Ace Africa (Kenya v Museve (Employment and Labour Relations Appeal E001 of 2020) [2023] KEELRC 3474 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 3474 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2020

JW KELI, J

APRIL 20, 2023

BETWEEN

ACE AFRICA (KENYA ..... APPELLANT

AND

VICTOR SHALAKHA MUSEVE ..... RESPONDENT

(Appeal against the entire Judgment of Hon. C.A.S Mutai (SPM) in Bungoma Chief Magistrate ELR in CMCC NO 20 OF 2019 between Victor Shalakha Museve and Ace Africa (Kenya) delivered on the 27th November 2020)

JUDGMENT

1. The Appellant aggrieved by the Judgment and decree of Honourable Hon. C.A.S Mutai (SPM) delivered on the 27th November 2020 in Bungoma Chief Magistrate ELR in CMCC NO 20 OF 2019 brought the instant Appeal vide Memorandum of Appeal dated 15th December 2020 and record of appeal received in court on the 4th April 2022 seeking the following Orders:-

    a. The judgment of the court in Bungoma MCELRC NO. 20 OF 2019 dated 27.11.2020 be and is hereby set aside and the same be replaced by an order that the claimant's case in the said matter be and is hereby dismissed with costs.

    b. Costs of the appeal be granted to the appellant

2. The Appeal was premised on the following grounds:-

    a. The Learned honourable Magistrate erred in law and in fact by awarding the Respondent salary in lieu of Notice when the same was not in dispute, was paid by the Appellant upon termination of Respondent's employment, was not pleaded by the Respondent, and that the Respondent admitted having been paid salary in lieu of notice.

b. The Learned Honourable Magistrate erred in law and fact by awarding the Claimant kshs.272,000/-.

c. The Learned Honourable Magistrate erred in law and fact by failing to find that the Certificate of Service has not been issued given that the Respondent has failed, ignored and/or refused to clear with the Appellant hence the delay in issuance of certificate of servic4e and that the Respondent admitted the same in his testimony.

d. The Learned Honourable Magistrate erred in law and fact by declining to hear 2 out of 3 witnesses presented by the Appellant.

e. Learned Honourable Magistrate erred in law and fact by failing to take into account the Respondent's own admission (in his testimony) that he " was involved in the offence of data fraud" and he was thus the author of his own misfortune.

f. The Learned honourable Magistrate erred in law and fact by rejecting the Appellant's request for certified copies of proceedings despite the fact that the Appellant had paid for the same.

g. The Learned Honourble Magistrate erred in law and fact by not giving the Appellant's chance to file hits written submission while considering those of the Respondent.

h. The Learned Honourable Magistrate erred in law and fact by considering written submissions by an Advocate who was not properly on record and which submissions were not served upon the Appellant's counsel. Submissions filed on 27.08.2020 could not possibly have been served on 20.8.2020.

i. The Learned Honourable Magistrate erred in law and fact by failing to find that the Respondent is liable for his dismissal given his conduct which amounted to gross misconduct.

j. The Learned Honouarble Magistrate erred in law and fact by disregarding the conduct of the employee during his employment and particularly his involvement in forging date which he admitted.

k. The Learned Honourable Magistrate erred in law and fact by disregarding the circumstances in which the termination took place and the extent to which the Respondent caused and/or contributed tohis dismissal.

l. The Learned Honourable Magistrate erred in law and fact by failing to consider and find that while in employment, the Respondent did not adhere to the required ethical and professional standards, fundamentally breached the terms of his own contract, and violated clear provisions of the law and of relevant policy guidelines.

m. The Learned Honourable Magistrate erred in law and fact by failing to find that the Respondent's dismissal was necessitated by withdrawal of funds by the Donor. That the Respondents conduct greatly jeopardized the funding of the entire project.

n. The Learned Magistrate erred in law and fact by failing to find that the Donor ordered using their gadget thereby necessitating summary dismissal of the Respondent. This was due to the fact that the integrity of the project was at stake due to rampant forgery of data.

o. The Learned Honourable Magistrate erred in law and fact by failing to find that the Appellant had proved its reasons for termination as required under section 43 of the *Employment Act* and that consequently, termination of the Respondent's employment cannot be said to be unfair.

p. The Learned Honourable Magistrate erred in law by failing to find that the legal threshold for summary dismissal under section 44 of the *Employment Act*, 2007 was met upon termination of the Respondent's employment.

Background to the appeal

3. The Respondent filed a suit Bungoma MCELRC NO. 20 OF 2019 dated 9th august 2019 against the appellant seeking the following reliefs:

   a. A declaration that the termination of employment was unfair , un-procedural, wrongful and illegal.

   b. 12 month's salary compensation for unlawful termination

   c. In the alternative , compensation for the remainder of the contract period

   d. Gratuity at 15 days' pay for every year worked.

   e. Certificate of service

   f. Costs of the suit

   g. Interest thereon (b) and (c)

   h. Any other relief this Honourable court may deem fit to grant.

4. The appellant/defendant entered appearance and filed memorandum of reply dated 5th February 2020 together with list of witnesses and witness statements of Augustine Imbuye Wasonga, Cyrilla Amanya and Dennis Amonde.

Evidence before the trial court

5. Claimant's case

The claimant's case was heard on 6th August 2020 with the claimant as the only witness of fact, he gave sworn evidence, adopted his written statement produced his exhibits and was cross examined at the trial court. (pages 44-48)

Defence case

6. The defence case was heard on the 7th august 2020 where Augustine Imboye Wasonga was DW1 witness of fact, he gave sworn evidence, adopted his witness statement and produced as defence evidence documents under list of documents dated 5th February 2020 and which were marked as D-Exhibits 1-13 and after re- examination of DW1 the defence through Mr. Wekesa told the court they wished to close defence case (pages 45-53.)

7. The learned magistrate decision appealed against was for :-

   a. The award of Kshs. 272,000.00 to the respondent

   b. The award of Kshs 54,450.00 in liue of notice to the claimant

   c. certificate of service

   d. cost of the suit and interest

9. The appeal was opposed vide replying affidavit of the respondent sworn on the 15th September 2022 and another affidavit by Doreen Munyua sworn on the 10th March 2021.

8. The court gave directions that the appeal be canvassed by way of written submissions. The parties complied. The appellant's written submissions dated 23rd November 2022 and received in court on the 29th November 2022 were drawn by Owino Kojo & Co. Advocates. The respondent's written submissions dated 15th September 2022 and received in court on the 17th January 2023 were drawn by Doreen Munyua Waiyaki & Co. Advocates.

Determination

Issues for determination.

9. The Appellant in their written submissions identified addressed the following items:-

   a. Salary in lieu of notice

   b. Award of Kshs. 272,000/-

   c. Certificate of service

   d. Unfairness of the trial court

   e. Employee's conduct

   f. Casus Incogitati

   g. Reasons for termination

10. The respondent in his written submissions addressed the following issues:-

   a. What is the jurisdiction of the court while sitting on appeal from the a lower court

   b. Whether the learned magistrate erred in law in returning the verdict that the respondent's termination was unlawful, unprocedural and unfair grounds 13 and 14

   c. Where the respondent's actions towards the claimant were also discriminative and contrary to fair labour practices.

   d. Whether the allegations that the learned magistrate failed to hear the appellant's two other witnesses, failed to supply the appellant with typed proceedings, failed and or refused the respondent a chance to file their written submissions and relied on the submissions of advocates who was procedurally on record hold sway (grounds ,4,6,7 and 8)

   e. Whether the respondent's contributed to his termination and whether he is to blame for the termination grounds 3,5,9,10,11,12,15 and 16.

   f. Whether the magistrate was right in law to award the compensation he did grounds 1,2,3.

11. The Court having considered the grounds of the appeal, the issues addressed by the parties in their submissions and the decision of the learned magistrate and there being no cross-appeal was of the considered opinion the issues to be addressed in the determination of the appeal was as follows:-

   a. Whether there was fair hearing of appellant/defence before the trial court

   b. Whether the learned magistrate erred in law and fact in arriving to the conclusion that the termination of employment of the respondents was unlawful and unfair

c. Whether the award was justified.

d. Which party should bear the costs of the appeal

12. The principles which guide the court sitting on appeal are well settled in Selle And Another v Associated Motor Boat Company Ltd & Others,[1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

> "An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

13. Further in *David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another Nyeri HCCA No. 43 of 2013* the court opined:- 'Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on pointe of law and facts and come up with its findings and conclusions."

14. The foregoing jurisprudence is consistent with authority cited by the respondent of Gitobu Imanyara & Others v Attorney General [2016]e KLR. The court is further guided by the decision of the East African court of Appeal in Peters v Sunday Post Ltd [1958] EA 424 on role of the court on appeal where the court observed:- 'Whilst the appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellate court will not hesitate so to decide."

Issue 1:- Whether there was fair hearing of defence before the trial court

The appellant's position

15. The appellant stated that the learned trial magistrate erred in law and fact by declining to hear 2 out of 3 witnesses presented by the appellant, by rejecting the appellant's request for certified copy of the proceedings despite the fact the appellant had paid for the same, failed to give the appellant chance to file its written submissions while considering those of the respondent, considered written submissions of advocate who was not properly on record and which submissions were not served on the appellant's counsel, that submissions filed on the 27th August 2020 could not have been served on the 20th August 2020.

16. The appellant submits that since the time of Lord Chief Justice Hewart In Res V Sussex Justices [1924] I KB 256 it has generally been agreed that, 'justice must not only be done but must be seen to be done." That the conduct of the hearing by the lower court was unfair to the appellant for the above reasons, that it paid for the certified copies of the proceedings(page 16-18) but the request was rejected. That it needed the proceedings to confirm whether the court had recorded that the appellant objected to the court's decision to hear 1 out of 3 witnesses, that when they got the proceedings their fears were confirmed as the court did not record the issue. The court did not record their 3 witnesses were

present in court or that their counsel requested that at least the witness statements be adopted. That the court did not give the respondent opportunity to file written submissions but considered those of the respondent. That the allegation at paragraph 11 of the respondent's reply that the court issued a date of judgment because the appellant did not appear in court on the 1st October 2020 was not true as the proceedings indicate Mr. Omeri appeared for the appellant and pleaded to be furnished with copy of the proceedings but the court overruled him and sided with respondent to issue judgment date. The appellant further submits that the respondent's/claimant's written submissions were filed by advocate not properly on record and which submissions were filed and not served. That the submissions filed on 27th august 2020 could not have been served on the 20.8.2020 7 days earlier as per affidavit of service (at page 108) and the submissions filed on the 27.08. 2020 (page 112). That the appellant protested the respondent's advocates were not properly on record but the trial court did not address the issue. That the provisions of the Civil Procedure Rules Order 9 rules 5 and 6 were not followed by the new advocates in change of advocates to Doreen Munyua Waiyaki as the notice of change was not filed and served upon all the parties with a memorandum stating the notice had been filed in court hence the former advocates were deemed to be on record. That all subsequent pleadings by the said law firm were a nullity. That the appellant would be prejudiced if the proceedings were quashed later for the non-compliance. That the appellant got confirmation from the Law Society of Kenya that there was no advocate called Doreen Munyua and the practice by such a person would be subject of criminal proceedings. That counsel defended herself stating she was also known as Namegembe Doreen who is advocate but a search at the Law Society of Kenya revealed the said person was working at Wangari Muchemi & Co. Advocates and not Doreen Munyua Waiyaki advocates (page 130) and that the said Doreen Munyua swore documents as Doreen Munyua and not Namagembe Doreen and no evidence on allegation at paragraph 18 of her affidavit she adopted alias name (page 108 affidavit of service).

Respondent's position

17. The respondent submits that the judgment was issued after hearing all the parties, that the witness statements of the 3 witness of the appellant were a replica of each save for names and titles with similarities. That in particular the 3 witness statements had the following similarities:- all had a total of 9 paragraphs, all contained similar information, in all the statements paragraph *3* was broken down into a total of 24 subparagraphs which were replica of each other , they all made reference to same documents and there was a regurgitation of memorandum of response dated 5th February 2020. That the appellant did not protest to calling of one witness. That the witnesses had identical information hence a waste of judicial time to subject the court to same testimony and relied on the decision in Walter Ogaro v The Republic where justice Mativo observed :-'The law is not concerned with the number of witnesses called to prove issue but with the quality of evidence submitted." That raising the issue at this stage was malafide and meant to defeat justice.

18. On the issue of whether the appellant was refused to file submissions, the respondent submits that while article 50 of *the Constitution* guarantees the right to be heard the right cannot be construed as sabotaging the trial and relied on the replying affidavits dated 15th September 2022 to demonstrate the appellant's conduct which derailed the hearing (paragraphs *15*,*18*,*19*,*20*,*22* and 23). On the issue whether the submissions were by advocate not properly on record, the respondent submits that the parties were to file submissions in 14 days and mention scheduled for 28th August 2020. That they filed submissions dated 20th August 2020 together with notice of change of advocates which were served on the 20th August 2020 at 17.35 hrs through email of the counsel for appellant (page 23-25 of the replying affidavit). That the said notice of change and submissions were subsequently submitted to court for assessment (page 27), that the appellant acknowledged receipt of the submissions and notice of change of advocates on 21st August 2020 at 19.10 hrs.

19. On issue of appellant having been denied copies of typed and certified proceedings to prepare written submissions, the respondents submits that when matter came up for mention on the 28th August 2020 the court confirmed the respondent's submissions had been filed. That the appellant informed the court they had not filed their submissions as they requested for typed proceedings to enable them prepare submissions. That this was an abuse of court process, that the court granted mention of 1st October 2020 to enable appellant file submissions. That the respondent did reminders to the appellant on the submissions on 14th September 2020 and on 24th September 2020 (pages 25 to 28 of the replying affidavit). That on the 30th September 2020 on eve of the mention the appellant's counsel sent them email that they had not received the respondent's submissions and reading mischief they swore an affidavit (page 29-35 of the replying affidavit). That on 1st October 2020 when matter came up for mention in absence of the appellant and having not field submissions the court issued judgment date of 27th October 2020. The respondent further submitted on the post judgment process which the court did not find relevant to this appeal.

20. On whether Doreen Munyua is an advocate, the respondent submits that he relied on the practice certificate of Doreen Namagembe(page 61 of the replying affidavit).

21. The respondent submits that the right to be heard means that the appellant is accorded opportunity to be heard. That the appellant cannot be heard to complain where such right is granted and the party refuses to take it and relied on the decision of the Court of appeal in Union Insurance Company of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. 179 of 1998 where having found the appellant was accorded right to be heard held :- 'The law is not that a party must heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised then the only point on which the party is not utilising the opportunity can be heard is why he did not utilise it."

Decision

22. The right to fair hearing is provided under *the Constitution* as follows:- 'Article 50. Fair hearing (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." The right to fair trial is one of the fundamental rights which cannot be limited under *the Constitution* Article 25 to wit : '' Article 25. Fundamental Rights and freedoms that may not be limited. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited— (c) the right to a fair trial;' Lord Chief Justice Hewart In Res v Sussex Justices [1924] I KB 256 stated , 'justice must not only be done but must be seen to be done." This is a principle universally accepted in fair trial discourse.

23. The court observed from the lower court proceedings that it was true the lower court did not record the number of witnesses for the respondent or that the counsel requested to call other witnesses. The court also observed that on the 7th August 2020 the court adopted the proposed position by the parties that the claimant serves the defense with written submissions within 14 days and then they would have 14 days to respond(page 54). The mention date to confirm compliance was scheduled for 27th august 2020 and on which date Mr. Osino holding brief for Owino Kojo stated they had not filed submissions(page 55). That they had made request for typed proceedings and prayed for further date to enable them obtain typed proceedings. The court gave time and mention date of 1st October, 2020. On 1st October, 2020(page 56) Mr.Omero held brief for Kojo, Mr. Wamalwa for the claimant informed court they had not been served by defense with written submissions and that they had served them. Mr. Wamalwa requested for judgment date. Mr. Omeri told the court they had requested and paid for

typed proceedings and the same had not been availed. The court stated that, 'the matter did not proceed exparte witness statements were within reach. Judgment to be delivered on the 13/11/2020''(page 57).On the 13th November 2020 Ratemo held brief for Owino Kojo and Wamalwa R for Munyua. The court indicated judgment was not ready and gave delivery date of 27th November 2020.The court finds no evidence in the foregoing lower court proceedings that the defendant indicated to court they had not been served with the submissions by the Respondent . On 1st October 2020 Mr. Wamalwa R indicated the respondent had served their written submissions. The counsel Omeri holding brief for Kojo for the appellant only raised issue of having not been availed typed proceedings which the court ruled the witness statements were within their reach and that the matter was not heard exparte.

24. The court finds that the appellant having not raised the issue not being served with the written submissions by the Respondent before the trial magistrate court , the issue is an afterthought and cannot be raised at appeal. On the issue of typed proceedings having not having been availed, the court does not find basis to fault the lower court on ruling the witness statements were within reach of the parties and that the proceedings were not exparte. On the issue of the failure by the learned magistrate to record the appellant's witnesses were not in court, the court finds that the respondent does not refute the claim only to state the witness statement of the 3 witnesses were repetitive and it was a waste of court time to record the replicated testimony. The Defence witness who testified was Augustine Imbuye Wasonga (page 49-53). The court adopted his witness statement dated 7th February 2020 and the witness produced documents under list of documents dated 5th February 2020 for the appellant in order of filing. The appellant had filed other two witness statements of Cyrilla Amanya and Dennis Amonde all of even date of 7th February 2020 and filed on 14th July 2020. The court examined the 2 statements and found that save for name of author and title they were similar verbatim in paragraph *2* to *9* with that of Augustine Imbuye Wasonga who testified in court. The court agreed with the holding Walter Ogaro v The Republic where justice Mativo stated:-'The law is not concerned with number of witnesses called to prove issue but with the quality of evidence submitted.'' The court found no probative evidential value in the omitted two witness statement of the appellant . No unfair trial can arise from such scenario. Lastly on the issue of notice of change of advocate. The court noted that the notice of change of advocates from Rachier & Amollo LLP to Doreen Munyua Waiyaki Advocates was dated 20th august 2020 and filed in court on 27th August 2020. The court agreed with the appellant that there is no way service would have been done earlier. The purported service of notice of change advocates was void as the said document was just mere papers having not been filed in court. That would also apply to the purported submissions. The court found the issue of service of the submissions having not been raised before the trial he court it could be raised at appeal stage. The notice of change of advocate process is declared by the law under order 9 rule 5 and 6 to wit ''5. Change of advocate [Order 9, rule 5.] A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal. 6. Service of notice of change of advocate [Order 9, rule 6.] The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court.''.The process starts by filing notice of change in court then serve not vice versa as the counsel for the respondent purported to do in the instant case by email on 20th August 2020. On whether Doreen Munyua was an Advocate it is the holding of the court the Law Society of Kenya being the statutory body for advocates and having issued letter to that effect that is taken as the valid position and the court will say no more. The court notes the written submissions dated

20th August 2020 were drawn by Doreen Munyua Waiyaki & Company advocates which is a lawfirm of which the court with material before court is not able to ascertain the ownership and whether it was registered with the regulatory body as such. The pleadings were not indicated as drawn by Doreen Munyua in person and so this court had no basis to make adverse inference based on the Law Society of Kenya letter. The court upholds the holding in Court of appeal in Union Insurance Co, of Kenya Ltd v Ramzan Abdul Dhanji Civil application . 179 of 1998 where having found the appellant was accorded right to be heard held :- 'The law is not that a party must heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it." The court was not satisfied why the appellant having been granted opportunity to file written submissions did not utilise the opportunity. In conclusion the court finds and determines that the lower court did grant fair opportunity to appellant to be heard. The appellant was represented by counsel all through and did not inform the court it had not been served with the written submissions by the claimant or if it did and issue not considered by the trial court, the appellant did not apply for review or appeal. At this stage the court finds such submissions to be afterthought. The court finds that the notice of change having been filed together with the submissions though not served it was not fatal to the claimant's cause.

Issue 2. Whether the learned magistrate erred in law and fact in arriving to conclusion that the termination of employment of the respondent was unlawful and unfair

25. The appellant submits that the learned magistrate erred in law in awarding salary in lieu of notice when the same was not in issue and had not been pleaded and had been paid on termination. That the claimant never pleaded notice in lieu and was awarded Kshs.54, 450/- which was paid under summary dismissal (page 69). That the appellant admitted payment of the salary in liue of notice under cross examination (47)

26. On certificate of service the appellant submits that the respondent was asked to clear with the employer (page 69) by handing over keys and admitted at cross-examination he never went back to clear (page 47). That his testimony that he was told he should not been seen in the premises was not true as letter of termination dated 2nd July 2019 requested the claimant to clear to be issued with certificate of service(page 69). That the magistrate court erred by failing to find certificate of service had not been issued for lack of clearance.

27. On the Employees conduct, the appellant submits that section 49(9)(k)of the *Employment Act* read with section 50 of the Act obliges the court to consider ' conduct of employee which to any extent caused or contributed to the termination." That the learned magistrate erred in law and fact for disregarding the conduct of the claimant who admitted in his testimony he was involved in the offense of data fraud (page 45 the claimant's testimony last sentence) and admitted he forged data on being shown document of proof (page 47 paragraph *2*) That the learned magistrate erred in failing to find the respondent while employed failed to adhere to required standards and breached terms of own contract and violated provisions of the law and relevant policy guidelines.

28. Casus Incogniti – The appellant submits that the learned magistrate erred in fact and the law in failing to find the respondent's dismissal was necessitated by the withdrawal of funds by the donor. That the conduct of the respondent greatly jeopardised the funding of the entire project and it was the donor who ordered immediate removal of the respondent from the funded project and barred him from using the gadget necessitating summary dismissal. That this was due to the fact the integrity of the project was at stake due to rampant forgery of data.

29. Reasons for termination. The appellant submits that the learned magistrate erred in failing to find that the appellant had proceeded with the termination as required under section 43 of the *Employment Act*. That they had produced proof of forgery of data by the respondent, that the respondent compromised the research by taking less time on interview several times and promised to change but did not(page 78 line 11), that the appellant produced investigation report showing the respondent had been forging data on interviews which he did not conduct (page 79,83-85) that the appellant produced the research policy which the respondent signed on accountability and honesty (page 88 and 89 paragraphs *7,11*,13), that the respondent breached core values of maintaining reputation of Ace Africa(K) which exposed the appellant to damaged reputation with major donors and it is not fair to compensate his misconduct.

30. That the magistrate erred in failing to find that the termination met the legal threshold of summary dismissal under section 44 of the *Employment Act*. That the learned magistrate erred in granting costs when they had proposed arbitration but instead of responding the respondent filed the claim and the demand notice was a matter of formality with intention of filing suit in court.

The respondent's submissions

31. The respondent submits that section 45 of the *Employment Act* provides for unfair termination to effect that no employer should terminate an employee unfairly and relied on the decision in Janet Nyandiko v Kenya Commercial Bank Limited 2017 e KLR . The court did not find the decision directly but found it was cited by Court of Appeal in Nairobi in Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR as follows: In Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR, the Court summarized those procedures as follows:- "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee. Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer." The counsel ought to have properly cited the decision instead of leaving the court to search for the citation as though it was a hidden treasure. The court does not have such luxury of time. The court upholds the decision as proper summary of the procedural fairness in termination of employment services by employer.

32. The respondent submits that the termination was unlawful, that the claimant was employed on 1st January 2014 under periodic contracts, that his last contract renewal was on 3rd January 2019 and was to run to upto 31st December 2019. That he was terminated on the 2nd July 2019 vide letter of even date, that prior to that he was not issued with warning letter or notice to show cause . That he was engaged as data clerk and re-assigned as a interviewer earning Kshs. 54,450 while his counterparts engaged as data clerks were earning Kshs. 87,150/-.

33. The respondent submitted that evidence of the DW was that the claimant had been employed in 2014 and his services terminated 2nd July 2019 for gross misconduct but had no prior warning letter or show cause , that the gross misconduct was data fraud and carrying out shorter interviews than dictated by the donor. DW did not show the recommended length of interview. DW told the lower court that the claimant's contract was terminated on instruction of Duke University and no such instruction letter was produced and due process was not followed. DW confirmed other persons were alleged culpable but only the claimant and one Oliver Masiza were terminated, that there was no report of the data fraud to the police and no hearing before the termination.

34. The respondent submits that the letter of termination of 3rd July 2020 was not compatible with the testimony of DW and pleadings before lower court asking why only the respondent was affected by the donor funding and not 77 other employees and that the reason for the termination did not exist. To buttress the submission that there was no fairness in the termination the respondent relied on decision in Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries [2013]eKLR which the court found was a replica to holding in Janet Nyandika case (supra)The respondent submits even in case of gross misconduct a fact they deny, the respondent was entitled to hearing as held by Monica Mbaru J in Festus Munyao Makau and Steel Limited[2017]eKLR '32. Even in a case of gross misconduct, an employer must give the employee a hearing on any allegations and where the same relates to work performance the employee must be accorded procedural justice in terms of section 41 by being given notice and hearing in the presence of an employee of his choice." The respondent submits the appellant breached the substantive and procedural safeguards in the termination process of respondent's employment.

Decision

35. Section 43 of the *Employment Act* provides for proof of reason or termination as follows:

'(i)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 files to do so the termination shall be deemed to have been unfair within the meaning of section 45.

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

1. Section 45 of the *Employment Act* states:-

'(i) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fail to prove

(a) that the reason for the terminations valid

(b) that the reason for the terminations is fair reason

(i) related to the employees conduct, capacity or compatibility or

(ii) based on the operational requirements of the employer

(c) that the employment was terminated in accordance with fair procedure.' In the primary suit the claimant was summarily dismissed for gross misconduct. The procedural fairness process is stated under section 41 (2) of the *Employment Act* as follows:- ''41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an 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.''

36. Section 45 (4) of the *Employment Act* reads:-'1. A termination of employment shall be unfair for the purpose of this part where :-

(a) the termination is for one of the reasons specified in section 46 or (b) it is found out in all the circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee".

37. Section 45 (5) *Employment Act* provides:- 'whether it is just and equitable for an employer to terminate the employment of an employee and for the purposes of this section, a labour officer or the industrial court shall consider:-

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handing of appeal against the decision.

(b) the conduct and capability of the employee upto the date of termination.

(c) the extend to which the employer has complied with any statutory requirements.....

(d) The previous practice of the employer in dealing with the type of circumstances which led to the termination.''

38. The court will apply the foregoing provisions of the law in determining the issue of whether the learned magistrate erred in determining the substantive and procedural fairness in the termination of the respondent's contract of service.

39. Substantive fairness. The appellant had obligation to justify the existence of valid reasons for the termination of employment under section 43 of the *Employment Act* by proving existence of valid reasons for the termination under section 43 to wit:- '(i)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 files to do so the termination shall be deemed to have been unfair within the meaning of section 45.

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

On validity of the reason the court did not make a finding in his ratio decidendi found in page 4 of the decision (page 126). The lower court decision was hinged on procedural fairness though the court stated it agreed with advocate Doreen Munyua that there was violation of procedural and substantive justice of the claimant entitled under section 45. The court finds that there was no finding on the

validity of the reasons for the termination by the lower court. The court then on appeal had to evaluate the evidence and reach conclusion on the issue.

40. The letter of termination of the respondent's services dated 2nd July 2019(page 69) gave the following reasons for the termination decision: -'i. data fraud – you were involved in unethical data fraud involving data manipulation and data breach of research protocols outlined by National Institute of Health (NIH) who are the funders of the research project you work under.

    ii. Due assessment with the donors(funders) of research project, this breach means that Ace Africa terminates your contract with immediate effect

    iii. your conduct is considered gross misconduct that has jeopardised the project to a great extent

    iv. withdrawal of funds supporting your salaries by the donor leaving the organisation with no option but to terminate your contract considering there is no any other c you can be deployed to.''

41. The court's role then under section 43 of the *Employment Act* is to establish whether the stated reasons under the above letter existed at time of the termination of the respondent's contract of employment. DW adopted his witness statement dated 7th February 2020 where it was stated that the termination was on grounds of gross misconduct namely data fraud. That in the employment contract it was clear the claimant was remunerated by Duke University and that the contract was donor dependent. That the research done by the claimant required each child be interviewed between 1 hour and 20 minutes, that the interview is fed into a tablet which when one opens communicates to computers in North Carolina and also detects when interview is complete, that from paragraphs J to R of the Appellant's witness statement the chronology of the events leading to the termination was given including the show cause on data malpractice, warning to the claimant, admission of liability of the claimant but he continued malpractice. That on 1st July 2019 via skype call the donor informed the respondent the claimant had once again done shorter interviews and computer analysis showed the data was fraudulent. That the donor gave condition the claimant should not be paid with the project funds leading to the termination as the funding was conditional. That upon complaint by the claimant the donor on the 3rd September 2019 submitted a report with regard to unethical data fraud which indicated the claimant's data was substantially different from those of other researchers and the same pointed to manipulation of data in disregard to contract and constitutional principle of bests interest of child this being a project on children with emotional and mental problems.

42. The claimant in his witness statement did not refute the reasons directly but stated that throughout the process and even at point of termination he was neither accused of gross misconduct nor was he accorded fair hearing. The defence produced email by the claimant to DW in response to his email of 20th February 2019 which alleged data breach protocal and time having been compromised. The email was stated dear all. The claim respondent explained why he took short time and admitted oversight and stated he would spend more time with the participants(page 78 Dexhibits). The claimant repeated this at cross-examination and insisted there was no stipulated time for the interviews.

43. The court looked into the policy filed in court (pages 87-92) and found no stipulation of time for interviews. The court finds and determines that though there was evidence that the claimant took shorter time than other researchers, he had explained in the email why that happened and most important the court finds that the employer did not inform or give evidence on required minimum time on the interviews. The reason then would not qualify as operational requirement. Consequently the court finds the reasons for the termination did not exist as valid reasons as at time of termination of the employment of the respondent. The said report by the donor was generated on 9th September

2019 post the termination hence not evidence of existence of the reasons as at time of termination as provided for under section 43 of the *Employment Act*. The court finding is consistent with the conclusion of the learned magistrate on substantive unfairness. There was no cross appeal hence the issue of discrimination having not been addressed by the learned magistrate and not appealed on, could not arise on this appeal.

Procedural fairness,

The letter of termination of the Respondent's contract stated it was immediate hence summary dismissal under section 44 of the *Employment Act* on basis of gross misconduct. There was no evidence before the lower court of hearing of the Respondent before the termination. The letter of termination stated it was immediate termination. The court finds that procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under section 44 of the *Employment Act*. The hearing process would be as defined under section 41(2) of the *Employment Act* to wit:- '41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an 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." The court upholds holding of Monica Mbaru J in Festus Munyao Makau and Steel Limited(2017)e KLR that :- '32. Even in a case of gross misconduct, an employer must give the employee a hearing on any allegations and where the same relates to work performance the employee must be accorded procedural justice in terms of section 41 by being given notice and hearing in the presence of an employee of his choice."

44. The court upholds the holding of the learned magistrate that the termination was substantively and procedurally unfair for lack of notice to show case and hearing before issuing of letter of termination to the claimant. .

Issue 3. Whether the award was justified.

45. The learned magistrate entered judgment for the claimant(pages 127) as follows:-

a. The award of Kshs. 272,000.00 to the respondent

b. The award of Kshs 54,450.00 in liue of notice to the claimant

c. certificate of service

d. cost of the suit and interest

46. It is trite law that the court has no jurisdiction to award a party outside their claim. The appellant submits that the notice in lieu was not in the claim yet was awarded and had also been paid under letter of termination. The court looked into the prayers (page 10) and indeed there was no claim for notice in lieu. The remedies on finding unfair termination are as stated in section 49 of the *Employment Act* and the relevant ones are:-' 49. Remedies for wrongful dismissal and unfair termination (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of

expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. (2) Any payments made by the employer under this section shall be subject to statutory deductions." In the instant appeal the respondent was awarded under 49(1) notice pay and 6 months gross salary which the court stated was for the remainder of the contract.

47. In arriving at the remedy the court ought to be guided by the criteria under 49(4) of the *Employment Act* to wit:-'49(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following— (a) the wishes of the employee; (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; (e) the employee's length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (g) the opportunities available to the employee for securing comparable or suitable employment with another employer; (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonably incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination;"

48. The court holds that the award for the remainder of contract is not a criteria allowed under section 49(4) of the *Employment Act*(supra). The relevant criteria which the court should have considered was under 49(4)(e) of the Act which reads : 'e. the employee's length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;" The court finds that an employee can only be remunerated for work done and the learned magistrate by awarding for remainder of contract of service erred in law as that is not a criteria under 49(4) of the Act. The award is set aside.

49. The court noted the contract was for one year. The contract had been renewed previously and it was possible with good performance to be renewed though not compulsory hence not a basis of ascertaining rights. The remaining period of the contract was 6 months.

50. Notice in liue. The court finds that the claimant under letter of termination was paid notice. He told the court he did not know the basis of the payment. The court finds the payment was the notice in lieu. The court finds it was erroneous for the learned magistrate to award the notice considering it was not even prayed for and sets aside the award of notice in liue.

51. Compensation. The court considered that payment of 6 months compensation was without legal basis and error on part of the court. The purposes of payment of compensation is not to punish the employer. In view of the remaining period of contract and the notice pay having been paid on termination the court considered that compensation for unfair termination equivalent of 3 months gross salary was sufficient and equitable compensation in the circumstances and hereby substitutes the award by the lower court with compensation pay of equivalent of 3 months gross last salary.

52. Certificate of service. The certificate of service is a statutory right of the employee under section 51 of the *Employment Act* and is not conditional to their exit terms. The lack of clearance by an employee is not a basis of the employer to withhold certificate of service as the certificate of service is not equivalent to clearance certificate or referral. The court finds that issuance of certificate of service to an employee

on termination of service is mandatory requirement as stated under section 51 of the *Employment Act* to wit:- '51. Certificate of service (1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. (2) A certificate of service issued under subsection (1) shall contain— (a) the name of the employer and his postal address; (b) the name of the employee; (c) the date when employment of the employee commenced; (d) the nature and usual place of employment of the employee; (e) the date when the employment of the employee ceased; and (f) such other particulars as may be prescribed. (3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee. (4) An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both''. The award on certificate of service was thus proper and based on the law. The same is upheld.

53. Costs: The appellant submit that on the 19th august 2019 they proposed to the claimant the dispute be resolved vide alternative dispute resolution to mechanism but instead of responding the respondent rushed court and filed the claim on 23rd August 2019. That the claimant issued demand letter out of formality without the intention of resolving the dispute out of court. That the trial court erred in awarding costs. The court finds that in letter dated 5th August 2019 the appellant vide the counsel on record responded to the demand letter dated 19th July 2019 denying the claim and stated any suit filed would be defended(page 73). The respondent vide letter dated 6th August 2019 Racher & Amollo Advocates responded and stated they had instructions to sue which letter was received by the appellant's counsel(page 75). On 19th August 2019 the appellant responded to the letter of 6th August proposing arbitration of the dispute under the *Arbitration Act*. There was no evidence of response to the said proposal. It is the finding of the court that the appellant having in its letter 5th August 2019 invited the claimant to sue, the offer to arbitrate was an afterthought and coming 13 days after the claimant indicated it would sue. It is a principle of law costs follow the event. The event being the party in whose favour the decision lies gets the costs. The court finds that the costs were properly awarded by the lower court and the said award on cost is upheld.

Conclusion and disposition.

54. The court upholds the finding on the termination of the respondent having been unlawful and unfair. The court holds there was fair trial at the magistrate court. The court holds that the compensation award of 6 months for reminder of contract of service was based on improper principles of law and sets aside the same. The notice pay is set aside as being irregular having not been pleaded but also having been paid under the termination letter and payment admitted by the Respondent at trial. The court sets aside the summary award by the Learned Magistrate C.A.S Mutai dated 27th November 2020(page 128) and substitutes the same as follows:-

    a. Compensation award for unlawful and unfair termination is awarded for equivalent of three months gross salary as per contract of employment dated 3rd January 2019 being monthly salary of KES 54,450 /= thus award of Kshs 163,350/- subject to statutory deductions.

    b. Certificate of service to issue under section 51 of the *Employment Act*.

    c. Costs of the suit at trial court to the claimant.

    d. Interest at court rates from 27th November 2020 to payment in full.

e. No order as to costs at appeal.

55. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 20th APRIL 2023.

JEMIMAH KELI,

.....

JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of:-

Court Assistant :

For Appellant :

For Respondent:-