



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B. M. KARIUKI, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 255 OF 2014

BETWEEN

NATIONAL CEREALS AND

PRODUCE BOARD ..... APPELLANT

AND

JOHN KIRUI TORONGEI ..... RESPONDENT

*(An appeal from the Judgment and Decree of the Industrial Court of Kenya at Nakuru*

*(Byram Ongaya, J) dated 21<sup>st</sup> June, 2013*

*in*

*Industrial Cause No. 6 of 2013)*

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**JUDGMENT OF THE COURT**

The respondent, **John Kirui Torongei**, was employed by the appellant, **National Cereal & Produce Board** as a Manager in 1999. It was stated in the Memorandum of Claim that was filed at the then Industrial Court of Kenya at Nairobi (that court is now called “**Employment & Labour Relations Court**”) that the said employment was terminated by the appellant in the year 2010. It was further claimed that the appellant had not paid to the respondent his salary for a period of time when his employment had been suspended and that termination of employment was without compliance with the Employment Act No. 11 of 2007. Various particulars of what was called “**unlawfulness**” were set out including that the appellants did not inform a trade union to which the respondent belonged of its intention to terminate the respondents services; that leave pay was not paid; that one month salary in lieu of notice was not paid; and there was a claim for severance pay. It was also claimed that the respondent was underpaid during his employment contrary to the law. Various claims were made including a claim for 3 months’ pay in lieu of notice; 12 months’ salary as compensation for unfair termination of employment; half month’s salary for the period of suspension and safari allowances for visits to Eldoret from the respondents station at Bungoma.

The appellant delivered a statement of response where the claim was denied. It was stated in the response that the respondent was a Silo Manager until his suspension and that the suspension was as a result of loss of stock amounting to Ksh.2,227,440/-. It was also stated that the respondent was granted ample opportunity to defend himself; that the said lost stocks was due to the respondent’s negligence and dishonesty; that the respondent had blamed his juniors for the loss of stocks; and that termination was after the appellant had complied with terms and conditions of service. In further response it was stated that the respondent was not entitled to salary and allowance during the period of suspension; that the termination of service was with effect from the date of suspension in line with terms of service; and that it was the respondent’s responsibility to pursue his benefits from a pension fund with the appellants trustee; it was finally stated that the respondent had lost stock and that the appellant had deducted the value of the lost stock and a loan taken by the respondent and the net result was that the respondent owed the appellant a balance of Ksh.49,911.43 which the appellant claimed. There was however no counter claim in the form prescribed by the rules.

A hearing took place before Byram Ongaya, J. who in a judgment delivered on 21<sup>st</sup> June, 2013 declared that the termination of the respondent’s employment by the appellant was unfair and for these the learned Judge awarded the respondent a sum of Ksh.1,024,880/-

made up of Ksh.461,950/- for withheld pay;Ksh.85,000/- incurred during travels from Bungoma to Eldoret and Ksh.477,930/ being 6 months' gross salary for unfair termination. The other claims in the Memorandum of Claim were dismissed having been found not to have merit. It is those findings that have provoked this appeal which is premised on the Memorandum of Appeal drawn by Lutta & Company Advocates.Nine grounds are set out where the learned Judge is faulted for finding that termination of the respondent's employment was unfair; that the learned Judge erred in law and fact by failing to find that the respondent had failed in performance of his duties or was negligent in performance of the same which resulted in a stock loss; that the learned Judge erred in ignoring a circular issued by the appellant to all employees by the appellants managing director ; that the learned Judge erred in law and fact in relying on a letter from the police where the respondent was found not criminally liable for the loss of stock belonging to the appellant; that the learned Judge erred in law and fact in not taking into account the facts and reliable documents that supported the termination of the respondent from the employment of the appellant; that learned Judge ignored the submissions of counsel; that the learned Judge erred in finding that the appellant was entitled to be paid dues when the suspension was ongoing; that learned Judge erred in awarding some money in respect of travel and night out by the respondent from Bungoma to Eldoret and finally that the learned Judge erred in law by applying wrong principles to find for the respondent.

