



**Motrex Limited v Ngolo (Appeal E082 of 2023)
[2024] KEELRC 372 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E082 OF 2023
M MBARÚ, J
FEBRUARY 22, 2024**

BETWEEN

MOTREX LIMITED APPELLANT

AND

YUSUF MUTEMI NGOLO RESPONDENT

(Being an appeal against the judgment of Principal Magistrate D. O. Mbeja delivered on 30 June 2023 in Mombasa CM ELRC No. 738 of 2018)

JUDGMENT

1. The appeal herein arises from the judgment delivered on 30 June 2023 in Mombasa CM ELRC No.738 of 2018. The background of the matter is a claim filed by the respondent on the grounds that from 24 April 2008, he was employed by the appellant as a heavy commercial driver. he worked until 30 October 2016, when his employment was orally terminated without warning, hearing, or payment of his terminal dues. he claimed the following terminal dues;
 - a. Notice pay Kshs. 26,000;
 - b. Unpaid leave Kshs. 78,000;
 - c. 12 months' compensation Kshs. 312,000; and
 - d. Costs.
2. In response, the appellant's case was that the respondent was not diligent in his duties. On 29 October 2016, while the appellant's representative was carrying out a routine inspection of the vehicle allocated to the respondent, they found the tracking device had been tampered with. Before his employment was terminated, there was due process and the respondent did not deny that the tracking device in Motor vehicle KCF 465V had been tampered with. An investigation was conducted and the respondent



- allowed a hearing due to gross misconduct, his employment was terminated and his claims should be dismissed with costs.
3. The trial court in the judgment delivered on 30 June 2023 made a finding that there was no due process and awarded the respondent all his claims at Kshs. 416,000 with costs.
 4. Aggrieved, the appellant filed this appeal on the grounds that the learned magistrate failed to make a finding that the tracking device for motor vehicle registration No. KCF 465V had been tampered with based on the appellant's exhibit 'RW-1' and confirmed by other witnesses. Despite the appellant demonstrating that there was an inquiry leading to a finding that the respondent had tampered with the allocated motor vehicle tracking device, the court failed to apply the provisions of Section 45(5) of the *Employment Act*, 2007 (the Act). The learned magistrate erred in ignoring the evidence that there was a disciplinary process conducted against the respondent after being issued with a notice to show cause which could not be produced upon the minutes being stolen and the matter reported to the police in OB No.019/29/06/2021. The appellant paid the respondent all his terminal dues but this was not taken into account and for these reasons, the judgment should be set aside and the same substituted with the dismissal of the claims with costs.
 5. Both parties attended and agreed to address the appeal by way of written submissions.
 6. The appellant submitted that the trial court awarded the respondent all his claims as pleaded without taking not account that there was evidence that he had tampered with the tracking device of the allocated vehicle KCF 465V as the drier in charge. The appellant called five witnesses and Mr. Ali Twaib, the human resources manager testified that during a routine inspection in the presence of Saleh Burja, Thomas Muteti, and Richard Mwaniki, the respondent was found to have committed gross misconduct by tampering with the tracking device. The appellant called Edwin Mugo to demonstrate the tampering with the tracking device. Investigations were led to such findings and the respondent was taken through the motions of Section 41 of the Act but he failed to give satisfactory responses as held in the case of *Cooperative Bank of Kenya Limited v Yator*, Civil Appeal No. 87 of 2018. Under Section 43 of the *Act*, the appellant had a valid and genuine reason leading to termination of employment as held in *Josephine M. Ndungu & others v Plan International Inc.* [2019] eKLR. The respondent did not deny the fact that he had tampered with the allocated vehicle, KCF 465V which was gross misconduct and justified summary dismissal in terms of Section 44(4) of the *Act* as held in *Jackson Butiya v Eastern Produce Kenya Limited* Cause No.335 of 2011.
 7. The appellant submitted that the remedies granted failed to take into account that the appellant paid the respondent his terminal dues. notice pay was not due upon submission of evidence that the respondent received Kshs. 41,496 which included his wages and payment in place of notice. On the claim for leave days not taken, there was no proof of such matter contrary to Section 107 of the *Evidence Act*. The respondent had utilized all his leave days and in the year 2016, he was paid Kshs. 15,288 as compensation instead of taking annual leave.
 8. The appellant submitted that the learned magistrate failed to take into account the financial loss caused by the respondent due to his conduct and tampering with motor vehicle KCF 465V in assessing the award of compensation as held in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [202] eKLR. the appeal should be allowed and the judgment of the lower court set aside with costs.
 9. The respondent submitted that there was no documentary evidence that the appellant took the respondent through the due process or disciplinary hearing before the verbal termination of his employment. Such resulted in unfair termination of employment and the judgment of the trial court should be confirmed with costs. The alleged loss of records and show cause notice said to be reported at Mikindani Police Station during the pendency of the claim in court was without any evidence. In



the case of *Dennis Kaiser v Makupa Transit Shade Limited* Cause No. 47 of 2020, the court held that an employer cannot dismiss an employee at will. The due process of Section 41 of the Act must be adhered to. The employee must be allowed to call his representative at the disciplinary hearing under Section 41 (2) of the *Act*. These provisions and requirements are mandatory and the appellant failed to apply the due process.

10. The respondent submitted that the trial court made a finding that there was unfair termination of employment which justified the award of notice pay and compensation. Salary for October 2016 was properly awarded as due, the amount of Kshs. 19,496 was paid but the respondent disagreed with the tabulation of his terminal payments. In the case of *Peter Wafula Juma v Republic*, Criminal Case No.144 of 2011 the court held that the burden of proof is on he who asserts, which proof of payment is lacking in this case and the appeal should be dismissed with costs.
11. This being a first appeal, the court is under a duty to evaluate evidence recorded by the trial court and come up with its assessment and conclusions. However, allowance should be made for the fact that the trial court had the advantage of hearing the witnesses.
12. The respondent testified before the lower court that he parked his allocated vehicle at Mikindani yard, KCF 465V only to be called and dismissed from his employment. he had no prior notice of why such action was taken against him and that when he was called by Swaleh, he found the vehicle had been dismantled. He was not present when the vehicle was inspected and could not tell who had tampered with the vehicle.
13. The appellant called several witnesses. Ali Twalib testified that the respondent was summoned by the fleet manager for inspection of motor vehicle KCF 465V. It was discovered that the tracking device was tampered with. He was invited to a disciplinary hearing and then dismissed. he however noted that he did not attend these events and only relied on records. The minutes for the disciplinary hearing together with the notice to show cause that issued to the respondent got stolen and the matter was reported to the police.
14. The motions of Section 41 of the *Act* are mandatory. Where the employee is alleged to be of misconduct or gross misconduct, the employer must demonstrate that notice was issued to the employee to attend and defend himself in the presence of another employee of his choice. The appellant has well relied on the case of case of *Cooperative Bank of Kenya Limited v Yator*, Civil Appeal No. 87 of 2018. The employee must be given a hearing of whatever gross misconduct is stated to have been committed. The hearing need not take the motions of a criminal trial such as demanding to prove an employment offense beyond reasonable doubt but to ensure the due process of allowing the employee a fair hearing before a sanction of summary dismissal is issued as held in *Joseph Onyango Asare vs Brookside Dairy Limited* (2016) eKLR.
15. In the case of *Patrick Abuja v Institute of Certified Public Accountants of Kenya (ICPAK) & another* [2015] eKLR, the court had this to say on the fairness of a disciplinary process;

Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but also time for an employee to prepare psychologically as such an employee is always under the threat of losing a livelihood. In my view, the Respondent's action of writing an invitation letter on 3 March 2014 inviting the Claimant to a hearing on the morning of 4 March 2014 when, according to it, he had absconded and therefore his whereabouts were not known was ill-motivated and did not align with the statutory requirements of procedural fairness. It was equally not in accord with justice and equity as envisaged by



section 45(4)(b) of the Employment Act, 2007. The dismissal was therefore procedurally unfair.

16. The appellant's case is that the notice to show cause issued to the respondent and the minutes from the disciplinary hearing were stolen and the matter was reported to Mikindani Police Station under OB No.019/29/06/2021 but the matter has not gone into as to when such theft occurred and if the respondent is responsible. Fundamentally, the purpose of Section 41 of the Act is to have the employee call another employee of his choice to present at the disciplinary hearing even where the subject disciplinary minutes are said to be stolen, the employee called is not only for the benefit of the subject employee but to the employer as well. The employee could have been called to address the matters gone into during the disciplinary hearing.
17. The appellant called Swaleh Bijra the fleet manager. He testified that he was the one who found the vehicle allocated to the respondent to have been tampered with. He opted to call Habiba Hassan, Edwin Mugo from SGS who stated that the motor vehicle device in KCF 465V had been tampered with. The device had been inserted by SGS. The appellant also called Thomas Muteti Makau who testified that he was the shop steward who confirmed that the tracking device in the vehicle allocated to the respondent had been tampered with. It was not clarified whether he was at the disciplinary hearing representing the respondent or as a witness for the appellant.
18. The procedural lapse must be applied to the advantage of the employee, the respondent. The finding by the trial court that employment failed the fairness test contrary to Section 4 of the Act is sound save for the reasons outlined above.
19. On the reliefs claimed and awarded, the trial court had a duty under Section 18(4) of the Act to assess all the claims and give reasons for each award. The claim for notice pay is made on the basis that there was summary dismissal and the appellant's case is that there was payment instead of notice together with the wage due for October 2016. Such payments are not denied. There is also a payment of Kshs. 19,496 in terminal dues and there is evidence of these payments for untaken leave days. These payments ought to have been taken into account in allocating the various awards.
20. For notice pay due in a case of unfair termination of employment for lack of due process, the respondent was entitled to Kshs. 26,000.
21. For the untaken leave days, Section 28 of the Act only allows an employee to accrue leave days for up to 18 months unless there is approval by the employer or there is an application for leave days that is submitted but the employer declines to allocate. There is evidence submitted by the appellant in the clearance form dated 1st November 2016. The respondent had accrued 17.4 days all at Kshs. 15,288. This was included in the tabulation of his final dues at Kshs. 19,496.
22. On the payment of compensation, indeed, the trial court ought to have been guided under Section 45(5) of the Act. Take into account the record of the employee and any other disciplinary matters, if any. No such record was submitted by the employer.
23. In assessing the payable compensation upon a finding that there was unfair termination of employment, the court should give reasons leading to the allocation of the maximum award as against the lowest. In the case of Gas Kenya Limited v Odhiambo (Appeal E006 of 2022) [2022] KEELRC 3930 (KLR) the court held that courts must justify the awards they make by providing reasons for the award.



24. In the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of a maximum of 12 months' pay must be based on sound judicial principles, and that the trial court must justify or explain why a claimant is entitled to the maximum award.
25. In this case, the court finds no particular reason(s) or rationale for the maximum allocation of compensation. The respondent was employed on 24 April 2008 until 30 October 2016, a period of 8 years. The appellant paid his terminal dues immediately upon termination of employment. This ought to have placed the appellant in good standing pursuant to Section 45(5) (c) of the *Act*;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
26. An award of three months' compensation taking all the facts into account is hereby found appropriate redress. On a gross wage of Kshs. 26,000 x 3, total due Kshs. 78,000.
27. On the award of costs, again, costs in employment claims are discretionary. Account must be taken about the employer complying with the motions of Section 45 of the Act.
28. In this regard, the appellant having paid terminal dues assessed at the time employment terminated, each party ought to take care of its costs.
30. Accordingly, the judgment in Mombasa CM ELRCNo.734 of 2019 is hereby reviewed in the following terms;
 - a. There was unfair termination of employment;
 - b. The respondent is awarded Kshs. 78,000 in compensation;
 - c. Notice pay Kshs. 26,000;
 - d. Each party is to bear its own costs of this appeal and proceedings before the lower court.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

