Inda v Kentaste Products Limited (Appeal E098 of 2023)
[2024] KEELRC 394 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 394 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E098 OF 2023

M MBARŨ, J

FEBRUARY 22, 2024

BETWEEN

JECKONIA ODIWA INDA ..... APPELLANT

AND

KENTASTE PRODUCTS LIMITED ..... RESPONDENT

(Being an appeal from the judgment of Hon. C.L. Adisa (SPM) at Taveta in Mombasa CM ELRC No.360 of 2021 on 16 August 2023)

JUDGMENT

1. This appeal arises from the judgment delivered on 16 August 2023 in Mombasa CM ELRC 360 of 2021. The respondent was served but failed to enter an appearance or file any responses or written submissions.

2. The background of the appeal is a claim filed by the appellant because he was employed by the respondent (Kwale Coconut Processors Ltd) as a truck driver from January 2015 at a gross wage of Kshs. 25,000 per month. the respondent took over the employees on the same terms and conditions on 26 June 2019. The appellant was allocated duties to collect and de-husk nuts from the Mafisini satellite and deliver them for processing at the respondent's premises. On 15 November 2019, the appellant was issued a notice to show cause why disciplinary action should not be taken against him and directed to respond by 16 November 2019. The allegations made were that on 29 October 2019, while on duty with two others, the appellant offloaded 600 nuts on the property of the respondent and gave them to two people on motorbikes. The notice did not give particulars of the allegations. He was not accorded a hearing or allowed to call any witnesses leading to the unfair termination of his employment. he claimed the following dues;

    a) Compensation for unfair termination Kshs. 500,000;

    b) Notice pay Kshs. 25,000;

c) Service pay for 5 years Kshs. 75,000;

d) Unpaid public holidays for 5 years Kshs. 91,666;

e) Overtime for 3 hours for 5 years Kshs. 67,485;

f) Certificate of service;

g) Costs.

3. In response, the respondent's case was that the appellant was initially employed by Serendi Kenya Limited as a casual employee based on his contract dated 11 May 2015, and following the purchase of the company by the respondent, his employment was transferred to the respondent through a letter dated 26 June 2019 on the same terms. The appellant was required to serve under his employment with integrity and honesty and to avoid conflict of interest as required under the code of conduct in clause 9. Part of his duties was to collect nuts from the Mafisini satellite and deliver them for processing at the factory. These nuts were the property of the respondent but on 29 October 2019, the appellant engaged in misappropriation and theft of nuts defined under the Code of Conduct as theft. By stealing 600 nuts under his care, the appellant exposed the respondent to financial losses which invited disciplinary proceedings against him. Notice to show cause was issued to allow the appellant to attend and disciplinary proceedings were held on 19 November 2019 and it emerged that he had engaged in gross misconduct of theft, which justified summary dismissal on 18 November 2019. For these breaches, compensation and notice pay are not available. There was no work during public holidays and he was allowed to take annual leave and the claims made are not justified. The certificate of service is ready for collection upon clearance.

4. On 16 August 2023, the trial court rendered judgment and dismissed the claim save, the appellant was directed to collect his Certificate of Service within 14 days.

5. Aggrieved, the appellant filed this appeal because the trial court failed to take the evidence in totality and hence made errors particularly the contradictions by the witnesses called by the respondent. the appellant was not given a hearing to defend himself and the filed minutes were not signed and hence not authentic. The alleged loss of 600 nuts could not be verified and internal investigations only revealed a loss of 400 nuts. The judgment should be set aside and the claims made allowed with costs.

6. As noted above, only the appellant attended and filed written submissions.

7. The appellant submitted that the finding that there was fair termination of employment was not proper and should be set aside and the claims made allowed as pleaded. The trial court failed to apply the fair justice procedures addressed in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR or the provisions of Section 41 of the *Employment Act*, 2007 (the Act). The law requires the employer to issue notice to the employee and to allow the employee a fair chance to attend and defend himself. Through a letter dated 25 November 2019, the respondent dismissed the appellant without due process. The show cause notice dated 15 November 2019 demanded that he should respond by 16 November 2019 and a disciplinary hearing on 19 November 2019. The appellant was not given reasonable time to prepare his responses in defence hence leading to unfair termination of employment.

8. The appellant submitted that Section 43 of the *Act* requires the employer to have justified reasons leading to termination of employment which were lacking in this case. Following internal investigations, it emerged that the respondent had lost 400 nuts and not 600 as alleged in the notice to show cause issued to the appellant. The other persons working with the appellant were not called to

account for such loss and hence, there was no substantive justification of why the appellant was found culpable.

9. The evidence by the respondent was contradictory and should have been applied to the advantage of the appellant. The human resources manager admitted in evidence that the loaders working with the appellant to collect nuts did not complain about the loss of 600 nuts. A quality controller was supposed to check and count nuts as they were loaded and where there was loss, to complain. There is no complaint about the respondent losing 600 nuts. The claims made were with merit and should be allowed.

10. As a first appeal, the court is allowed to re-evaluate, re-assess, and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned magistrate should stand, and give reasons either way.

