IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, G.B.M. KARIUKI & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 56 OF 2011

BETWEEN

TELKOM KENYA LTD……..APPELLANT

AND

PAUL NGOTWA…….……...…RESPONDENT

(Being an Appeal against the Award and Decree therefor of the Industrial Court at Nairobi (Kosgei, J.) dated 14th January 2011

In

INDUSTRIAL CASE NO. 798 OF 2010)

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JUDGMENT OF THE COURT

1. This is an appeal and cross-appeal against the award of the Industrial Court at Nairobi made on 14th January 2011 in Industrial Cause No. 798 of 2010. In the award the Industrial Court ordered the immediate reinstatement of the Respondent to the position he occupied as the Programme Office Manager before his dismissal.
2. A brief statement of the facts of the case are that on 23rd September 2009 the Head of Human Resources (HHR) asked the respondent to see the Chief Executive Officer (CEO) at 5.00 p.m. on that day for routine discussions on operations. The issue at hand would appear to have been the respondent's alleged complaint to the HHR that the respondent's immediate boss, the Head of IT & N, was harassing (at times even physically assaulting) staff in his department. The HHR had booked an appointment for the respondent to see the CEO on 23rd September 2009 at 5.00 p.m. and brief him on those allegations. The respondent did not keep that appointment because he had allegedly gone to pick his child from school. He was able to see the CEO the following day that is on 24th September 2001, at 4.30 p.m. when he denied making allegations of harassment and assault against the Head of IT & N department. Taking into account the respondent's seniority and the communication facilities at his disposal, the CEO rejected the Respondents explanation that he had unsuccessfully tried to reach the HHR the previous day to reschedule the appointment with him. The CEO considered the respondent's failure or refusal to repeat allegations against the Head of IT & N department and the failure to keep his appointment with him on 23rd September 2009 as insubordination and summarily dismissed him on 25th September 2009.

3. Aggrieved by that dismissal, the Respondent filed the said cause No. 798 at the Industrial Court Nairobi and sought general, special and punitive damages for the arbitrary and unlawful dismissal or alternatively for reinstatement to his position as the Programme Office Manager. He also sought costs of the cause.
4. In its statement of response to the claim, the appellant denied the respondent's claims. On 23rd September 2010, counsel for the parties appeared before Justice Kosgei, sitting with members Solomon Luyali and Clifton Morris Mulupi, and recorded a consent order requiring the Industrial Court to determine the dispute on the basis of the parties' pleadings and their respective counsels' written submissions.
5. Upon consideration of the parties pleadings and their respective counsels' written submission, on 14th January 2011, the Industrial Court found that the respondent had unlawfully been dismissed and, pursuant to **Section 12** of the **Labour Institutions Act 2007,** directed his immediate reinstatement with effect from the date of dismissal, that is 24th September 2009, without any loss of benefits such as salaries, house allowance, leave etc. In default of reinstatement the court directed the appellant to invoke the redundancy law and terminate his services. This appeal and cross-appeal is against that decision.
6. In its memorandum of appeal, Telkom Kenya Ltd., the appellant, faults the Industrial Court for making findings and determinations on contested matters of fact without hearing evidence and having its veracity tested by cross-examination; for preferring the respondent's factual account to that of the appellant without granting the appellant's counsel the right to cross-examine the respondent and that the Industrial Court erred in failing to find that a conjunctive and not disjunctive reading of **Sections 35 (4) (b), 41, 44** and **45(2) (a)** & **(b)**of the **Employment Act**justified the respondent's summary dismissal.
7. In his submissions before us in support of these grounds of appeal, Mr.Ngugi, learned counsel for the appellant, argued that despite the parties' consent that the matter was to be determined on the basis of their pleadings, the trial court should have realised that the legality of the respondent's dismissal was a hotly contested issue which required oral evidence. In the circumstances it should have asked the parties to call evidence on the issue.

8. Even without any evidence on record, counsel for the appellant argued that had the Industrial Court carefully considered of the averments in the parties' pleadings as well as their respective counsel's written submissions,it could have found that the appellant was justified in dismissing the respondent. The respondent failed to keep the appointment with the CEO without good cause. When he saw the CEO on 24th September 2009, he declined to repeat the allegations of harassment and assault that he had previously made against his immediate boss, the Head of IT & N department. The appellant's Code of Conduct required its employees to "perform their duties with honesty and integrity and to communicate openly and honestly."In the light of that requirement, the appellant considered the respondent's conduct of making wild and unfounded allegations against his fellow staff members as insulting not only to its integrity rules, regulations and processes but also to its staff.
9. Counsel for the appellant downplayed his client's failure to give the respondent notice under **Section 41** of the **Employment Act** as minor and not negating the respondent's lack of integrity and persistent insubordination. Counsel also dismissed the respondent's monetary claims. Given the fact that the respondent was a member of the Telposta Pension Scheme and a contributor to the National Social Security Fund (NSSF), counsel submitted that the respondent's claim for payment of one month's salary for every year worked as gratuity was, under **Section 35** of the **Employment Act,** untenable. Having, in the appellant's view, for good reason, been summarily dismissed under **Section 44,** he was also not entitled to payment of salary in lieu of notice. In the same breath, he said the other claims for payment for 23 days leave, general and punitive damages were unsustainable.
10. The appellant was in particular aggrieved by the trial court's order of reinstatement. In view of the respondent's insubordination, counsel for the appellant urged us to overturn that order arguing that a proper interpretation of **Section 12** of the **Labour Institutions Act 2007** will not justify the reinstatement of the respondent in this case.
11. Counsel for the respondent strongly opposed the appeal and also faulted the trial court for ordering reinstatement instead of granting the respondent's main claim which was for special and

general damages for wrongful dismissal. In support of the trial court's judgment, counsel dismissed as baseless counsel's contention for the appellant that the trial court should have asked parties to adduce evidence. He argued that the parties having authorised the trial court to determine the dispute on the basis of their pleadings and their respective counsel's submissions, the trial court had no reason whatsoever to call for evidence. On the material placed before the trial court and in particular the fact that, contrary to the rules of natural justice the respondent was not accorded an opportunity to show cause why he should not have been dismissed and the appellant's management Board was not given an opportunity to deliberate on the matter, counsel submitted that the trial court was entitled to find as it did that the appellant had no valid reason for dismissing the respondent.

12. On the cross-appeal, counsel submitted that given the acrimony between the parties, reinstatement was not an efficacious remedy. In the circumstances he urged us to reverse the trial courts award on reinstatement and grant respondent's prayer for payment of his terminal dues as stated in his memorandum in support of the claim. On the item of gratuity, he submitted that it is common practice world wide that employees whose services are terminated are entitled to one month's salary for every year worked. On those submissions, he urged us to dismiss this appeal with costs and allow his client's cross-appeal.

13. We have considered the matter. The main issue raised in this appeal is whether or not the appellant was justified in summarily dismissing the respondent. **Section 44** of the **Employment Act 2007** provides for summary dismissal. Subsection (1) thereof defines what summary dismissal is. Subject to the rest of the provisions of that Section, **subsection (2)**outlaws termination of a contract of service without notice. Subject to the provisions of the Act, **subsection (3)**permits an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.**Subsection (4)**, though not exhaustive, gives instances which may justify an employer to summarily dismiss an employee. These include absconding duty or wilful neglect to perform or careless or improper performance of the employee's duties; intoxication rendering an employee incapable of performing his duties; using abusive language against or behaving in a manner insulting to his employer; knowingly failing or refusing to obey his employer's lawful command; involvement in a case that leads to imprisonment or detention for more than 14 days; and committing or reasonably being suspected of having committed a criminal offence against his employer or his employer's property. Besides outlawing of unfair termination of employment, **Section 45** sets out instances of unfair termination of employment and what the Labour Officer or Industrial Court dealing with a complaint of unfair termination of employment should consider. **Section 46** sets out what does not constitute fair reasons for summary dismissal.

14. In this case as we have pointed out, the respondent's services were terminated for failing to keep an appointment with his CEO and making wild allegations of harassment and assault against his immediate boss which he was not prepared to stand by. Failing to keep an appointment with his CEO falls under **Section 44 (4)(e)** which relates to refusal or failure to obey a lawful order or command. Making wild allegations falls under **Section 44 (4) (d)**which outlaws using abusive or insulting language against his employer. The issue is whether or not the Respondent was guilty of both or either of these accusations to justify his summarydismissal.

15. To determine these accusations the Labour Officer and the Industrial Court are required to consider the matters enumerated in **Section 45** of the **Employment.** The relevant aspects of that Section are in **Sub-Section (5) (a)** and **(f).** These are considerations of the procedure the Appellant employed in reaching the decision to dismiss the Respondent, the conduct and capability of the respondent upto the date of termination and the existence of any previous warnings. There is nothing on record casting any aspersions on the respondent's conduct or capability. No previous warnings were raised. That leaves us with the procedure the appellant adopted before reaching the decision to dismiss the Respondent. This has of course to be considered along with the reason or reasons given for dismissal.

16. As stated above the reasons or the grounds for dismissal are that the Respondent refused or failed to keep an appointment with his CEO which, if true, falls under the rubric of disobeying a lawful command, and making wild allegations against his boss which falls under using abusive or insulting language. The second ground can be disposed of immediately. On 23rd September 2009

the HHR booked an appointment for the Respondent to see the CEO at 5.00 p.m. on that day for a routine discussion on operations. From what we have on record, the HHR did not say there was any complaint that the CEO needed to discuss with the Respondent. It is actually the Respondent who said that HHR told him the CEO wanted to see him about those allegations. When the Respondent saw the CEO the following day he denied making any allegations against his boss. We are not told if the CEO called the respondent's immediate boss or the HHR to confront the respondent with the claims that he had allegedly made to the HHR earlier on. In the circumstances we find that there was no substance in the accusation that the Respondent abused, insulted or was in any way disrespective to his immediate boss.

17. The accusation of refusing to obey a lawful order or command also had no substance. The Respondent was asked to see the CEO at 5.00 p.m., a time when he was supposed to go off duty. From the employer's side no urgency was raised that could not wait to the following day. When the Respondent met the CEO on 24th September 2009 he explained that he had to pick his sickly child from school and he unsuccessfully tried to reach the HHR to cancel the appointment. We find that a plausible explanation which in our view, without any previous neglect in that regard, was unreasonably rejected. There is also the aspect that the CEO did not refer the matter to the Management Board for consideration. Taking all these factors into account, we concur with the trial court that the respondents dismissal was unjustified. What remedy or remedies then was the Respondent entitled to?
18. As pointed out the Industrial Court ordered reinstatement. In his submissions, counsel for the appellant stated that the remedy of reinstatement should not be readily granted. We partly agree with him on that. A personal employee or an employee of a small firm who has been dismissed or whose services have been terminated should not be imposed on his employer. That would be casting such employer into servitude which is against public policy. We, however, do not agree with the said submissions by counsel for the appellant where the employer, like in this case is a large organisation. In large organisations where the sacked employee is not the immediate junior and/or does not, on a day to day basis, deal with the officer he has clashed with, or where he can be redeployed to another department, and especially so in a country like ours where employment opportunities are very hard to come by, reinstatement is the most efficacious remedy. Before ordering it however the court must consider the employee's antecedents and age.
19. In this case although the appellant is a large organisation, the person the respondent had a problem with was said to be his immediate boss whom he dealt with on daily basis and there is no evidence that the respondent can be deployed to another department. At any rate from the submissions by counsel for the appellant and the respondent's notice of cross – appeal as well as his advocate's submission, neither party is interested in reinstatement. In the circumstances, we are left with no choice but to set aside the Industrial Court's order of reinstatement, although we find no fault with it.
20. That is, however, not the end of the matter. In his claim and notice of cross appeal, the respondent sought payment of various amounts. Having not called any evidence, he is also caught in the same web of the consent order the parties recorded to have the matter determined on their pleadings and their respective counsel's submissions. In the circumstances we order the appellant to invoke the redundancy law to determine the Respondent's terminal benefits as the trial court had directed. If there is a dispute on the terms of the redundancy law, we remit the matter to the Industrial Court to take evidence on that point only and determine it. No party having been a clear winner in this appeal, we make no order as to costs.

DATED and delivered at Nairobi this 19th day of July 2013.

D.K. MARAGA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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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