Kay Construction Company Limited v Oduong & another (Employment and Labour Relations Appeal E158 of 2022) [2023] KEELRC 749 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 749 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E158 OF 2022

BOM MANANI, J

MARCH 23, 2023

BETWEEN

KAY CONSTRUCTION COMPANY LIMITED ..... APPELLANT

AND

GEORGE OUMA ODUONG ..... 1ST RESPONDENT

MARTIN KIRAGU NJUGUNA ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. This is an appeal challenging the trial court's decision by which the Appellant was found to have violated the Respondent's right to due process while processing the separation of the parties. The Appellant was dissatisfied with several aspects of the court's pronouncement prompting the filing of a Memorandum of Appeal containing nine (9) grounds of appeal. However, as will appear later in the decision, from the nine (9) grounds, the Appellant eventually framed only three (3) issues for determination. From the way the issues were formulated, it would appear that some of the grounds of appeal were dropped in the process.

Facts of the case

2. From the record, the Respondents were employees of the Appellant having been engaged on diverse dates. It would appear that the parties separated in 2021 after disagreement between them arising from a controversy over the use of staff transport that had been provided by the Appellant.

3. From the evidence before the trial court, the Appellant introduced a staff van at the workplace whose user was not very clear. Whilst the Respondents assert that the van was intended for all employees of the Appellant, the Appellant's witnesses suggest that the vehicle was meant for particular members of staff who had been posted to the Appellant's Athi River outlet.

4. The vehicle was scheduled to be departing from the workstation at 4.30 pm. In a bid to fit into the schedule, the Respondents adjusted their reporting time to 7.30 am so that they could leave their workstation at 4.30 pm just in time to catch the van. As the record shows, the Appellant's management did not approve of this change. The Respondents were accused of having made unilateral adjustments to their reporting and departure time.

5. The Appellant convened a staff meeting on 12th February 2021 to address the matter. The evidence on record shows that there was general disorder at the meeting. The Respondents are said to have kept shouting at the Appellant's management as the meeting progressed. On 15th February 2021, the 1st Respondent is accused of having continued to use derogatory language against the Appellant's officials whilst on their way to work.

6. It is this conduct by the Respondents which prompted the Appellant to issue the Respondents with letters requiring them to explain why disciplinary action should not be taken against them for using abusive and derogatory language against their supervisors. The Respondents were thereafter subjected to a disciplinary session which resulted in the decision to terminate their contracts of service through summary dismissal. It is this decision that triggered the case before the trial court.

7. After hearing the parties, the trial court found that the evidence disclosed a justifiable ground for the Appellant to terminate the Respondents' contracts. However, the court was not satisfied that the Appellant observed due process in terminating the Respondents' contracts. Consequently, the court declared the decision to summarily dismiss the Respondents from employment as unlawful. This pronouncement triggered the current appeal.

Analysis

8. Being a first appeal, the court is alive to its obligation to re-evaluate the evidence on record with a view to arriving at its own conclusion on the dispute. In executing this task, the court is to be guided by the grounds of appeal as framed and argued by the parties.

9. The court is also alive to the fact that it did not have the opportunity of seeing the witnesses give their oral testimony. As a consequence, it does not enjoy the privilege of appreciating their demeanour as did the trial court. Accordingly, these realities must be borne in mind and adequate allowance made for them (see *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR).

10. Despite the several grounds of appeal, the Appellant framed and submitted on the following three issues only:-

    a. Whether disciplinary hearings for gross misconduct can be carried out on short notice.

    b. Whether conflict of interest arises when a complainant is a member of the disciplinary hearing panel.

    c. Whether employees summarily dismissed are entitled to notice pay.

11. The directions that were issued on 8th December 2022 required parties to argue the appeal through written submissions. Essentially, the parties were to make their representations in support of or opposition to the appeal through their written remarks. It is therefore safe to assume that any ground of Appeal that is not addressed in the submissions by the Appellant has been abandoned. In this regard, the court will not delve into addressing grounds that the Appellant has abandoned through this election.

12. From the outset, I wish to observe that the record does not show that there is a dispute regarding whether the Appellant had valid reason to terminate the Respondents. As has been pointed out by the Appellant, the trial court found that indeed there were valid grounds to support the Appellant's decision to terminate the Respondents' contracts of service. As the record demonstrates, there is no appeal by either of the parties challenging this finding. That being the position, this court will not stray into that aspect of the case.

13. The court will only address two questions regarding the impugned termination: whether the trial court erred in law and fact in finding that the Appellant failed to observe due process in terminating the Respondents' contracts of service; and whether the trial court was wrong in holding that the Respondents were entitled to notice before termination of their employment contract despite the fact that they were summarily dismissed from employment. The first question covers issues numbers one and two as framed by the Appellant and the second question covers issue number three.

14. On the first question, I understand the Appellant as having narrowed its submissions to the following issues:-

    a. Whether notice for the disciplinary session was inadequate as suggested by the trial court.

    b. Whether the Respondents were entitled to cross examine the Appellant's witness at the disciplinary session as suggested by the trial magistrate.

    c. Whether having found that the Appellant had valid ground to terminate the Respondents' contracts of service, the trial court was thereby precluded from upsetting the decision by the Appellant to terminate the contracts on account of the Appellant's failure to observe procedure in arriving at its decision.

    d. Whether the trial court was wrong in holding that the Appellant's disciplinary committee was conflicted.

Adequacy of the notice for the disciplinary session

15. The question of adequacy of notice for the disciplinary session is indeed raised as a distinct ground of appeal under paragraph five (5) of the Memorandum of Appeal. The Appellant states that the trial magistrate misdirected herself in failing to recognize that disciplinary hearings for gross misconduct can be carried out on short notice.

16. Under this subheading, the Appellant contends that the notice for the disciplinary session against the Respondent was adequate. It is the Appellant's case that the Respondents were afforded seven (7) days to prepare for their case. That despite the ample time granted to them, the trial court held that the Respondents were not afforded sufficient time to prepare their defense. In the Appellant's view, this finding by the trial court was erroneous and should be set aside.

17. I have looked at the record before the trial magistrate. The context in which the trial court raised the question of adequacy of time for the Respondents to prepare their defense had nothing to do with the time the notice to show cause was served on them in contradistinction with the date of the disciplinary hearing as asserted by counsel for the Appellant.

18. The trial court's concern in this respect was with regard to the time the witness statements by Appellant's witnesses were procured during the disciplinary session. The court observed that the witnesses recorded their statements on the day of the disciplinary session. Further, the court observed that there was no evidence that these statements were shared with the Respondents in time or at all in order for the Respondents to prepare to respond to the statements during the disciplinary hearing.

19. A key witness in the disciplinary session was one Beata W. Peter. Her statement appears at page 72 of the Record of Appeal. It is dated 18th February 2021. There are other statements by Patrick Mbithi (prepared on 17th February 2021), Clement Mwangi (prepared on 18th February 2021) and John Ndegwa (prepared on 18th February 2021). The statements are at pages 69 to 71 of the Record of Appeal. The minutes of the disciplinary sessions for the Respondents are at pages 73 to 84 of the Record of Appeal. They indicate that the disciplinary sessions were held on 18th February 2021 the same day that the Appellant recorded statements of the various witnesses.

20. There is no evidence to demonstrate that these statements, including that one of Beata W. Peter who attended the disciplinary session were shared with the Respondents before the sessions of 18th February 2021. Yet, a scrutiny of the minutes for the session for the 1st Respondent shows that one Ann Karanja who was apparently conducting the session through telephone reminded the 1st Respondent that she had in her possession statements from witnesses which were perhaps incriminating against the 1st Respondent.

21. The same thing applies to the session involving the 2nd Respondent. As the minutes demonstrate, the verdict reached against this Respondent was based on information supplied to the Disciplinary Committee by Valji, Harish and Beata. Whilst the record shows that Beata recorded her statement on the subject on the day of the disciplinary session, there is no evidence that this statement was shared with the 2nd Respondent in time or at all to enable him respond to it at the hearing. Yet, the panel relied on this statement to reach its verdict.

22. It is this approach to handling the disciplinary process against the Respondents that the trial court found inappropriate. It does not appear proper for the employer to withhold relevant information from an employee facing disciplinary action yet use the information to push the employee to admit to charges against him on the ground that the information is in any event incriminating against the employee. The rules of natural justice require that the employee is shown this incriminating evidence in order for him to respond to it. Importantly, such information ought to be shared in good time in order to allow the employee the opportunity to prepare informed responses to it.

23. Whilst it is true that internal disciplinary proceedings by an employer are not in the nature of a court trial, this cannot be a justification for handling the sessions in flagrant disregard of due process. Such action makes a mockery of the provisions on due process under sections 41 and 43 of the *Employment Act*. If the court were to agree that an employer is entitled to withhold relevant information from an employee facing a disciplinary process but still use the information to cajole the employee into self incrimination just because the rules of a court trial do not strictly apply to disciplinary proceedings conducted by an employer, the court will be acting as a harbinger of injustice.

24. I note from their pleadings the Respondents specifically indicate that the Appellant's overall conduct in the disciplinary process violated their rights under *the Constitution* and statute. Articles 41 and 47 of *the Constitution* protect the rights to fair labour practice and fair administrative action. In employment matters, these rights are actualized mainly through the application of provisions of the *Employment Act* and the *Fair Administrative Action Act*. Both legislations contemplate a procedurally fair disciplinary and or administrative process against employees (see section 41,43 and 45 of the *Employment Act* and section 4 of the *Fair Administrative Action Act*).

25. To withhold witness statements from the Respondents which the Appellant was relying on to push its case at the disciplinary session was certainly in violation of these constitutional rights. Commenting

on this requirement Maureen Onyango J in *Jonathan Chepkwony v George Makateto, Acting Chief Executive Officer, Export Processing Zone Authority (EPZA) & 2 others* [2021] eKLR states as follows:-

> ''As rightly stated by the Petitioner, Article 47 of *the Constitution* requires that a person likely to be affected by an administrative decision be given a fair hearing. .....It is crucial that an employee facing disciplinary process be supplied with the information, material and evidence that will be used against him.''

26. It is noteworthy that both Respondents state in their witness statements which were adopted as their evidence in chief that they were not furnished with particulars of the alleged abusive language they are alleged to have used against their superiors prior to the commencement of the disciplinary sessions. It was their case that this hampered their ability to effectively respond to the accusations against them.

27. A look at the notices to show cause served on the Respondents shows that apart for the generalized accusations of using abusive and derogatory language against their superiors, the Appellant did not provide specifics of the accusations to the Respondents. A perusal of the witness statements recorded by the Appellant's witnesses between 17th February 2021 and 18th February 2021 demonstrates that the particulars of the accusations were for the first time set out in these statements. However and as pointed out earlier, these statements were withheld from the Respondents. They appear to have been only available to the Appellant's team who were using them to conduct the disciplinary session. This should explain why the details of the accusations appeared to get to the Respondents on the floor of the disciplinary session.

28. It was inappropriate for the Appellant to hold off particulars of the charges against the Respondents only to ambush them with the details on the floor of the disciplinary session. This conduct by the Appellant was clearly intended to disable the ability of the Respondents to adequately prepare for their defense.

The Right to Cross Examine

29. The Appellant also argues that it was improper for the trial court to fault the Appellant for failing to allow the Respondents the opportunity to cross examine witnesses during the disciplinary session. The position expressed by the Appellant in this respect is incorrect.

30. It is true that cross-examination of witnesses at a disciplinary session is not to be conceptualized from the viewpoint of cross-examination during a court trial. It is sufficient that the employee is afforded an opportunity to present his case unhindered, confront his accusers and has the chance to comment on the evidence presented against him (see *Joseph Mbalu Mutava v Attorney General & another* [2014] eKLR (pars 97 to 120).

31. I agree with the decision in *Joshua Rodney Marimba v Kenya Revenue Authority* [2019] eKLR that an employee facing a disciplinary session has a right to cross examine his accusers. The only difference as pointed out earlier is that this right need not be exercised in the context of the procedure contemplated under the Evidence Act. It is sufficient that the employee has had a fair opportunity to confront his accusers and been given a fair chance to present his defense and seek clarification of the evidence presented against him in whichever manner.

32. Where the employee seeks the opportunity to put questions to the accusers and the opportunity is denied, this will undoubtedly be inappropriate on the part of the disciplinary panel. Similarly, where the internal disciplinary rules expressly provide for the right to cross-examine a witness, it would be improper for the employer to overlook this requirement.

33. Importantly, section 4 of the *Fair Administrative Action Act* which applies to all administrative actions including internal workplace disciplinary sessions recognizes the right to cross-examine as a cardinal pillar for due process. This entitlement cannot therefore be wished away by the employer.

34. In the case before me save for the failure to furnish the Respondents with material particulars of the charges against them in time or at all, there is evidence that the disciplinary session proceeded unhindered and the Respondents were not unduly constrained in airing their responses. Indeed, the opening remarks by the panel chair demonstrate that the Respondents were assured of their right to fully participate in the process and to call their witnesses. Perhaps to the extent that some of the witnesses whose statements were relied on to determine the Respondents' fate were not presented before the panel, one would understand the trial court's position that the opportunity for the Respondents to confront their accusers through cross examination or otherwise was thereby lost.

Approbation and reprobation by trial court

35. The Appellant's counsel questions the appropriateness of the trial court's verdict faulting the Appellant's decision to terminate the Respondents' employment on account of failure to comply with due process despite having found that the Appellant had valid reason to terminate the contracts in question. In the Appellant's view, the verdict displays approbation and reprobation by the trial court on the issue.

36. With respect, I do not think that the trial court erred in this respect. The law on termination of employment requires the employer to justify the decision to terminate an employee's contract of service by proving two things: that he had a valid reason to support his decision to terminate the contract; and that he followed due process in making the decision. Absent one or both of these ingredients, the decision to terminate the contract will be rendered invalid (see *Aga Khan Hospital Kisumu v Erick Wanjohi* [2020] eKLR).

Conflict of Interest at the appellant's disciplinary session

37. A cardinal rule of natural justice is that nobody should be a judge in his own cause. However, balancing the application of this requirement does sometimes present some challenges in certain circumstances. Such challenge would for instance arise where a sole natural employer is obligated to conduct a disciplinary session against an employee. In such case, it is difficult to see how the employer would fail to act as accuser, prosecutor and judge at the same time.

38. That the principle forbidding one from being a judge in his cause should be respected as far as is practicable is not in doubt. However, where the employer is clearly constrained in terms of personnel such as in cases of a sole natural employer, application of the principle may understandably be tempered with. It is in this context that the decisions in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR and *Samuel Nyeso Masha v Silver Holdings Limited & another* [2018] eKLR ought to be understood.

39. The position will certainly be different in situations where the employer, whether corporate or natural, has a larger number of personnel. In such case the principle should find stricter application.

40. In *Peris Wambogo Nyaga –Vs- Kenyatta University* (2014) eKLR, the court observed as follows on the matter:-

> ''The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting and that whatever standard is

adopted it is essential that the person concerned would have had a reasonable opportunity of presenting his case".

41. In the case before me, it is clear that the Respondent had capacity to set up a disciplinary panel that did not have the accusers playing the roles of prosecutor and judge in the disciplinary session. At best, it was desirable that the accusers only appear as witnesses. Unfortunately, in the impugned disciplinary proceedings, the accusers appear to have taken an active role in prosecuting and judging the Respondents. For instance, Beata Peter appears to have acted as both accuser and prosecutor in the matters. Apart from reading out the charges to the Respondents, she gave evidence against them before signing off the decision against them. This violated the right to due process.

Award of salary in lieu of notice in a case of summary dismissal

42. The last issue for consideration is whether the trial court was wrong in holding that the Respondents were entitled to notice before termination of the employment contract despite the fact that they were summarily dismissed from employment. As rightly pointed out by the Respondents, once the trial court nullified the summary termination, the question whether the termination was through a summary process was closed. Therefore, the court was entitled to award the Respondents pay in lieu of notice to terminate as one of the remedies available to them under section 49 (a) as read with sections 35 and 36 of the *Employment Act*.

Conclusion

43. Based on the issues that the Appellant framed from the grounds of appeal, I am of the view that the trial magistrate had valid grounds for arriving at her findings. I find no basis upon which to upset her findings. I will therefore uphold the trial court's decision. Consequently, the Appeal is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF MARCH, 2023.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI