G4S Security Services (K) Ltd v Lagat (Appeal E015 of 2021) [2022] KEELRC 13433 (KLR) (7 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13433 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

APPEAL E015 OF 2021

NJ ABUODHA, J

DECEMBER 7, 2022

BETWEEN

G4S SECURITY SERVICES (K) LTD .... APPELLANT

AND

JERONO LAGAT .... RESPONDENT

JUDGMENT

1. Through a memorandum of appeal filed on October 10, 2021 the appellant averred that:

    a. The trial court failed to consider that there were valid reasons for the summary dismissal. The court should have found on the evidence before it, that the respondent had deserted duty.

    b. The trial court failed to consider that the respondent had failed to show up for the first disciplinary hearing. The court should have found that the respondent was afforded an opportunity to be heard which opportunity she did not avail herself.

    c. The trial court erred in holding that there was no union representative during the hearing, when that was not a matter in issue before him and was therefore not addressed by the parties.

    d. The award of 12 month's pay as compensation for unlawful termination is inordinately high and was excessive in the circumstances of this case.

    e. The trial court erred in awarding the claimant one month salary in lieu of notice in the circumstances.

2. In the submissions in support of the appeal Ms Kirimi for the appellant submitted that although the trial court found that the appellant failed to controvert and contradict the respondent's case, the learned magistrate did not set out what constituted evidence to controvert or contradict the respondent's case. According to the appellant, the claimant failed to report to work after having been granted leave. The reason for termination of the respondent's employment was set out in the dismissal

letter as failure to report for duty without authority or official leave with effect from April 20, 2020. According to counsel, the respondent alleged that she failed to report for duty on April 20, 2020 because she was granted 10 days' unpaid leave however the respondent failed to lead evidence before the trial court to prove that the 10 days unpaid leave from April, 2020 had been authorized or was lawful.

3. Counsel further submitted that the appellant produced correspondence between the respondent and her supervisor Mr. Alvan Kagema which proved that the respondent's request for 10 days unpaid leave from April 20, 2020 to May 4, 2020 was declined and respondent instructed to report to the Nakuru office on April 20, 2020. This was confirmed by the appellants witness Jaqueline Onyango in her testimony before the trial court. Given the foregoing, it was the appellants submissions that the trial court should have found that the respondent had produced sufficient evidence before it to prove that the respondent's summary dismissal was lawful in accordance with section 44(4) (a) of the *Employment Act*

4. On substantive and procedural fairness, counsel submitted that the respondent was served with the notice for disciplinary hearing on Thursday, April 23, 2020 via her work e-mail address and was then served with the physical copy of the notice on April 24, 2020. Counsel further submitted that the respondent was granted two working days to prepare for the hearing. This was in line with the respondent's right to have two days to prepare for the hearing as set out in the notice for disciplinary hearing.

5. Ms Kirimi further submitted that the respondent did not make any request for additional time, a fact she admitted during cross-examination. Counsel further submitted that it was not in dispute that the respondent failed to attend the disciplinary hearing scheduled for April 27, 2020. She also did not reach out to the appellant to communicate her reasons for not attending the hearing or to request for another date. Further that the only reason the disciplinary hearing was held on April 30, 2020 in Eldoret was because the appellant's operations Manager Francis Gathugu wrote to Mr Nyandong and informed him that the respondent had failed to show up for the disciplinary hearing on April 27, 2020 in Nakuru.

6. According to counsel, once the respondent was invited for the hearing and failed to attend without any reason and the appellant proceeded to conclude the matter in her absence, it was irrelevant when and where the conclusion of the hearing occurred. To this and counsel relied on the case of *Peter Maina Muangai v Black Petals Ltd* [2021] eKLR where the court held that section 41 of the *Employment Act* was not a cover for failure to attend a disciplinary meeting procedurally called by the employer.

7. Regarding the issue of the proportionality of the award counsel submitted that the award of 12 months' pay as compensation for unlawful termination was inordinately high and excessive in the circumstances of the case. The learned trial magistrate did not make any attempt to justify the minimum award of 12 months' compensation. Ms Kirimi submitted that it was a settled principle of law that a judge seeking to award the maximum award must set out reasons for the award. In granting the award the trial court did not observe consideration of section 49(4) of the *Employment Act* which requires that the court considers any conduct of the employee which to any extent caused or contributed to the termination.

8. On the issue of gratuity counsel submitted that the trial court erred in applying the provisions of section 49(1)(c) of the *Employment Act* in making an award for gratuity. The section applied to considerations a court takes when awarding compensation for unfair termination and does not apply to an award of gratuity.

9. Counsel further submitted that the court should have found that there was evidence before it that the respondent had received payment of gratuity for nine years when she worked as a courier Guardette prior to her promotion in 2012 to the position of Branch Supervisor. The appellant produced the discharge form confirming the respondent was paid her dues comprising of gratuity on February 14,

2014. Counsel further submitted that the issue of the discharge form not having been signed by the respondent as determined by the trial court did not negate the claimant's admission during cross-examination that she was paid nine years gratuity pay of Kshs 49,000/=. The award of gratuity for the period 2003 to 2011 therefore amounted to unjust enrichment.

10. Further the trial court erred in awarding the respondent gratuity for the period following her promotion to Branch supervisor in 2012 until her dismissal in 2020 and the basis of the award was that the employment contract did not have an express provision for and or against gratuity.

11. Ms Kirimi submitted that it was not in dispute that the respondent was in 2012 promoted to the position of supervisor – Courier Service and was on November 12, 2015 appointed a Branch Supervisor. It was not in dispute that these positions were part of the appellant's management. According to counsel management employees are only paid gratuity if the contract provides. To support the submission counsel relied on the case of *Central Bank of Kenya v Daries Kereko Muteti*.

12. Keter for the respondent on his part submitted that the court is required to review both the evidence placed before trial court, the weight placed upon such evidence and whether the same supports the award of the trial court or not and whether the same is supported by evidence and law. These principles according to Counsel were captured in the case of *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1985] EA per Madan, JA. The learned judges stated.

> "The Court of Appeal will not interfere with discretionary decision of the judge appealed from simply on the ground that its members if sitting at the first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: First, that the Judge misdirected himself in law, secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account, fourthly that he failed to take account of considerations of which he should have taken account or fifthly that his decision albeit discretionary one, in plainly wrong."

13. According to counsel, the trial court applied the law and facts correctly. The learned Magistrate addressed issues in question and was satisfied that the ingredients of lawful, fair and procedural termination were not met. The respondent was not accorded hearing or opportunity to prepare for and present her defence. Counsel submitted that upon realizing their mistake the appellant quickly fixed another hearing on April 30, 2020 without informing the respondent of the same.

14. Mr Keter submitted that for termination to be considered lawful, fair and procedural it should pass the substantive and procedural fairness test. In this regard counsel relied on the case *Anthony Mkala Cheitave v Malindi Water & Sewrage Co Ltd* [2013] eKLR where the court held that procedural fairness requires that an employer should inform an employee as to what charges the employer is contemplating using to dismiss the employee and the employee has a right to an opportunity to prepare and be heard and to present a defence/state his case in person or through a representative.

15. According to Mr Keter, the notices of disciplinary inquiry dated April 23, 2020, addressed to the respondent to attend hearing to be held in G4S Nakuru office on April 27, 2020 at 1000 hrs was dated on Thursday and served on the claimant on Friday yet the hearing was for Monday, April 27, 2020. There was therefore no sufficient time for the respondent to respond to the allegations, prepare and or defend herself sufficiently. Counsel further submitted that whereas the meeting was scheduled for Nakuru, the minutes show the meeting was done at G4S Eldoret office. There was no proof of service

of the hearing notice upon the claimant. The minutes show that the meeting took place on April 30, 2020 yet there was no further notice for April 30, 2020 for postponement of the hearing.

