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Siginon Group Limited v Mwaruwa (Appeal E071 of 2023) [2024] KEELRC 1404 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 1404 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E071 OF 2023

M MBARŨ, J

MARCH 20, 2024

BETWEEN

SIGINON GROUP LIMITED .... APPELLANT

AND

JUMA KAPHUTSU MWARUWA .... RESPONDENT

(Being an appeal from the judgment of D.W. Mburu (SPM) delivered on 14 July 2023 in Mombasa MCELRC No. 82 of 2018)

JUDGMENT

1. The background to this appeal is a claim filed by the respondent in Mombasa MCELRC No 82 of 2018 on the basis that he was employed by the appellant under a contract of employment in the year 2004 as a grade 3 heavy commercial driver with duties involved in driving of the appellant's lorries in Kenya and regionally transporting goods. It was a term of his contract that after every full year, the contract would be renewed at the discretion of the appellant upon application by the respondent. In this regard, the respondent's contracts were renewed on 16 December 2014 for 3 years, 1st January 2015 to 31st December 2017 earning a gross wage of Kshs 61,668.15 per month. Through a letter dated 21st April 2017, the appellant terminated the respondent's employment by summary dismissal. He had been issued with a show cause notice dated 3 March 2017 but without particulars or an opportunity for a hearing. The respondent filed suit and claimed the following dues;

    a) One month's notice pay Kshs 61,668.15;

    b) Compensation for the unexpired term contract from 1st May to 31st December 2017 Kshs 493,345.20;

    c) Certificate of service;

    d) Costs of the suit.

2. In response, the appellant admitted that the respondent was under a fixed-term contract for 3 years from 1st January 2015 to 31st December 2017 as a heavy commercial driver but earning Kshs 42,395.70 which included other benefits such as house allowance, shift pay, and overtime. Through a show cause notice, the appellant made the respondent aware of various allegations made against him and provided him with a chance to respond. During the hearing, he was allowed to bring another witness with him. After the disciplinary hearing, the respondent confirmed that he had been given a fair hearing. The events leading to termination of employment were that on 2 April 2016 the respondent while driving motor vehicle No KCD 220 Q ZD 0960 the property of the appellant was involved in an accident. He had encroached on the opposite lane of oncoming traffic when the accident occurred. The Kenya Police prima facie blamed him for driving without due care and charged him with a traffic offence. The respondent gave misleading information to the appellant about the accident, was argumentative during the disciplinary hearing, unapologetic, and deemed the accident a normal incident although the accident had occasioned the appellant great loss. There were Kshs 264,110 costs for repairs and Kshs 8,000,000 on truck downtime.

3. The appellant counterclaimed for the sum of Kshs 8,264,110 being costs for repair of truck Reg. No KCD 220 Q ZD 0960. The loss was compounded by the respondent who became hostile in CMCC No 1979 of 2017 Simon Kimotho Wanjiru v Siginon Group as such exposed the appellant to further losses arising out of litigation whose genesis was the accident caused by the respondent. The claims made by the respondent are not justified as this was a case of summary dismissal and the claim should be dismissed and the counterclaim allowed in the sum of Kshs 8,264,110 with costs.

4. A judgment delivered on 13 July 2023 dismissed the counterclaim and allowed the respondent's claim as follows;

   a) Kshs 379,180.80 compensation of 8 months' wages;

   b) Certificate of service;

   c) Interests on compensation from the date of judgment until payment in full;

   d) Costs of the suit.

5. Aggrieved by the judgment, the appellant has 11 grounds. The appellant challenged the finding that there was termination of employment without substantive justification after failing to consider the documentary evidence substantiated in the Notice to Show Cause. The respondent was found liable for the accident by the police and hence 100% liable to blame for the accident. In a separate civil matter, the court unequivocally found the respondent had caused the accident through negligence and careless driving. The respondent who was driving truck registration No KCD 220 Q ZD 0960 the property of the appellant caused the accident along Mombasa-Mariakani road involving the truck and two other vehicles, KBA 539G/ZC 7824 and KBL 540H as admitted and he admitted to the occurrence of the accident and termed it as an act of God.

6. Other grounds for appeal are that the trial court erred in ignoring the evidence on record and the fact that the police charged the respondent in a traffic case and found him to blame for it. The appellant was able to establish that the respondent had encroached onto the oncoming traffic lane when the accident occurred. The trial was treated as a criminal case calling for proof beyond reasonable doubt violating the long-established standards to apply in employment matters and that there was an employer/employee relationship. The finding that the letter of termination had more than one reason while the show cause notice had one reason was to ignore the evidence and submissions and matters arising during the disciplinary hearing.

7. Compensation was allowed at 8 months while the respondent had 6 months to the end of his contract and for these reasons, the appellant is seeking that the judgment be set aside and an order be issued dismissing the claim with costs.

Both parties attended and agreed to file written submissions.

8. The appellant submitted that in Civil Appeal No 3 of 2014- Mombasa *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona*, the court held that the employee had admitted he was not diligent in his transactions. The reasons for the dismissal were valid and fair; they warranted summary dismissal of the respondent. In Civil Appeal No 202 of 2017-*East Africa Portland v Nduati and 4 others* the Court in this case held that as much as the employees sought to extricate themselves from the allegations of fraud by claiming that they were not involved, and that in any event the fraudulent transactions were not detectable, it was not disputed that the employer suffered massive financial loss as a result. The loss occurred during the period when the employees were working in the finance department, and clearly, the fraud involved matters intimately connected with their individual actions, duties and responsibilities.

9. The appellant submitted that the reasons for dismissal were in keeping with the requirements of section 44 (4) (g) of the *Employment Act*. An employer is only required to provide the reasons for dismissal, and to demonstrate that the reasons were valid and justifiable. This being an employer/employee disciplinary matter, the appellant was not required to prove beyond reasonable doubt, this being the standard of proof in criminal cases, that the respondents had committed the fraud. And neither was the court required to superimpose its own decision on that of the employer.

10. The respondent submitted that in the case of *Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & another* [2022] eKLR the court held that negligence is proved by evidence. The police abstract cannot substitute the requirement or the need to adduce evidence to prove the case on the part of the employer even if this was not opposed. In the case of *Oloo v H Young & Co (EA) Limited* (Cause 654 of 2018) [2022] KEELRC [3792] (KLR) (28 July 2022) (Judgement) in addressing the question whether the termination of the Claimant's employment was lawful and fair, held that based on the evidence on record, the reason given by the respondent for termination of the claimant's employment is that the claimant had caused an accident while driving the respondent's motor vehicle. The employee stated that he was not to blame for the accident because the subject motor vehicle had faulty headlights that went off, thus causing the accident. A party alleging negligence as the cause of an accident must, at the very least, adduce evidence that links the conduct of the indicted party, with the accident. In an employment situation, an employer alleging such negligence against an employee is required to establish this nexus at the shop floor, prior to taking disciplinary action against the employee. This is the essence of sections 41 and 43 of the *Employment Act*.

11. The respondent submitted that in the case of *Mburu v CIC General Insurance Limited* (Cause 53 of 2019) [2023] KEELRC 807 (KLR) (27 March 2023) (Judgment) the court held that part of the due process measures to be taken into account before an employer terminates employment is to ensure that upon an employee being issued with a notice to show cause to explain why employment should not be terminated pending investigations, is to conduct such investigations and based on the outcome, allow the employee to see the results before attending any disciplinary hearing. Sharing such information would in essence give opportunity to the employee having a chance to see what matters came out from the investigations and hence be able to respond effectively. Without the investigations report, the employee attending at the disciplinary hearing would simply be groping into the darkness with the employer well aware of the outcome of the investigations but the employee innocently attending without advantage of the same as held in *Olute v County Government of Siaya & another* (Cause E059

of 2021) [2022] KEELRC 13206 (KLR) (17 November 2022) (Judgment) that procedural fairness envisages a situation where the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a connected statutory right to be informed of any evidence existing against the subject employee and naturally then; the employee should be allowed to give his responses therefrom. This in essence then requires that the employee be informed of the charges he has and a right to a proper opportunity to prepare and to be heard and to present a defence and his case in person, writing or through a representative or shop floor union representative if possible. Even in a serious case of gross misconduct, the motion of section 41(2) of the *Employment Act* 2007 (the Act) applies.

Determination

12. It is settled law that a first appeal is in the form of a re-hearing. As such the first appeal court has to re-evaluate the entire evidence objectively and arrive at its finding of fact, if necessary

13. Before the trial court, the respondent's case was while at work as a commercial driver with the appellant, using motor vehicle No KCD 220 Q ZD 0960 he had an accident. He was issued with a show cause notice dated 3 March 2017. His case was that he was not given particulars of the allegations against him and hence he was denied the opportunity to fully and effectively defend himself. He claimed that his employment was unfairly terminated.

14. The appellant's case on the other hand was that the respondent while driving its motor vehicle registration No KCD 220 Q ZD 0960 caused an accident through negligence and careless driving and was charged in a traffic case. He was issued with a show cause notice and invited to a disciplinary hearing where he admitted to causing the accident but that this was an act of God.

15. The appellant attached the letter of show cause to his claim. The allegations against him were that;

16. … on 2nd April 2016 while driving company truck KCD 220 Q ZD 0960 at about 5.00 am he caused an accident. In this particular incident, you are reported to have hit a third-party truck KBA 539G that subsequently hit and damaged a matatu registration KBL 540H.

    Therefore, in respect of the above the following irregularity was noted;

    i) Carelessly driving company truck KCD 220Q thus causing an accident and extensively damaging it, third party truck and matatu respectively. '….

17. The issue at hand was addressed with the respondent. He was invited to show cause by 8 March 2017.

18. In a detailed response dated 9 March 2017, the respondent noted as follows;

> … I do wholeheartedly accept the nature and the damages that occurred to those parties involved, as per the statement previously recorded and documented by police officers. At the scene of the crime, it was not my willing to cause the same. I tried my level best to control the accident or to prevent it as such but it was above my control.
>
> I further deny the content of the letter of carelessly driving since the accident is an accident hence the introduction of insurance documents purposely. As per my previous record in the same capacity, it was my first time to be involved in such a road strangely 14 years in the same field.
>
> I further regret to such and do apologise. Since it was god's will and could cause my life of …

19. Upon his response, through a notice dated 10 March 2017, the appellant invited the respondent to a disciplinary hearing on 17 March 2017. He was advised to bring another employee of his choice.

20. The learned magistrate in judgment properly highlighted the issues for determination and analyzed with regard to whether there was procedural fairness. Indeed, the trial court took into account that notice to show cause was issued, a disciplinary hearing notice was issued and the respondent was allowed to bring another employee of his choice, and that there was procedural fairness.

21. On the issue as to whether there was substantive fairness, the trial court referred to the provision of Section 43 of the *Employment Act*, 2007 (the Act) and that the appellant had the burden of proof which it failed to discharge that the respondent was negligent and careless in driving motor vehicle registration No KCD 220 Q ZD 0960. Without discharging such burden through an investigation report, a mere charged with a traffic offence is not sufficient and hence employment is terminated without a substantive reason.

22. The motions of Section 43 of the Act are that in proving the reasons for termination of employment, the employer is entitled to plead matters that it genuinely believed to exist and which would if they were in fact in existence, provide valid grounds for terminating employment as held in the case of *Matsesho v Newton* (Cause 9 of 2019) [2022] eKLR.

23. In this case, the respondent caused an accident and was charged in a traffic case. Such a fact is not contested. He was invited to show cause over his conduct and admitted indeed the accident occurred but it was an act of God. Hence at the time the appellant invited the respondent to attend a disciplinary hearing on 17 March 2017, it genuinely believed that he was negligent in his duties. He had committed a traffic offence and caused damage to the appellant's motor vehicle.

24. Under Section 44(4)(g) of the Act, summary dismissal is allowed where the employee through an act of negligence or performing his duties improperly leads to damage and loss to the employer. The law mandates the employer to terminate an employee where there are reasonable and sufficient grounds to suspect that the employee has been involved in a criminal act that is injurious to the person or property of the employer. The requirement to undertake investigations before finding fault on the respondent as analyzed by the trial court is not a requirement under Sections 41, 44, or 43 of the Act as cited.

25. The test is whether the action of the employer is based on genuine and valid reasons that would be considered reasonable in the circumstances. Put differently, the question would be whether another reasonable employer acting on the same set of facts would have reached a similar decision as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR).

26. The Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR aptly captured the standard to apply and 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. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 meters of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in

proof of the discrepancy and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

27. The appellant moved the respondent's case on the basis that after the accident, a traffic police officer visited the scene and found him culpable. Beyond that, he was charged with a traffic offence. More fundamentally with regard to his employment, he was invited to show cause and admitted to the accident but blamed it as an act of God. There was a disciplinary hearing and the trial court properly made a finding that procedural fairness was met.

28. In this regard, there were justified and valid grounds leading to termination of employment through summary dismissal. The findings by the trial court are hereby set aside.

29. The award of compensation on the background of a justified summary dismissal is not available to the respondent. such is set aside.

30. On the counter-claim, in employment and labour relations and unlike commercial disputes, at the end of employment, under the Act, the employer is allowed to recover losses for any damage done to its property by the employee. Section 19 (1)(b) of the Act;

    (1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

        (a) ...

        (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

31. This is permissible particularly where the employee is found culpable for gross misconduct resulting from improper, negligent, and careless performance of his duties. Whether the counterclaim is addressed or the loss incurred arises as a response to the claim or a claim against the employee, under the provisions of Section 19 of the Act, the amount of loss and damage is due from the subject employee.

32. In this regard, the loss of Kshs 8,264,110 following the respondent causing an accident while driving the appellant's motor vehicle registration No KCD 220Q is due to the appellant. The finding by the trial court that the respondent had no contract to provide for repairs for the vehicle he drove looked against the applicable law, such was an error.

33. Accordingly, the appeal is with merit and is hereby allowed; judgment in Mombasa MCELRC No 82 of 2018 is hereby set aside; judgment is hereby entered in the counterclaim for the appellant against the respondent in the sum of Kshs 8,264,110. Each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet

.... and ....