REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC APPEAL NO. E024 OF 2024

REUBEN IMBUSI MKALO……

APPELLANT

-VERSUS-

GITHUNGURI DAIRY FARMERS COOPERATIVE SOCIETY LIMITED……

RESPONDENT

(Being an appeal from the Judgment and decree of Hon. P. Muholi (SRM) delivered on 25th January, 2024 in the Chief Magistrate Court at Githunguri MCRLC NO. of 2020).

JUDGMENT

1. Through the Memorandum of Appeal dated 12nd February, 2024 the Appellant appeals against the Judgment of Hon. P. Muholi (SRM) delivered on 25th January, 2024 in the Chief Magistrate Court at Githunguri, MCRLC NO. of 2020) on grounds *inter alia.*

a) The learned trial magistrate erred in law and fact and misdirected himself when he failed to consider the Appellant's submissions on both points of law and fact.

b) The learned Magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

c) The learned Trial Magistrate erred in law and fact in holding that the Respondent never terminated the Appellant unlawfully despite evidence on record showing that the conduct of the respondent implied unlawful termination of the Appellant without any justifiable reason.

d) The Learned Trial Magistrate erred in fact and in Law in failing to enter a judgment in declaration that the actions of the Respondent amounted to unlawful termination despite the evidence submitted by the Appellant and the parties in the suit.

e) The Learned Trial Magistrate erred in fact and in law in failing to enter judgment in favour of the Appellant in respect of the claim for compensation for unfair termination despite the Appellant's evidence being uncontroverted by the Respondents.

2. The appellant therefore prayed that the entire judgment and decree of the Chief Magistrate's Court at Othaguri written and delivered by Hon. P. Muholi (SRM) on 30th January, 2024 in MERLRC NO. 1 of 2020 be set aside and the honourable court makes appropriate orders in respect of the claim and further that the honourable court issues a declaration that the actions of the respondent amounted to unlawful

termination and thereby award the appellant compensation for unlawful termination in the sum of Kshs. 321,984 as prayed in the appellant's memorandum of claim dated 23rd October, 2020.

3. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

4. The Appellant's Advocate M[illegible] submitted among others that the appellant was suspended from employment pending disciplinary hearing on 3rd September, 2020 and at the time of suspension, the appellant was also required to hand over all the society's property and documents in his possession to the Inventory Control Manager, further that the letter of invitation to disciplinary hearing did not capture the questions that the disciplinary panel would ask at the hearing and at the hearing the appellant was not allowed to bring witnesses of his choice and was asked only one question that is whether he saw the date of the invoice which question limited the appellant to a yes or no answer and was never allowed him

to explain the events of that night. According to counsel the appellant needed to be given an opportunity to explain himself. Further the disciplinary hearing minutes filed by the respondent in the lower court showed the appellant was asked the same questions he had answered in his response to show cause letter. According to Mr. [illegible] the hearing was therefore a sham and showed the outcome had been predetermined.

5. Counsel further submitted that the respondent's witnesses stated that the appellant was dismissed on the grounds that the Distribution Assistant attributed the failure to detect the reprinted invoice however it was important to note that the appellant was a Logistic Assistant having been promoted from his former role of Distribution Assistant and his role was custodian of products. The error of failing to notice and or detect that the invoice was a reprint was not the appellant's but the Distribution Assistant's. The appellant was therefore blamed and terminated for the mistake of another person. Counsel further submitted that despite the fact that the goods were loaded, they were detected at the weighbridge

and thus never left the respondent's premises hence no loss was incurred.

6. Mr. Mugo submitted that the act of asking the appellant to handover respondent's property and documents in his possession prior to proceeding on suspension implied the respondent had already made up its mind to dismiss the appellant further the conduct of the respondent during the disciplinary hearing failed to accord the appellant fair hearing as provided in the Employment Act and the Constitution. In this regard counsel relied on the case of **Michael Dowling v. Workplace Safety & Insurance Board [2004] CAN LII 436** cited the case of **JSC vs. Gladys Boss Shollei & Another [2014]eKLR.** Counsel further relied on the case of **Walter Ogal Anuro vs. TSC [2013]eKLR.**

7. In conclusion Counsel submitted that from the foregoing it was clear that the trial court erred in law in failing to fault the respondent for unfairly terminating the claimant's service and urged the Court to set aside the decision of the

trial court and grant the prayers sought by the appellant in his memorandum of claim filed in the trial court.

RESPONDENT'S SUBMISSION.

8. Mr. Njeru, Counsel for the respondent on the other hand submitted among others that the appellant was lawfully terminated and the position was rightfully confirmed by the trial court. According to him, the appellant was guilty of gross misconduct on account of wilfully neglecting or carelessly and improperly failing to perform his duty as a Distribution Assistant. Regarding the disciplinary process, it was counsel's submission that the appellant was afforded an opportunity to explain himself on the allegations of misconduct in accordance with section 41 of the Employment Act. The appellant was invited to a disciplinary hearing which proceeded before the Board, the appellant and a Union representative were present and that the statutory burden to call witnesses was on the appellant and no explicit prohibition was placed on the appellant by the respondent. Counsel further submitted that whereas the

appellant alleged that he was not given an opportunity to explain himself, evidence on record shows the contrary. The appellant was issued with a show cause letter which he responded to. He was thereafter invited for a disciplinary hearing which he attended. Further, the termination letter stated the reasons for termination. On the foregoing, Counsel submitted that the termination followed and met procedural fairness as in the case of **Walter Ogal Anuro vs. TSC [2013]eKLR.**

9. On whether the claimant was entitled to the reliefs sought in the statement of claim, counsel submitted that section 49 of the Employment Act guides the Court on the reliefs to be awarded where the court reaches a finding of unfair termination. The trial Court awarded the claimant one month's salary in lieu of notice, accrued leave and 50% costs of the suit. Counsel further submitted that a claimant who loses a claim for unfair termination is not entitled to compensation under section 49 and relied on the case of **Francis Nyongesa Kweyu vs. Eldoret Water and**

Sanitation Company Limited [2017] KEELRC 1330 (KLR)

DETERMINATION

10. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by both counsel herein and reiterates that the principles which guide this court in an appeal from a trial court are now more or less settled. In **Peter Oloo Nyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

> ***An appeal to this court from a trial by the High Court is by way of retrial and the principles on which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowance in this respect.***

11. The trial Court (Hon. P. Muholi) had the benefit of listening to evidence and observing the demeanour of witnesses and came to the decision, the subject of the present appeal. The Court acknowledges that an appeal to this court from a trial by the magistrate's court is by way of retrial.

