REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL NO. 11 OF 2015

H. YOUNG [EA] LIMITED..... APPELLANT

-VERSUS-

SAMUEL GIKUNDA MBIUKI.....RESPONDENT

JUDGMENT

1. The appeal herein is from the Judgment of the Senior Resident Magistrate, Hon. P. Muholi, delivered at Nairobi on 31st January, 2020 in **CM ELC Case No. 725 of 2018, Samuel Gikunda Mbiuki -v- H. Young & Company (East Africa) Limited**. The background of the case is that the Respondent, Samuel Gikunda Mbiuki was employed by the Appellant as a tipper driver on 13th August 2011 and his employment was terminated vide a letter dated 15th November 2018 for misconduct. By the suit before the trial court the Respondent sought one month's pay in lieu of notice and damages for unlawful termination of employment. After hearing both parties, the Honourable Magistrate awarded the Respondent one (1) months' salary in lieu of notice, two (2) months' salary in damages for unlawful termination of employment and costs of the suit.

2. The Appellant was aggrieved by that decision and it filed this Appeal based on the grounds that:

> ***a) The Learned Magistrate erred in law and fact by holding that the Respondent was unlawfully terminated and awarding him one month's pay in lieu of notice and two months' salary in damages for unlawful termination of employment without providing any legal justification.***
>
> ***b) The Learned Magistrate erred in law by failing to consider Section 44 (4) of the Employment Act, which provides for summary dismissal where an employee such as the Respondent is deemed to have committed a criminal offence against his employer or to the substantial detriment of his employer's property.***
>
> ***c) The Learned Magistrate erred in fact by failing to take into consideration the anomalies in the fuel report which was produced by the Appellant which showed that the respondent was fraudulently consuming large amounts of fuel while on duty thus amounting to gross misconduct.***

3. The Appellant seeks the Order that the Appeal be allowed and the Judgement delivered by the Trial Court on 31st January 2020 be set aside and be substituted with an Order dismissing the Respondent's claim in the Memorandum of Claim dated 28th December 2018 with costs.

4. The Appeal was disposed of by written submissions and the Record of Appeal dated and filed on 3rd July 2020 is before this Honourable Court for consideration.

Appellant's Submissions

5. The Appellant submitted that the Respondent lacked diligence during the course of his employment and was issued with two (2) warning letters cautioning him of his misuse of fuel on the tipper entrusted to him. It further submitted that the respondent did not heed to the said warnings but continued to misuse the fuel in the said tipper until it terminated his employment for same misconduct.

6. It urged this court to re-evaluate the evidence on the record of appeal and find that the trial court erred in entering the impugned judgment in favour of the respondent. For emphasis, it relied on the decision in **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** where the Court of Appeal held that the primary role as a first appellate court is to re-evaluate, re-assess and reanalyse the extracts on the record and determine whether or not the conclusions reached by the learned trial Judge are to stand and further give reasons either way. The Court went on to cite its own decision in ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212*** where it held inter alia that the appellate court should always bear in mind that it has neither seen nor heard the witnesses and make due allowance in that respect; and secondly, that the responsibility of the court is to rule on the evidence on record

and not to introduce extraneous matters not dealt with by the parties in the evidence.

7. The Appellant further submitted that the trial court found the Respondent was unlawfully terminated contrary to section 45(2) of the Employment Act on the reason that the Appellant failed to follow due process under Section 41 of the Act, specifically on notification and hearing. It contended that **section 45(5) of the Act** identifies what the Court should consider in deciding whether it was just and equitable for the employer to terminate the employee which include: procedure adopted by the employer in reaching the decision to dismiss the employee; the conduct and capability of the employee up to the date of termination; extent with which the employer has complied with any statutory requirements connected with the termination; and existence of any pervious warning letters issued to the employee.