This is a first appeal from a judgment of a court with the same status as the High Court and it is this Court's duty as the first appellate court to reappraise the evidence and, in the event, retry the case. This is what Rule 29 of the Court of Appeal Rules mandates us to do. The point on jurisdiction on a first appeal has received many judicial pronouncements in such leading cases as Selle v Motor Boat Company Limited [1968] IEA 123 – we have to give the appellant a retrial and make our own conclusions of fact. We shall therefore revisit the whole record to enable us exercise this mandate as required in law.

The appellant in his testimony before the trial court stated amongst other things that he was employed by the appellant as Assistant Silo Manager and was later promoted to the position of Silo Manager. He served at the appellant Silo in Eldoret but in July 2009 he was transferred to serve as the Silo Manager at Bungoma. Four weeks into his service in Bungoma, he was notified by the appellant that there were irregularities relating to the handling of stock at the Eldoret station where he had worked for 2 years. He was summoned to Eldoret and recorded a statement where he stated *inter alia* that upon leaving Eldoret for Bungoma a stock take was done and there was handing over and that according to him the books balanced; he further stated that upon being resummoned to the Eldoret Depot a second stock take was undertaken and that all stocks balanced. The appellant reported a stock loss to the police and the respondent was summoned to Eldoret Police Station where investigations commenced and he was required to report to that police station every Friday. He reported as required at that police station traveling from Bungoma to Eldoret a good 14 times. The result of the investigations were that the respondent was cleared by the police who found that the Respondent was not part of any fraudulent acts committed on the part of the stock belonging to the appellant. The respondent further stated that he was asked to write an explanation by the appellant but that, after doing so, he was summoned to Nairobi where after a hearing his services were terminated on 15<sup>th</sup> July 2010 for the reason of negligence of duties. He stated that he was paid a sum of Ksh.326,961.77 which sum he thought to be unfair. He also challenged a deduction of Ksh.69,427.50 which according to him was unfair deduction because it was in respect of fertilizer that was lost by a transporter. The respondent further testified that his signature had been forged by a clerk at the depot and the forgery had been confirmed by the police. In cross-examination the respondent stated that he was suspended by the appellant for alleged forgery of documents and that it had been found that he had not interfered with or forged any document. He further stated that as a Manager he was authorized to delegate and allocate duties to other staff working under him.

That was the only witness called in support of the respondent's case.

George Abila, the Assistant Human Resource Manager of the appellant was called for the appellant. He confirmed that the respondent was first suspended and then services terminated because of stock losses during his service at the Eldoret depot. He testified that documents were created to cover the loss of stocks. According to this witness a circular had been issued on 5<sup>th</sup> June, 2009 by the appellant's Managing Director informing Regional Managers and Depot Silo Managers that a stock check was to take place between 29<sup>th</sup> June, 2009 and 3<sup>rd</sup> July, 2009 and that Managers were to be in-charge of that process. It was during that stock check that losses were detected at the Eldoret Station and the respondent as a Manager and his Silo clerk were surcharged each to bear 50% of a loss that was detected through the stock check. The witness further testified that a further loss of 810 bags of fertilizer was uncovered in the stock check and that is why the respondent and 2 others were suspended and finally the respondents' services were terminated. He stated of the three employees including the respondent:

***“They all attended the hearing. From interviews, it was clear from the account (sic). The stock clerk complained that inexperienced clerk had been assigned duties. For the Invoice Dispatch Advice, the claimants signature had been forged. The particulars of negligence (sic). As Silo Manager he neglected to sign the stock sheet which showed weekly and annual position of stocks. He was to sign after the weekly stock take. He delegated duty to the assistant. He had no authority to delegate. The circular is not on record.....”***

In cross-examination this witness confirmed that he had not produced the circular not allowing the respondent to delegate duties to the assistant. He also confirmed that the respondent had not forged any document as was confirmed in a police report but that forgery had been committed by the respondent's clerk who was arrested by police and charged with a criminal offence.

The learned Judge reviewed that evidence and all other material placed before him and made the findings that we have already stated.

This appeal came for hearing before us on 27<sup>th</sup> September, 2017 when learned counsel, P.O. Lutta who combined with Miss S Leitono appeared for the appellant while learned counsel Mr. J. Rugut appeared for the respondent.

In submissions before us learned counsel Mr. Lutta submitted that the respondent had employed the use of inexperienced staff which led to loss of stock. Learned counsel further submitted that the respondent had been accorded an opportunity to appear before a disciplinary Committee which found that he had used inexperienced staff and recommended that his services be terminated. According to Mr. Lutta, the respondent had received and accepted final dues from the appellant and it was surprising that he had decided to file a case. Learned counsel submitted further that it was wrong for the learned Judge to rely on findings of the police in a criminal process as an employer always retains administrative functions over its employees. Learned counsel also challenged the award of what appears to be special damages where according to counsel, there was no proof. Finally learned counsel submitted that the award by the trial court amounted to giving an additional unjustified payment to the respondent when the respondents' final dues had been worked out and paid.

It was then Mr. Rugut's turn. He supported the findings of the trial Judge submitting that it was the appellant who had made a report against the respondent to the police and that the police had cleared the respondent. Learned counsel faulted the appellant's conduct in reporting a loss of stock to the police but coming up with an allegation of poor performance during a disciplinary hearing conducted by the appellant against the respondent. Learned counsel challenged a clause in an employment manual maintained by the appellant where it stated that salary was not payable during suspension. According to learned counsel such a clause would be contrary to law. On delegation of duties it was Mr. Rugut's view that the appellant had not produced any evidence before the trial Judge to show that the respondent had delegated duties to his juniors or that delegation of duties was disallowed.

In a brief response Mr. Lutta submitted that the respondent knew of the allegations facing him when he attended the disciplinary hearing. He submitted that a Human Resource Manual was the contract between the respondent and the appellant and that the same was binding on the parties.

We have considered the record of appeal, the submissions made and the law after evaluating the evidence and all the material on record and this is what we think of this appeal.

There is on record a letter dated 6<sup>th</sup> October, 2009 by the appellant to the respondent. This letter plays a central role in this appeal and it is important to reproduce it in full:

***“NATIONAL CEREALS AND PRODUCE BOARD***

***Telephone:536028/555288P. O. Box 30586***

***Fax:557622/650710NAIROBI***

***Telegrams: MARKETERKENYA***

***Email:hresources@ncpb.co.ke***

***C/ST/6940Forwarded.***

***Please comply***

***Signed***

***R/M 12/10/09***

***6<sup>th</sup> October, 2009***

***John Kirui***

***Silo Manager***

***Thro” Regional Manager***

***Lake Western***

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***“RE: SUSPENSION***

***Reports reaching this office indicate that you authorized falsified***

***Invoice Dispatch Advice of fertilizer and which was posted into the stocks records purportedly to conceal physical shortages before the annual stock take exercise (29/06/09). You also authorized double posted Customer Dispatch Advice which were posted into the stock records to conceal shortages of 12 bags and occasioned the Board to a total loss of Kshs.2,227.440.00.***

***The Management of the Board views your above act as a very serious offence.***

***You have thus been suspended from the services of the Board with***

***immediate effect.***

***Accordingly, you are hereby required to show cause within 72 hours of the receipt hereof as to why disciplinary action should not be taken against you.***

*Should you fail to submit your explanation as required, it will be*

*presumed that you have no explanation to offer and the matter will be disposed off without any further reference to you.*

*You are required upon receipt of this letter to handover any Board's property in your possession to the Assistant Depot Manager, Mr. Peter Obuba.*

*This letter is issued in duplicate, sign a copy and return it to this*

*office as soon as possible.*

**Signed**

**F. Muchina**

**HUMAN RESOURCE MANAGER**

**Signed 14/10/09"**

The respondent in response to that letter wrote a 7 page letter to the appellant where he narrated events as he saw them; he stated for instance that a stock check done on 4<sup>th</sup> July, 2009 at the Eldoret Depot showed all the stocks to be in place and it was after that that he was transferred to the Bungoma depot. Further that a new Manager took over from him later that month and another stock check was done and all stocks tallied. Further that he was informed that there was a loss of 810 bags of fertilizer and he was required to write a statement about that loss; he did so but was required with 2 of his colleagues to report to Eldoret Police station. He was shown various documents but denied authorizing the same and he denied that there was any loss of stocks belonging to the appellant. He named his colleagues as the people who had forged documents; he disassociated himself from those documents and denied the allegations.

There are Minutes of a meeting of the appellants Staff Advisory Committee held on 21<sup>st</sup> April, 2010. Various people were in attendance and Mr. Abila who testified for the appellant at the trial of the suit was Secretary of that meeting. It was reported in that meeting by an Auditor that audit had revealed shortages of various commodities worth Ksh.2,197,440/- and that some falsified documents had been prepared to conceal the loss. The auditor reported that the fraudulent activities were carried out by the respondent as Silo Manager, a Silo Clerk and a Stores Clerk. The record shows that each of the 3 employees were interviewed by that committee. When it came to the respondents turn, he explained as he did in his written response to the suspension letter that physical stock check when he was leaving Eldoret had balanced the books but that he was shown some falsified documents where he noticed that his signature had been forged. He named the people who he suspected of forging documents who were his junior officers in the office. That committee after interviewing various people recommended that the respondent's services be terminated for poor work that led to loss of fertilizer and other commodities belonging to the appellant. This was followed by a termination letter dated 15<sup>th</sup> July 2010. This letter stated amongst other things that the appellants' management had considered the respondents' written and oral defence and had come to the conclusion that as a result of the respondent's poor performance the appellant had lost fertilizer and other stock and it was decided to terminate his services with effect from 6<sup>th</sup> October, 2009 for negligence of duties. That letter further stated that the respondent would be paid his benefits that he was entitled to in accordance with terms and conditions of service.

The learned trial Judge considered that it was the appellant who, after discovering loss of stocks at the Eldoret Depot, had made a report to the Eldoret Police Station which report led to the respondent and his two colleagues Justus Momanyi Miyoge (Stores Clerk) and Fidelis Kimonge (Supervisor) being summoned to the said police station. Police investigations found that it was the said Stores Clerk who had forged the respondent's signature to falsify documents and conceal stock losses as a result of fraud committed by the said Stores Clerk who was thereafter charged with criminal offences arising from the said acts of fraud. The respondent was cleared of any culpability by the police. The learned trial Judge considered the concatenation of events – the letter by the police exculpating the respondent was dated 21<sup>st</sup> December, 2009 which was before the Staff Advisory Committee Meeting of 15<sup>th</sup> July, 2010. That meeting did not consider contents of the said police letter and the learned Judge was surprised that proceedings of that meeting proceeded as if the appellant had not made a report to the police and without considering the fact that the police had found that the respondent had not participated in any way in any fraud leading to loss of the appellants' stock. Instead the police had found sufficient evidence to charge a Stores Clerk who had forged documents to look as if the respondent had authorized movement of certain stocks which forgery led to loss of stealing of the appellants stocks. Although it is true, as ably submitted by Mr. Lutta, learned counsel for the appellant, that police investigations or findings in a criminal process where the standard of proof is high should not fetter the administrative functions of an employer on discipline of employees, it is surprising that the Staff Advisory Committee, in its recommendations to the appellants management, did not make any reference to the fact that the respondent had been cleared by the police but that the respondent's colleague had been charged with criminal offences relating to loss of the appellants stocks and forgery of documents.

The other matter that surprised the learned trial Judge was that the appellants' Staff Advisory Committee deviated from the original complaint made by the appellant against the respondent which is captured in the appellants' suspension letter which we have set out in full in this judgment. Those allegations were to the effect, that the respondent had authorized falsified documents to be posted into stock records to conceal physical shortages before a scheduled stock take exercise. When the respondent was summoned to appear before that committee in Nairobi on 21<sup>st</sup> April, 2010 it would have been expected that he would have been required to give a detailed explanation or response to the allegations made against him as captured in the suspension letter. The respondent was at that meeting:

***"...asked to explain his role in the loss of stocks at the Eldoret Silo...."***

Section 41 of the Employment Act (No. 11 of 2007) in respect of notification of hearing before termination on grounds of misconduct provides:

***“(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.”***

Section 45 of the said Act on unfair termination provides:

***“(1) No employer shall terminate the employment of an employee unfairly.***

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employee’s conduct, capacity or***

***compatibility; or***

***(ii) based on the operational requirements of the***

***employer, and***

***(c) that the employment was terminated in accordance with fair procedure”***

The learned Judge considered the facts as presented where the respondent was served with a suspension letter giving reasons for suspension and being required to give an explanation and the fact that the appellant thereafter summoned the respondent to an administrative meeting where other allegations were made against the respondent to be unfair and not according with fair administrative action. The learned Judge found such action not to be fair or according with due process. He stated:

***“The court holds that while considering a disciplinary case, the employer is not at liberty at the hearing stage to deviate from the allegations of misconduct or poor performance or ill health as may have been alleged in the notice delivered to the employee before the hearing stage. In the instant case, the staff advisory committee wandered away in a drift from the legitimate inquiry as it had been commenced in the suspension letter and the committee disregarded the objective findings of the police investigations as the committee created its own fresh line of considerations and findings never put to the claimant at the initial stage. In the court’s opinion, the committee walked outside its jurisdiction or exceeded its jurisdiction or was irrelevant in arriving at its decision: it lost the vector of navigating the case that confronted the claimant and that was to constitute the subject of its findings.”***

As we have shown the Employment Act, 2007 did not permit an employer to terminate the services of an employee unfairly. The letter of termination of employment of the respondent by the appellant stated that the reason for such termination was ***“...as a result of your poor work performance....”*** where the appellant had lost 810 bags of fertilizer and other stock losses valued at a considerable sum of money.

When the respondent was accused of authorizing falsified documents, he gave what appeared to the learned trial Judge to be a reasonable explanation. His signature had been forged by a Stores Clerk and this was established by police and hand writing experts which led to the respondent being cleared by the police but led to his colleague, the Stores Clerk, being charged with criminal offences. It was therefore established to the required standard that the respondent had not participated in any fraud. When the respondent was summoned to an administrative employment meeting, allegations were made notice of which had not been served on the respondent. This was wrong. The appellant should have adhered to fair administrative action by notifying the respondent in advance of new allegations and giving him ample opportunity as required by law to prepare and present a response or defence to the allegations and to be represented by a representative to the said meeting if he so wished. This the appellant failed to do and in the process the respondent was denied a fair hearing. By terminating the respondent’s services for reasons that were different from the reasons given in the suspension letter, the appellant breached the respondent’s rights and the learned Judge was right to find that termination of the respondent’s employment was unfair. We agree with that finding and can find no error in the way the trial Judge dealt with the same.

Mr. Lutta, learned counsel for the appellant, referred us to a circular attached to submissions made by the appellant before the learned trial Judge as proof that the respondent had breached certain process by delegating duties to an Assistant Manager. We note that the learned trial Judge referred to that circular and discussed it in his judgment.

We must disabuse learned counsel, and the trial Judge, of this practice of introducing evidence into proceedings. Submissions of counsel in

proceedings are not pleadings as defined by Section 2 Civil Procedure Act. They serve a purpose of highlighting certain salient facts in a case as seen by parties or their advocates but cannot take the place of pleadings or the actual evidence produced by a party on which a trial court would take as forming part of the record and on which reliance is laid to make a determination in a case. It was wrong for the appellant to introduce a document through written submissions and it was wrong for the trial court to refer to the same in its judgment. We shall, on our part ignore the same as not forming part of the record at all and that is all we would say of ground 3 as set out in Memorandum of Appeal.

On the complaint that the learned Judge erred in placing emphasis on a letter by the police exonerating the respondent from criminal conduct, we have found that the appellant breached process by terminating the respondent's employment on allegations that were not originally made against the respondent. We agree that an employer retains administrative function against employees on disciplinary issues but in view of our findings that is all we should say on this issue.

The learned trial Judge found that the termination of the respondent's employment was unfair and awarded damages for unfair termination. He also awarded the respondent withheld salary and finally awarded special damages for travel and subsistence which had been prayed for in the Memorandum of Claim and which were proved to the satisfaction of the Judge at the trial.

Having reconsidered all the material placed before the learned Judge and having re-evaluated the same we did not find any merit in this appeal which we now proceed to dismiss with costs to the respondent.

***Dated and delivered at Nakuru this 22<sup>nd</sup> day of November, 2017.***

***G.B.M. KARIUKI, SC***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

***S. ole KANTAI***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**