16. On the issue of payment in lieu of notice, counsel submitted there was no evidence that notice was given for the termination of the claimant. The trial court was therefore right in granting the prayers. Regarding compensation for unfair termination. Counsel further submitted that an award under section 49(c) was discretionary. On gratuity counsel submitted that the trial court found that the discharge form was not signed by the respondent hence the claim that gratuity was paid was false.

17. This is a first appeal and as the 1st appellate court, the role of the court is well set out in the case of *Selle v Associated Boat Co of Kenya & others* [1968] EA where it was stated that:

> " an appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of facts if it appears either that of particular circumstances or probabilities or if the impression or the demeanour of witnesses is inconsistent with evidence generally."

18. An appeal to this court from the trial court is by way of a retrial and principles upon which the court acts on in such an appeal are well settled. Briefly put they were that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

19. The appellant condensed the grounds of appeal to three. The first one being about the validity of the reasons for dismissal. According to the appellants the respondent on March 3, 2020 was informed of her transfer to Nakuru office as Branch Supervisor. She consequently sought to clear her 2019 accrued leave days. The leave was approved and she was advised to report to Nakuru on 8th April, 2020. The respondent however sought 10 more days of unpaid leave but his was declined and she was accordingly informed.

20. On the issue the trial court observed as follows:

> " under section 44 of the *Employment Act*, absconding duty and desertion are misconducts and disciplinary issues which ought to be investigated and due procedure followed as per section 41 and 45 of the *Employment Act*... this was never followed by the respondent. The claimant was never issued with a show cause letter nor accorded sufficient time to respond and file her defence and documentation to rely on."

It was not disputed that the respondent was on March 3, 2020 informed of her transfer to Nakuru office as Branch Supervisor. She consequently sought to clear her 2019 accrued leave days. This was approved and was advised to report to Nakuru on April 8, 2020 upon conclusion of her leave. The respondent however sought an extension of her leave by further ten days unpaid leave but this was declined and she was accordingly informed and advised to report to Nakuru office on April 20, 2020.

The respondent did not report to work as advised prompting the Appellant to issue the respondent with a letter for disciplinary hearing on April 23, 2020 which was first served upon the respondent via email and a physical copy on April 24, 2020. The respondent during the trial contended that she was granted two working days and that she was served on Friday hence could not prepare. In cross-examination she stated that she did not attend the hearing and further that she did not request the appellant to grant her sufficient time.

21. The trial court rightly observed that under section 44 of the *Employment Act* absconding or desertion of duty are disciplinary issues. It is also correct that an employer ought to investigate them before taking

disciplinary action against the employee concerned. In this particular case however, the respondent's bid to get ten days unpaid leave was rejected by the appellant, she therefore ought to have reported to Nakuru as advised by the appellant. Her continued absence from work without the approval of the appellants was a valid ground for summary dismissal. Besides the respondent did not deny that she was subsequently invited for disciplinary hearing at Nakuru which she neither appealed for enlargement of time if she felt the notice was short, nor attended to explain her absence from work without the permission of the appellant. To this extent the court finds and holds that the trial court erred in holding that the case before it was one of unlawful constructive termination of employment because the respondent failed to controvert and contradict the claimant's case. This ground of appeal therefore succeeds.

22. On the issue proportionality of the award, the court having found that the appellant had valid grounds for dismissing the claimant and further that due process was followed, this award has no ground to stand on and is hereby discharged. Further, the issue of gratuity is a matter of contract and or payable if an employee is not registered with NSSF or a pension scheme. The respondent herein was registered with NSSF hence could not be awarded gratuity in the absence of an express provision in her contract of employment.

23. In conclusion the court allows the appeal and sets aside the judgment of the trial court entering judgment in favour of the respondent herein and substitutes therewith an order dismissing the suit with costs.

24. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER, 2022.

ABUODHA NELSON JORUM

JUDGE ELRC