8. The Appellant further contended that the Respondent's act of siphoning and or misusing the Company's resources amounted to gross misconduct as under **Section 44 (g) of the Employment Act** which warranted summary dismissal; that the fuel consumption report it produced during the proceedings was never challenged by the Respondent but the trial Court never addressed itself on the same despite its counsel's lengthy submissions on the substantial role played by the report in the proceedings including it being the upon the issuance of the warning letters and subsequent termination.

9. Referring to pages 162-163 of the Record of Appeal, it submitted that while the trial court held there was no evidence that the said warning letters were ever served, its HR Manager had testified to the contrary that the warning letters were issued in the office but the Respondent had declined to acknowledge receipt. It further submitted that the trial court also ignored the evidence by DW1 that he never received any complaints of leakage in the Respondent's truck, and instead concerned itself more with the Appellant's failure to affor the Respondent notification and hearing.

10. It further submitted that the court ignored the unchallenged evidence by DW1 who testified that the Respondent's employment was only terminated after he was numerously summoned for hearing and he refused to appear. It contended that the record is clear that the trial court failed to consider that due process was followed to the best of the Appellant's ability. It further contended that the trial court was under a duty to consider the Respondent's conduct and existence of previous warning letters in rendering its decision but she did not.

11. The Appellant argued that the trial court never justified the sums for notice pay and damages that it awarded the Respondent herein. It contended that the respondent never produced any contract of employment to support the claim for salary in lieu of notice, and the trial court never justified the award of 2 months compensation for unfair termination by any of the reasons set out under section 49(4) of the Employment Act. For emphasis, it relied on the case of **National Social Security Fund v Grace K. Kazungu & another [2018] Eklr, Freight In Time Limited v Rosebell Wambui Munene [2018] eKLR** where the Court of Appeal confirmed its decision in ***Ol Pejeta Ranching Limited -v - David Wanjau Muhoro [2017] eKLR***, that whereas an award of damages is discretionary, the same should be exercised on some sound judicial principles and in the absence of any reasons justifying the ward, it would be presumed that the trial court in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then justifies intervention on appeal.

12. The Appellant further submitted that even though the award of two months' pay as damages for unfair termination was given under the court's discretion, had the relevant factors under **section 49 (4) of the Act** been considered then the said award would have been either less or nil. It contended that had the court failed to consider that the respondent was 63 years old and that he had a minimal expectation to continue in employment. It further contended that the trial court did not consider that the respondent contributed to the termination through misconduct, namely, reckless abuse of fuel to the detriment of its business of road construction.

13. In view of the foregoing acts by the trial court, the appellant submitted that this Court is warranted to exercise its powers to interfere with the decision of the trial magistrate who exercised court's discretion injudiciously and on wrong principles. For emphasis, it relied on the decision in **Kenya Revenue Authority v Kenya Bankers Association [2020] eKLR** where the Court of Appeal cited ***Selle & Another vs. Associated Motor Boat Company Limited & others [1968] E.A 123***, that an appellate court is not bound by the trial court's findings where it appears that the learned Trial Magistrate failed to take into account evidence presented before them.

Respondent's Submissions

14. The Respondent submitted that the appellant did not prove the reason that justified his dismissal as required under **section 43(2) of the Employment Act**. He contended that it is clear on page 174 of the Record of Appeal that the Trial Magistrate in her judgment correctly articulated the legal position and addressed herself to the reason cited as the basis for the termination of his employment, namely, the Tipper he was driving "*had a high consumption of more than 10 litres on 5th and 6th June, 2018*".

15. The respondent invited this Court to look at DW1's testimony on ***pages 165 and 167 of the Record of Appeal*** with regards to the fuel consumption and/ or alleged syphoning whereby DW1 admitted that there were no records where he (respondent) acknowledged the amount of fuel fed on his assigned Tipper including 5th and 6th June 2018. He further contended that DW1 admitted in his evidence that it was possible that the loss of fuel could have been occasioned by other factors like syphoning or leakage in the Tippers fuel tank or pipes. Consequently, the respondent contended that the trial court was correct in its conclusion that the Appellant did not tender any evidence to rule out other extraneous factors that would have caused loss of fuel; and that the evidence tendered could not legally justify the termination of his employment.

16. On the other hand, the respondent submitted that termination of his employment was procedurally unfair by dint of **section 41** of the Act, and relied on the exposition by the court in **Mombasa ELRC Cause No. 64 of 2012, Anthony Mkala Chitavi vs Malindi Water and Sewerage Company Limited** for emphasis. He contended that the Appellant neither invited him to a disciplinary meeting nor accorded him an opportunity to defend himself. Referring to the written witness statement of the DW1 on ***pages 63 to 67 of the Record of Appeal*** and the transcript of his testimony at ***pages 162 to 166 of the Record of Appeal*** it is clear that the Appellant did not tender any evidence to the effect that it accorded him any opportunity to defend himself against the allegations forming the basis of termination of his employment. Consequently, he contended that the trial court arrived at the correct conclusion in finding that termination of his employment was procedurally unfair as he was not given any chance to explain himself on how the fuel was consumed.

17. In conclusion, the Respondent urges this Court to affirm the Learned Trial Magistrate's judgment and dismiss the Appellant's Appeal with costs.

Analysis

18. This being a first appeal, my duty is well cut out, namely, reconsider the evidence, evaluate it, draw my own conclusions to test whether the conclusions reached by the trial court should stand. The said mandate has been restated by the Court of Appeal in numerous decisions including ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212*** where it held inter alia that:

> ***"On a first appeal from the High Court, the court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

19. Having carefully considered the evidence on record of appeal and the rival submissions filed by both parties, it is my view that this appeal turns on the following issues:

a) Whether the Learned Trial Magistrate erred in law and fact in holding that the termination of the respondent's contract of employment was unfair.

b) Whether the Learned Trial Magistrate erred in law and fact by awarding the Respondent one month's pay in lieu of notice plus two months' salary as compensation for unlawful termination of employment without providing any legal justification.

Whether the termination was unlawful.

20. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment–

> ***"(1) No employer shall terminate the employment of an employee unfairly.***
>
> ***(2) A termination of employment by an employer is unfair if the employer fails to prove—***
>
> ***(a) that the reason for the termination is valid;***
>
> ***(b) that the reason for the termination is a fair reason—***
>
> ***(i) related to the employee's conduct, capacity or compatibility; or***
>
> ***(ii) based on the operational requirements of the employer; and***
>
> (c) ***that the employment was terminated in accordance with fair procedure.***

21. Flowing from the above mandatory provision of the law, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reason(s) and upon following a fair procedure. In **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** the Court of Appeal held:

> ***"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. 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."***

22. The question that arises is whether the appellant herein proved on a balance of probability that there was a valid reason for dismissing the respondent and that a fair procedure was followed.

Reason for the termination.

23. The reason cited for terminating claimants' employment herein was captured in the Summary Dismissal Letter dated 14.6.2018 as follows:

> ***"Dear Samuel,***
>
> ***RE: SUMMARY DISMISSAL***
>
> ***It has been observed that while driving TP 80 you had high consumption of more than 10 litres on 5th and 6th June 2018.***

The Employment Act Section 44(c) states: If an employee commits, or on reasonable and sufficient grounds is suspected of having commited, a criminal offence against or to the substantial detriment of his employer or his employer's property he is liable for summary dismissal.

Thus the management has been left with no alternative but to terminate your services summarily effective Thursday 14th June 2018."

24. After considering the evidence adduced by the appellant's witness on the above cited misconduct, the trial court observed that:

"… in his evidence in court DW2 stated that there was no evidence of siphoning of the fuel by the claimant. He actually confirmed that there was no evidence to show that the claimant had misappropriated the fuel, his mistake that he was the driver of the tipper and there was high consumption. To me this reason is not satisfactory, high consumption can be caused by other factors other than siphoning, for example if the vehicle is mechanically unsound, or if there is leakage, no evidence was adduced to rule out other extraneous factors that would have caused the fuel consumption. In my view the reason advanced were not amounting to gross misconduct."

25. I have considered the evidence by DW2 and confirmed that he admitted during cross examination that the vehicle assigned to the respondent was fitted with a seal to prevent fuel siphoning. He further admitted that the seal was not broken. He further admitted that it was not possible to tell how much fuel was deposited in the vehicle because the fuel card was not produced in court. Finally, he admitted that it was possible to lose fuel through leakage. The foregoing admission leads to conclusion that the appellant did not prove on a balance of probability that the reason for dismissing the respondent was valid as required by section 43 and 45 of the Employment Act. Consequently, I find and hold that the trial court made the right conclusion that the appellant did not prove a valid reason for summary dismissal of the respondent.

The procedure followed

26. The respondent testified that the termination was unfair because he was dismissed without being accorded any hearing or opportunity to defend himself as required under section 41 of the Employment Act. The said section provides that:

"(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." *[Emphasis Added]*

27. In this case, the appellant did not adduce any evidence to prove that the foregoing mandatory procedure was followed before dismissing the respondent on the alleged misconduct. Therefore, I find and hold that the trial Court was right in concluding that the summary dismissal was procedurally unfair for failure to comply with the procedure set out under section 41 of the Employment Act. It is clear from the record that in arriving at the said conclusion, the trial Court was guided by the decisions of the Court of Appeal in the case of **Standard Group Limited v Jenny Luesby [2018] eKLR** and **CMC Aviation Limited v Mohammed Noor, Civil Appeal No. 199 of 2013** where the right to hearing before dismissal for a cause was held to be mandatory or else the separation is unfair and unlawful.

Whether the court erred in awarding one-month salary in lieu of notice plus two months' salary as compensation.

28. Section **49(1) (a) of the Employment Act** provides that:

"(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;"

29. The Appellant's case is that the Respondent is not entitled to payment in lieu of notice because he did not show the basis for the same which should either be a contract of employment or statute. However, without a contract of service, an employee is still entitled to payment of salary in lieu of notice under **section 36 of the Act** based on the intervals in which his wages or salary are paid. **Section 35(1) (c) of the Employment Act** provides that where the contract is to pay wages or salary periodically at intervals of or exceeding one month, the contract shall be deemed terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

30. In this case, there was no dispute that the respondent was drawing a monthly salary which he proved by payslips. Consequently, I find that the respondent was entitled to one-month salary in lieu of notice and the trial court correctly awarded the same to him under section 49(1)(a) of the Act.

31. As regards the award of 2 months' salary as compensation for unlawful termination, it is now trite law that the award of compensatory damages for unfair termination of contract of employment is discretionary and as such the court is obligated to exercise the said discretion

judiciously and upon consideration of the factors set out under section 49(4) of the Act. In ***Ol Pejeta Ranching Limited -v - David Wanjau Muhoro [2017] eKLR***, the Court of Appeal held that:

> ***"The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention..."***

32. In this case, the appellant submitted, and correctly so, that the trial court did not make any justification for awarding the respondent the said two months' salary as compensation for unlawful termination. I have perused the impugned Judgment on page 175 of the record of appeal and confirmed that all what the court stated was that:

> ***"Damages for unlawful termination. On this head I will award two months' salary at Kshs. 31,117.10 x 2 = 62,234.20."***

33. Having found that the trial court did not give any reason for awarding the two months' salary compensation, I find that the said award was made without taking into account relevant considerations, and by so doing invited this court to interfere with the discretionary award.

34. The foregoing notwithstanding, I decline to set aside the award of 2 months' salary compensation because the amount is fairly little considering the claimant's length of service of 7 years and also the fact that being 63 years old, the probability of securing another job was minimal.

35. Having found that the appeal fails save for the failure to justify the award of two months' salary as compensatory damages, I proceed to uphold the impugned judgment and accordingly, dismiss appeal with half costs to the respondent.

Dated, signed and delivered at Nairobi this 5th November, 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE