IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 76 OF 2016

BETWEEN

KENYA PORTS AUTHORITY …………………………………. APPELLANT

AND

FADHIL JUMA KISUWA ……………………………………...RESPONDENT

(Being an appeal from the Judgment of E & L Relations Court at Mombasa (Makau, J) dated 24th June, 2016

in

ELRC Cause. No. 793 OF 2015)

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JUDGMENT OF THE COURT

The appellant has, in this appeal challenged the decision of the Employment and Labour Relations Court ***"E & L R C"*** (**Makau, J.**) in which the learned Judge declared that the dismissal of the respondent by the appellant from its employment was unfair and wrongful, for which the latter was condemned to pay to the former Kshs.108,000/=, being his one month's salary *in lieu* of notice. The appellant was also ordered to refund to the respondent any pension contributions that may be due to him.

The respondent, who had worked for the appellant, first on contract and subsequently on permanent and pensionable terms for cumulative period of about seven years, was summarily dismissed on allegations that he presented to the appellant two forged academic certificates for the Kenya Certificate of Secondary Education from Kapsengere Secondary School and Lenana School for the same period. Secondly he was accused of presenting a forged degree certificate for a second class honours (Lower Division) in Bachelors of Education degree allegedly issued by Kenyatta University; and finally, the respondent was alleged to have failed to respond, within the stipulated period, to a letter asking him to show cause why disciplinary action should not be taken against him for gross misconduct in relation to the forged papers.

Following his dismissal on those grounds, the respondent instituted E & L R Cause No.793 of 2015 to have the dismissal declared unfair, unlawful and wrongful and to be reinstated in the same position from which he had been removed, paid monthly salary in the sum of Kshs.108,000/- *in lieu* of notice, compensation for unfair termination in the sum of Kshs.1,296,000/- representing 12 months' salary, Kshs.24,642,000/- for loss of future earnings, worked out as salary, he would otherwise have earned for

the 19 years remaining before retirement. He also applied to be paid his pension entitlements as provided under the appellant's pension scheme.

Both parties presented their respective cases before the learned Judge with the respondent maintaining that he responded to the show cause letter within the time stipulated in the letter and that the only certificate he presented at the time of his employment was that from Kipsengere Secondary School. On the other hand the appellant contended that the respondent had deliberately, with the assistance and collusion of a member of staff, Kulthum Khamisi, who also on account of that collusion was dismissed, back dated the response to bring it within 72 hours; and that Lenana School had confirmed that the certificate presented by the respondent was in fact for another student called Hussein Ahmed Hassan, while Kenyatta University, on the other hand confirmed that the degree was a forgery as it had not awarded it.

Makau, J. evaluated that evidence and, in declaring that the dismissal was unfair, found, as a matter of fact that the respondent deliberately failed to respond to the show cause letter within 72 hours as required; and that, although the certificate from Kapsengere Secondary School was genuine, the one from Lenana School and the degree from Kenyatta University were forgeries. Having found that the reason for dismissal was lawful and justifiable, the learned Judge considered whether the dismissal was procedurally fair and came to the conclusion that **section 41(2)** (erroneously recorded as **section 44 (3**) and **(4)** of the Employment Act (the Act) that enjoins the employer before summarily dismissing an employee to give reasons for that action, was breached as the respondent was not invited to a disciplinary hearing.

Because of this omission, the learned Judge, as we have said entered judgment under **section 49(1**) in respect of one month's salary *in lieu* of notice and ordered the appellants to pay to the respondent his pensions entitlement. The rest of the prayers were dismissed.

It is the finding on liability and the above award that has aggrieved and prompted the appellant to bring this appeal on four grounds; that the learned Judge misapplied **section 41** of the Act; that he concluded in error that failure to hear oral representation of the respondent rendered the termination of his service unfair and unlawful; that the court below had no jurisdiction to determine the question of pension contribution; and that the award of costs was made in abuse of judicial discretion. In their written submissions however the appellant only argued three grounds which in our own assessment can further be condensed into two. For this reason we will only determine whether the learned Judge erred in his construction of **section 41** of the Act by holding that the appellant, through an unfair procedure failed to invite and hear the respondent through an oral presentation before dismissing him, and secondly, whether it was in error for the learned Judge to order for the refund to the respondent of pension contribution.

On the first question the appellant submitted that two schools of thought have emerged, with one maintaining that the hearing contemplated by **section 41** is oral while the other school is of the view that the section may be complied with not necessarily by being heard orally; that even exchange of correspondence will suffice. Counsel cited five authorities that propound the first position and three for the latter. It was however counsel's argument that the correct position is that espoused in this Court's decision in the case of **Kenya Revenue Authority** v **Menginya Salim Murgani**, Civil Appeal No.108 of 2010, where the Court held that the hearing contemplated under **section 41** is not necessarily oral but one that will be determined on a case by case basis, depending on the circumstances of each case; that in some instances, even exchange of correspondence would be constitute sufficient hearing for the purpose of section 41. It was the view of learned counsel that, in the circumstances of the case, the learned Judge ought to have found on the evidence presented before him that from the exchanged letters the respondent clearly knew what the complaint was and did not have to insist on oral hearing; and by that, he further erred in awarding one month salary *in lieu* of notice even after finding that the respondent was guilty of presenting forged papers.

With regard to the second ground the appellant submitted in line with the decision of the Court in **Kenya Ports Authority** v **Industrial Court of Kenya & 2 Others**, Civil Appeal No. 236 of 2012, that an order for a refund of pension contributions to the Kenya Ports Authority Pension Scheme can only be directed against the trustees of the scheme as an independent corporate entity from the appellant itself; that the

refund can only be in accordance with the Retirement Benefit Act; and that it was erroneous for the court, having found that the respondent could not derive advantage from his wrong doing, to then go around that conclusion and award him his portion of the contribution to the pensions scheme.

In opposing the appeal and supporting the determination by the learned Judge, the respondent submitted that the appellant failed to comply with mandatory requirement for oral hearing and the learned Judge could not be faulted for so finding. On the question of pensions the respondent insisted that the learned Judge ought to have ordered a refund of the full pension contributions by himself and the appellant's contribution, which should have followed automatically after concluding that the respondent's dismissal was unfair.

This is a first appeal in which our consideration under **section 17** of the Act is on both facts and law. The Court is obliged to reconsider the evidence, assess it afresh in order to draw its own independent conclusions based on the evidence on record, but bearing in mind that it does not have the advantage of the trial court, where that evidence was received, witnesses heard and seen. (See Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123).

In order to re-evaluate the evidence and thereafter come to an independent conclusion, it is important to relate briefly the facts giving rise to the dispute. Investigations by the Ethics and Integrity Department of the appellant confirmed from both Lenana School and Kenyatta University that academic papers attributed to them respectively for Kenya Certificate of Secondary Education (KCSE) and a degree in Education allegedly issued to the respondent were not genuine. Consequently by a letter dated 28th July, 2015 the respondent was asked to show cause within 72 hours of receipt of the letter, why, on account of the alleged forgery, disciplinary action should not be taken against him. He was warned in the letter that should he fail to respond within that time the appellant would proceed with the contemplated disciplinary action without further reference to him.

On 11th September, 2015 a follow up letter was addressed to the respondent warning him that having failed to respond to the show cause letter as directed, the appellant was at liberty to assume that he had no explanation to offer and would, as a result be free to commence disciplinary proceedings without further recourse to the respondent.

An undated letter from the respondent was received by the appellant on 21st September, 2015, a few days after the aforesaid letter. In his letter, the respondent was asking the appellant for more time to reply to the show cause letter, explaining that he was on his annual leave and therefore did not get time to reply within 72 hours. By some strange twist of fate the respondent, through the law firm of Marende Birir Shimaka & Co. Advocates wrote to the appellant a day after requesting for time to reply, alleging that he had, on 3rd August, 2015 replied to the show cause letter. Strange because, why ask in the undated letter received by the appellant on 21stSeptember, 2015 for more time to respond if infact he had replied three weeks earlier? With respect, we agree with the conclusion of the learned Judge that the respondent failed to respond within the stipulated time. We are ourselves satisfied that the respondent instead engaged in unhelpful farce by causing his response to be backdated to 3rd August, 2015 and, with the help of a staff member, stamped "*received*" by the appellant on the same date, a conduct that cost the latter his job. Having submitted his response out of time, the respondent, again with mischief instructed his lawyers to write an incongruous letter with the emphasis only on the date of the alleged response to the show cause letter and in an uncanny manner threatening to institute legal action against the appellant if it did not act on the respondent's letter!

The second accusation was that the respondent had relied on forged academic papers to earn a promotion to the management position at Grade HM4, which position he held up to the time he was dismissed. He denied presenting the certificate from Lenana School or the degree certificate but maintained that the only certificate he presented to obtain employment on contract with the appellant was that from Kipsengere Secondary School.

Both the certificate and the degree are in the name of the respondent just as the certificate from

Kipsengere Secondary School. According to the latter the respondent sat for KCSE in 1993 and scored D- while the Lenana School results are in respect of 1991 examination where it is shown that he scored C+. The degree, on the other hand was issued on 17th October,1997.

For the respondent to qualify to join the management level at Grade HM4, according to the appellant's Appendix A of the Human Resource Manual, 2008, he was required to possess a university degree. It should be apparent why it became imperative for the respondent to employ all means to acquire a degree certificate. For one to qualify for admission to undergraduate programme one must have attained a mean grade C+ or equivalent. With D+ obtained at Kipsengere Secondary School, the respondent stood no chance to be elevated to the post of HM4.

We therefore entertain no doubt that the respondent presented forged documents in order to qualify for a higher position which he did not deserve. We do not see how a stranger, without any interest in any outcome, would have used the respondent’s name to procure the documents, submit them to his employer and the person who ultimately benefit is the respondent.

In his belated reply to the show cause letter, the respondent merely stated that he completed Form Four at Kapsengere Secondary School and that despite his academic qualifications (D+) or level of education, he had been lucky to have undergone several training programmes. It would appear he attributed his elevation to these training opportunities. He said nothing regarding the certificate from Lenana School or the degree from Kenyatta University in the entire 9 paragraphs of his letter. From these facts, we, like the learned judge, come to the conclusion that the burden of proof of gross misconduct against the respondent was discharged.

As a general rule, no employer has the right to terminate a contract of service of an employee without notice. However under **section 44**, for specific reasons, the employer can summarily dismiss an employee without notice or with a shorter notice than that to which the employee is entitled. An employee, by his conduct may leave no doubt that he is in fundamental breach of his obligations under the contract of service. Among the many conducts enumerated under **section 44 (4) (a)** to **(g)** that would warrant summary dismissal is where the employee commits, or is, on reasonable and sufficient grounds suspected of having committed, a criminal offence against or to the detriment of the employer or the employer’s property.

Forgery and uttering false documents are crimes under **sections 349** and **353** of the Penal Code, respectively.

Section 41 deals with the notification and hearing of an employee before the employment can be terminated on specific grounds. It stipulates that;

> **"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.**
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> **(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 duty to hear an employee is limited to the employer explaining to the employee clearly the nature of the accusations for which it is contemplated that his employment be terminated and an opportunity for the employee to make representations, if any, which the employer will consider in deciding, one way or another. Only where the employee wishes to be accompanied at the hearing, by another employee or a shop floor union representative, will it be necessary to hear him in their presence.

Section 41 is in accord with the well-known rules of natural justice which are today constitutional principles. The House of Lords in a landmark labour case of **Ridge (A.P)** v **Baldwin& Others** [1964] AC 40, for the first time in the United Kingdom extended the application of the rules of natural justice, in particular the right to a fair hearing, (*audi alteram partem* rule) beyond bodies having a duty to act judicially into the realm of administrative decision making. Lord Hodson at page 132 identified three features of natural justice in more or less the same way **section 41** does, namely that it is the right to be heard by an unbiased tribunal, to have notice of charges of misconduct and to be heard in answer to those charges.

Lord Reid, for his part said the following in this often-quoted passage;

> ***"…..where there must be something against a man to warrant his dismissal……there, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation…….".***

While it is not in doubt that before an employee can be summarily dismissed, the employer must hear and consider his representation, the question that has always arisen as demonstrated by the several cases cited by parties, is whether the hearing must be oral.

Guided by the dictum in another English decision in **R** v **Immigration Appeal Tribunal *ex parte* Jones (**1988) 1 WLR 477 in deciding the appeal in **Salim Murgani** case (supra) this Court (Omolo,Waki & Nyamu, JJA) said that;

> ***"The thrust of Dr Kuria's submissions was that the internal disciplinary procedures of the appellant should have involved an oral hearing of the respondent either by the Staff Committee or the Board being the appellate body or both. 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.***
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> ***In the case of LOCAL GOVERNMENT BOARD v ARLIDGE [1915] A.C. 120, 132-133, SELVARAJAN v RACE RELATIONS BOARD [1975] I WLR 1686, 1694, and in R v IMMIGRATION APPEAL TRIBUNAL ex-parte JONES[1988] I WLR 477, 481 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 have said earlier that where dismissal is on the grounds of misconduct, poor performance or physical incapacity the employer, by the provisions of section **41** is bound, not only to explain the reason for which the employee's dismissal is contemplated but also to hear and consider any representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he/she wishes, another employee or a shop floor union representative of his choice. This requirement only imposes a duty on the court to hear the employee in the presence of his/her colleagues where the employee wishes them to be present. The court cannot impose them on the employee. It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case.

The learned Judge was of the opinion that, in the circumstances of the case the appellant erred in dismissing the respondent without first inviting him for a disciplinary hearing; that the dismissal was in violation of procedural fairness.

The respondent's response to the show cause letter was hollow and did not offer any explanation

regarding the forged documents yet that was the crux of the matter. But he was afforded a hearing which he squandered by failing to squarely deal with the question of forgery of certificates. His explanation that he only presented the certificate from Kipsengere Secondary School did not answer the more serious question.

In our view, in the circumstances of this case we are satisfied that the appellant afforded the respondent an opportunity as contemplated in **Section 41**.

On reinstatement, we, with respect agree with the learned Judge's rejection of that prayer. Similarly we agree that prayers for compensation and future earnings were not available for the reason that the respondent lacked the requisite qualification for the post and was in that post as a result of forged papers.

We can only emphasise that *ex turpi causa non oritur actio*, based on the doctrine that no legal remedy or benefit can flow from an illegal act, explained succinctly by **Lord Mansfield CJ** in **Holman v Johnson** (1775) 1 Cowp 341 as follows:

> **"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio* ["no action arises from deceit"]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ["from an immoral cause"], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both were equally in fault, *potior est conditio defendentis* "stronger is the position of the defendant".**

Finally the learned Judge erred in granting pension benefits without evidence that the respondent was a member of the pension's scheme. If he was, then we have no doubt that the scheme would spell out the terms of payment of such benefits to the members, which details were not before the learned Judge. We also think the award of half of the costs to the respondent was made in error and we accordingly set it aside.

Therefore only to the extent explained above, the appeal succeeds and we make no orders as to costs.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR