Milly Glass Works Limited v Were (Appeal E015 of 2022)
[2023] KEELRC 1327 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1327 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E015 OF 2022

M MBARŨ, J

MAY 25, 2023

BETWEEN

MILLY GLASS WORKS LIMITED ..... APPELLANT

AND

ANTHONY WERE ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. M. L. Nabibya SPM delivered on 20th January, 2022 in Mombasa CM ELRC No.304 of 2020)

JUDGMENT

1. The background to this appeal is that the respondent filed his claim before the trial court on July 23, 2020 on the grounds that he was employed under a written contract as an assistant operator in the appellant's batch mixing department from November 1, 2004and worked for 15 years until February 14, 2020when he was transferred to the furnace department while earning a wage of Ksh. 18,319 per month. While at the furnace department, the respondent's duties included overseeing fuel offloads and ensuring there were no spillages. On January 16, 2020 a truck from Gulf Energy Registration No. KBM 831C came to offload fuel, and he oversaw the fuel offloading and shielded any spillage and left the truck empty. However, despite being diligent in his duties, the respondent held that he was culpable for loss of fuel on this date which fact was not correct. Later, he discovered that there was loss of fuel by the truck which occurred at the weighbridge which fact he did not know at the time. The appellant served the respondent with a notice to show cause letter dated February 6, 2020 to explain why 3,000 litres off fuel were lost on January 16, 2020. Despite giving his explanations, his employment was terminated on February 14, 2020 without any good or justified cause and he thus sought for an order of reinstatement and in the alternative, the following payments;

    a. Compensation at 12 months Ksh. 216,000;

    b. Service pay for 14 years Ksh. 126,000;

c. Gratuity for 14 years Ksh. 126,000; and

d. Costs

2. In response, the appellant's case was that the respondent's employment was terminated lawfully due to failure to follow company policies which were known to him including the fact that he allowed the offloading of fuel from a Gulf Energy truck registration No, KBM 381C after 1700 hours, he failed to physically check that the truck's oil tank was full before offloading commenced; and he purported to check the dipstick measurements of the undergrounds tank in the absence of a representative from Crest Security Services the firm offering security services to the respondent. The respondent was also accused that he directed the truck to go for a second weight measurement at the weighbridge in the absence of a representative from Crest Security Services which was careless and negligent and as a result, the appellant lost 3,063 litres of heavy fuel valued at Ksh. 173,070.53 for which he was required to show cause why his employment should not be terminated and he gave his explanations through letters dated 18th January, and 6th February, 2020. The respondent did not request for an oral hearing and his submitted responses were found unsatisfactory and for gross misconduct, his employment was terminated pursuant to section 44(4) (c) of the *Employment Act*.

3. The learned magistrate in the judgment delivered on January 20, 2022 made a finding that there was unfair termination of employment and awarded the respondent 12 months' compensation and service pay of Ksh. 216,000 and Ksh. 126,000 respectively together with costs.

4. Aggrieved, the appellant filed this appeal on the grounds that there was no finding with regard to the investigations report by Crest Security Services forming the basis of the appellant terminating the respondent's employment and there was a presumption that an oral hearing is the only hearing permitted under the law. The appellant also faulted the findings of the trial court on the grounds that the awards of 12 months had no legal basis and the award of service pay was in disregard of the fact that the respondent was a member of the NSSF and hence the appeal should be allowed and the judgment set aside with costs.

5. Both parties attended and agreed to address the appeal by way of written submissions which are analysed and the issues which emerge are whether the findings by the trial court with regard to compensation and service pay are proper and whether the appeal should be allowed.

6. This being a first appeal the court has the duty to analyse the evidence on record and make own findings.

7. The appellant's case is that the learned magistrate erred in finding that there was unfair termination of employment when as the employer they failed to allow for an oral hearing of the respondent before terminating his employment yet, on two occasions he was allowed to make written responses to the notice to show cause on January 18, 2022and on February 6, 2022. Such is hearing and the respondent failed to give satisfactory responses for his gross misconduct.

8. On whether an employee should be given an oral hearing or written hearing, the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, held that;

> ... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

9. Taking these motions into account, upon a notice to show cause, the employee should be invited to a hearing in accordance withsection 41 of the *Employment Act*, 2007 (the Act).

10. In the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR the Court of Appeal in addressing the motions of section 41 of the Act held that;

> Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed, the appellant has cited the Kenya Revenue Authority case where this court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under section 41 of the Act. It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.

11. The elements to be satisfied before employment is terminated are therefore outlined undersection 41 of the Act. In addressing a similar matter in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) the court held that;

> Under this Section [section 41 of the Act], four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -
>
> a. An explanation of the grounds of termination in a language understood by the employee;
>
> b. The reason for which the employer is considering termination;
>
> c. Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
>
> d. Hearing and considering any representation made by the employee and the representative chosen by the employee.
>
> The four elements must thus be discernible for the procedure to pass muster

12. A hearing of the employee before employment is terminated is imperative. During such hearing, the employee must be allowed the chance to have another employee of his choice present and then allowed to make his representations.

13. In this case, upon the appellant issuing the respondent with the notice to show cause, having conducted investigations in the cited report from Crest Security Services, it was necessary to hear the respondent in his representations, however dire his case seemed to be. The provisions of section 41(2) of the Act are mandatory in that;

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

14. The findings by the learned magistrate in this regard cannot be faulted.

15. With regard to the award of 12 months' compensation, under the provisions ofsection 49 (1) of the Act, there is a discretion to award compensation up to 12 months but the court must give reasons and basis for the highest award of 12 months. In the case of *Alfred Muthomi & 2 others v National Bank of Kenya Limited* [2018] eKLR the Court held that in granting 12 months' salary as compensation for unfair termination of employment, it considered the employee's long service. In the case of *Olute v County Government of Siaya & another* (Employment and Labour Relations Cause E059 of 2021) [2022] KEELRC 13206 (KLR) (17 November 2022) (Judgment) the court held that an award of the maximum of 12 months' pay must be based on sound judicial principles, and that the trial judge must justify or explain why an employee is entitled to the maximum award.

16. In this case, the learned magistrate considered the evidence and various aspects of the respondent's employment with a finding that the maximum compensation awarded was justified with due regard to the number of years worked, he had no negative issues arising from his employment and he had remained a disciplined employee. These findings are commensurate with the provisions of section 45(5) of the Act which requires the trial court to take into account the work records of the employee, if any, and to this extent, the trial court did put such matters into perspective and cannot be faulted.

17. On the award of service pay, the trial court made a finding that there was no evidence that the respondent was a contributor to the NSSF and hence awarded service pay for 14 years served at Ksh. 126,000. However, part of the records filed by the respondent in his claim was his payment statement for October, 2019 and part of the deductions include NSSF, NHIF and PAYE. In terms of Section 35(5) and (6) of the Act, service pay is not due and to this extent, the appeal is with merit.

18. On costs, these are discretionary and not automatic to the successful party. In employment and labour relations, the court must be guided by section 12(4) of the *Employment and Labour Relations Court Act*, 2011. In this case, each party shall bear own costs.

19. Accordingly, the appeal partially succeeds and the judgment in CM ELRC No.304 of 2020 delivered on January 20, 2022is hereby reviewed with a finding that;

    a. A declaration is hereby issued that the termination of employment was unfair;

    b. 12 months' compensation are Ksh. 216,000;

    c. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF MAY, 2023.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....