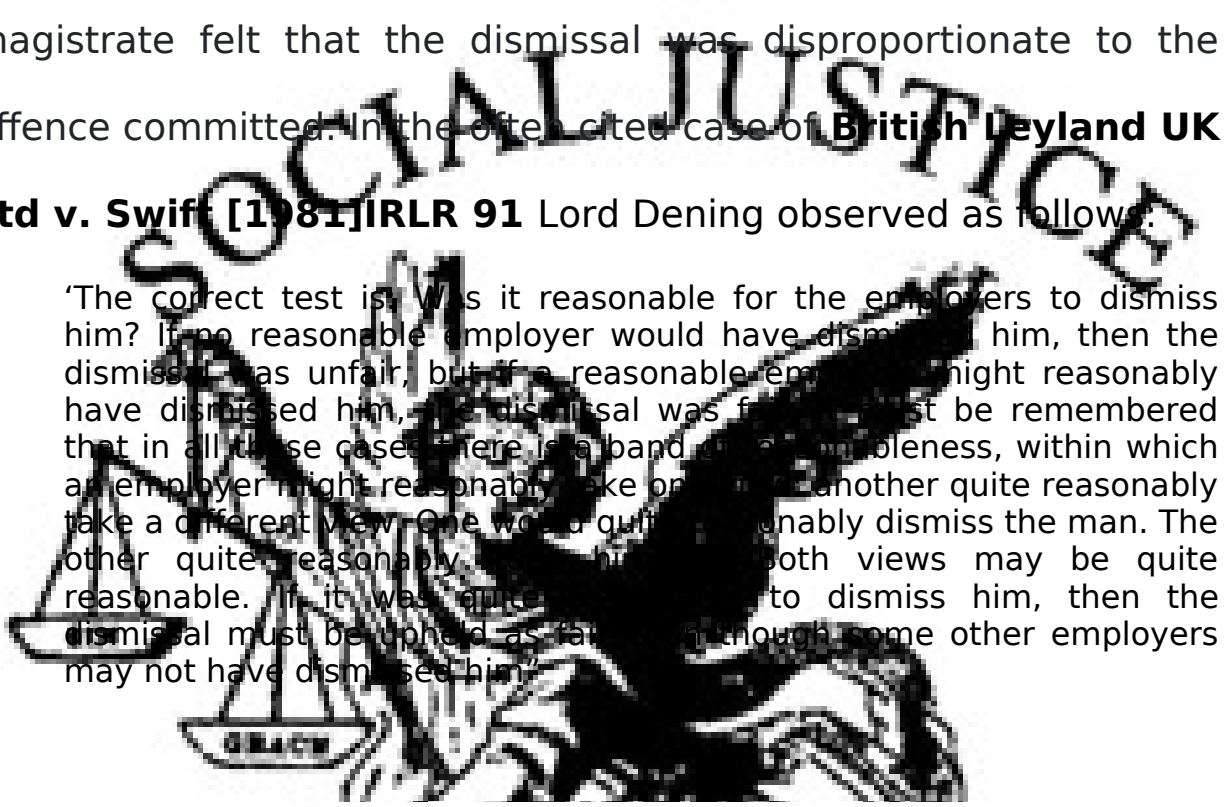
However in exercising this jurisdiction, the court must guard against acting whimsically and replacing its view of the judgment it could have reached if it tried the matter in the first instance with the finding of the trial court. The decision of the trial court need not be perfect but provided it is in line with the operative law and a reasonable deduction of the evidence presented before it, this court will not interfere simply because as an appellate court it has the jurisdiction to revaluate the evidence and come up with its own findings.

12. The Court has reviewed and considered the judgment of the trial court vis a vis the evidence presented before the trial court. At page 6 to 7 of the record the judgment of the trial court reads:

> "The claimant was alleged to have used a repeated invoice and the date had been backdated. This according to the respondent was a way that could cause the company to lose goods. Is this reason sufficient enough to warrant a dismissal. It was their evidence that the invoice was not printed by the claimant, the same was printed by the loading clerk. The claimant alleges that he had detected the anomaly and sent it back to the loading clerk. The genesis of the anomaly was by the loading clerk and not the dispatch clerk. In my view the company has a right to dismiss any person on any allegations. However, warning in such circumstances would suffice since there was a chain of several other players before it got to the claimant. It is also clear that this was the first time the claimant had been found with such anomaly..."

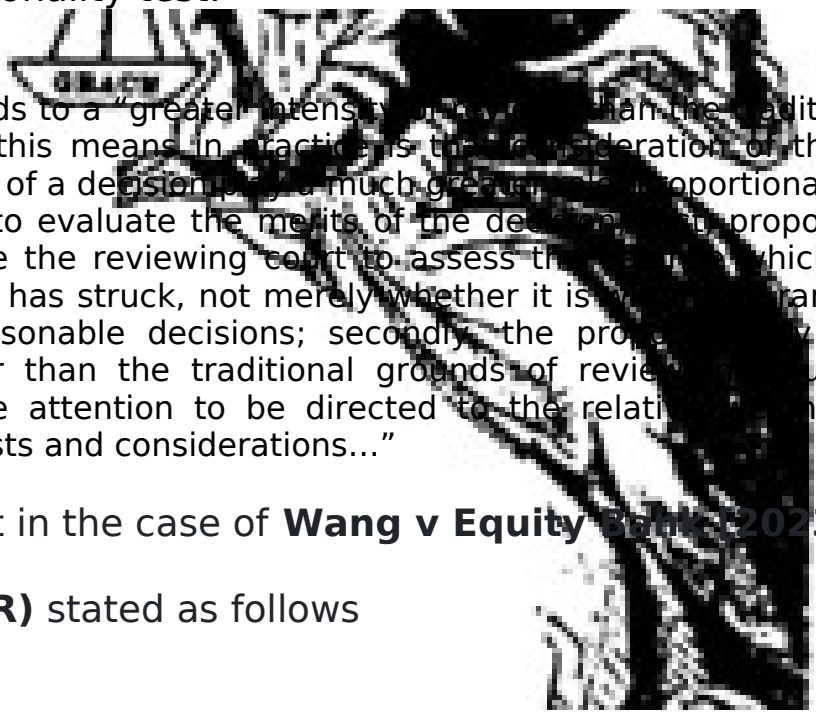
From the above extract of the judgment, it is clear that the trial magistrate felt that the dismissal was disproportionate to the offence committed. In the often cited case of **British Leyland UK Ltd v. Swift [1981]IRLR 91** Lord Dening observed as follows:

> 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. You must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably would not. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.'



13. From the above extract of the judgment, the trial court in a sense was of the view that a reasonable employer ought to have not dismissed the appellant hence reduced the dismissal into a termination. In this court's view a dismissal and a termination have the same effect in that they bring to an end the employment relationship. A dismissal which is often called summary dismissal is a dismissal for gross misconduct as stipulated under section 44 of the Employment Act where such employee is not entitled to termination notice or payment in lieu.

14. This Court is in agreement with the trial court that the appellant did not originate the chain of events that led to his dismissal and the fact that this was the first time he was caught up in a disciplinary case. The dismissal was therefore disproportionate to the offence allegedly committed by the appellant. The principle of proportionality was considered in the English case **R v Home Secretary; Ex parte Daly [2001] 2 AC 532.** where the Court stated as follows concerning the proportionality test:



> "...leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision by a much greater [illegible] proportionality invites the court to evaluate the merits of the decision. [illegible] proportionality may require the reviewing court to assess the [illegible] which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review [illegible] such as it may require attention to be directed to the relative weight accorded to interests and considerations..."

This Court in the case of **Wang v Equity Bank [2023] KEELRC 3187 (KLR)** stated as follows

> "The respondent failed to demonstrate how the infractions if any, put the respondent at reputational jeopardy or risk of loss. Further, assuming the infractions by the claimant were offenses against the respondent's code of regulations, they could have been dealt with by less drastic disciplinary options than termination. **Not all infractions in employment should attract dismissal. There are less drastic disciplinary measures such as warning, loss or privileges or surcharge where there is material loss, that can be handed down to an employee in milder cases that need not attract the**

ultimate penalty of a dismissal. It is the Court's view that in terminating the claimant's service based on the allegations against him, the respondent acted disproportionately and unreasonably hence unfair".

Section 45 of the Employment Act provides:

45(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 employee was terminated in accordance with fair procedure.

15. The above section therefore incorporates the principle of proportionality by requiring that the reason for termination ought to be a fair reason. From the foregoing, the trial court having found that the termination was disproportionate to the offence the appellant was alleged to have committed, ought to have returned a finding of unfair termination and assessed compensation for unfair termination. The court therefore finds and holds that the appellant was unfairly terminated.

16. From the pleadings, the appellant was employed on 3rd April, 2017 and was terminated on 4th September, 2020 implying he had worked for the respondent for approximately three years. He had no disciplinary record and further considering that the offence for which he was purportedly accused of did not originate from him, an award of eight month's salary would adequately compensate the appellant. This award will be in addition to the awards by the trial court. **That is to say the respondent is hereby ordered to pay the appellant an additional amount of Kshs. 214,656/- as compensation for unfair termination of service.**

17. The appellant shall further have the costs of this appeal.

18. It is so ordered.

Dated at Nairobi this 3rd day of October 2025

Delivered virtually this 3rd day of October 2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division


SOCIAL JUSTICE