IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 61 OF 2015

BETWEEN

JOSEPH KILINDA) …….……. RESPONDENT

Section 44(3) of the Employment Act provides that:

It is gross misconduct on the part of an employee if –

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

This list is however not exhaustive and an employer can summarily dismiss an employee on any other ground so long as it is justifiable.

the action as the claimant by an amendment to the claim. The amendment also introduced the following prayers:

(b) Gratuity under Collective Bargaining Agreement

(c) Damages for wrongful and or unfair Dismissal (to be assessed by Court) - (not provided)

(e) Withheld salary for Feb 2013 - Ksh.105,939.00

In the aforesaid judgment the learned Judge, (**Rika, J.**) framed three questions to the following effect;

1. Whether gratuity was payable, and
2. On the issue under (a) above, the Employment Act uses the words "termination" and "dismissal" deliberately and distinctively, with the word "unfair" accompanying termination and "wrongful" going with dismissal and the two phrases can not be used interchangeably as has been done in the parties' submissions and in the judgment of the court below. For instance Part VI of the Act is devoted to termination and dismissal. The sections under this part deal either with termination or dismissal. The distinction is reflected in the different remedies provided for "wrongful" dismissal

and those for "unfair termination" in **section 49** of the Act. We shall revert to this question after disposing the last issue, whether the response filed out of time was admissible. The learned Judge held that the court having received the response and the appellant having been allowed to participate in the proceedings the issue was moot and spent. We think, in view of **Article 159** of the Constitution and **section 3** of the Employment & Labour Relations Court Act, the court properly directed itself and we say no more on this.

The finding of liability and the above award aggrieved the appellant who has brought the appeal to challenge the entire decision on five grounds, which in the written submissions were condensed into two. The appellant has argued that the learned Judge, in finding that the respondent's dismissal was wrongful in the face of overwhelming evidence of the respondent's gross misconduct misdirected himself; that the respondent did not request for the calling of any witness at the disciplinary hearing; and that having been allowed to attend the hearing in the company of two of his colleagues, he was accorded a fair hearing opportunity. According to the appellant the question whether a reasonable employer would terminate the services of an employee who is involved in stealing from the employer was, in the circumstances of this dispute answered in the affirmative. The appellant relied on two decisions of this Court on the proper test to apply in determining the reasonableness or otherwise of an employer's action to dismiss an employee, that is to say, **CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona, Civil Appeal No. 3 of 2014** and **Judicial Service Commission v Gladys Boss Shollei**, **Civil Appeal No. 50 of 2014** and South African case of **Nampak Corrugated Wadeville** v **Khoza** (JA 14/98) (1988) ZALAC 24.

The respondent for his part maintained that the learned Judge properly found the appellant liable and granted appropriate award; that the court did not err in holding that the disciplinary hearing was flawed on account of lack of clarity on the dates of the alleged misconduct, the omission to call those who accused the respondent and the failure to prove the allegations against the respondent.

The respondent was employed by the appellant in 1990 as a Filter Machinist. On 13th January 2013 the appellant addressed a letter to the respondent suspending him pending investigations into the allegations that he had been ***"…. Involved in cutting & transporting from the plant metallic kiln support beams located at the garage without authorization."*** That letter was followed on 4th February 2013 by another one inviting the respondent to attend a disciplinary hearing on the allegations that;

(2) On 5th January 2013 (a day after) at about 2305 hrs the respondent once again accessed the garage yard and shortly Didas Okwemba arrived with the van and more beams already cut into pieces were once more carted away at 2330 hrs.

Disciplinary hearing was conducted on 7th February 2013 and was attended by the respondent and seven other people, namely the Quarry Manager, Maintenance Manager, Quarry Engineer, Human Resource Manager, Mechanical Superintendant and a representative of the trade union in which the respondent was a member. The accusations enumerated above were reiterated at the hearing where it was alleged that the theft of metal beams on the three occasions was witnessed by three independent witnesses, that is, the night guard, stores attendant and shift supervisor. The three were however not called to confirm these events in the presence of the respondent, who is recorded in the minutes of the hearing to have vehemently denied ever going to the garage on the dates and time alleged. He explained to the panel that when he left the premises on Friday 11th January 2013 he only returned on Sunday 13th January 2013 the day he was ***"on call."*** That on that day he was not let beyond the gate, was turned away and asked to arrange to collect his suspension letter. In view of the respondent's denial, the union representative in attendance at the hearing sought to know from the panel whether the management had conducted proper investigations into the allegations to confirm how many times the respondent came through the gate into the plant, whether he collected the forklift after signing for it, and the details of the motor vehicle used to cart away the goods.

Did the respondent by his conduct fundamentally breach his obligations arising under the contract of service to warrant his dismissal?

3. Was he subjected to due process,? and
4. The breach by an employee of his obligation under the contract of employment that would lead to summary dismissal must be one that is so fundamental, or as **Lord Green MR** labelled it in **Alderslade v Hendon Laundry Ltd (1945) KB 189** at p. 193 ***"the hardcore"*** to the performance of the contract that the employer would be entitled to rescind the entire contract. It is a breach that goes to the root of the contract.

It was alleged by the appellant that on three separate occasions in the wee hours of the night the respondent went to a garage within the appellant's plant where he cut and removed from the plant metal kiln support beams without authorization. The minutes of the hearing indicate that, confronted with these allegations the respondent repeatedly and vehemently denied going to the premises on the dates alleged. It was clear during the disciplinary hearing that other than the failure to call the three critical witnesses, there were obvious doubts even in the panel about the respondent's participation in the theft. It is recorded that members sought to know from the respondent whether he ***"suspected anyone who would want to give false information about him"*** and was asked ***"if he had enemies he was aware of"***, to which he answered that he had no enemies at work and that he was not aware of anyone who would create such false information against him.

The appellant has relied on the decision of this Court in case of **Judicial Service Commission v Gladys Boss Shollei & Another Civil Appeal No. 50 of 2014** for the definition of what constitutes reasonable grounds that will warrant a dismissal. The Court in that case quoted with approval the following passages from the Canadian case of **Michael Dowling v Work Place Safety & Insurance Board (2004) CAN LII 43692**;

This passage followed the Canadian Supreme Court decision in **McKinley v B.C. Tel (2001) 2 S.C.R. 161** in which the court explained that; -

On a factual inquiry based on contextual examination of the circumstances of the alleged misconduct, we, like the court below find that the respondent was not subjected to a fair hearing. A person accused of criminal wrong-doing is entitled to have a face-to-face confrontation with his accusers and to look them in the eye in the form of cross-examination during a trial. **Article 47** of the Constitution of Kenya, 2010 provides that a person in the respondent's position is not only entitled to be informed in advance of the evidence against him but also given an opportunity to challenge it.

The fourth issue is on the award of quantum. This is a matter of judicial discretion and an award will only be upset on appeal if the appellate court considers that the amount awarded is so inordinately high or low as to represent an entirely erroneous estimate; that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and as such made an erroneous conclusion. See **Butt v Khan (1981) LR 349**.

"(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

"(i) Annual leave pay at Kshs.120,000

(iii) 6 months gross salary in compensation for unfair termination

5. He also awarded costs. The first two (i) and (ii) above were conceded by the appellant. The

learned Judge based the award under (iii) above on **section 49(1) (c)** of the Employment Act, even though the respondent was also entitled to notice pay under **sub-section (1) (a)**. Again under **sub-section (1) (c)** he was free to award upto a maximum of twelve months salary but chose to limit the award to only three months, even though the respondent had been in the appellant's employment for over twenty years. We think in these circumstances, the learned Judge properly exercised his discretion. The only omission he made was to fail to direct that the award under **sub-section (1) (c)** be made subject to statutory deductions.

Each party shall bear its own costs.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

…….

K. M'INOTI

JUDGE OF APPEAL

true copy of the original.

<p justify;"=""> **DEPUTY REGISTRAR**