11. The appellant has admitted that on 15 November 2019, he was issued with a notice to show cause which required him to respond by 16 November 2019. The issue was that on 29 October 2019, he was assigned to collect de-husked nuts from Mafisini Satellite accompanied by two quality controllers named Mwinyi and Ngare but he decided to offload some of the nuts at the Mwachande area by ordering the two to offload some of them and to give them to two people who had motorbikes. The PCN from Mafisini indicated that a total of 12,250 but the actual received nuts at the factory were 11,650, an indication that 600 nuts were missing.

12. The appellant submitted his response on 16 November 2019 and noted that he left for Mafisini on 29 October 2019 and collected 12,250 coconuts and submitted them at the factory on 15 November 2019 it was alleged that some were missing but this related to miscounts.

13. The appellant was invited to a disciplinary hearing through a notice dated 18 November 2019 for the following day on 19 November 2019 and advised to attend to answer to alleged theft, dishonesty, and defrauding the company. He was allowed to attend with another employee of his choice.

14. An employer who suspects an employee to be of gross misconduct is allowed under Section 44(4) together with Section 41(2) of the Act to issue him with notice to respond to the allegations. The motions of Section 41(2) of the Act are not similar to criminal proceedings where the employer is called to give evidence beyond reasonable doubt but to establish on a balance of probabilities that there is misconduct.

15. Hence, under Section 41 of the *Act*, all an employer needs do is conduct investigations, give the employee or his representative a reasonable opportunity to respond to the allegations after a reasonable period and take a decision with notice to the employee. If an employee is charged with gross misconduct for being an accomplice in theft, the standard of proof is on a balance of probabilities.

16. The Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR held that;

> Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist," causing him to terminate the employee's services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. ...

> ... Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. There were. [underline added]

17. In the case of *Matsesho v Newton* (Cause 9 of 2019) [2022] KEELRC 1554 (KLR) (29 July 2022) (Judgment) the court held that;

> ...the employer is entitled to plead matters that he genuinely believed to exist and which would if they were in fact in existence, provide valid grounds for terminating the employee. In other words, situations may arise where the employer genuinely believes that a ground for terminating an employee has arisen when in fact it has not. For example, the employer may have strong preliminary evidence pointing to the employee having committed an offense against the property of the employer only for subsequent investigations to clear the employee. If the employer shows that he acted on such evidence out of a genuine belief that the employee had committed the act, the termination would be on valid grounds.

18. In this case, the appellant was called to account for his conduct on 29 October 2019, and in response on 16 November 2019, he took a casual approach and stated that the respondent had taken from 29 October to 15 November 2019 to note the difference in counting and hence it must have been a misconduct. during the hearing, the appellant made it a big issue that the two quality controllers with him should have been made to account for the coconuts collected on the material date. in his submissions, he has made a case that he could not control the two adult loaders with him to offload nuts from his tractor and give them out to two other persons waiting on motorbikes at Mikande.

18. The notice to show cause was issued to the appellant and not the quality controllers or the two loaders with him. he was the one called to account for his conduct. Shifting blame to others did not aid his case.

19. The respondent conducted investigations and established that on 29 October 2019 based on the returns from the appellants, there were missing nuts. The appellant was taken through the due process and found culpable. He failed to render a proper account. The respondent filed work records and returns to demonstrate missing coconuts from the tractor allocated to the appellant.

20. The findings by the learned magistrate cannot be faulted. The appellant was properly found to have engaged in gross misconduct that justified summary dismissal.

21. The claims made, ought and should have been analyzed on their merits despite the finding that the summary dismissal was justified. This is a requirement under the provisions of Section 18(4) of the Act.

22. The claim for service pay is on the basis that the appellant should be compensated for 5 years of service with the respondent. service pay is due according to the provisions of Section 35(5) and (6) of the *Act* where the employer fails to pay statutory dues and not for years of service.

23. The respondent filed the appellant's contract of service dated 11 May 2015 and the transfer of employment dated 26 June 2019 on similar terms as the initial contract issued. Under the contract, clauses 10 and 11 made provisions for health insurance and provident fund. The appellant cannot justify a claim for service pay.

24. On the claim for pay during public holidays, these are gazetted days by the Minister and cannot be justified through a general claim. A claimant must particularise how such days accrued.

25. On the claim for overtime pay for 5 years, the claim was for overtime worked at 3 hours each day of the year, 365 days. The respondent filed work records on the appellant taking various days of his annual leave;

    From 14 to 23 November 2019 he took 7 days of leave;

    2 to 15 July 2019 he took 10 days;

    5 to 1 March 2019 he took 4 days;

    6 to 11 September 2019 he took 2 days;

26. From 18 to 25 April 2017, he took 4 days; from 22 June to 6 July 2015 he took 10 days.

27. Cumulatively, the appellant was allocated various days for annual leave and cannot justify a claim for overtime for 365 days for 5 years. such a claim is not honest and not justified.

28. A certificate of service was properly allowed and the appellant was directed to collect the same within 14 days.

29. Accordingly, the findings by the learned magistrate are sound and hereby affirmed. The appeal is without merit and is hereby dismissed. no orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 22 DAY OF FEBRUARY 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....