IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 12 OF 2015

BETWEEN

IYEGO FARMERS CO-OPERATIVE SACCO …….
APPELLANT

AND

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS……...
…….RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nyeri (Aboudha, J.) dated 30th September, 2014

In

Industrial Cause No. 47 of 2014)

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JUDGMENT OF THE COURT

Mr. Ayub Kamau (Ayub) was employed by the Iyego Farmers Co-operative Society (the appellant) in the year 1983 as a casual labourer but following several promotions he eventually rose to the position of Factory Manager in 1997.

On 1st April, 2012 during a routine stock taking it was discovered that an electric motor had gone missing. By a letter dated 3rd April, 2012 the appellant's then Secretary Manager demanded a written explanation from the grievant of the whereabouts of the said electric motor and gave notice to show cause why disciplinary action should not be taken against him (Ayub) for gross negligence. In his written explanation dated 5th April, 2012 Ayub indicated that prior to the discovery he had no knowledge that the electric motor was missing and that a named machine operator knew the whereabouts of the electric motor. Thereafter, he was suspended pending investigations on 14th April, 2012 with half pay. He was later invited to attend a disciplinary hearing on 4th June, 2012 by the appellant. At the hearing the charges laid against him were as follows: -

- ***Loss/theft of electric motor to the recirculation pump at Iyego main factory and***

- ***Negligence while performing duties as a factory manager leading to loss/theft of the electric motor.***

Subsequently, Ayub was summarily dismissed for gross negligence on 13th June, 2012. Aggrieved with the dismissal, he reported the same to his union (the respondent) which has a recognition and collective bargaining agreement with the appellant. Several attempts were made to settle the issue between the appellant and respondent which failed. Pursuant to ***Section 62*** of the ***Labour Relations Act, 2007*** the respondent reported the same as a trade dispute to the then Minister for Labour & Human Resource Development. The minister appointed a conciliator to effect a settlement by conciliation but his efforts came to naught and, pursuant to ***Section 69(a) of the Labour Relations Act,*** he issued a Certificate of not resolving the dispute between the parties. Ultimately, the respondent filed a Claim in the Employment and Labour Relations Court seeking *inter alia* reinstatement of Ayub or in the alternative damages for wrongful dismissal.

The appellant filed a Reply to the Claim and denied the respondent's averments and maintained that Ayub's dismissal was proper and within the confines of the law. It was the appellant's contention that Ayub falsified the stock list of the machines in the factory by indicating there were three electric motors in the store while in fact there were only two. Prior to the disciplinary issue in question, he had been subject of warning letters for failure to account for money.

At the hearing, Ayub testified that following his promotion as a Factory Manager he was not given a job description by the appellant. He maintained that the electric motor in question was under the care of the machine operator, one Julius Kamweru. On cross examination, he stated that he used to do stock taking of the factory equipment.

Benson Ndegwa Maina (DW1), the secretary to the appellant's committee, gave evidence that on 2nd April, 2012 while stock taking with Ayub he noted that there were only two electric motors contrary to the three the latter had indicated in the check list. He reported the matter to Jackline Wanjira, the Secretary Manager (DW2). DW2 testified that she suspended Ayub following his failure to give a satisfactory account of the whereabouts of the missing electric motor. During cross examination she conceded that the appellant was not sure whether the electric motor was lost or stolen.

Having taken into consideration the evidence on record and submissions made on behalf of the parties the trial court (Abuodha, J.) found in favour of Ayub by a judgment dated 30th September, 2014, ruling his dismissal was unfair and awarding him damages. It is that decision that has provoked this appeal in which it is complained the learned Judge erred in law by;

- ***Holding that there was unfair termination and that the reasons given fell short contrary to Section 45 of the Employment Act.***

- ***Disregarding the appellant's evidence of gross misconduct justifying the termination.***

- ***Disregarding that the respondent failed to shift the burden under Section 47(4) of the Employment Act.***

- ***Disregarding the terms of the Collective Bargaining Agreement between the parties.***

- ***Disregarding that fair hearing had been accorded.***

- ***Ordering the appellant to pay Kshs. 394,400/= gratuity in disregard to the terms of the Collective Bargaining Agreement and the Employment Act.***

- ***Ordering payment of Kshs. 69,600/= six months' salary contrary to Section 44 of the Employment Act.***

At the hearing of this appeal Mr. Kenneth Wilson learned counsel for the appellant submitted that the

underlying principle under ***Section 45*** of the ***Employment Act*** is that while considering a claim for unfair termination the court ought to look at the conduct and capability of the employee, the operational requirement of the employer and the procedure followed prior to the termination. He submitted that Ayub falsified the check list by indicating there were three electric motors. He stated at the disciplinary hearing that he was not aware that one electric motor was missing which confirmed he had falsified the check list. Counsel argued that witnesses gave evidence during the disciplinary hearing that Ayub was aware that the electric motor was missing. The appellant found that Ayub's explanation unsatisfactory and he was dismissed.

Mr. Wilson submitted that the disciplinary procedure was fair and in accordance to the law. He maintained that Ayub was guilty of negligence which was a valid ground for summary dismissal under ***Section 44(4) (c) of the Employment Act***. In Mr. Wilson's view under ***Section 47(5) of the Employment Act*** the burden lay with the respondent to demonstrate that the termination was unfair which they failed to do. Therefore, the burden should not have shifted to the appellant to prove the contrary.

Counsel further argued that under the parties' Collective Bargaining Agreement Ayub was not entitled to terminal benefits upon dismissal. Placing reliance on the decision of the Labour Appeal Court of South Africa in **NAMPAK CORRUGATED WADEVILLE –vs- KHOZA (**JA14/98) [1998] ZALAC 24 he submitted that the test of whether a court ought to interfere with the dismissal decision of an employer is whether a reasonable employer faced with the same set of circumstances would make a similar decision. He finally urged this Court to allow the appeal.

Mr. Owiyo learned counsel for the respondent in opposing the appeal submitted that the appellant had erroneously cited the ***Employment Act Cap 226*** in his Memorandum of Appeal which had since been repealed; the applicable law is the ***Employment Act No. 11 of 2007***. He argued that under ***Section 17(2) of the Employment and Labour Relations Act*** an appeal to this Court only lies on matters of law. Mr. Owiyo submitted that the appellant needed to demonstrate to this Court how the trial court erred in arriving at its decision. In his view Ayub's dismissal was unfair because firstly, he was never given a job description when he was promoted to a Factory Manager hence he was not aware of the full extent of his responsibilities. Second, Ayub gave a satisfactory explanation regarding the missing electric motor yet he was suspended. Third, the person who had moved and dismantled the electric motor confessed during the disciplinary hearing yet it was Ayub who was fired. Mr. Owiyo urged the Court to dismiss the appeal.

We will first dispose of two issues of a preliminary character. Contrary to the submissions by Mr. Owiyo, counsel for the respondent, the jurisdiction of this Court on appeal is no longer restricted to matters of law. ***Section 17(2)*** of the ***Employment and Labour Relations Court Act*** which restricted appeals to this Court to matters of law was deleted by ***Section 34A(3)*** of the ***Statute Law (Miscellaneous Amendments) Act, 2014*** issued on 24th November, 2014. ***Section 17*** of the ***Employment and Labour Relations Court Act*** currently provides: -

> ***"Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution***"

Consequently, the appeal herein from the Employment and Labour Relations Court is a first appeal to this Court. As the first appellate court, we have a duty to re-consider the evidence, evaluate it and draw our own conclusion while appreciating that we do not have the advantage, like the trial court had, of seeing and hearing the witnesses. See **SELLE –vs- ASSOCIATED MOTOR BOAT COMPANY LTD [**1968] E.A. 123 *and* ***WILLIAMSON DIAMONDS LTD. –vs- BROWN*** *[1970] E.A. 1*.

The next issue that falls for our consideration is the effect if any, of the appellant's citing the repealed ***Employment Act Cap 266*** in its Memorandum of Appeal. It is not in dispute that the applicable law is the ***Employment Act No. 11 of 2007***. The Supreme Court in ***Hermanus Phillipus Steyn –vs- Giovanni Gnecchi Ruscone- Application No. 4 of 2012*** wherein the applicant had failed to cite a provision of the Constitution expressed itself as follows:-

> ***"The question then is, whether this omission is fatal to the appellant's case. It is trite law that a court of law has to be moved under the correct provisions of the law. We note that this court is the highest court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite Article 163(5) will not be fatal to the applicant's case."***

We are of the considered view that the erroneous citation of the repealed Employment Act by the appellant is not fatal to this appeal. This is because it is clear from the record and the submissions by counsel that the Act relied upon by the parties and the trial court is the ***Employment Act No. 11 of 2007***.

Going back to the substance of the appeal we are of the considered view that the following two broad issues fall for consideration:-

1. ***Whether the dismissal was wrongful; and***
2. ***Whether the trial court erred in awarding terminal dues and damages for unfair termination.***

Section 47(5) of the ***Employment Act*** provides: -

> ***" For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer."***

The respondent herein had the burden of proving that Ayub's dismissal was wrongful while the appellant had the burden of proving that the grounds of the grievant's termination were justifiable.

Section 45(2) of the ***Employment Act*** provides that a termination of an employee becomes unfair where the employer fails to prove:-

a. The reason for termination is valid;
b. That the reason for termination is a fair reason –

i. related to the employees' 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.

Consequently, in considering an issue of wrongful or unfair dismissal the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness. In ***CMC AVIATION LTD. –vs- CAPTAIN MOHAMMED NOOR –Civil Appeal No. 199 of 2003 (2015) eKLR*** this Court held,

> ***"Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination."***

Radido, J. in **ANTHONY MKALA CHITAVI–vs- MALINDI WATER & SEWERAGE Co. LTD- Mombasa Industrial Cause No. 64 of 2012 (2013) eKLR** while considering procedural fairness held,

> ***"The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.***

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

We respectfully agree with and endorse those sentiments. We find and hold that the procedure used for the disciplinary proceedings herein was in accordance with ***Section 41*** of the ***Employment Act*** and we see no reason to fault the same.

Following the disciplinary hearing, the appellant vide a letter dated 13th June, 2012 indicated to Ayub that it had summarily dismissed him on the grounds of gross negligence while performing his duties and theft/loss of electrical motor for the recirculation pump at the main factory. Were the reasons for the dismissal valid and justifiable?

From Minute No. 65/2011/2012 of the disciplinary hearing Ayub gave evidence that he was not aware that the electric motor in question was missing until the day of stock taking. Following the discovery, he called Justus Kamweru, the machine operator to explain the whereabouts of the same. Kamweru informed him that he together with one James Kanyugi had dismantled the motor which was not working and kept it in the factory's tools store. Kamweru, who was also facing similar charges as Ayub did admit to dismantling and storing the motor in question and his evidence was corroborated by James Kanyugi.

After considering the representations made before it the appellant's disciplinary committee resolved in Minute No. 70/2011/2012 to summarily dismiss Ayub with loss of benefits effective from 13th June, 2012. The committee found that he had deliberately falsified the stock card, failed to report the loss of the motor and that according to his employment history he was mischievous.

Lord Denning in the case of ***BRITISH LEYLAND UK LTD. v. SWIFT [1981] IRLR 91*** stated as follows:

"The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"

Further in the South African case of **NAMPAK CORRUGATED WADEVILLE –vs- KHOZA** (Supra) the Labour Appeal Court expressed itself thus;

"A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"

In determining whether a dismissal was unfair or not in a particular case Rika, J. in ***DAVID WANJAU MUHORO –vs- OL PEJETA RANCHING LTD. – Industrial Cause No. 1813 of 2011 (2014) eKLR*** stated,

"In dealing with employment disputes however, Courts must exercise caution in

> ***adopting judicial precedents, as not all circumstances in each case, are similar to the other. Employment relationships are unique, and each case must be analyzed on the basis of its own unique characteristics. Facts, in each case of negligence, with all the extenuating circumstances, must be considered to ascertain if the conduct or omission by the Employee is sufficiently serious to merit dismissal."***

In the instant case the appellant failed to prove that Ayub had deliberately falsified the stock card and failed to report the loss of the electric motor hence that he was guilty of gross misconduct. There was clear evidence that the same had been dismantled by one Justus Kamweru and James Kanyugi. Further, Ayub testified that he was not aware that the same was missing until the day of stock taking. We note that the averment that Ayub's employment history was mischievous was neither a ground he was called upon to answer to during the disciplinary hearing nor was the allegation proved. We also note from Minute No. 70/2011/2012 that Kamweru who was facing similar charges was reinstated. All in all we are not satisfied that the reasons advanced by the appellant justified the summary dismissal.

In the circumstances we agree with the following findings by the learned Judge;

> ***"Section 45 of the Employment Act prohibits unfair termination of employment. Further a termination of employment shall be deemed unfair if the employer fails to prove among others that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility. A termination is further deemed unfair where it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee."***

Section 50 of the ***Employment Act*** provides that in determining the remedies to grant for unfair dismissal the court ought to be guided by the provisions of ***Section 49*** of the same Act. The courts have also pronounced themselves on the subject. In ***D.K NJAGI MARETE -vs- TEACHERS SERVICE COMMISSION- Industrial Cause No. 379 of 2009 (2013) eKLR*** Rika, J. held,

> ***"What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way."***

Also in ***SOUTHERN HIGHLANDS TOBACCO-vs- McQUEEN (1960) EA 490***, the predecessor of this Court held,

> ***"A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss."***

It was the appellant's contention that the trial court erred in awarding gratuity in disregard of the terms of the collective bargaining agreement. Having perused the collective bargaining agreement on record, we note that clause 4 prohibits the payment of terminal benefits only to employees who have been dismissed for gross misconduct and redundancy. In this case however we have found as did the trial court that the termination was unfair hence Ayub was entitled to terminal benefits.

The appellant also contends that the trial court erred in granting six months' salary for the unfair dismissal. ***Section 49(1)(c)*** of the ***Employment Act*** and ***Section 12(3)(vi) of the Employment and Labour Relations Court Act*** empowers the Court to issue damages not exceeding 12 months' salary for wrongful/unfair termination. The learned Judge awarded Ayub Kshs. 69,600. The applicable principle on when an appellate court can interfere with quantum of damages was set out in the decision of this Court in ***KEMFRO AFRICA LTD.& ANOTHER –vs- LUBIA & ANOTHER (No.2)(1987) KLR 30*** as follows:-

> ***The appellate court must be satisfied that, in assessing the damages, either the Judge***

> ***took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage."***

We are not so satisfied and therefore see no reason to interfere with the learned Judge's exercise of discretion in awarding the damages in question.

The totality of our consideration of this appeal is that it lacks merit. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 28th day of October, 2015

P. N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR