after his reinstatement and deployment.

After granting the prayer for the reinstatement the learned Judge ordered the payment of respondent's full salary in arrears from 22nd January, 2009 to the date of the judgment (48 months) at the rate of Kshs. 48,255 per month, amounting to Kshs. 2,316,240. He also reinstated the respondent's full medical benefits but dismissed the prayer for damages for wrongful suspension, pain and injury.

The appellant now brings this appeal to challenge that decision on 6 grounds, which, in the written submissions, were condensed into two broad clusters. First, it was argued that the learned Judge erred in holding that the appellant was reckless in failing to proceed to conduct a disciplinary hearing in the respondent's absence instead of imposing an indefinite suspension and secondly, that the learned Judge exceeded his jurisdiction in granting an order of reinstatement of the respondent to his employment without invitation to do so in the suit and in awarding the respondent full salary from January 2009 to the date of judgment when the respondent had only prayed for the reinstatement of his half salary.

In his submissions on these two grounds on behalf of the appellant, **Mr. Imende** urged us to allow the appeal and set aside the decision of the learned Judge taking into consideration the respondent's conduct of refusing to attend the disciplinary hearing; that the decision of the 2nd appellant did not amount to indefinite suspension because in that decision, it was stated that the respondent would be informed when to appear for disciplinary hearing; and that the invitation to the disciplinary hearing took place within 36 days from the date of the respondent's suspension hence the requirement for the conclusion of disciplinary cases within 3 months of the suspension was not violated.

Relying on the cases of **Suraya Holdings Limited V Icici Bank Limited**, HCCC No. 85 of 2015 and **Alguhussein Establishment V Eton College** [1988] 1 WLR 587 for the proposition that, no party ought to be allowed to benefit from his own wrong doing, learned counsel faulted the learned Judge for blaming the appellants even after finding that it was the respondent who had committed a misconduct which would have entitled the appellants to summarily dismiss him.

On the second issue, counsel submitted that the learned Judge overlooked the reliefs the respondent sought from him. For instance it was contended that the award of full salary between January 2009 and March 2009 was in error and without a basis. The consequence of this award was that the respondent would earn 150% of his salary for that period because the learned Judge failed to take into account the half salary the respondent received during the period of suspension.

Mr. Mandala, learned counsel for the respondent, for his part argued that the learned Judge having found the suspension to have been unlawful for being indefinite, could not be faulted for the awards he made in favour of the respondent. He maintained that the appellants were not justified in stopping the respondent's half salary; that the indefinite suspension of the respondent was contrary to the CBA; and that nothing stopped the appellants from conducting disciplinary proceedings against the respondent. While conceding that the 1st appellant was ordered to reinstate the respondent when there was no prayer for reinstatement, counsel nonetheless argued that the infraction was not fatal relying on the case of **Kenya Commercial Bank V Mukiri Ndegwa & Another**, Civil Appeal No.132 of 2008 and the provisions of **section 49** of the Employment Act on the remedies for wrongful dismissal and unfair termination. He submitted that the court had the power to order for reinstatement of an employee or re-engagement of an employee whose employment has been wrongfully terminated. On the aforementioned grounds, he urged us to dismiss the appeal and uphold the decision of the Industrial Court.

By way of a retrial, being a first appeal, we re-evaluate the evidence presented before the trial court in order to come to our own independent conclusion as guided by **Selle v Associated Motor Boat Co.** [1968] EA 123.

It is not in doubt that the disciplinary process had just commenced when the respondent instituted a suit against the appellants. At that time, he had been aggrieved by the latter's decision to suspend him, to stop the other half of his salary and to limit his access of medical facilities to the 1st appellant's clinic. He made three specific prayers, a declaration that his suspension and subsequent stoppage of monthly half salary and medical cover entitlements during his suspension was unlawful, reinstatement of his monthly half salary and the arrears of 5 months of Kshs.118, 250, the reinstatement of his medical cover and finally, damages for wrongful suspension, pain and injury.

The initial allegations on which the respondent was required to respond related to some fraudulent claims. He was forthwith suspended and put on half salary. His medical benefits were restricted to those services provided at the 1st appellant's health unit. In accordance with the law the respondent was invited to appear before the disciplinary board on 27th February 2009, but he declined to attend. This led to the decision to stop the other half of his salary.

The Employment Act, the CBA and the appellants' Administration Division Procedures and Policies emphasize the need to hear an employee before any disciplinary action is taken against the employee. For example **section 41** of the Act stipulates that;

> **"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".**

Clause 5 of the CBA similarly provides that in a case of misconduct that may warrant a dismissal, an employee is entitled to be heard. Clause 4.15 of the Kenyatta University Administration Division Procedures and Policies provides that any member of staff who has a disciplinary case will normally be suspended from the performance of their duties pending appearance before the Senior or Junior Staff Disciplinary Committee to defend themselves until the final determination of the disciplinary case.

For example the terms of suspension under the Administration Division Procedures and Policies are that;

> **"4.15… Any member of staff involved in cases of theft will be suspended without basic salary. Staff members with disciplinary cases other than theft will be suspended on half salary.**
>
> **Disciplinary cases should be heard and determined within a period of 3 months from the date of suspension...**
>
> **Staff on suspension will be treated only at the University Health Unit."**

Clause 5.2 of the CBA, on the other hand, provides as follows with regard to suspension:

> **"(a) The employer reserves the right to suspend an employee from employment with half salary pending investigation into the alleged misconduct.**

(b) The employer shall inform the employee in question the position of the suspension unless the case is pending in court or being investigated by the police or other statutory authority."

From these provisions we are not in any doubt that the 1st appellant was permitted to suspend the respondent following allegations of fraud against him. The suspension came with the withdrawal of half salary and medical benefits. The case against the respondent was to be heard and determined within a period of 3 months from the date of suspension. The learned Judge was clearly convinced that by his own conduct, the respondent exposed himself to a summary dismissal but turned around to blame the appellants for apparently being lenient with the respondent, and indulging him by extending "*the suspension indefinitely*". He found the indulgence reckless and unheard of for an employer to "*say that it will hear the employee's disciplinary case when an employee is willing to be heard*". These observations amount to misdirection and misapprehension of the matters in contention.

The intervention by the learned Judge was premature. The disciplinary proceedings had only taken 36 days from the date of the respondent's suspension and his invitation by appellant to attend the disciplinary hearing. This was clearly within the 3 months limit under Clause 4.15 of the Policies and Procedures for the determination of the disciplinary proceedings. We are prepared to find that the response and failure to attend, constituted a separate misconduct, hence our agreement with the 1st appellant's decision to withdraw the other half salary.

It was equally in error for the learned Judge to have based his decision on an indefinite suspension when it was clear from the appellants' letter stopping the other half salary that the stoppage was temporary until the respondent cleared himself of the allegations. The appellants also promised to revert to him "*in due course"*.

Section 44 (4) (e) of the Employment Act provides as follows with regard to summary dismissal:

"44.(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct, indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so 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—

…….

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

……..

(g) 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".

The appellants reasonably believed that the respondent had committed a fraud and began a disciplinary process to investigate the misconduct. The respondent was summoned to defend himself against the allegations. In what we ourselves consider a discourteous reply the respondent flatly refused to attend the hearing. None of the transgressions the appellants were accused of was contrary to the law. The learned Judge ought to have left the appellants to conclude the disciplinary process. He could not order the reinstatement of the respondent to his employment when he had not been invited to do so. In any case the

respondent had not been dismissed. The award of full salary from January 2009 to the date of judgement was equally without any basis. All the respondent had prayed for was the reinstatement of his half salary and parties are bound by their pleadings.

In these circumstances, we find considerable merit in this appeal. Accordingly, we allow it, set aside the decision rendered on 20th December, 2012 and order for the dismissal of the respondent's claim in the court below, with the result that the appellants are at liberty to conclude the disciplinary case against the respondent.

We make no orders as to costs.

Dated and delivered at Nairobi this 19th Day of October, 2017.

ASIKE – MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

……..……

JUDGE OF APPEAL

A.K. MURGOR

……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR.