

**IN THE COURT OF
APPEAL AT NYERI**
(CORAM: KANTAI, LESIIT & MUCHELULE,
JJ.A.) CIVIL APPEAL NO. 63 OF 2018

BETWEEN
LUCY WANGARI KARIUKI.....APPELLANT

AND
KANGUNU FARMERS
CO-OPERATIVE SOCIETY.....RESPONDENT

*(Being an appeal against the Judgment of the Employment and
Labour Relations Court at Embu (B. Ongaya, J.) delivered on 4th
November, 2016*

in
E.L.R.C. Case No. 145 of 2015)

JUDGMENT OF THE COURT

This is a first appeal from the judgment of **Ongaya, J.** delivered on 4th November, 2016 in the Employment and Labour Relations Court (ELRC) where the appellant's suit was dismissed. Our duty as a first appellate court as recognized by **rule 31** of the **Court of Appeal Rules** is to re-re-appraise the evidence and to draw inferences of facts. This duty has been recognized in various pronouncements of this Court in such cases as **Selle & Another vs. Associated Motor Boat Company Ltd & Others [1968] EA 123** as follows:

***"...this Court is not bound necessarily to accept
the findings of fact by the court below. An
appeal***

to this court... is by way of retrial and the principles upon 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 due allowance in this respect..."

In a Memorandum of Claim filed in ELRC at Nyeri the appellant stated that she was an employee of the respondent **Kangunu Farmers' Co-operative Society Limited** up to 15th September, 2014 when she was dismissed from employment. She stated that she was a member of Kenya Union, Commercial Food & Allied Workers (KUCFAW) - hereafter the Union- in accordance with sections 4, 48 and 54 of the Labour Relations Act 2007; that the respondent was a coffee farmers society registered in accordance with the Cooperatives Act 2004 which society specializes in advisory processing and marketing of its members proceeds; that the Union was a Union within the provisions of the Labour Relations Act 2007 which represented members in accordance with parties Collective Bargaining Agreement (CBA); that both the Union and the respondent enjoyed regulatory terms and conditions of employment through a CBA. She further claimed that on 5th December, 2013 she had been ordered by the respondent to proceed on 38 days' leave to resume on 10th February, 2014 and that no reasons were given for that order; that on 31st January, 2014 she was suspended from employment with effect from 10th February, 2014 to await an internal audit inquiry;

that on 10th February, 2014 the Union wrote and complained that the respondent had violated clause 7 of the CBA by failing to give reasons for and the duration of the suspension; that on 11th February, 2014 the respondent wrote back to the union stating that a special general meeting of the respondent held on 13th September, 2013 had suspended all activities carried out by former management committee which was suspected of gross mismanagement of the respondent's funds; that on 21st May, 2015 the respondent had extended the suspension of the appellant promising to accord the appellant an opportunity to clear the accusations made against her; that efforts to resolve the dispute in accordance with CBA had not yielded any fruit; that on 28th May, 2014 the Union invoked section 62 of the Labour Relations Act and reported the dispute to the Cabinet Secretary for Labour Social Security and Services; that on 1st July, 2014 the Cabinet Secretary accepted the dispute and in an effort to promote settlement had appointed a conciliator; that on 28th July, 2014 the Union forwarded the Memorandum to the conciliator demanding revocation and release of half salary withheld during the period of suspension; that in disregard of the Cabinet Secretary's effort to resolve the dispute the respondent had dismissed the appellant from employment on 5th September, 2014 on allegation of irresponsibility and dishonesty as allegedly revealed by the auditor's report; that the conciliations efforts had not succeeded thus leading to the dispute being referred to court. It was prayed that the court orders nullification of the dismissal and reinstate the appellant to

employment without any loss of benefit or in the alternative that the court alter the dismissal by reducing it to unfair termination and order an award of payment in lieu of notice at Kshs.98,145.75 as per clause 3 of the CBA; payment of leave traveling allowance not paid during the 38 days period of leave at Kshs.16,357.60 in accordance with clause 11 b(v) of the CBA; service gratuity at Kshs.1,472,186.25 in accordance with clause 4 of the CBA; maximum compensation Kshs.451,470 as per section 49 of the Employment Act and any other form of compensation and relief that the court may deem fit.

In a Memorandum of Response the respondent admitted that the appellant had been its employee and that it had dismissed her from employment; it was denied that the dismissal was unprocedural or contrary to the terms of the CBA; it was contended that the appellant had engaged herself in improprieties to the detriment of the respondent leading to her being sent on compulsory leave to facilitate investigations; that the said action was approved by a special meeting of the respondent held on 13th September, 2013; that the respondent had reported the matter to the relevant ministry and an enquiry had been conducted where the appellant was involved; that in an enquiry report submitted by the ministry on 9th September, 2014 it revealed that gross acts of impropriety by the appellant had been found in that she had been unprocedurally and fraudulently employed; that she was guilty of forging documents used to procure her employment; that the appellant had misrepresented

herself to procure her employment

whereas she was not employable in that capacity; that she had forged minutes increasing her salary and that she was guilty of gross improprieties in running the financial affairs of the respondent which had caused financial loss to the respondent; it was further stated in the Memorandum of Response that the said inquiry report had made recommendations which touched on the conduct of the respondent to the effect that the respondent should employ a qualified person in place of the appellant; that the appellant be dismissed from her employment forthwith; that the appellant and her management committee be banned from holding any co-operative office; that the appellant be surcharged with the financial loss to the respondent and that a comprehensive forensic audit be undertaken to establish the extent of financial improprieties perpetuated by the appellant and her management committee; further that the respondent had engaged the services of a forensic auditor whose audit report confirmed those findings of improprieties by the appellant; that she had been improperly, fraudulently and irregularly employed and that she had been overpaid Kshs.253,249.50; that the forensic audit found that the appellant had further been involved in fraudulent purchase of goods which caused loss of Kshs.173,850; that the appellant had been involved in fraudulent expenditure as a consequence whereof the respondent lost Kshs.2,013,254; that the appellant was involved in procurement of coffee external transport service for which she was liable to be surcharged at the sum of 30% thereof and that she was involved in false seminar allowance of Kshs.308,000; it was

therefore contended that the dismissal of the appellant from employment was lawful, fair and that such employment had been void ab initio as the same was fraudulently procured.

Particulars of fraud and misrepresentation were given in the Memorandum of Response where the matters we have already addressed were set out. It was prayed that the claim be dismissed with costs and in what was called a counter claim in the prayer the court was asked to make a declaration. We say what was called a 'counter claim' because this is not the way a counter claim is framed in pleadings; that the employment between the appellant and the respondent was void ab initio and unenforceable against the respondent and that an order be made for the appellant to retribute to the respondent the financial loss as pleaded in paragraph 12 of the Memorandum of Response.

In a response to the respondent's response, the appellant claimed that the respondent had failed to uphold the threshold provided for in section 41 of the Employment Act on fair hearing prior to its disciplinary action of dismissal. The appellant claimed that she was not fully involved in the inquiry and she only attended one meeting before the inquiry team by the Ministry of Industrialization and Enterprise; she stated that she was never given the report and was not asked to give her side of the story and had only learned of the existence of the report through third parties. She stated that she was promoted by the respondent on 1st October, 2010 and was entitled to a salary increase as per the CBA; that she

was a responsible employee answerable to the respondent's management committee.

When the suit came up for hearing the appellant testified that she was employed by the respondent as an Assistant Recorder on 1st October, 1999 and was promoted over the years, her last position being Acting Secretary Manager. She relied on documents filed in court which included suspension letter and letter of dismissal; she testified that at the time of dismissal she was not given any show cause letter and was not invited to any disciplinary hearing by the respondent; further that she was not given a copy of the report leading to her dismissal. She stated that her employment was governed by the CBA. Asked questions in relation to the enquiry report she stated that she never challenged it because it was not given to her and she was not aware of it at all.

Geoffrey Maina Macharia testified on behalf of the respondent. He relied on a witness statement which he had filed in court where he had stated that the respondent had employed the appellant as its Secretary Manager from October, 2010 after invitations had been received for the post done by the previous management committee; that sometime in September, 2013 there arose suspicion of massive financial improprieties and other misdeeds against the appellant and her team of management committee which necessitated calling a special general meeting which resolved that the appellant and the entire management committee be sent on compulsory leave to pave way for

investigations; that a new interim management committee was chosen which referred the investigations to the Commissioner for Co-operative Development for inquiry; that in the meantime the appellant had commenced her 38 days leave on 5th December, 2013 to 10th February, 2013; that vide a letter of 31st February, 2014 (*sic*) (*this date does not exist in the calendar*) the appellant was informed of her suspension from employment and was given reasons for suspension as the ongoing inquiry. He stated that the appellant had been involved in the inquiry; that the inquiry took longer than expected and the suspension was extended vide a letter of 21st May, 2014; that the inquiry made its findings which disclosed gross financial misdeeds and other improprieties by the appellant and the inquiry report recommended that the appellant be surcharged with the resultant loss and had found that she had used fraud to procure employment. The inquiry had recommended that she be dismissed from employment forthwith and that a forensic audit be conducted; that based on the inquiry and the forensic audit report the appellant was dismissed from employment on 15th September, 2014.

Challenged in cross-examination he corrected the dates when various things happened involving the appellant's employment stating: *"... I say I have forgotten the flow of things..."* He further stated that because of the inquiry report he dismissed the appellant from employment. Asked how the dismissal took place he said: *"...she never came to our premises and we held no hearing..."*

The Judge considered the case and as we have seen he dismissed it.

The first issue that the Judge considered for determination was whether the dismissal was unfair. He found that throughout the proceedings from the imposition of the compulsory leave to suspension to statutory inquiry and finally the dismissal, the appellant was aware of the case that confronted her. He found that the appellant was accorded a notice and a hearing as envisaged in section 41 of the Employment Act and that the appellant participated in the statutory inquiry and was entitled to appeal as per provisions of sections 74 of the Co-operatives Act; further that the respondent had acted according to the recommendations of the inquiry report and therefore the Judge found that the reasons for the termination were valid as envisaged in section 43 of the Employment Act, 2007.

The second issue that the Judge determined was whether the parties were entitled to the remedies as prayed for.

On the counterclaim the Judge found that the audit report had not specified any cash lost that could be recoverable from the appellant. He found that there was no evidence that the appellant was accorded an opportunity to defend herself and that in the absence of such administrative disciplinary findings the counter claim had not been established. The Judge found that the appellant was not entitled to any of the remedies prayed for.

Those are the findings that provoked this appeal through the Memorandum of Appeal drawn for the appellant by her lawyers Messers J. N. Mbutia Advocates where 3 grounds of appeal are set out. It is stated that the trial Judge erred in finding that the termination of the appellant was not justified since the appellant only saw the inquiry report after it was filed in court and the same was not served on the appellant during the disciplinary process culminating to summary dismissal. It is stated that the trial court, while dismissing the counter claim, found that the appellant was not given an opportunity to defend herself in view of the audit findings, and that in absence of such administrative disciplinary findings the conclusion by the trial court contradicted its earlier findings that the termination was not unfair. Finally, that the court in making its final conclusion that the claim was to be dismissed failed to consider the rest of the claim for payment in lieu of notice, unpaid leave allowance and service gratuity. It is therefore proposed that this Court makes a finding that the appellant's suit be allowed and the awards prayed for be granted and costs be awarded to the appellant.

When the appeal came up for hearing before us on 4th March, 2025 **Mr. Mbutia** learned counsel appeared for the appellant while learned counsel **Mr. Kingori** appeared for the respondent. Counsel relied on written submissions which had been filed.

The appellant in written submissions gives a history of the case that was before the ELRC. It is submitted that the requirement

in section 41 of the Employment Act was not adhered to. That the respondent had declined to participate in reconciliation proceedings before the suit was filed; that the respondent was required to grant the appellant a hearing in the presence of another employee or a shop floor Union representative of her choice and that the respondent as employer was required to consider any explanations that the employee would make. It is submitted that the appellant was not issued with a show cause letter or an invitation to answer to matters raised in the inquiry report which it is said the appellant saw for the first time in court. It is submitted that there was no substantive fairness as required; that the respondent's witness had admitted that no hearing was held before the appellant was dismissed and that the appellant is entitled to the prayers in the Statement of Claim.

The respondent in a very brief written submission quotes **Lord Denning** in **Western Excavating Limited vs. Sharp** [1978] 1 All ER 713 that an employment contract is subject to the usual contract laws. It is stated that there was an audit report which demonstrated that the appellant got her employment by falsification. That a contract based on illegalities or falsification is not enforceable and the appeal should be dismissed.

We have considered the whole record and the submissions made.

The respondent referred the suspected misconduct of fraud to investigations by a ministry of government. An inquiry was carried

out which made certain recommendations including that the appellant's employment be terminated forthwith. Looking at that report and its recommendations the respondent would ordinarily be entitled to dismiss an employee from employment for gross misconduct under section 44 of the Employment Act for she appears to have committed fraud in the way she procured her employment and her conduct during employment. But we have looked at the whole record and we are disturbed by the way the whole process was undertaken. As we understand it in addition to substantive justice the Employment Act places process as the central consideration in matters of employment where an employer is considering or has decided to terminate the services of an employee.

In **Nairobi Bottlers Limited vs. Adrian Imbuga Civil Appeal No. E661 of 2022 [2024] KECA 434**: it was observed that **sections 41 to 49** of the **Employment Act** cover areas relating, *inter alia*, to notification and hearing before termination on grounds of misconduct; reason for termination; summary dismissal; unfair termination; reasons for termination or discipline; complaint relating to summary dismissal or unfair termination; representation during disciplinary hearing and remedies for wrongful dismissal and unfair termination. An employee who is being dismissed for gross misconduct or incapacities must be notified of the reason why he is being dismissed. The communication must be in a language that the employee understands; the employer is duty bound to inform the

employee and the employee is entitled to appear at the

hearing accompanied by another employee or by a representative who must also be heard. The employer must prove the reasons for termination. Dismissal may be for instances of gross misconduct, absenteeism, refusal to work, carelessness in the performance of duties, intoxication, use of abusive language, or criminal conduct to the detriment of the employer. The employer must also prove that the termination is for a valid reason which is fair and must prove that due process had been followed for termination of an employee from employment. The employee has a duty in law to prove that termination from employment was unfair while the duty shifts to the employer to prove that termination of an employee from employment was fair. Remedies available to the employee under the Act include notice in lieu of termination, wages for time worked, compensation in form of salary for not more than 12 months; and, reinstatement if the period of 3 years has not elapsed. In case of reinstatement, the court has always to consider the wishes of the employee, the circumstances leading to termination, practicability of reinstatement, other opportunities available to the employee, the employee's conduct before termination of employment and mitigating factors available to the employee.

The record here shows, and that was confirmed in evidence and by documents produced in the case, that by a letter dated 5th December, 2013 the respondent sent the appellant on 38 days leave which was said to be her annual leave to report back on 10th February, 2014. That was followed by a letter of 31st January,

2014 where the appellant was suspended from duties for the reason that

an internal audit and inquiry was being conducted. That suspension was extended through a letter of the respondent dated 21st May, 2014 where it was stated that she would remain on suspension until the said report was received by the respondent. By a letter of 15th September, 2014 headed "Summary Dismissal" the respondent dismissed the appellant from employment for what it termed as irresponsible and dishonest conduct revealed by auditors auditing the affairs of the respondent. The appellant's case before the ELRC was that she had been suspended from employment and finally dismissed but was not involved at all in any inquiry process regarding her employment. The respondent's witness admitted before the Judge that no formal disciplinary process had taken place in respect of the appellant.

An employer is required in mandatory terms by **section 41** of the **Employment Act** on notification and hearing before termination on grounds of misconduct before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language the employee understands the reason for termination where the employee is entitled to have another employee present during those deliberations. The employer must hear and consider any representations from the employee. Under section 43 of the Act on proof of reason for termination, the employer must prove the reason or reasons for termination, absent which the termination shall be deemed to be unfair within the meaning

ascribed by section

45 of the said Act. No employer may terminate the employment of an employee unfairly (section 45).

So process is everything under the Act and an employer who ignores it (process) while terminating the services of an employee will fall foul of the law and will be visited with consequences as set out in the Act.

The facts in the case before us are very clear that the appellant was first sent on 38 days compulsory leave and was not given reasons why that action was taken. Efforts of conciliation by the relevant ministry did not bear fruits because the respondent failed or refused to participate. The period between the letter sending the appellant on compulsory or annual leave and the time of termination by summary dismissal was about 9 months and there was no evidence that the appellant was at any time during that period involved in any disciplinary process that the respondent was undertaking. The respondent did not at any time during that period summon the appellant to any disciplinary hearing. She was not told to explain anything. She was not informed of her rights to attend any meeting or that she would be accompanied by her fellow employee or Union representative. The appellant was entitled to be asked to show cause why the respondent was considering terminating her services. She was entitled to offer an explanation and in law she was even entitled to an appeal against any decision taken after process had been followed. None of these happened.

We find that the Judge erred in finding that there was a valid reason for termination where the appellant was not involved in the inquiry process initiated by the respondent. That is to say that termination of employment was unfair and could not be upheld.

We would allow this appeal by setting aside the judgment of ELRC and substituting therefore an order allowing the appellant's claim. As a period of over 3 years has passed since termination we would not order reinstatement. We grant the prayers made in the alternative in the Memorandum of Claim. We would award the appellant costs here and below.

Dated and delivered at Nyeri this 28th day of November, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR