Kamajugo v Trademark East Africa Limited (Cause E650 of 2021) [2024] KEELRC 13511 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13511 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E650 OF 2021

L NDOLO, J

DECEMBER 19, 2024

BETWEEN

RICHARD KAMAJUGO .... CLAIMANT

AND

TRADEMARK EAST AFRICA LIMITED .... RESPONDENT

JUDGMENT

1. The Claimant in this case, Richard Kamajugo, is a Ugandan National, who was employed by the Respondent, Trademark East Africa Limited, a body corporate registered in Kenya as a company limited by guarantee, with the core business of promoting trade within the East African Region.

2. At the material time relevant to this dispute, the Respondent was engaged in a Regional Electronic Cargo Tracking System, a project funded by several development partners and working closely with Revenue Authorities in Kenya, Uganda and Rwanda.

3. The dispute was triggered by the termination of the Claimant's employment as communicated by letter dated 12th August 2020.The Claimant states his case in a Memorandum of Claim dated 5th August 2021 and the Respondent defends itself by a Statement of Response dated 8th September 2021. The Claimant responded to the Respondent's Statement of Response on 25th October 2021.

4. The matter went to full trial where the Claimant testified on his own behalf with the Respondent calling its Senior Director, Corporate Resources, Josepha Ndamira. Both parties also filed final submissions.

The Claimant's Case

5. By a letter dated 19th February 2015, the Claimant was employed by the Respondent, in the position of Senior Director, Trade Environment, earning a monthly salary of US Dollars 12,531.

6. On 28th April 2015, the Claimant was issued with a contract of employment, by which he was he was entitled to gratuity at the rate of 15% of annual gross salary, a yearly educational allowance or a retirement contribution of US Dollars 15,247.

7. Effective February 2019, the Claimant was promoted to the position of Chief Operations Officer, earning a monthly salary of US Dollars 15,405 plus gratuity at the rate of 15% of annual gross salary, a yearly educational allowance or a retirement contribution of US Dollars 19,405.

8. By a letter dated 11th December 2019, the Claimant's employment contract was extended to 30th June 2023.

9. On 21st April 2020, the Claimant received an email from the Respondent's Chief Executive Officer, notifying him of the commissioning of an investigation on the financial management of the Regional Electronic Cargo Tracking System. The email specified that the investigation was necessitated by the discovery of cost overrun commitments made to the Revenue Authorities in Kenya, Uganda and Rwanda.

10. The investigation yielded a report that recommended that disciplinary action be taken against the Claimant. By a letter dated 3rd July 2020, the Respondent forwarded the report to the Claimant and invited him to show cause why disciplinary action should not be taken against him on account of the following charges:

    a. That the Claimant failed to address cost overruns or to escalate the issue to the senior management, despite being copied in correspondence from the vendor, BSmart, on 1st and 16th August 2018;

    b. That the Claimant's truthfulness was called to question as he had stated that he first became aware of the cost overruns in November 2019, yet he had been copied in the August 2018 emails;

    c. Failure by the Claimant to exercise oversight of the ICT4Trade in the exercise of his responsibilities;

    d. Failure by the Claimant to communicate the Respondent's funding commitment to the Revenue Authorities.

11. In his response to the show cause notice, the Claimant stated that he had requested for a brief from the project lead person, on the magnitude of the problem, to enable him assess the extent of the problem and propose remedial action, before escalation.

12. The Claimant claims to have been assured that the issue of payments had been agreed upon with the vendor and until November 2019, he was confident that the problem had been resolved. He states that he relied on information given to him by his team.

13. By a letter dated 24th July 2020, the Claimant was invited to a disciplinary hearing and on 12th August 2020, his employment was terminated. The Claimant appealed against the termination by his letter dated 25th August 2020 and he was invited to an appeal hearing on 19th November 2020. By a letter dated 30th November 2020, the Claimant was notified that his termination had been upheld.

14. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

    a. Unpaid salary from 13th August - 30th November 2020............$ 68,955.00

b. Salary for the remainder of the employment contract............. 692,274.42

c. 12 months' salary in compensation..243,588.00

d. Exculpatory damages for discrimination......................................243,588.00

e. Damages for breach of legitimate expectation...........................243,588.00

f. Damages for bias

g. Costs plus interest

The Respondent's Case

15. In its Statement of Response dated 8th September 2021, the Respondent admits having employed the Claimant as stated in the Memorandum of Claim. The Respondent however denies the Claimant's averment that his employment was unlawfully terminated.

16. The Respondent asserts that the Claimant's employment was governed by Kenyan law as well as the Respondent's Human Resource Policies and Procedures Manual.

17. The Respondent states that by an email dated 21st April 2020, the Claimant and other employees working in the Regional Electronic Cargo Tracking System project, were informed of an impending investigation into cost overrun commitments made to Revenue Authorities in Kenya, Uganda and Rwanda. The Respondent avers that these commitments amounting to $ 5.8m, were not reflected in its financial systems and was not backed by committed contributions.

18. According to the Respondent, the investigation was not criminal in nature nor was it envisaged as one involving fraud. Rather, the investigation sought to establish; what lapses might have occurred, the nature of commitments made by the Respondent's staff to the respective Revenue Authorities, when the commitments were made, and by whom. The investigation would also result in recommendations on corrective measures and improvements with a view to avoiding a recurrence of cost overruns.

19. The Respondent maintains that the Claimant was aware that the investigation was expected to reveal staff members who were liable for misconduct arising from non-compliance with set policies and procedures.

20. The Respondent states that the investigation report established that the Claimant had a case to answer. The Claimant was therefore invited to show cause why disciplinary action should not be taken against him. The Respondent adds that the Claimant was allowed time off to prepare his response.

21. The Respondent avers that the Claimant's response was found unsatisfactory and a decision was made that the matter proceeds to disciplinary hearing. The Claimant was issued with a disciplinary notice containing the date, time and venue of the hearing; relevant documentation and the names, designation, and specific roles of the disciplinary panel members.

22. Further, the Claimant was notified of his right to be accompanied at the disciplinary hearing and to call witnesses. In addition, he was allowed time off to prepare for the hearing. The Respondent maintains that the Claimant was afforded adequate opportunity to be heard.

23. On the charges levelled against the Claimant, the Respondent singles out the charge of failure to inform the Senior Leadership Team about the payment demands made by BSmart. In this regard, the Respondent states that the disciplinary panel concluded that given the Claimant's oversight role in the project, he should have escalated the matter to the Senior Leadership Team, as soon as the issue became apparent.

24. The Respondent's case is that the Claimant did not provide plausible reasons for his conduct and a decision was therefore made that his employment be terminated. The Respondent states that the Claimant was allowed to exercise his right of appeal and adds that upon receipt of the Claimant's appeal, it sought time to consult an external advisory firm.

Findings and Determination

25. Upon review of the parties' pleadings, testimony and submissions, I have distilled the following three (3) issues for determination in this case:

    a. Whether the termination of the Claimant's employment was lawful and fair;

    b. Whether the Claimant has made out a case of discrimination;

    c. Whether the Claimant is entitled to the remedies sought.

The Termination

26. The termination letter issued to the Claimant on 12th August 2020, discloses the following as the reasons for the termination of his employment:

    a. Failure to inform the Senior Leadership Team about payment demands made by BSmart, in order to facilitate timely resolution and management of the issue;

    b. Misrepresentation regarding the time when the Claimant became aware of the outstanding invoices from BSmart, contrary to the Respondent's core values, principles and ethics;

    c. Failure to exercise the required oversight of the ICT for Trade in the execution of his responsibilities, in line with the roles of his job description;

    d. Failure to communicate the Respondent's funding commitment to the Revenue Authorities in line with the approved PAR despite having been in copy in the discussions on the Regional Electronic Cargo Tracking System project contract, negotiation and approval.

27. The termination letter goes further to state that a decision had been made that the Claimant be summarily dismissed without notice. It further notified the Claimant of his right to appeal against the dismissal to the Complaints Committee of the Board.

28. In adjudicating the lawfulness and fairness of a termination of employment, the Court is required to deal with the twin issues of substantive justification and procedural fairness. Substantive justification deals with the reason for termination, while procedural fairness addresses the issue of due process.

29. With regard to substantive justification, Section 43 of the *Employment Act* lays out the employer's burden as follows:

    43.

    (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

    (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

30. The interpretation of the foregoing provision is now well settled and it is this; that in determining whether an employer has proved a valid reason for termination of the employment of an employee, the Court does not seek to supplant the employer's decision with its own.

31. In other words, the Court does not ask what action it would have taken had it been in the employer's position; all the Court is required to determine is whether the action taken by the employer, against the employee, is one that a reasonable employer, faced with similar circumstances, would have taken.

32. This is what is referred to as the 'reasonable responses test' whose beacons were established by Lord Denning in British Leyland v Swift (1981) IRLR 91 as follows:

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

33. In its final submissions, the Respondent cited the Court of Appeal decision in Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR where the following excerpt from Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642 was adopted:

> "In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

34. The Respondent further relies on the South African decision in Nampak Corrugated Wadeville v Khza (JA 14/98) where it was held that:

> "A court should...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."

35. The charges levelled against the Claimant, as communicated by both the show cause notice and the dismissal letter, and as deliberated upon at the disciplinary and appeal hearing proceedings, revolve around the Claimant's role in the handling of an issue of cost overruns in the Regional Electronic Cargo Tracking System project, undertaken by the Respondent.

36. In this regard, the Claimant was accused of first, failing to escalate the issue to the Senior Leadership Team; and second, attempting to conceal the time when the issue was first brought to his attention. The Respondent therefore concluded that the Claimant was both negligent and dishonest.

37. The Respondent's case is that the Claimant failed to notify the Senior Leadership Team about invoices submitted BSmart, the vendor in the project, despite having received the information as early as mid-2018. The Respondent submits that given his oversight role in the project, the Claimant ought to have escalated the issue as soon as it was brought to his attention.

38. By his own email dated 5th May 2020, the Claimant admitted having relied on information from staff working under him. He states as follows:

> " …I never got indications…that there was a big issue and my impression all along was that the matter was being addressed and there was no cause for alarm. I had confidence in the team and on hindsight, I probably over trusted and I believed what I was told. I did not realise that the problem had persisted and when B'SMart addressed both of us in his email of early Nov, 2019 that's when it dawned on me that there was a problem whose magnitude I needed to understand…"

39. From this email, it is evident that the Claimant failed to pick and escalate a crucial matter, which carried reputational and existential risk to his employer. In addition, the Claimant did not adduce any evidence to counter the Respondent's assertion that he had been notified of the issue before November 2019, as recorded by him in his statement.

40. On this account, and applying the 'reasonable responses test', I have reached the conclusion that the Respondent had a valid reason for dismissing the Claimant, as required by law.

41. The next question is whether in executing the dismissal, the Respondent observed due procedure. The procedural fairness requirements are set out in Section 41 of the *Employment Act*, which provides thus:

42.

(1) Subject to section 42(1), an employer shall, before terminating misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing the employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

43. There is evidence on record that the Claimant was informed of the

charges levelled against him, by way of a notice to show cause, to which he duly responded. The Claimant was also invited to a disciplinary hearing and an appeal hearing. Nonetheless, the Claimant faults the disciplinary process on the following grounds:

a. That the process contemplated by the email dated 21st April 2019 was administrative and not disciplinary in nature;

b. That upon completion of the compliance report, the Respondent ought to have undertaken further investigations to ascertain whether the Claimant had a case to answer;

c. That no impartial investigating officer was appointed to investigate the allegations against the Claimant;

d. That the Claimant was not provided with the report by the external expert retained by the Respondent.

44. On its part, the Respondent avers that the allegations levelled against the Claimant were of a serious nature, requiring formal action in line with clause 15.3.2 of the Human Resources Manual. The Respondent cites clause 15.3.2.1 of the Manual which provides as follows:

Investigation

The purpose of the investigation is to determine whether the employee has a case to answer at a formal disciplinary hearing. All allegations of misconduct shall be investigated impartially and thoroughly by an Investigating Officer appointed by the CCSO or the Fraud Response Group as appropriate. As part of that investigation, the employee against whom the allegations of misconduct have been made shall be given an opportunity to respond to the allegations.

The Investigating Officer will prepare a report summarizing the nature of allegations, or complaint, the process of investigation and the findings, and the outcomes of the investigation. The possible outcome may be;
There is no case to answer and therefore no disciplinary action should be taken;There was some minor misconduct which should be dealt with informally; orThere is a disciplinary case to answer and a disciplinary hearing should be arranged.

45. By its email dated 21st April 2020, the Respondent notified the Claimant and other employees that an investigation would be conducted; and the investigating team was named as Joanita Nakimuli, the Director, Risk and Compliance and Elsie Wangari, the Risk and Compliance Manager. More significantly, the Claimant was allowed to participate in the investigations, including being availed an opportunity to be interviewed and to record his statement. Finally, the Claimant was issued with a copy of the report emanating from the investigations.

46. From the foregoing, the Court is satisfied that proper investigations were conducted prior to the Claimant being put on his defence. His assertion that there was need for further investigation is therefore without basis and is rejected.

47. The Claimant also complains that he was denied a copy of the report prepared by the external expert retained by the Respondent at the appeal stage. There is evidence on record that the Claimant acceded to the request by the appeals panel for extension of time within which to address his appeal. There is further evidence that the appeals panel sought external expert opinion on the proceedings and outcome of the initial disciplinary proceedings.

48. The question is whether the Claimant was entitled to see the external expert report before appearing for his appeal hearing. The answer to this question turns on the further question whether the subject report was a relevant document in facilitating the Claimant to present his appeal before the appeals panel.

49. The Respondent referred the Court to the South African decision in South Africa Sports Confederation and Olympic Committee (SASCOC) v Commission for Conciliation, Mediation and Arbitration & others (JR 2642/19) [2021] ZALCJHB 23 (1 March 2021) where it was held that denial

of a report that was not used in the disciplinary proceedings cannot be said to have compromised the fairness of a dismissal.

50. In conducting internal disciplinary proceedings, an employer will marshal all resources at their disposal, both internally and externally. It would be absurd and altogether unfair for such an employer to be compelled to disclose advice in the nature of professional or technical advice submitted by experts engaged by them.

51. Additionally, the Claimant flags the fact that his disciplinary hearings were conducted virtually, as an issue. He however admits that this happened at the height of the COVID-19 global pandemic, when physical meetings were restricted. His argument that he did not have internet capacity was not supported by any evidence. That is all I will say on this issue.

52. The Claimant also alleges that the composition of the disciplinary and appeal panels was laced with bias; because the Human Resource Director and the Company Secretary were present in both proceedings.

53. In response, the Respondent states that the two officers were not part of the panels, adding that the Human Resource Director was in attendance as an adviser on policy and regulatory matters, while the Company Secretary was in attendance to ensure accuracy and independence in recording of deliberations. The Court finds the explanation by the Respondent in this regard plausible and there is nothing more to say on the issue.

54. Ultimately, I find and hold that the Claimant's dismissal was substantively and procedurally fair.

Discrimination?

55. The Claimant's claim on discrimination proceeds from the admitted fact that Alban Odhiambo ,,who served as the Director ICT4Trade was subjected to a lesser disciplinary action; yet, he was equally culpable in the predicament the Respondent found itself in.

56. Section 5(3) of the *Employment Act* provides that:

    (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee-

        a. on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

        b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

57. By definition, discrimination occurs where persons are subjected to differential treatment for illegitimate grounds. It is common cause that both the Claimant and Alban Odhiambo were subjected to disciplinary proceedings arising from the same issue of cost overruns that went unreported. It is also true that while the Claimant was summarily dismissed, Odhiambo was issued with a caution.

58. The Respondent attributes the differential treatment as between the Claimant and Odhiambo to their conduct. According to the Respondent, while the Claimant sought to avoid culpability by misrepresenting the actual time when the issue at hand was brought to his attention, Odhiambo took full responsibility for his error in judgment for which he apologised.

59. The Respondent relied on the South African decision in De Beers Consolidated Mines v Commission for Conciliation Mediation and Arbitration & others (JA68/99) [2000] ZALAC 10 (3 March 2000) where it was held that:

> " …Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he has broken. Where…an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great."

60. Where, as in the present case, the conduct of two employees facing disciplinary proceedings arising from the same transaction, is diametrically different; with one being evasive and the other overtly remorseful, the employer is entitled to impose disparate sanctions, without falling afoul of the edict against discrimination. This is part of the 'reasonable responses test' which has been addressed in the preceding part of this judgment.

61. I therefore find and hold that the Claimant has failed to establish a case of discrimination.

Final Order

62. In light of the foregoing findings and conclusions, the final order that commends itself is that the Claimant's entire claim fails and is dismissed with costs to the Respondent.

63. It is so ordered.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Madowo for the Claimant

Mr. Ohaga, SC with Ms. Ahmed for the Respondent