



REPUBLIC OF KENYA



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**Kwale Water and Sewerage Company Ltd v Nyondo (Civil Appeal
E025 of 2021) [2024] KECA 443 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 443 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E025 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 12, 2024**

BETWEEN

KWALE WATER AND SEWERAGE COMPANY LTD APPELLANT

AND

SAID DINGO NYONDO RESPONDENT

*(Being an appeal from the Judgment of the Employment and Labour Relations
Court at Mombasa (J. Rika, J.) dated 15th December 2020 in ELRC No 293 of 2018)*

JUDGMENT

1. Said Dingo Nyondo, the respondent herein, filed a Statement of Claim on 2nd May 2018 against the appellant, Kwale Water and Sewerage Company Ltd., in which he sought:
 - a. 3 months' salary in lieu of notice at Kshs. 130, 650.
 - b. Unpaid leave since 2010 at Kshs. 304,850.
 - c. Salary deduction at Kshs. 17,850.
 - d. Half-salary for the period of interdiction at Kshs. 195,975.
 - e. 12 months' salary in compensation for unfair termination at Kshs. 522,600.
Total Kshs. 1,171,925.
 - f. Declaration that termination was unfair.
 - g. Certificate of Service to issue.
 - h. Costs.
 - i. Interest.



- j. Any other relief.
2. The respondent's case as pleaded and narrated by him before the trial court was that he was employed by the respondent on 15th July 2010 as a Procurement Assistant at a gross monthly salary of Kshs. 22,000, which amount was later increased to Kshs. 43,550 by the time he left employment; that, by a letter dated 19th August 2016, the respondent was required by the appellant to explain allegations that he had irregularly issued a receipt book, to one Mohammed Khamisi Kalandi, who then gave it out to Asha Mohammed Mlingo; that he did not respond to the said letter as he was on study leave; that, on 8th September 2016, he received a letter requiring him to show cause in which it was alleged that the receipt book in question was illegally used for collection of revenue from the appellant's customers; that he responded to the allegations in the show cause letter on 14th September 2016 stated that the said receipt books were in the custody of the accounts department and not in his department, and that the receipt book series was shown to have been issued to one Jared; and that, on 23rd November 2016, the respondent was placed on indefinite interdiction and on half salary of Kshs. 21,775.
 3. It was the respondent's case that, on 25th April 2017, he was invited for a disciplinary hearing which he attended accompanied by his Trade Union Branch Chairman. However, during that process, he was confronted with further allegations that he purposely misread the tender amount on a bid placed by Suhufi Agencies Ltd as Kshs. 15.7 million instead of Kshs. 14.4 million; that he was involved in an illegal industrial action; and that he had altered the bid bonds.
 4. By a letter dated 30th June 2017, he received a letter summarily dismissing him from employment with no benefits.
 5. The respondent's complaint was that he was not heard in accordance with the requirements of fair procedure, and that the reason given to justify his termination was not valid. According to the respondent, he was a member of the tender committee, which comprised other members, and that the issue of misreading a bid amount revolved around Gondoni Water Project; that the issue was dealt with and resolved internally by the tender committee whereafter, the committee proceeded with the tendering process based on the correct bid amount; that the said Project was investigated while he was on interdiction, and that he was not aware of the person who carried out the investigations; that, since a bid bond was a security document issued by a bank or insurance company, it was not possible to alter them as alleged; that at the time of the alleged industrial action, he was at home serving his interdiction and that, in any case, it was not declared illegal; that, during the hearing, and apart from introducing new charges, the appellant referred to documents which the respondent was not aware of; and that, despite the respondent's objection to reference being made to them, the appellant's position was that it was not necessary for the respondent to have the documents in advance of the hearing.
 6. According to the respondent, the letter of summary dismissal, dated 30th June 2017 was received by him on 17th July 2017 and concerned the same grounds that were in the letter of interdiction. While he was advised that he could appeal within 14 days of the decision, he had received the letter late, thereby denying him the opportunity to appeal.
 7. The respondent testified that, as a result of his good performance, he was promoted to Procurement Assistant 1 on 23rd May 2016 with a salary of Kshs. 43,550.00; that the notice period under contract was 3 months, and he was not allowed to take annual leave since he was alone in the office, and hence his claim for annual leave pay from the year 2010 based on his monthly salary of Kshs. 43,550.00, which was irregularly reduced to Kshs. 41,000 between November 2015 and May 2016. He nonetheless conceded that, upon receipt of the notice to show cause, he did not ask for any documents, and that he was aware that Kalandi was in possession of an unauthorized receipt book. By virtue of being in the



procurement department, his department was mandated to procure services and goods, but was not mandated to supply receipt books to individuals, as this was a function of the accounts department. He also admitted that he did not apply for annual leave.

