



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & J. MOHAMMED, JJ.A)**

**CIVIL APPEAL NO. 41 OF 2014**

**BETWEEN**

**HOSEA MURUAIGI GICHOHI ..... APPELLANT**

**AND**

**KENYA AGRICULTURAL RESEARCH INST..... RESPONDENT**

***(Appeal from the judgment of the Industrial Court of Kenya at Nairobi, (Marete, J.)***

***dated 1st July, 2013 in INDUSTRIAL CAUSE NO. 925 OF 2010)***

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**JUDGMENT OF THE COURT**

1. On 6th January, 2005 the appellant was employed by Kenya Tripanosomiasis Research Institute (KETRI) as a Store-man II with effect from 1st February, 2003. Pursuant to a Presidential circular issued sometime in 2004, the Management, assets and employees of KETRI were transferred to the respondent, (KARI). The appellant agreed to transfer his services to the respondent and was accordingly on 6th January, 2005 issued with a letter to that effect.

2. By a letter dated 27th March, 2006, the appellant was interdicted by the respondent on allegation of conspiracy to defraud KETRI between 1st May, 2004 and 5th June, 2004. On 4th April, 2006 he responded to that letter. On 6th July, 2007 the appellant was summarily dismissed from his employment with loss of all benefits. He lodged an unsuccessful appeal against the dismissal. Thereafter he filed a suit against the respondent and sought, **inter alia**, a declaration that the summary dismissal was unjustified, unlawful and void; compensation in the sum of **Kshs.5,367,880/=**; in the alternative, reinstatement to employment and payment of all outstanding salaries and benefits from the date of interdiction; costs and interests of the suit.

3. The respondent denied the appellant's claim and stated that the appellant failed to account for Toner Cartridges valued at Kshs.503,380/= that had been supplied to KETRI in June, 2004. Consequently, on 6th July, 2007 he was summarily dismissed from his employment.

4. By way of a counter-claim, the respondent sought to recover from the appellant the sum of Kshs.503,382/= being the value of the Toner cartridges which the appellant had failed to account for. The respondent also sought from the appellant a sum of kshs.31,225/= being costs awarded to the respondent, arising from an earlier suit in respect of the same claim which the appellant had filed against the

respondent in the Chief Magistrate's Court at Nairobi which he subsequently withdrew.

5. After a full trial, the Industrial Court dismissed the appellant's claim, holding that the summary dismissal was justified. On the other hand, the court allowed the respondent's counter-claim to the extent of Kshs.503,382/= on account of the Toner cartridges. The trial court held that the claim of Kshs.31,225/= ought to have been pursued under the withdrawn suit in the process of execution.

6. Being dissatisfied with that decision, the appellant preferred an appeal to this Court. The appellant faulted the learned trial judge for failing to find that the summary dismissal was unlawful; for failing to find that the appellant was not given a hearing before his dismissal; for awarding the respondent the sum of Kshs.503,382/= in the absence of any evidence in support of the claim; and for failing to make a determination on whether KARI had the legal capacity to dismiss the appellant for offences allegedly committed against KETRI.

7. When the appeal came up for hearing, both Mr. Masinde and Mr. Michimo, learned counsel for the appellant and the respondent respectively, chose to rely entirely on their written submissions which they had filed.

8. Before we deal with the substantive grounds of appeal, we need to first dispose of a preliminary issue regarding competence of the appeal that was raised by the respondent's advocate. He submitted that **section 17** of the **Industrial Court Act** provides for a right of appeal from decisions of Industrial Court to this Court on matters of law only. To that extent, he added, this Court has no jurisdiction to hear appeals from that court (*now Employment and Labour Relations Court*) on matters of fact.

9. Our finding on that preliminary issue is that the law has since been amended by **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** which deleted **section 17** of the **Industrial Court Act** in its entirety. This Court therefore has jurisdiction to hear appeals on both issues of fact and law in employment and labour relations disputes. See this Court's decision in **LAMATHE HYGIENE FOOD V WESLEY PATRICK SIMASI WAFULA & 8 OTHERS [2016] eKLR**.

10. Turning now to the substantive grounds of appeal, we must start by pointing out that the learned trial judge, having identified the issues for determination, failed to observe the requirements of **Order 21 rule 4** of the Civil Procedure Rules which states that:

**"4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."**

11. The learned judge, after summarizing the facts of the case, determined the appellant's claim summarily in a four sentence paragraph where he stated:

**"The evidence of the claimant and the defence witness brings out the case very, very clearly. The claimant was unaccountable and fraudulent in his dealing with the respondent employer. This is clearly brought out in the evidence of Nyaga Kanugutima, DW1 – an employee of KARI who was involved in an investigation belying the invoice for Kshs.503,382.00. The claimant in all ways fails to come out clear on this matter and therefore the claim must fail."**

12. This Court, being the first appellate court, has an obligation to re-evaluate the evidence that was tendered before the trial court and determine whether the conclusions reached by the trial judge were correct. See **KENYA PORTS AUTHORITY V KUSTON (KENYA) LIMITED [2009] 2 E.A.212**.

13. The first issue for determination is whether the appellant's dismissal from his employment was lawful. According to the evidence on record, by a letter dated 6th July, 2007 the appellant was summarily dismissed because, while working as a Store man at KETRI, he signed a delivery note dated 7th June, 2004 for Toner cartridges valued at Kshs.503,382/=. The appellant was unable to account for the said items. He had also not recorded the goods in the store records as was the procedure.

14. According to unchallenged evidence of **Nyaga Kanugutima, (DW 1)** who was in the respondent's employment, the appellant was interrogated in the presence of two other employees and he admitted having received the toners.

In his testimony before the trial court, the appellant also admitted having signed the delivery note for the said items. In a subsequent meeting between the appellant, DW 1 and the supplier of the cartridges, the appellant requested for time to prepare a comprehensive report as to what actually happened. He was to deliver the report on the following Monday but that was not to be, the appellant did not submit anything.

15. DW 1 did a report to the respondent's head office. By a letter dated 27th March, 2006 the appellant was interdicted and asked to show cause why disciplinary action could not be taken against him.

16. The appellant responded vide a letter dated 4th April, 2006. Although the appellant admitted having received the goods, he denied that he intended to defraud his employer, though he never accounted for the goods. The respondent's Staff Advisory Committee considered the appellant's defence but found it unsatisfactory.

**17. Section 44 (4) (C) of the Employment Act, 2007** permits summary dismissal if an employee carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly. The appellant was a Store Keeper and had, among other duties, the responsibility of receiving supplies and recording them in the store books. He received goods worth Kshs.503,382/= but neither recorded them nor accounted for them, yet the respondent had to pay the supplier the said sum.

18. Further, **section 44 (4) (g) of the Employment Act, 2007** provides that an employee may be summarily dismissed from employment if the employer has reasonable and sufficient grounds for suspecting the employee of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

19. Before his dismissal, the appellant was notified in writing of the reasons for which the respondent was considering his dismissal. The appellant was given an opportunity to make his representations, which he did. The representations were considered but found wanting. In our view, therefore, the provisions of **section 41 (1) of the Employment Act, 2007** regarding a notification and hearing before termination for misconduct were substantially complied with.

20. In view of the foregoing, we find and hold that the appellant's summary dismissal from his employment was substantively and procedurally lawful. This finding disposes of grounds 1, 2 and 3 of the grounds of appeal.

21. In ground 4 of his appeal, the appellant faulted the learned trial judge for awarding the respondent the sum of Kshs.503,382/= in the absence of any evidence in support thereof. We do not find any merit in that ground. The appellant admitted having received and signed the invoice in respect of the said goods. The goods had not been recorded in the store records and the appellant was unable to account for the goods. DW 1 stated in his re-examination that the cartridges had been paid for.

We dismiss that ground of appeal.

22. The last ground of appeal is whether the respondent had the legal capacity to dismiss the appellant for offences allegedly committed against a different legal entity. There was unchallenged evidence that Presidential circular No. 3 of 2003 amended the Constitution of KETRI and KARI and dissolved KETRI, whose functions were taken over by KARI.

23. By a letter dated 6th January, 2005, the appellant was informed that following the aforesaid reorganization and his expressed intent to serve with KARI, his services had been transferred to KARI with effect from 1st July, 2004. He was further informed that he would be subject to the prevailing terms and conditions of employment of the respondent. The appellant did not raise any objection and continued

to discharge his duties until the date of his interdiction and subsequent dismissal.

24. We find and hold that the respondent had legal capacity to dismiss the appellant. The functions and responsibilities of KETRI had lawfully been taken over by KARI.

25. In conclusion, we find no merit in this appeal and dismiss it in its entirety. The appellant shall bear the costs of the appeal. It is so ordered.

**DATED and Delivered at Nairobi this 6th day of October, 2017.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**