



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 62 OF 2015

BETWEEN

BAMBURI CEMENT LIMITED APPELLANT

AND

WILLIAM KILONZIRESPONDENT

*(Being an appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Mombasa
(Makau, J.) dated 26th June, 2015*

in

E. & L.R.C. Cause No.465 of 2014)

JUDGMENT OF THE COURT

The appellant joined the respondent company in 1992 and had worked for it for twenty two years when he was dismissed from its employment. At the time material to this appeal he was working as a weighbridge clerk at a monthly salary of Kshs.182,905.16. The facts leading to his dismissal may be briefly stated as follows;

It was alleged, first that on 26th June 2014, while working as a weighbridge clerk he weighed two trucks KBJ 425C and KBH 984R which were supplying scrap tyres to the respondent's premises, in which, despite their difference in tare weight he issued tickets indicating that they had exactly the same gross weight. Secondly it was alleged that the appellant generated weighbridge tickets confirming receipt of scrap tyres despite the fact that there was no corresponding entry or exit of the trucks in the security log book, an indication that in fact the trucks did not enter or exit the plant. A show cause letter was subsequently addressed to him along these lines. His response having been rejected, he was invited to a disciplinary hearing at which he was accompanied by three employees who were union representatives of the respondent's trade union. After the hearing, the appellant was summarily dismissed. In the letter conveying this decision, he was notified that he would not be entitled to any period of notice or payment in lieu of notice; and that he would receive payment in respect of 20 accrued leave days as part of his final salary payment. He was informed of his right of appeal against the dismissal within one week of receipt of the dismissal letter. Pursuant to this right the respondent filed an appeal.

Instead of prosecuting the appeal the respondent instituted a suit in the then Industrial Court (now Employment & Labour Relations Court) in which he sought a declaration that his dismissal was without evidence; that the dismissal process was null and void, an order directing the appellant to compensate him for wrongful dismissal or in the alternative, that the appellant be ordered to reinstate him; and in further alternative, that judgment be entered in his favour in the sum of Kshs.10,251,916.24 representing:

- a. Two months Salary in lieu of notice- Kshs.182,905.16 x 2= Ksh.365,810.32
- b. Meal allowance - Kshs.7,200/-
- c. 20 accrued leave days - Kshs.115,000/=
- d. 3 days worked in
September, 2014 - Kshs.6,500/-
- e. Gratuity payment calculated at
3 months'
basic pay for each
completed year of service - Kshs.114,584 x 3 x 22=Ksh.7,562,544
- f. Damages for unfair termination
@ 12 months salary - Kshs.2,194,861.92
Kshs.10,251,916.24

At the hearing of the claim, the respondent called evidence in support thereof. In particular he emphasized that as a weighbridge clerk, his duties were restricted to weighing the vehicles entering the appellant's premises carrying goods after being shown inspection reports and delivery notes prepared by Marshalls contracted by the appellant for this purpose; that the weighing machine was automated and all the respondent did in his work was to enter the registration number of the vehicle being weighed and the weight would automatically be generated and printed. He confirmed that on the material date he weighed the two motor vehicles in question as they were driven into the premises. He gave out the automatic generated print-out of their respective weights. After they were offloaded the vehicles passed through the weighing machine and once more print-outs of their respective weights without goods were automatically generated.

The appellant, on the other hand presented its case through Mohamed Kassim, the Logistics Manager and Rose Sally, the Human Resource Manager, having denied liability in its response to the claim. In their testimonies the witnesses maintained that the respondent was engaged in a fraud involving the weighing of the two vehicles, citing;-

- i. That the two vehicles were weighed within 2 minutes of each other which in its view was not practical; because, depending on other factors the weighing should take at least 5 minutes interval of each other.
- ii. That the print out generated indicated that the two vehicles had the same gross weight despite their different tare weight (i.e. the weight while empty)
- iii. That the two vehicles were weighed on their way out of the premises within 5 minutes of each other.
- iv. That the delivery notes presented in respect of the two vehicles did not appear genuine, because there were 2 delivery notes for different companies but in respect of one truck – and not two – for the same date.
- v. That there was no sufficient proof of delivery of goods by both trucks.

Mohamed Kassim confirmed that indeed the respondent's duty was limited to feeding the registration

number of the vehicles being weighed in the system. But he suspected that the appellant may have inserted misleading numbers in the system. He further confirmed that the personnel engaged in the processes of receiving vehicles, issuing of delivery notes, inspection of vehicles, inputting the dates of entry in the system were sourced-out to a third party company and that on the day in question one Lazaro Mrabai did all the above. He was, however, not called as a witness.

The learned Judge (**Makau, J.**) after considering the totality of the evidence gave judgment in favour of the respondent, having found that although the procedure leading to the respondent's dismissal was in compliance with **sections 41, 45 (5) and 51** of the Employment Act in that he was heard in his defence before being dismissed, there was, however, no evidence linking the respondent to any wrong doing, hence his dismissal was neither fair nor valid within the meaning of **sections 43 and 45** of the Act. The learned Judge having so held awarded the respondent under **section 49(1)** damages in the sum of Kshs.365,810.32 being 2 months' salary in lieu of notice at a monthly salary of Kshs.182,905.16. He also awarded Kshs.115,000 for 20 leave days not taken by the respondent, Kshs.7,562,544 for gratuity at the rate of 3 months' basic pay per year covering a period of 22 years of service and Kshs.2,194,861.92 being compensation for the unjustified and unfair termination, making a total of Kshs.10,238,216.24 (but erroneously entered by the learned Judge as Kshs.10,251,916.24). The learned Judge dismissed the claim for meal allowance in the sum of Kshs.7,200/-. He also rejected the prayer for reinstatement which was brought as an alternative to the award for wrongful dismissal.

Aggrieved by the judgment, the appellant now brings this appeal on 8 grounds which were condensed into two in its written submissions, namely;

- i. Whether the respondent's termination was fair, and
- ii. Whether the respondent was entitled to any of the sums awarded.

According to the appellant, the learned Judge erred in dismissing the two grounds upon which the respondent's dismissal was based; that it was clear from the facts of the case that he irregularly issued weighbridge tickets for two different trucks indicating they had the same gross weight despite having different tare weights, and generating fictitious weighbridge tickets purporting that scrap tyres were delivered to the appellant whereas no such goods were delivered. In its view such conduct amounted to gross misconduct which warranted summary dismissal in accordance with **sections 44** of the Act, the Collective Bargaining Agreement and the appellant's Employees Handbook.

Regarding the award it was submitted that since the dismissal was summary, the respondent was not entitled to the award of two months' salary *in lieu* of notice, that gratuity could only be paid to him if he had retired, resigned or was retrenched; as summary dismissal leads to loss of all benefits (except those held with NSSF) and finally, that since the dismissal was not wrongful, the respondent was not entitled to 12 months' salary for the dismissal.

The respondent on the other hand submitted in support of the finding by the learned Judge that his summary dismissal was not warranted; that the award was given in accordance with the law; that the appellant failed to adhere to the procedure laid down in its own Employees' Handbook that provides for different stages of warning before dismissal; that there was no evidence of any misconduct to warrant a dismissal; and that despite the appellant's admission that he was entitled to meal allowance, 20 days' leave pay and salary for part of September 2014, not a single cent had been paid.

The Employment Act, 2007 makes a distinction between termination and dismissal. It distinguishes unfair termination and wrongful dismissal. In the impugned judgment the underlined terms have been used interchangeably. But nothing turns on that. The appeal before us is on wrongful summary dismissal. In terms of **section 44** of the Act an employer may only resort to summary dismissal when the employee has, by his or her conduct fundamentally breached his or her obligations arising under the contract of service. It is only a misconduct that is gross in nature that will entitle the employer to summarily dismiss an employee. The following instances of misconduct will amount to gross misconduct as to justify the summary dismissal of an employee, that is to say;

- i. absenteeism from work without leave or other lawful cause,
- ii. intoxication to the extent of being incapable of performing his or her duties during working hours,
- iii. willful neglect to perform his/her work or doing so carelessly and improperly;
- iv. using abusive or insulting language towards his or her employer;
- v. failing or refusing to obey lawful commands issued within the scope of his or her employment by his or her employer or a person placed in authority over him/her by the employer,
- vi. if arrested for a cognizable offence punishable by imprisonment and is not released on bail or bond or otherwise lawfully set at liberty within 14 days, or
- vii. if an employee commits or, on reasonable and sufficient grounds, is suspected of having committed a criminal offence against or to the substantial detriment of the employer or the employer's property.

This list is not exhaustive and there will be other instances not enumerated above.

The appellant suspected that the respondent's conduct amounted to a criminal act against it or to its substantial detriment by purporting to weigh two trucks when in fact there was only one truck and also for purporting that the trucks had delivered tones of scrap tyres when no tyres were delivered.

The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to **section 47(5)** the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing. It was the respondent's contention that his summary dismissal was not justified while the appellant, for its part maintained that the respondent committed acts of gross misconduct hence the decision for summary dismissal was justified. The trial court was asked to balance the rival positions and was persuaded by the position of the respondent in effect finding that the appellant had failed to discharge its burden while the respondent had succeeded.

The test to be applied is now settled. In the case of the **Judicial Service Commission v Gladys Boss Shollei**, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in **Mc Kinley v B.C.Tel.** (2001) 2 S.C.R. 161

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”

To determine whether the respondent committed or whether there were reasonable and sufficient grounds to suspect him to have committed a criminal offence or to have done an act to the substantial detriment of the appellant, we must evaluate afresh the evidence presented to the trial court in order to arrive at our own independent conclusion. In doing so we must bear in mind that unlike the trial court we have neither seen nor heard the witnesses. See **Selle vs Associated Motor Boat Co.Ltd** (1968) EA 123.

Starting with the respective pleadings of the parties, the respondent in his memorandum of claim insisted that the disciplinary hearing was flawed as there was no complaint against him and that what was alleged against him was not proved. In the response, the appellant averred that the procedure followed in dismissing the respondent was sound and there was overwhelming evidence to warrant the action. In his testimony the respondent maintained that his work was restricted only to feeding in the system the registration number of vehicles entering or leaving the appellant's premises. The system would automatically generate the weight of the vehicle; that beyond that there were other persons who would inspect the goods carried in the vehicles, issue inspection reports and delivery notes. He explained that;

“The machine is automated and no manual input can be done in the system while weighing The duty to feed the information was not my duty. It was the duty of the Marshalls. Marshalls are contracted workers not employees of the respondent..... It is not my duty to ensure the vehicles who (sic) bring cargo are fed into the security system. I have no obligation to receive cargo and sign delivery notes. In this case Lazarus Rabai is the one who received the cargo and signed the delivery note to confirm receipt of the cargo.” (Emphasis supplied)

The appellant’s evidence to counter the above testimony was to the effect that the respondent irregularly dealt with the two vehicles registration numbers, KBJ 425C and KBH 984R in that the weighbridge tickets reflected a time difference of only two minutes between weighing the two vehicles as they were driven in and five minutes upon being driven out; that the time interval of five minutes was more likely than the two minutes; that the two vehicles weighed the same gross weight despite their difference in tare weight. Mohamed Kassim, as a Logistics Manager was versed in the delivery procedures of goods and weighbridge mechanisms and it is apparent that it was his expert opinion that was used as a basis to dismiss the respondent. He explained in his testimony that;

“... the anomaly in the weighing of the trucks led to loss of company finances. The two trucks purportedly were delivering scrap tyres. There is no evidence of such delivery of tyres on the material day. I am not convinced that the said delivery notes are genuine because they are not recorded in the register. All trucks going in and out must be recorded at the security register at the gate The CW1 has the key input when weighing trucks. He is the one who inserts the vehicle registration number and he can give misleading number. Marshalls are outsourced staff who inspect the trucks and puts (sic) dates in the system at the weight bridge. The trucks go to the weighbridge from the gate then delivery The tickets produced on the material date are from the respondent. They are genuine tickets. The delivery notes are supposed to be signed by the production clerk, Mr. Lazaro Mrabai. He was never called during the disciplinary hearing. The register by security at the gate indicates that KBH 984R and KBJ 425C delivered tyres but the delivery notes show KBJ 425C delivered twice CW1 is only assigned duty of managing the weigh bridge.”(our emphasis)

From the testimony reproduced above it is common factor that the respondent’s duty did not extend to issuing of delivery notes, recording of vehicle details in the register, inspecting the goods in the vehicles, or confirming their delivery. These functions were specifically assigned and performed by known people, namely the Marshalls, and Lazarus Mrabai who the appellant failed to present at the disciplinary hearing or later at the trial of this dispute. The appellant has not indicated how the alleged financial loss occurred or its extent. It was not demonstrated how the respondent could manipulate the system to interfere with the weights or the registration numbers in view of the uncontroverted evidence that the system operated automatically. The appellant through Mohamed Kassim confirmed that the tickets were genuine but failed to explain why it was thought the delivery notes were not, yet the details of the two companies alleged to have delivered scrap tyres were provided, from which it would have been easy to verify this fact.

We, like the trial court have come to the conclusion that although the proper procedure relating to hearing the respondent in his defence before dismissal was followed, the appellant failed to discharge its burden to demonstrate any justification in summarily dismissing him. There was no evidence of conduct on the part of the respondent that fundamentally breached his obligations as to justify his summary dismissal. We also do find the grounds upon which the dismissal was based were unreasonable and insufficient. The dismissal, we hold was wrongful.

The remedies for wrongful dismissal are listed under **section 49** of the Act and include:-

“(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;

(b) ... the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising

between the date of dismissal and the date of expiry of the period of notice which the employee would have been entitled to by virtue of the contract; or

(c) 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,”

We reiterate that the respondent prayed for, *inter alia*, two months' salary *in lieu* of notice, meal allowance, 20 accrued leave days, 3 days worked in September, 2014, gratuity payment at 3 months basic salary for each completed year of service and damages for “*unfair termination*” based on 12 months' pay. Any or all of the above remedies are payable at the discretion of the court where it is found that the dismissal was wrongful. In addition the court can order the reinstatement or re-engagement of the dismissed employee.

In deciding which remedy to give an employee who has wrongfully been dismissed the court exercises a judicial discretion and like the labour officer will be guided only by the principles contained in **section 49 (4)** namely, the wishes of the employee, the circumstances in which the termination took place including the extent to which the employee contributed to the termination, the employee's length of service with the employer,

“(f) ...the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonably incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

Guided by these principles and specifically bearing in mind the respondent's twenty two years of service with the appellant, the fact that he was not likely to secure alternative employment and his age, the learned judge awarded Kshs.2,194,861.92 compensation for unlawful dismissal. We think, with respect the learned Judge applied the correct principle under **section 49(1) (c)** with regard to the correct remedy for wrongful dismissal. We cannot disturb that award.

Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuity payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross

or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment.

Clause 30(a) of the Memorandum of Agreement entered into between the appellant and the Kenya Chemical & Allied Workers' Union, on behalf of the workers, including the respondent provides that employees who were in service of the appellant as at 7th November 2005 would be paid gratuity calculated *inter alia*, as follows;

“For service of over twenty hears - Three months’ basic pay for each completed year of service.”

This payment would, however, not be available to any employee who as at 7th November, 2005 had opted to join the appellant’s pension scheme. There is no evidence that the respondent was a member of the pension scheme. On the other hand his claim to gratuity is not controverted. Instead the appellant without making reference to clause **30**, aforesaid merely submitted that gratuity was only payable to employees who have retired, resigned or declared redundant; and that those who are dismissed summarily or whose services are otherwise terminated are not entitled. In terms of **clause 30(a)** and having held that the dismissal was wrongful, we come to the conclusion that the respondent was entitled to gratuity of three months’ basic salary for 22 years of service as follows;

Kshs.114,584 x 3 x 22=Kshs.7,562,544/-

Apart from this, the respondent, as found by the learned Judge, was entitled, in terms of clause 19 of the Collective Bargaining Agreement, to two months’ notice before termination of his services in any manner. Following his summary dismissal he was entitled to two months’ salary in lieu of notice translating to Kshs.182,905 x 2=365,810/-. The remaining claims, namely, meal allowance (Kshs.7,200/-), 3 days worked in September, 2014 (Kshs.6,500/=) and accrued 20 days’ leave (Kshs.115,000/-), were admitted by the appellant. The learned Judge however, in error rejected the claim for meal allowance. He also failed to apply subsection (2) of section 49 in awarding compensation for wrongful dismissal. The award of Kshs.2,194,861 under this head ought under the aforesaid section 49 (2) to have been given subject to statutory deductions. Save for this, with respect, we agree entirely with the finding of the learned Judge on liability and quantum. The amount of Kshs.7,200/- shall also be included in the decree.

The appeal therefore fails and is dismissed with no orders as to costs.

Dated and delivered at Mombasa this 27th day of May, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR