H Young and Company (East Africa) Limited v Kasina (Civil Appeal E39 of 2019) [2022] KEELRC 13005 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13005 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E39 OF 2019

MN NDUMA, J

OCTOBER 27, 2022

BETWEEN

H YOUNG AND COMPANY (EAST AFRICA) LIMITED ..... APPELLANT

AND

JOSEPH MUTISYA KASINA ..... RESPONDENT

JUDGMENT

1. The appeal is against the judgment and decree of the Magistrate's Court at Milimani (Hon DA Ochara) Principal Magistrate delivered on September 16, 2019.

2. The grounds of appeal may be summarized that the learned trial magistrate erred in law and in fact by finding in favour of the respondent against the weight of evidence. That the magistrate also erred in law and in fact by awarding excessive damages to the respondent in the sum of Kshs 200,000 for the unlawful and unfair termination and that the learned magistrate erred in law and in fact by awarding the respondent gratuity at 15% of the respondent's annual salary.

3. At the outset, the Court relies on the case of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 where Sir Clement De Lestang stated: -

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.
>
> However, 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 on 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,"

to fully consider the evidence before the trial Court afresh minded that the appeal Court had no advantage of listening to the witnesses directly and also minded that it ought not to review and or set aside the finding of the Court aquo merely because the Court of Appeal would have arrived at a different conclusion.

4. In this regard, the respondent (PW1) testified that he was employed by the Appellant on May 21, 2008 as a Prime Mover Driver stationed at Industrial plot.

5. That he worked diligently and faithfully. That on October 20, 2017, he was called from the house by Mr Simon who was the Appellant's Head of Security and instructed to drive the Appellant's Trailer from the Appellant's Head Office at Funzi Road to the Industrial plot. That the trailer was laden with a consignment of metal bars. That Simon instructed that some additional goods would be loaded on the Trailer at Industrial Plot and thereafter PW1 would drive the Trailer to Meru.

6. That PW1 reported at the Head office as instructed and drove the Trailer. That whilst on the way, PW1 was stopped by police officers who were in a motor vehicle. That the police demanded to know where PW1 was taking the consignment and PW1 explained to them. That the police demanded for a delivery note which PW1 did not have. PW1 called Simon and asked for the delivery note and Simon said PW1 would collect the delivery note at the Industrial plot. The police demanded that PW1 to drive to the Industrial Area Police station. PW1 was placed under arrest. That Simon was called to the police station and was also placed under arrest when he arrived.

7. That PW1 was released subsequently on the same day and was not charged with any offence. That he did not hear of the matter again. However, on October 23, 2017, PW1 was issued with a letter of suspension by the Human Resource Manager and was asked to show cause why he should not be disciplined for the events outlined above.

8. That PW1 responded to the show cause letter explaining that he had been instructed by Simon to perform the duties aforesaid. The Human Resource Manager issued PW1 with a letter of termination dated October 24, 2017, which was the day that followed. PW1 testified that the allegations made against him of theft were never proved. That the Appellant did not follow lawful procedure in terminating the employment of the PW1. That the termination was for no lawful cause and violated provisions of *Employment Act*, *2007* and was therefore unlawful and unfair. That the Court found so and awarded PW1 compensation and other reliefs sought in the plaint. That at the time PW1 earned Kshs 45,022 per month. That a demand letter was sent to the appellant but same was not heeded.

9. Under cross-examination by Mr. Burugu for the appellant, PW1 stated that he was arrested together with Mr. Simon and another driver called Phannuel who he had not mentioned in his statement and that the arrest took place on October 20, 2017 which was a public holiday. PW1 also admitted that there were not many people at the site other than the security. PW1 admitted that he was arrested because he had no delivery note for the items he was found with. PW1 also admitted that he was aware that to ferry items out of the company premises required a delivery note. PW1 also admitted that he was given opportunity to respond to the allegations made against him in writing. PW1 also admitted that he was a contributor to National Social Security Fund and that he had a clean record from August, 2013 to the date of his arrest. PW1 also admitted that upon termination of his employment he was paid by the appellant Kshs 80,894 vide a cheque dated February 2, 2016.

10. The Appellant's case was that PW1 had strangely reported to work on a public holiday when he knew there were not many people around at the work site and removed goods from the company premises without a delivery note issued to him by the relevant office. That PW1 knew it was illegal to do so and that he was engaged in unauthorized activity at the time he was arrested by the police. That the

appellant had reasonable suspicion and lawful cause to summarily dismiss PW1 from employment in terms of Section 44(4) (g) of the *Employment Act*, *2007* which provision allows an employer to terminate the employment of an employee without notice.

11. The appellant stated that it had no obligation to establish the misconduct committed by the employee beyond any reasonable doubt as required in a criminal prosecution.

12. That PW1 was fully aware of the requirements of removing goods from the company premises which he had violated without any good explanation offered.

13. The parties filed written submissions in support of the respective cases and the issues for determination are: -

    (i) Whether the learned trial magistrate found in favour of the respondent against the weight of evidence adduced.

    (ii) Whether the learned trial magistrate wrongly awarded the respondent damages, terminal benefits as set out in the judgment of the Court.

14. In *Lawrence Maina Nyamu v Boma Hotels* (209) eKLR, the Court found: -

> " 14. Claimant was informed of the allegations to confront and he made a response in writing. However, there was no oral hearing.
>
> 15. In the view of the Court, the Respondent was in substantial compliance with the statutory requirements of sections 35(1)(c) and 41 of the *Employment Act*, 2007 and without having demonstrated that he was prejudiced by failure to have an oral hearing, the Court finds that the process followed by the Respondent was fair."

15. In *Jacob Oriando Ochanda v Kenya Hospital Association t/a Nairobi Hospital* (2019) eKLR the Court of Appeal stated: -

> " In light of the foregoing we do not understand the appellants argument that there was no oral hearing. But even if this was true, the Court has repeatedly said that the right to be heard does not necessarily entail an oral hearing only. Such was the opinion of the English Court of Appeal in R v Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481 where it was held: -
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> > " "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.....whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..."

We cite one more decision to buttress this point. In the case of KenyaRevenue Authority v Menginya Salim Murgani, Civil Appeal 108 of 2009, this Court pronounced itself as follows:-

> " "However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing."

In our determination, we are in agreement with the learned Judge, that the appellants summary dismissal was lawful and procedural, we find no point of considering the other grounds that have now been subsumed in that determination.

There is no merit in the appeal. It is accordingly dismissed with costs."

16. The above notwithstanding, it is important to note that the Kenyan scenario involves an actual interpretation of express provisions of statute which provisions must be given their ordinary meaning without any addition or subtraction unless there is a lacuna that need to be filled. In this respect, Section 41 of the *Employment Act* provides thus:-

41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of 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 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.

17. It is apparent that a plain interpretation of the express words of the provisions above require the employer to "explain to the employee, in a language the employee understands" the reasons for which the employer is considering termination.

18. This explanation may be made orally or in writing provided it is in a language that an employee understands.

19. The other requirement is that when that explanation is made the employee: -

(a) shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

20. It is clear thus this additional requirement in its very nature means that an actual physical confrontation between the employer and the employee in the presence of a third party must take place before the decision to terminate the employment of a person is arrived at by the employer.

21. It is impossible to see any other contrary interpretation of this second requirement under Section 41(1).

22. Furthermore, as happened in the present case, the respondent was summarily dismissed in terms of Section 44(3) and (4) of the *Act*, and therefore the relevant provision guiding the procedure to be followed is Section 41(2) cited above which uses direct and express words which if given their plain meaning make it mandatory in the Kenyan employment scenario for an employee to conduct an actual physical hearing before "summarily dismissing" an employee.

23. It is useful to reiterate the relevant statutory phraseology under sub-section 43(2) "hear and consider any representations which the employee may on the ground of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make."

24. From the foregoing, the conclusion of the Court is that the mandatory statutory requirements for an employer before making a decision to terminate or summarily dismiss an employee are: -

    i. The employer must orally or in writing explain to the employee the reason(s) for which the employer intends to end the employment.

    ii. The explanation whether oral or in writing must be in a language the employee understands.

    iii. The employer must physically hear (in addition to any written response) any defence the employee has in respect to the grounds of misconduct poor performance/physical incapacity alleged against the employee.

    iv. In that physical confrontation between the employer and the employee the employee must be allowed, if he so choses, to bring any person or a union representative of his choice.

25. It is therefore beyond per adventure that the position as enunciated in the English decision of *Rv Immigration Appeal Tribunal exparte jones* (1988] 1WLR 477, 481 is different from the statutory scenario in Kenya under the provisions of Section 41(1) and (2) of the *Employment Act*, *2007*.

26. In the present case, the Appellant did not provide any opportunity to the respondent to make oral representations to the Appellant before the decision to summarily dismiss him was arrived at. It is also clear that the Appellant did not provide the respondent any opportunity to bring to a hearing a representative of his choice.

27. The above failure by the appellant denied the appellant the opportunity to lawfully determine under Section 43(1) and (2) as read with Section 45(1) and (2) whether the appellant had a lawful or valid reason to summarily dismiss the respondent from employment. For example, the circumstances of this case present a situation where the respondent was acting under a superior command which situation needed to be fully explained by the respondent to the Appellant in a conducive environment as set out under Section 41(1) and (2) of the *Act*. These requirements meant to engender a fair hearing to an employee ought not to be assumed, second guessed or swept under the carpet. Statutorily, they make an essential ingredient of a fair hearing in the context of Kenya statutory employment law.

28. Accordingly, the Court finds that the trial Court though did not make a detailed analysis of this scenario did not err in finding that the appellant did not accord procedural fairness to the respondent. This Court upholds that position taken by the trial magistrate and finds that the summary dismissal of the respondent was unlawful and unfair and in violation of Section 36, 41, 43 and 45 of the *Employment Act*, *2007*.

Remedies

29. With regard to the remedies granted to the respondent, the learned trial magistrate misdirected himself in various respects. Firstly, the trial Court did not appreciate that gratuity for the period served is only payable if provided expressly in the contract of employment and or there is evidence before the Court that the employer did not register the employee with any pension or provident fund scheme under the *Retirement Benefits Act*; Provide gratuity or service pay scheme under a Collective Bargaining Agreement; or any other scheme established and operated by the employer with favourable terms; or did not register and contribute to the National Social Security Fund (NSSF) for the employee.

30. In the absence of a specific finding by the Court that Section 36(6) of the *Employment Act*, *2007* was applicable to the respondent in any of the above respects, then the award of gratuity at 15% of the years served was misguided and is set aside.

31. The award of the equivalent of one month notice in lieu of notice is merited in the circumstances of the case and is upheld by this Court.

32. With regard to the award of damages at Kshs 200,000, the learned trial magistrate did not address himself on the provisions of Section 49(1) (c) as read with subsection (4) of the *Act*. The judgment is indeed silent on any consideration it made in arriving at the award of Kshs 200,000.

33. In this regard, the Court has carefully considered afresh the facts of the case and having arrived at the decision that the summary dismissal of the respondent was unlawful, and unfair, proceeds to be guided by the considerations under sub-section 49(4). In this respect, the Court finds that the respondent suffered loss and damage by fact of the sudden loss of his employment and therefore means of livelihood for no good cause and without notice. The respondent was not compensated for the loss. The respondent had diligently served the Appellant and had a good record for a period of over nine (9) years. That the respondent was not granted a Certificate of Service and had prayed to be granted one in his pleadings; the respondent was paid some terminal benefits which did not include payment in lieu of notice.

34. The Court considers the case of *Paul Mwakio versus Reliable Freight Services Ltd* Cause No 267 of 2018 and grants the respondent the equivalent of nine (9) months' salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs (45,022 x 9) = 405,198 and sets aside the unexplained award of damages to the respondent in the sum of Kshs 200,000

35. Accordingly, the Court finds that the appeal has no merit and dismisses the same to that extent.

36. The Court however sets aside the award to the respondent by the lower Court and in its place enters judgment in favour of the respondent as against the Appellant as follows: -

a. Kshs 45,022 *in lieu of* one-month notice.

(b) Equivalent of nine (9) months salary in compensation for the unlawful and unfair summary dismissal in the sum of Kshs 405,198.

Total award – Kshs 450,220.

(c) Interest at court rates from the date of this judgment till payment in full.

(d) Costs of the suit in the lower court and this court.

(e) Appellant to grant the respondent certificate of service within 30 days of this judgment.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27TH DAY OF OCTOBER, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Burugu for Appellant

Obel & Co. Advocates for the respondent

Ekale: Court Assistant