8. In its response dated 29th November 2018, the appellant, while not denying that the respondent was its employee, averred that, sometime in 2016, the respondent irregularly issued to Mohammed Khamis Kalandi a receipt book, a fact that was admitted by the said Kalandi in a letter dated 19th August 2016; that, by a letter dated 10th August 2016, the appellant asked the respondent to explain the incident, but that the respondent did not respond to the said letter; that, as a result, the respondent was asked, through a letter dated 8th September 2016, to show cause why he should not be disciplined; that in response to the notice, the appellant denied the allegations; that the respondent was fairly interdicted on 23rd November 2016 to pave way for investigations and the subsequent disciplinary hearing; that the respondent was summarily dismissed with loss of all benefits; that the hearing was conducted fairly and the respondent was accompanied by his Trade Union Representative and afforded the opportunity to state his case; and that the respondent did not request for any documents before, during or after the hearing.
9. It was the appellant's position that the respondent was found guilty of misreading a tender amount; failing to disclose the circumstances of misreading of the tender amount; altering related bond statements; issuing receipt books irregularly to Kalandi and Mwangunya; and of participating in an illegal industrial action on 28th and 29th November 2016, and yet he was not a member of the involved Trade Union. The appellant further averred that, between November 2015 and September 2016, the appellant harmonised salaries which affected allowances, but did not affect the respondent's basic salary, and that the respondent was not subjected to illegal salary deductions. The appellant therefore urged that the respondent's claim be dismissed with costs.
10. The respondent's internal auditor, Stephen Ngala Safari, its technical manager, Kanzere Swalehe Kidzuga, and Human Resource Manager, Susan Solomon Mlamba, all testified for the Respondent on 12th October 2020 when the hearing closed.
11. Stephen Ngala Safari testified that it was the mandate of his docket to ensure the appellant's resources were utilized optimally. According to him, the appellant used to receive requests for receipt books from user departments, which requests went through various approvals. However, there were receipt books which were in the respondent's custody that were found to have been circulating unofficially; that receipt book Serial No. 302001 was shown to have been issued to another person and not to the respondent. In his evidence, the officers concerned with the said receipt books were not witnesses in the matter, and were taken through individual disciplinary processes. Though he insisted that outsiders were using them, the said receipt books were not made available to the court.
12. The second witness for the appellant, Kanzere Swalehe Kidzuga, its Technical Manager and a member of the tender committee, told the trial court that there were 3 proposed Water Projects in Kwale for which the appellant sought funding from sponsors. It then went on to procure, prepare tender documents and call for bids nationally via the normal tendering procedures; that the respondent served as secretary to the tender committee; that one of the tender applicants complained that his tender with regards to Gandoni Water Project was altered; that the tender committee acted collectively and that, if there was a misreading of tender amount, it could be corrected; that Bid Bonds are issued from banks or insurance companies and it was not easy to alter them; that the respondent made the wrong tender amount announcement, individually and failed to alert anyone that there was a wrong announcement; and that the matter was raised with the committee by the concerned county executive committee member.



13. The third witness for the appellant, Susan Solomon Mlamba, the appellant's Human Resource Manager in charge of staff issues, joined the appellant after the respondent had already been interdicted. She attended the disciplinary sessions and confirmed that the minutes on record fairly captured the disciplinary proceedings. In her view, due process was followed in terminating the respondent's contract. While she agreed that the respondent requested for certain documents at the hearing, she maintained that he did not do so before the hearing. She explained that the respondent was accorded the opportunity to defend himself and was allowed to call witnesses, but did not call any. In her view, the Managing Director wrote the letter of dismissal as the accounting officer. Though the respondent had a chance to appeal within 14 days, he did not do so. To her, the respondent was guilty of gross misconduct and was fairly terminated.
14. However, the witness stated that, although in her witness statement she stated that the respondent issued receipt book to Mohammed Khamis, he was not called as a witness as he had left employment. According to her, receipt books are in the custody of procurement department which issues the same to the finance department. She admitted that the same receipt book was indicated to have been issued to one Jared. While stating that the disciplinary committee did not make recommendation with respect to the respondent's employment status, it was her position that the Managing Director had the final word on disciplinary sanction. Although the dismissal letter stated that the respondent participated in an illegal demonstration, she agreed that there was no order barring any demonstration which the respondent joined while on interdiction. She conceded that the respondent received the dismissal letter after the 14 days given to appeal had lapsed, and that he was on half salary while on interdiction.
15. After hearing the case, the learned Judge found that the charges levelled against the respondent when he appeared before the disciplinary committee were expanded beyond what was in the letters calling for his statement, to show cause and the interdiction, which only revolved around the receipt book issued to Mohammed Kalandi. The learned Judge noted that, in addition, the respondent faced charges of issuing unauthorized receipt books to another gentleman named Ali Mwangudya for illegal revenue collection; benefitting financially from issuing these receipt books; organizing a cartel to facilitate illegal revenue collection; participating in/attending an illegal demonstration held by unionized employees on 28th and 29th November 2016, while he was not unionized; mispronouncing tender sum for a bid made by Suhufi Limited; altering the bid bond statement for Suhufi Limited in order to favour their tender award; and for making financial gain from alteration of the bid bond statement.
16. According to the learned Judge, the disciplinary process was not objective, rational or consistent with the minimum standards of fairness prescribed under Sections 41, 43 and 45 of the *Employment Act*, 2007. He noted that, from the conclusion of the process, it was clear that there was no link between the decision of the Managing Director and the conclusions and recommendations of the disciplinary committee; that the committee's resolution determining that the respondent be summarily dismissed, which the Managing Director purported to cite in justifying his decision, was not what the disciplinary committee decided; and that the Managing Director seemed to have stepped in, taken over the disciplinary process, and concluded a process the disciplinary committee had left hanging.
17. It was noted that, whereas the Managing Director regurgitated and copy -pasted the allegations made against the respondent at the disciplinary hearing as the reasons for dismissal, not all of the allegations were contained in the letters calling for the respondent's statement, to show cause and the interdiction, and that the respondent did not have the benefit of responding to all the allegations from the outset as they kept mutating. The learned Judge found that the disciplinary committee did not arrive at a conclusion on all the allegations in the expanded list; that, whereas there were 14 allegations made against the respondent, when he appeared before the disciplinary committee, there were only 4 conclusions; that the Managing Director based his decision on 6 findings, which were not supported



- by the disciplinary committee, such as participation in an illegal demonstration, the alleged use of unauthorized receipt books resulting in loss of KShs. 2.4. million, and the misreading of the tender sum relating to Suhufi Agencies Limited.
18. In his judgement, the learned Judge found defects in the disciplinary process since the persons mentioned as having implicated the respondent, such as Mwangudya and the respondent's other colleagues, , and who, in the appellant's view, belonged to a cartel led by the respondent, and who would be accomplices to the respondent, were not called at the disciplinary hearing and their evidence tested by the respondent; that the tenderers, who were victims or victors in the alleged machinations of the respondent, were not called at the disciplinary hearing; that the appellant did not explain to the court how the respondent could possibly have altered bid bonds, which were secured through banks or insurance companies, and which the Technical Manager, Kidzuga, confirmed were not easy to alter; that the appellant's witnesses admitted that any fault with the tendering process would be taken collectively by the committee as would any remedial action; that the appellant did not present any member of the tender committee at the disciplinary hearing or in court to establish what the respondent's fault was, in discharging his role as secretary to the tender committee; that, whereas the respondent prepared a professional opinion to the Managing Director dated 23rd September 2016 explaining in detail how the tender process was conducted, the Managing Director did not seem to have taken it into account while summarily dismissing the respondent; that no receipt books, regularly or irregularly issued by the respondent, were exhibited before the court, and no witness who was irregularly issued with a receipt was called to testify before the court; and that the police investigation recommended by the disciplinary committee did not materialize.
 19. In the learned Judge's finding, the appellant did not establish any valid reason in summarily dismissing the Respondent.
 20. Regarding the procedure, the same was also found to have been flawed. According to the learned Judge, whereas the necessary letters/ notices before the disciplinary hearing took place were issued, the charges were not consistent throughout the proceedings; that the respondent was not availed the report made by Mohammed Kalandi from the time he was required to respond to the report on 19th August 2016, right through the letter to show cause, interdiction and invitation to disciplinary hearing; that the proceedings in the Kalandi disciplinary hearing, which was the basis for the action against the respondent, were not availed to him in time for his own hearing; that the investigation report prepared by the County Executive Member for Water Services, Hemed Mwabudzo, dated 14th November 2016 linking the respondent to the matters he was accused of, was similarly not availed to the respondent at any time before the hearing as confirmed by the Human Resource Manager; that it was not necessary for the respondent to have made a demand for these reports as it was for the appellant to make full disclosure of evidence against the respondent; and that, the respondent having indicated in his response to the letter to show cause that he was not privy to the report made against him by Mohammed Kalandi, and that the contents of the report remained unclear to him, the appellant ought to have disclosed the report or reports against the respondent in preparation for the disciplinary hearing.
 21. It was noted that the Managing Director wrote his letter summarily dismissing the Respondent on 30th June 2017 and giving the respondent 14 days from 30th June 2017 to lodge an appeal, failure to which the summary dismissal would become effective. However, the respondent received that letter on 17th July 2017 after the appeal period had expired. According to the learned Judge, he was denied his right of appeal by the appellant's default in that regard.
 22. Accordingly, the learned Judge found that the respondent deserved compensation for unfair termination; that the respondent had worked for 7 years for the appellant without any warnings issued



- to him; that no complaint of a disciplinary nature or regarding his performance prior to 2016 was ever recorded against the respondent; that he was promoted and his salary improved in the course of his service; that, in his letter of appointment, it was indicated that he was being absorbed into regular employment, thereby suggesting that he had worked irregularly for the appellant before 2010; that his contract was term-indefinite and the he expected to work until retirement; that he did not have any proven contribution to the circumstances leading to his termination, and did not author his own misfortune; and that he was not paid terminal dues after 7 years of service.
23. The learned Judge accordingly awarded the respondent the equivalent of 7 months' salary in compensation for unfair termination at Kshs. 287,000. He also found that the contract gave a 3-month notice of termination and awarded him 3 months' salary in lieu of notice at Kshs. 123,000. Based on the above findings and, as the respondent was denied half salary for the period of interdiction, he found that there was no justification in denying the respondent salary for a period during which he was still contracted to serve the respondent and awarded him half salary for a period of 9 months at Kshs. 184,500. Regarding the annual leave pay, the learned Judge found that there was no evidence that the same was taken by the respondent and, therefore, the respondent's contention that he never took annual leave was not controverted. In the learned Judge's view, the appellant, as the custodian of employment records, ought to have disproved the oral evidence of the respondent on the claim on annual leave by documentary evidence. Accordingly, the learned Judge found that the respondent was entitled to 30 days of annual leave under his contract; and that, even though it contained a forfeiture clause on leave not taken, such a clause has no force under the *Employment Act*. Accordingly, he granted the claim for annual leave over a period of 7 years at Kshs. 287,000. However, the learned Judge found no merit in the respondent's claim that his salary had been reduced.
24. Dissatisfied with this decision, the appellant lodged this appeal in which it contends that the learned trial Judge erred in law and in fact: by holding that the respondent responded to the appellant's letter dated 19th August 2016 albeit late; by holding that the respondent did not contribute to the circumstances that led to termination of his employment with the appellant in any way; by holding that the respondent was not obliged to request for documents from the appellant prior to the disciplinary hearing if he needed them; in declaring that the termination of the respondent's employment with the appellant was unfair; by holding that the respondent did not go for annual leave over a period of 7 years; by effectively re- writing the contract of employment between the appellant and the respondent with regard to the clause on forfeiture of leave days not taken; and by awarding the respondent half salary for a period of 9 months, which period is over and above the period the respondent was on interdiction. It was further contended that, in view of the circumstances that led to the termination of the respondent's employment with the appellant, the learned trial Judge erred in law and in fact in awarding the respondent an equivalent of 7 months' salary as compensation for unfair termination. We note that the first ground was, rightly so in our view, abandoned in the appellant's submissions.
25. The appellant prayed that the appeal be allowed and the judgement delivered on 15th December 2020 be set aside and be substituted for an order dismissing the claim. Alternatively, it was prayed that the award of compensation for unfair termination and in respect of the period of interdiction be reduced.
26. We heard the appeal on the Court's GoTo virtual platform on 19th October 2023 when learned counsel, Mr. Tamini Lewa, appeared for the appellant while learned counsel, Ms. Njuguna, appeared for the respondent. Mr. Lewa relied on the submissions dated 13th March 2023 while Ms. Njuguna relied on the submissions filed on 11th September 2023. Both counsel saw no need to highlight their written submissions.
27. In their submissions, the appellant contended that, the respondent having been name adversely by one Asha Mohamed Mlingo as the one who issued the unauthorised receipt book that was used to



- collect revenue from the appellant's customers illegally, the appellant did not condemn the respondent unheard since it called on the appellant to submit a written statement of the said allegations within seven days; that the respondent failed to respond to the said letter dated 10th August 2016; that failure to respond to the said letter amounted to insubordination, which constitutes gross misconduct under section 44(4) (e) of the Employment Act, 2007; that, by failing to respond to the said letter, the respondent denied himself the opportunity of the dispute being resolved at that preliminary stage; that, after the decision summarily terminating his employment, the respondent did not appeal as advised by the appellant; and that the learned Judge erred in finding that the respondent, who was the author of his own misfortune, did not contribute to the circumstances leading to termination.
28. It was contended that the learned Judge therefore erred in awarding the respondent an equivalent of 7 months salary as compensation for unfair termination; that since the letter of interdiction was dated 23rd November 2016 and the letter of summary dismissal was dated 30th June 2017, the period when the respondent was on interdiction was 7 months as opposed to the 9 months as found by the learned Judge; that, the respondent having admitted that he did not ask for any document, his contention that he was not furnished with certain documents prior to the disciplinary proceedings was an afterthought, and that the learned Judge erred in finding that it was not necessary for the respondent to have demanded for the said documents; that the disciplinary committee's recommendation that the matter be reported to the police for investigations was evidence of culpability or suspicion of commission of criminal acts, which justified his termination by the appellant's Managing Director pursuant to section 45(4)(g) of the Employment Act, 2007; and that the evidence adduced by the respondent did not support his pleading that he was not permitted to take his leave during the 7 years he worked for the appellant because he was alone in the office.
29. According to the appellant, the learned Judge's finding was contrary to the holding in *Gandhi Brothers vs. H K Njage T/A H. K. Enterprises Nairobi (Milimani)* HCCC No. 1330 of 2001 (UR) where it was held that a fact is not proved when it is neither proved nor disproved; that the learned Judge effectively re-wrote the contract of employment between the appellant and the respondent when he held that forfeiture of leave clauses have no support in the Employment Act; and that the law as set out in the case of *Five Forty Aviation Limited vs. Erwan Lanoe* [2019] eKLR is to effect that it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.
30. The appellant prayed that the appeal be allowed and the respondent's claim be dismissed; and that, in the alternative, the court reduces the awards for unfair termination and interdiction and awards the respondent one month salary as compensation for unfair termination and 7 months half salary for the period of interdiction. The appellant also prayed for the costs of the appeal.
31. In the submissions made on behalf of the respondent, reliance was placed on the decision in *Co-operative Bank of Kenya Ltd vs. Banking Insurance & Finance Union* CA No. 188 of 2014 in which it was held that section 49 of the Employment Act provides for discretionary remedies whose award is based on the peculiar facts of each case. According to the respondent, the dismissal was not based upon a valid reason as envisaged in section 43 of the said Act; that the trial court did not err in computing the period which the respondent was on interdiction and that the contract of employment was in place until the date of termination; that the appellant failed to supply the respondent with documents that formed the basis for termination at the disciplinary hearing or in court; that the appellant did not present any member of the tender committee at the disciplinary hearing or the court to establish the respondent's culpability; that the respondent's colleagues who allegedly implicated him never appeared before the disciplinary hearing; and that the police investigations recommended by the disciplinary committee did not materialise.



32. In support of his case, the respondent cited *Grace Gacheru Muriithi vs. Kenya Literature Bureau* [2012] eKLR for the proposition that an employee on interdiction or suspension has a legitimate expectation that, at the end of the disciplinary process, he or she will be paid by the employer all the dues if the employee is exculpated. According to the respondent, since the dismissal was not based upon a valid reason as envisaged in section 43 of the *Employment Act*, the trial court did not err in its computation of the period which the respondent was on interdiction; that the interdiction took place immediately on 23rd November, 2016 and was never lifted up to the time the respondent was dismissed on 17th July 2017; that the respondent was never given the evidence which the appellant was relying on before the decision was made; that it was not necessary for the respondent to have made demand for the reports since it was upon the appellant to make full disclosure of the evidence against the respondent; that, in the absence of evidence that the respondent took leave, the learned Judge did not err in his finding on the issue of leave; that the learned Judge did not rewrite the contract of employment, but only relied on past judicial decisions that forfeiture clauses have no support in the *Employment Act*.
33. We were urged, on behalf of the respondent, to dismiss the appeal with costs.
34. We have considered the material placed before us. This is a first appeal. We are enjoined to not only consider the submissions made before us, but to also consider the record of the proceedings before the trial court. In so doing, we are under a duty to analyze and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal. Caution must however be exercised in so doing since, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify and we must give allowance for that handicap. This position was restated in *Selle v Associated Motor Boat Co.* [1968] EA 123 where this Court held that:
- “An appeal to this Court from a trial by the High 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 particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
35. The Court, sitting as the first appellate court, must however appreciate, while undertaking its said obligation that, as held in *Alfarus Muli v Lucy M Lavuta & Another* [1997] eKLR, it will interfere with the findings of the first trial court:
- “only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”
36. In this case, the issues that fall for our determination are broadly whether the summary termination of the respondent’s employment with the appellant was both procedurally and substantively fair; and whether the award made to the respondent was justified.
37. There is no doubt that the respondent’s employment was summarily terminated with no benefits. Under section 43 of the *Employment Act*, 2007 the burden of proof is on an employer to demonstrate the existence of reasons for termination. The section provides that:



1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
38. The law in these matters was laid down in *Bamburi Cement Limited vs. William Kilonzi* [2016] eKLR where the Court expressed itself on the nature of proof required as follows:

“The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing..... The test to be applied is now settled. In the case of *Judicial Service Commission vs. Gladys Boss Shollei*, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in *Mc Kinley vs. B.C.Tel.* (2001) 2 S.C.R. 161.

“Whether an employer is _justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that _just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

39. This Court in *Nebert Bernard Muriuki vs. Multimedia University of Kenya* [2020] eKLR held that termination of employment must be both substantially and procedurally fair and must be based on valid reasons.
40. In its letter dated 19th August 2016 signed by Ali Bakari, the appellant’s Human Resource Director, the appellant informed the respondent that:

“It has been reported that you gave a receipt book to Mohammed Khamisi Kalandi who then gave it to Asha Mohammed Mlingo.

In view of the above allegations, we wish to get a written statement from you in regards [to] the receipt book. The report is required by this office seven (7) days from the date of this letter.”

41. However, in the subsequent letter dated 8th September 2016 under the hand of Asma Mohamed, the appellant’s Senior Human Resource Officer, the appellant outlined the allegations against the respondent in the following terms:

“Reference is made to the report submitted by Mr Mohammed Kalandi, (the then Billing Officer) to this office on the following allegations;

1. That you issued him with a receipt book for revenue collection contrary to work procedure where Accounts issue the receipt books to Cashiers.



2. That the receipt book was illegally used to collect revenue from customers by the name of Kwale Water & Sewerage Company Ltd (sic).
 3. That you received a call for statement letter on the 29th August, 2016 on the above and did not respond within the time specified (7 days).”
42. The respondent responded vide his letter dated 18th September 2016.
43. Upon receipt of the said response, the appellant interdicted the respondent vide the letter dated 23rd November 2016 stating that:

“Your response to show cause letter dated 18th September 2016 was well received. The company has decided to interdict you on the following grounds:

1. It is alleged that you issued an unauthorised receipt book to Mr Mohammed Kalandi, as stated in his response to show cause letter dated 10th August 2016 and also in his disciplinary hearing held on 11th November 2016.
 2. It is also alleged that you had in your custody as the Assistant Procurement Officer, receipt book batches whose series (receipt numbers) were printed way ahead from (sic) the series to be issued.
 3. It is also alleged that from the batch stated above, you issued to Mr Kalandi series (306851-306900) for an illegal collection.
 4. It is also alleged that you instructed Mr Kalandi to ensure the receipt book (306851- 306900) that you issued him is destroyed since two of its receipts had been accessed by the management.
 5. It is also alleged that there were anomalies in the received supply of the receipt books, and you did not inform management about such anomalies but receipted the supply and forwarded the same for company use.”
44. The respondent was placed on half salary pending disciplinary proceedings. The letter calling the respondent for the disciplinary proceedings was dated 18th April 2017. It was framed in the following words:

“In reference to your interdiction letter dated 23rd November 2016, you are hereby invited to a disciplinary hearing on the 25th April 2017 at 8.30 am at the KWAWASCO Boardroom. You will be required to respond to the following:

1. It is alleged that you issued an unauthorised receipt book to Mr Mohamed Kalandi, as stated in his response to show cause letter dated 10th August 2016 in his disciplinary hearing held on 11th November 2016.
2. It is also alleged that you had in your custody, as the Assistant Procurement Officer, official receipt batches whose series (receipt numbers) were printed way ahead from (sic) the series to be issued.
3. It is also alleged that from the batch stated above, you issued to Mr Kalandi series (306851-306900) for illegal revenue collection.
4. It is also alleged that you instructed Mr Kalandi to ensure the receipt book (306851- 306900) that you issued him is destroyed since two of its receipts had been accessed by the management.



5. It is also alleged that there were anomalies in the received supply of the receipt books, and you did not inform management about such anomalies but receipted the supply and forwarded the same for company use.
 6. It has been alleged that you purposefully acquired unauthorised receipt books for illegal revenue collection in the name of KWAWASCO.
 7. It is alleged that you issued the unauthorised receipt books (as in 6 above) to Mr Ali Mwangudya for illegal revenue collection in KWAWASCO's name.
 8. It is alleged that you tampered with the supply of these receipt book series in order to favour illegal provision of unauthorised receipt books.
 9. It is alleged that you benefited financially from collection of those unauthorised receipt books.
 10. It is alleged that you organised a cartel with other staff to facilitate the illegal revenue collection in KWAWASCO's name.
 11. It is alleged that you attended and/or participated in an illegal demonstration of union members whilst you were not a KWAWASCO union member on the 28th and 29th November 2016.
 12. It is alleged that upon inquiry, you purportedly claimed that you mispronounced the tender sum of Suhufi Ltd, a bidder for the tender of the Godoni Chitsanze project.
 13. It is alleged that you altered the Bid bond statements for Suhufi Ltd in order to favour their award of the tender.
 14. It is alleged that you were to benefit financially from Suhufi Ltd by making those alterations in their favour.”
45. The minutes of the disciplinary committee meeting dated 26th April 2017 made recommendations that:
1. The case be taken to the police for external investigations since Mr Saidi denied all allegations despite the evidence provided.
 2. Mr Ali Mwangudya to provide the M-pesa statement that shows how he divided cash collected from the unauthorised receipt books to the cartel.”
46. The second recommendation by the committee was based on its conclusion that:
- “The committee could not quantify how much Mr Saidi is accused for unless Mwangudya to submit the M-pesa transmission statement to the committee.”
47. After the disciplinary hearing, the appellant, through a letter dated 30th June 2017, by Athman Gunda Chembes, its Managing Director, while purporting to rely on the decision of the disciplinary committee, communicated the decision summarily terminating the respondent's employment based on the following findings:
1. “That you purposefully misread the tender sum for m/s Suhufi Agencies Ltd, a bidder for the tender award of the Godoni Chisanze project as Kshs 15,733,454/- instead of Kshs 14,369,106/-.



2. You did not communicate or report the same error mentioned in (1) above to the other bidders till it was verbally revealed by one bidder for the Godoni Chisanze project.
 3. It is assumed that you altered the Bid bond statements for Suhufi Ltd to favour their award of the tender, and thereafter benefit financially from the Company at the expense of your employer (KWAWASCO).
 4. That you had in your custody as the Assistant Procurement Officer receipt books batches whose series/receipt numbers (306851- 306900) were printed way ahead from the series to be issued and the same were issued to Mr Mohamed Kalandi (the then Billing Officer) for revenue collection. The receipt books were apparently used for illegal revenue collection of which two receipts were accessed by the Management. You later on instructed Mr Kalandi to destroy the books.
 5. That you issued unauthorised receipt books to one Mr Ali Mwangudya for illegal revenue collection in KWAWASCO's name from which a total of Kshs 2.4 million was collected as revenue.
 6. You participated in an illegal demonstration of Union members on 28th and 29th November 2016, whilst not a member of the KWAWASCO union.”
48. The respondent was then informed of his right to appeal within fourteen (14) days from the date of the letter, failure to which the decision would automatically take effect.
49. From the foregoing background, it is clear that the allegations against the respondent kept on mutating at each stage of the disciplinary process. The allegations to which the respondent was required to respond at the initial stages were clearly not the same as those that eventually faced him when he was interdicted and at the disciplinary committee stage. The initial complaint against the respondent was that he issued a receipt book to Mohammed Khamisi Kalandi, who then gave it to Asha Mohammed Mlingo. However, in his letter of interdiction, the said allegation was expanded and a new allegation introduced to wit that there were anomalies in the received supply of the receipt books, and that the respondent did not inform management about such anomalies, but receipted the supply and forwarded the same for company use. When called before the disciplinary committee, the respondent faced several fresh allegations such as issuance of unauthorised receipt books to Mr. Ali Mwangudya for illegal revenue collection in KWAWASCO's name; tampering with the supply of the said receipt book series in order to favour illegal provision of unauthorised receipt books; benefiting financially from the collection of the said unauthorised receipt books; organising a cartel with other staff to facilitate the illegal revenue collection in KWAWASCO's name; attending or participating in an illegal demonstration of union members while not a KWAWASCO union member; mispronouncing the tender sum of Suhufi Ltd, a bidder for the tender of the Godoni Chitsanze project; altering the Bid bond statements for Suhufi Ltd in order to favour their award of the tender; and benefiting financially from Suhufi Ltd by making those alterations in their favour.
50. The appellant's 3rd witness, Susan M. Solomon Mlamba, admitted that the respondent requested for certain books during the hearing and not beforehand. However, section 4(3)
- (g) of the *Fair Administrative Action Act* provides that:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-



.....

- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

51. Although the appellant was of the view that the respondent ought to have sought for the documents, it is our view that the appellant had the duty to furnish the respondent with all the necessary information, materials and evidence to be relied upon, in light of the mutation in the allegations made against the respondent. It was not upon the respondent to have requested for them before being supplied therewith. It was the appellant who knew the documentation it was intending to rely on against the respondent. The nature of these documents ought to have been disclosed in advance and where possible copies thereof supplied to the respondent.
52. It is also clear that the decision communicated to the respondent by the appellant's Managing Director was not the same decision that had been arrived at by the disciplinary committee. The said committee recommended further investigations by the police and sought further information from Mr Ali Mwangudya. Presumably, the committee would have made its final decision after receipt of the said information and the police report. That the committee did not arrive at the decision one way or the other was confirmed by the said appellant's third witness, Susan Solomon Mlamba, who stated that:
- We did not make recommendation on his employment status.
53. The appellant contends that the recommendation that the matter be investigated by the police was evidence of culpability on the part of the respondent justifying his dismissal. However, a reading of the committee's report does not expressly bring this out. What the committee stated rather vaguely was that the investigations were necessary since the respondent had denied the allegations made against him. In our considered view, such a vague statement cannot be taken to amount to a finding of culpability in order to justify suspicion of commission of a criminal act. Therefore, by arriving at the decision to summarily terminate the respondent's employment, the appellant's Managing Director clearly jumped the gun and acted contrary to his mandate.
54. It is also clear that, in his decision, the Managing Director relied on grounds upon which no finding was arrived at by the disciplinary committee, and no recommendation was ever made thereon.
55. Further, the respondent's right to appeal the decision of the disciplinary committee was curtailed by the fact admitted by the 3rd witness to the effect that, by the time the decision was communicated to him, the period stipulated for appeal had lapsed. He was therefore denied the opportunity to lodge his appeal.
56. It is also clear that none of the persons who allegedly made the allegations against the respondent was called to testify against him during the disciplinary committee hearing. For example, it was alleged that Mohammed Khamis Kalandi admitted in his letter dated 19th August 2016 that he received a receipt book from the respondent, and yet that person was not called to give evidence at the disciplinary committee hearings. Instead, the committee relied on the alleged evidence given by the said Mr Kalandi in proceedings to which the respondent was not party. The appellant relied on the reports allegedly made by persons who were not availed before it in order for the respondent to be given the opportunity to test their allegations.
57. In view of the foregoing, we find that the appellant's decision summarily dismissing the respondent was procedurally infirmed.



58. As regards the issue as to substantive fairness, some of the allegations made against the respondent, such as his participation in the strike, were clearly baseless since there was no evidence that the said strike had been declared unlawful. The appellant had the freedom of association and, unless it was shown that his exercise of that freedom was unlawful, the respondent could not be penalised for exercising the said right. As the respondent's 3rd witness stated, there was no order barring demonstration.
59. As regards the allegation that the respondent altered the Bid Bonds, it was clear from the evidence of the appellant's second witness, Kanzere Swalehe Kidzuga, that the Bond Bids were not easy to alter. No evidence was led from the issuer of the said bonds that they were in fact altered. As regards the issuance of the receipt book, the 3rd witness for the appellant admitted that the same receipt book was shown to have been issued to one Jared. This Jared was not called to testify before the committee.
60. The respondent's position, which was not controverted by the appellant, was that the initial letter dated 19th August 2016 was written while he was on study leave. In those circumstances, the respondent cannot be blamed for not having responded to the same. We agree with the learned Judge that there was no evidence that the respondent contributed to his termination by not responding to the same.
61. In our view, the respondent proved that his dismissal was wrongful while the appellant failed to prove the grounds justifying the respondent's wrongful dismissal.
62. Regarding the award of damages, there is no doubt that it was the appellant that had custody of the documents relating to the respondent's employment, including the leave taken. Once the respondent contended that he never took his leave due to reasons of insufficient manpower, the burden shifted to the appellant to produce evidence showing that the respondent did in fact take his leave. No such evidence, which was within the appellant's knowledge, was produced. While it was admitted by the respondent that he did not apply for leave, he explained that he was alone in the office and no evidence was adduced to challenge this by the appellant. We find that the appellant failed to satisfy the evidential burden that was legally upon it to discharge under and by virtue of sections 109 and 112 of the Evidence Act, which provide that:
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
63. Regarding the award in respect of the period during which the respondent was on interdiction, the evidence was that the respondent was interdicted vide the letter dated 23rd November 2016. He was dismissed vide the letter dated 30th June 2017. It is clear that the respondent was on half pay for a period of 7 months and not the 9 months as found by the learned Judge. We therefore find that the learned Judge erred in awarding the respondent full salary for a period of 9 months.
64. Regarding the award for unfair dismissal, the Supreme Court decision in *Kenfreight (E.A) Limited vs. Benson K Nguti Nairobi SCPET 37 of 2018* expressed itself in the following words:
- "On award of damages, the Act limits the award a court can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-section 4 of [section 49] the Employment Act."



65. This position was clearly highlighted in *OI Pajeta Ranching Ltd vs. David Wanjau Muhoro* [2017] eKLR where the Court stated as follows:

"... The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 month's pay. 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 then invites our intervention"

66. In this case, the learned Judge awarded the respondent the equivalent of 7 months' salary in compensation for unfair termination at Kshs. 287,000. However, section 49(4) of the *Employment Act* provides that:

A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

- a. the wishes of the employee;
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- c. the practicability of recommending reinstatement or re-engagement;
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonable incurred by the employee as a consequence of the termination;
- k. any conduct of the employee which to any extent caused or contributed to the termination;
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m. any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.



67. The foregoing considerations are applicable to the Employment and Labour Relations Court by virtue of section 50 of the same Act which provides that:

In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

68. In his judgment the learned Judge did not explain the factors that he took into account in arriving at his award. In the absence thereof, we set aside the award of damages for unfair termination of the respondent’s employment and instead award him 5 months salary.

69. In the premises, we hereby set aside the award of Kshs 287,000 in respect of unfair termination and substitute therefor the sum of Kshs 205,000. We also set aside the award of Kshs 184,500 made in respect of deductions during the respondent’s interdiction and substitute therefor Kshs 143,500.

70. Save for the foregoing, this appeal otherwise fails and is hereby dismissed with no order as to costs as none of the parties can be said to have substantially succeeded.

71. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

A. K. MURGOR

.....

. JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

.. JUDGE OF APPEAL

G. V. ODUNGA

.....

. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

