Fredrick Oduor Lamba v Kenya Electricity Generating Company PLC. (Civil Appeal E126 of 2021) [2023] KECA 118 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 118 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E126 OF 2021

HM OKWENGU, HA OMONDI & JM MATIVO, JJA

FEBRUARY 3, 2023

BETWEEN

FREDRICK ODUOR LAMBA .... APPELLANT

AND

KENYA ELECTRICITY GENERATING COMPANY PLC. .... RESPONDENT

(Being an appeal from the Judgement and decree of the Employment and Labour Relations Court at Nairobi (Rika J) dated 15th January, 2021 in ELRC Cause No. 516 of 2019)

JUDGMENT

1. In order to properly appreciate the issues presented in this appeal, it is necessary to briefly rehash the history of this dispute which is essentially uncontroverted. In 1998, the respondent employed the appellant as a senior transport engineer. On 1st May, 2016 he was competitively recruited as the respondent's administration manager, a position he held until 25th August, 2017 when he was served with a notice to show cause (NTSC) why he should not be disciplined for allegedly misusing the respondent's motor vehicle KBL 869 G (the vehicle).

2. The NTSC was triggered by a report presented after investigations into an accident involving the said vehicle which occurred at Yala, Siaya County on 22nd July, 2017 in which a pedestrian died. The report presented on 18th August, 2017 recommended disciplinary action against the appellant for inter alia misusing the said motor vehicle. Vide a letter dated 1st September, 2017, appellant replied to the NTSC denying misusing the vehicle. He was invited to a disciplinary hearing on 14th September, 2017. After the hearing, the disciplinary committee found the appellant negligent in performance of his duty; and for violating the respondent's transport policy and the policy on employee discipline. So, vide a letter dated 19th July, 2018, his contract was terminated. He appealed internally against the decision, but on 4th April, 2018, the appeals committee upheld the termination decision.

3. The appellant filed a claim against the respondent at the Employment & Labour Relations Court (ELRC) seeking:

   a. a declaration that the termination was un-procedural, unfair, unlawful and unconstitutional and

   b. an order reinstating him as the respondent's administration Manager without loss of any salary and benefits.

4. In the alternative to (a) & (b) as above stated, he prayed for:

   i. Kshs. 6,611,704/= for compensation for unfair termination;

   ii. Kshs. 1,652,926/= being three months' pay in lieu of notice;

   iii. Kshs. 1,524,365/= pay in respect of untaken leave of 83 days; and

   iv. Kshs. 286,643.20 in respect of unpaid salary adjustment arrears effective 1st January, 2017 before termination. In addition, he prayed for defamation damages, punitive and aggravated damages, compensation for constitutional rights violations, certificate of service, interests on (a) to (c) above from date of filing suit, costs of the suit and any other relief that the court may deem fit to grant.

5. The substance of his claim before the ELRC was that:

   a. he was not allowed to hear and challenge his accuser's evidence during the disciplinary hearing;

   b. that all the relevant documents relied upon in the disciplinary hearing were never supplied to him prior to the disciplinary hearing;

   c. that he was charged with the offence of misuse of office but he was terminated on a different charge of negligence of duty, so, he did not have an opportunity to respond to the said charge;

   d. that the penalty of termination was not proportionate to the offence he was charged with; and,

   e. that the mandatory procedure under section 41 of the *Employment Act*, 2007 was not complied with, so the termination was unfair.

6. In its statement of response filed on 6th September, 2019, the respondent stated that:

   a. prior to issuing the NSTC, it investigated the misuse of its aforesaid motor vehicle and established that the vehicle had hit and killed a pedestrian at Yala, Siaya County on 22nd July, 2017;

   b. that the vehicle had been released to the driver to pick the appellant who was undertaking his private chores in Kisumu at the Kisumu Airport the same date the vehicle was involved in the accident;

   c. the investigation report recommended disciplinary action against the appellant for allowing the vehicle to operate during the weekend on unofficial business of ferrying the appellant and his family members from Kisumu Airport.

7. Further, the respondent stated that the appellant replied to the NTSC that he was afforded a hearing by the disciplinary panel and the appeals panel; that the decision to summarily dismiss him was upheld on appeal. The appellant was found guilty of gross misconduct under section 44(4) of the *Employment Act* and clause 7.3.2 (g) of respondent's human resource manual. However, the respondent commuted

summary dismissal to normal termination and offered to pay him 3 months' notice and the pending leave, less his liabilities subject to the appellant completing the clearance form and handing over respondent's property in his possession, but the appellant did not meet those requirements.

8. Before the ELRC, the appellant's case rested on his own evidence and his 3 witnesses, namely, his Sister Nelly Achieng' Lamba, Siaya farmer Joseph Onyango Awere, and driver- craftsman Lazaro Ouma. The respondent's case rested on the testimony of its chief security officer, Captain (retired) George Kazungu, and human relations officer Martin Makallah.

9. The ELRC (Rika, J) found that the respondent's contract was validly terminated as required under Sections 43 and 45 of the *Employment Act*, that the appellant in his reply to the NTSC and during the disciplinary hearing, conceded wrongdoing and asked for leniency; that his presence at Kisumu Airport was not official; he was coy about his presence at the airport and he kept changing his explanation, creating the impression that he had something to hide. The Judge held that in the absence of a clear explanation by the appellant, the respondent correctly concluded that the appellant used its car to run his personal errands. The court held that the appellant was the architect of the respondent's transport policy, yet he disregarded it.

10. Further, the learned Judge found that the procedure was fair and in conformity with Sections 41 and 45 of the *Employment Act* because the matter was investigated, NTSC was issued, and the appellant replied to it in detail. Further, he was notified in good time about the disciplinary meeting, which he attended and the minutes of the meeting show a fair hearing was accorded to him. The court found that the appellant never applied to avail witnesses and that the appellant misused a public asset for his private purpose, and despite being found guilty of gross misconduct warranting summary dismissal, the respondent considered the appellant's disciplinary record and long years in service, and reduced summary dismissal to termination on notice, and the decision was upheld. The court was persuaded that reinstatement was unmerited because the termination was substantively justified and procedurally fair. The learned Judge declined his claims except the prayer for certificate of service.

11. Aggrieved by the above verdict, the appellant entreats this Court to set aside the entire Judgment and all the consequential orders. He also prays for:

    a. reinstatement as the respondent's Administration Manager without loss of any salary and benefits thereof;

    b. alternatively, this Court orders his re-engagement in whatever capacity but without loss of any salary, benefits, and privileges thereof;

    c. that this Court recommends amendment to section 12 (3) (vii) of the *Employment and Labour Relations* Act, 2011 by proposing either deletion of the 3 years' time limitation or enactment of regulations on certification and speedy disposal of suits where reinstatement is sought; and

    d. that he be awarded costs of this appeal and the costs in ELRC.

12. In his memorandum of appeal, the appellant mounted 58 grounds which are mostly imprecise and repetitive. Rule 88 of the *Court of Appeal Rules*, 2022 provides guidelines for contents of a memorandum of appeal. We must draw the attention of appellant to the said provision.

13. We have considered the record, the parties' respective submissions and the authorities cited. Our mandate in a first appeal under Rule 31(1) (a) of the *Court of Appeal Rules*, 2022 is to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved, we remain guided by the principles articulated in *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, that we will not interfere with the trial courts findings unless we are satisfied that the trial judge misdirected

itself in some matters and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial judge was clearly wrong in the exercise of his discretion and occasioned injustice by such wrong exercise.

14. As pointed out earlier, the appellant's 58 grounds of appeal are principally intersecting and repetitive and so are the submissions. Nonetheless, we have extracted the salient grounds upon which the appellant seeks to reverse the impugned Judgement.

15. First, we will address the argument that the appellant was denied the opportunity to cross-examine the witness who testified against him. He faulted the learned Judge for finding that he did not apply to bring his own witnesses or protest at the hearing. He argued that there is no evidence that he waived his right to cross-examine the witnesses/his accusers. He argued that the failure to give him an opportunity to cross examine his accusers manifestly prejudiced him. Specifically, he argued that the disciplinary committee relied on the testimony of a Mr. Fredrick Oloo, its chief transport engineer and a Mr. George Kazungu without giving him an opportunity to challenge their evidence. He cited the ELRC decision in *Joshua Rodney Marimba v Kenva Revenue Authority* [2019] eKLR in which the Court held that an employee is entitled to face his accusers and test their evidence through cross-examination and where this right is denied then the process is not fair as it infringes on the fair hearing concept.

16. The respondent submitted that the circumstances of this case did not warrant cross-examination of witnesses because the appellant had in his response to the NTSC admitted misusing the respondent's property, namely, the subject motor vehicle and that the disciplinary committee's findings were mainly based on the said admission. In addition, neither the act nor the respondent's procedure for employee discipline expressly guarantee the right to cross-examine witnesses during a disciplinary hearing and in any event disciplinary committee proceedings cannot be subjected to the rigorous process of court hearings because they are governed by the Act and the existing policies of the employer.

17. The respondent distinguished the case of *Joshua Rodney Marimba v Kenya Revenue Authority* (supra) cited by the appellant on grounds that:

    a. the said case is not binding to this Court.

    b. the ELRC in the said case in arriving at its decision relied on the High Court decision in *Menginya Salimi Murgani v Kenya Revenue Authority* [2006] eKLR which was appealed to this Court in *Kenya Revenue Authority v Menginya Salimi Murgani* [2010] eKLR and this Court set aside the decision holding that the fairness of a hearing is not determined solely by its oral nature.

18. The *Employment Act* of 2007 does not explicitly provide that a formal hearing should be conducted during disciplinary procedures. However, such disciplinary procedures must conform to strict procedural fairness. The consequence of the foregoing is that during disciplinary hearings, where an employer decides to call a witness (es), it is imperative that after their testimony, the employee should be allowed to challenge the testimony.

19. The uncertainty in cross-examining witnesses during disciplinary hearings is cured by Article 47 of the *Constitution* which guarantees the right to a fair administrative action. This article requires an administrative action or quasi-judicial proceedings to be procedurally fair, among other irreducible requirements. However, whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. The standards of fairness are not immutable. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects. The Supreme Court in *Judicial Service Commission v Beatrice Nyambune Mosiria* [2020]

eKLR acknowledged two key issues. One, it is only in contested issues where cross-examination would be warranted. Two, majority of labour disputes do not require oral hearing. The Apex Court stated:

> "(24) The issue of admission was a contested one and the only way it could have been resolved is through an oral hearing that avails the process of examination and cross- examination. We are aware that majority of labour disputes do not require oral hearing. However, in situations where matters are contested, that is the safe way of resolving them. We should not also lose sight of the fact that one of the reasons why the disciplinary hearing by JSC was quashed is because the respondent was not given an opportunity to cross- examine a witness. In determining this issue this is what the learned Judge stated in one sentence: -..."

20. It is imperative to appreciate the distinction between the right to a fair hearing under Article 50 of the *Constitution* and the right to a fair hearing under Article 47 of the *Constitution*. In *J.S.C. v Mbalu Mutava* {2015} eKLR the Court of Appeal held that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies. The disciplinary proceedings are largely governed by the procedural safeguards under Article 47 of the Constitution.

21. Here is a case where the appellant admitted using his employer's motor vehicle without authority contrary to the respondent's transport management policy. The admission was never recanted. Section 17 of the *Evidence* Act defines an admission as follows:

> An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

22. An admission of the opposite party to the proceedings may be produced for the purpose of proving a party's own case. It is the best evidence which can be produced in proof of the party's case, and although the proof of such admission is not conclusive against the opposite party, nevertheless it is such strong evidence of the facts admitted that the burden of proving the contrary is upon the party making the admission. He can do this only when he gives a satisfactory explanation that the admission was wrong or made under circumstances which render it "unfit to be relied upon." A duty is cast upon him to offer an explanation of the circumstances under which a wrong admission was made. If he does not offer an explanation, the burden is not discharged. The appellant never recanted the admission nor did he offer a satisfactory explanation why he made the admission.

23. The proof of admission shifts the burden to the party making it.As Baron Parke said in *Slatterie v Pooley*, (1840) 6 M & W664 (D) (England and Wales)

> "What a party himself admits to be true may reasonably be presumed to be so." Only the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. In view of the appellant's admission, one wonders whether cross-examination was necessary. We also find no prejudice was occasioned to the appellant."

24. Next, we will address appellant's argument that section 12(3)(vii) of the *Employment and Labour Relations Court* Act is unconstitutional and unjust in the absence of attendant statutory rules enabling all litigation in matters involving reinstatement to be concluded within 3 years. He argued that the

said provision should be construed to mean filing a claim within 3 years of the dismissal entitles an applicant to an order of reinstatement.

25. The respondent submitted that the appellant never challenged the constitutionality of the said section in his Statement of Claim before the ELRC or at all and that this Court lacks original jurisdiction to determine constitutionality of an Act of Parliament by dint of Article 165 (3) (d) of the *Constitution*.

26. The appellant's attack on the constitutional validity of the above provision fails on two fronts. First, the said issue was not pleaded before the ELRC. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un pleaded issues as having been fully investigated. As was held by this Court in *M.N.M. v D. N. M. K. & 13 others*, [2017] eKLR:-

> "Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine..."

27. The general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.

28. The second ground upon which the appellant's attempt to assail the constitutional validity of the above provision is that this court lacks original jurisdiction to determine the constitutional validity of a statutory provision. That mandate is constitutionally ordained to the High Court by Article 165 (3) (d)(i) of the *Constitution*.

29. We now address the question whether there were sufficient grounds to support the termination. The appellant faulted the trial court for relying on fabricated disciplinary committee minutes. He argued that the Superior Court's assertion that there was no reason shown by the appellant why Kazungu, an officer with a background in disciplined forces, would forge claimant's Further Statement was wrong in law and fact since the burden of proving the authenticity of an unsigned statement was on the party seeking to rely upon it. He faulted the trial court for failing to find that the work ticket was conclusive authorization of use of the vehicles, and that the vehicle was on official duty.

30. In addition, the appellant blamed trial court for concluding that he violated the transport policy. He argued that the respondent was enjoined by Section 45(2) (a) of the *Employment Act* to look into the validity of the reasons for dismissal, because the said provision places the burden of justifying the reason on the employer and cited *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR. He submitted that the respondent's regulations provide that an accident ought to be reported to the police by the driver, and that the respondent did not provide any regulation mandating him to report all accidents to the director, and at no time did he use the vehicle for his personal use, so there were no valid reasons for termination.

31. The respondent submitted that the test under section 43 of the *Employment Act* is partly a subjective one in that all an employer is required to prove are the reasons that he 'genuinely believed to exist' causing him to terminate the employee's services. It argued that it is improper for a court to expect an employer to undertake a near forensic examination of the facts and establish beyond reasonable doubt as in criminal trials. It relied on this Court's decision in *Kenya Power & Lighting Company Limited v Aggrey Wasike* [2017] eKLR and submitted that it had valid reasons to terminate the employment contract following his breach of the policy on transport management as well as the procedure for employee discipline. It argued that the appellant admitted using the respondent's motor vehicle for his personal use and other non- official purposes from Kisumu International Airport to Kisumu town. It maintained that the termination was procedural, lawful, fair, and based on reasonable grounds.

32. The ELRC found that the appellant had conceded that his decision to dispatch the driver on a night trip was rush and not proper. He also admitted reaching out to the craftsman (Ouma) to assist him (appellant) from Kisumu Airport to town while on his personal errands. The appellant pleaded for clemency and expressed his sincere regrets about his omissions and commissions. He stated that he was truly remorseful for his misjudgment and apparent misuse of resources. The ELRC also concluded that the appellant was involved in misuse of a public asset, for his private purpose. We have reviewed the evidence, the law and the learned Judge's evaluation of the evidence. We find and hold that there were sufficient grounds to warrant the termination.

33. We turn to the appellant's argument that the trial court disregarded some evidence and in particular the evidence of both Mr. Ouma and Joseph Onyango and failed to give reasons for the same. Undeniably, when evaluating or assessing evidence, it is imperative for a court to evaluate all the evidence, and not to be selective in determining what evidence to consider. The conclusion reached must account for all the evidence. However, some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.

34. The facts found to be proven and the reasons for the Judgment of the trial court must appear in its Judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for Judgment including its reasons for the acceptance and the rejection of the respective witnesses. We must, however, make it clear that by requiring the trial court to consider and weigh all evidence is not meant that the Judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.

35. This Court must determine, what evidence was led by the parties, as understood within the totality of the evidence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions. This exercise necessarily entails a scrutiny of the evidence of each witness within the context of the totality of evidence, and, what the trial court's findings were in relation to such evidence.

36. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, including whether the appellant's evidence was considered, this Court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said Judgment. This means that if this court is of the view that a particular fact is so material that it should have been dealt with in the Judgment, but such fact is completely absent from the Judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other mis-directions, is so material as to affect the Judgment, in the sense that it justifies interference by the court of appeal. We have evaluated the entire evidence and the reasoning and findings of the trial court. We find no merit in the argument that the appellant's witnesses' evidence was ignored.

37. We now address the appellant's argument that the entire process was procedurally unfair. To buttress his argument, he cited Articles 41 (1), 35 (1) (b), 47, 50 and 45 (2) (c) of the *Constitution* which guarantee the right to fair labour practices, access to information, fair administrative action and a fair hearing respectively. He also cited section 45(2) (c) of the *Employment Act* which outlaws unfair termination and clause 2.3. g (iii) of the respondent's policy on human resources and administration

which provides that" no employee will be disciplined without … having been given the right and opportunity of defending themselves.

38. The ELRC held that the procedure was fair under sections 41 and 45 of the *Employment Act*, that there is ample evidence that the matter was investigated, that it is common ground that the appellant was served with a NTSC to which he replied in detail. The court also held that the appellant was notified in good time, of the disciplinary meeting, which he attended, that, the minutes of the meeting show a fair hearing was accorded to him.

39. A decision is procedurally unfair if in the process of its making, the procedures prescribed by statute are not followed, or if the rules of natural justice are not adhered to. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. Lord Diplock in the *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 A.C. 374 explained that a public authority could be acting ultra vires if it commits a serious procedural error.

40. Section 41 of the *Employment Act*, 2007 requires that allegations against an employee be made known to him and he/she be heard before termination. Such an employee is entitled to have another employee present during the hearing. In *Kenya Revenue Authority v Menginya Salim Murgani* C.A. No. 108 of 2010, this Court held that under section 41, a hearing is not necessarily oral but one that will be determined on a case by case basis, depending on the circumstances of each case.

41. This Court in *Jacob Oriando Ochenda v Kenya Hospital Association t/a Nairobi Hospital* [2019] eKLR cited with approval the opinion of the English Court of Appeal in *R v Immigration Appeal Tribunal ex-parte Jones* [1988] WLR 477, 481 where it was held:

> "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing……whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made…"

42. Whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. The standards of fairness are not immutable. They may change in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects. (See *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560). Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met. (See also *McInnes v Onslow-Fane* [1978] 3 All ER 211). In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others.

43. In *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017] eKLR, this Court held as follows:

> "The duty to hear an employee is limited to the employer explaining to the employee clearly the nature of the accusations for which it is contemplated that his employment be terminated and an opportunity for the employee to make representations, if any, which the employer will consider in deciding, one way or another. Only where the employee wishes to be accompanied at the hearing, by another employee or a shop floor union representative, will it be necessary to hear him in their presence. Section 41 is in accord with the well-

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

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

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

44. When we talk about a procedurally fair process, in our view the following 7 concepts must be manifest in the entire process.

    a. Fair Notice. An employer may not discipline an employee for violating a rule or standard whose nature and penalties have not been made known.

    b. Prior Enforcement. An employee may not be penalized for violating a rule or standard that the employer has failed to enforce for a prolonged period.

    c. Due Process. An employer must afford the employee a reasonable opportunity to rely to the allegations. Once assessed, punishment may not be increased.

    d. Substantial Evidence. Charges must be proven by substantial and credible evidence.

    e. Progressive Discipline. When responding to misconduct that is short of egregious (very serious), an employer must issue at least one level of punishment that allows the employee an opportunity to improve.

    f. Mitigating and Extenuating Circumstances. Penalty must be proportional to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances.

45. We have evaluated the entire process right from the NTSC, the disciplinary proceedings, the internal appeal and the trial before the High Court. We find and hold that at all the stages, the proceedings substantially complied with the requirements discussed above. The entire process was substantially procedurally fair. In addition, the evidence is in consonance with the Superior Court's finding that the appellant repeatedly conceded wrongdoing vide his letter dated 1st September, 2017 in his response to the NSTC, and during the disciplinary hearing on 14th September, 2017.

46. The other ground urged by the appellant is that he was not supplied with the relevant documents relied upon by the respondent to dismiss him prior to the disciplinary hearing among them the Investigation Report that was the primary evidence against him. He faulted the trial court for failing to address the said issue which he argued amounted to an unfair procedural practice in contravention of Article 35(1)(b) of the *Constitution*. To support this argument, he cited *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR.

47. It is common ground that the appellant was served with the NTSC to which he replied in detail. In his reply, he never mentioned the alleged failure to be supplied with any documents. In fact, his response was detailed and comprehensive. He appealed against the decision. A reading of his responses,

his appeal against the dismissal and his claim filed before the ELRC and indeed all the documents filed by him leave no doubt he was fully aware of all the elements of the charges against him. He fully understood each and every element of the allegations. He even admitted the allegations and pleaded for clemency. This admission was never recanted. The allegation that he was not supplied with some documents is an oxymoron, a contradiction of terms. It falls to be rejected.

48. The other argument mounted by the appellant was that the ELRC based its decision on fabricated minutes. We have considered the entire record. We find that the said issue was never pleaded by the appellant in his Statement of Claim nor did the ELRC consider it. A party cannot on appeal be allowed to mount a new suit. As was held in *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR a court cannot be said to have erred on an issue that was never argued before it. Accordingly, we decline to consider grounds 21-24 of the memorandum of appeal alleging that the minutes were fabricated.

49. The other grievance cited by the appellant was that the court relied on the further statement that was not signed by the appellant. However, we note that the Superior Court was satisfied with the evidence given by the respondent's witnesses, in particular the investigating officer Captain [retired] George Kazungu. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in the above issue, it is guided by the principles enunciated in numerous case law from this Court. In *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* [2014] eKLR, it was stated that the court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice. (See the Supreme Court decision in *Apungu Arthur Kibira & 3 others* [2019] eKLR).

50. The trial court which had the benefit of seeing and hearing the witnesses first hand was satisfied that there was no basis to suggest that Captain Kazungu would forge the appellant's unsigned further statement. We find no reason to fault this finding conscious that the trial court had the benefit of hearing and observing the witnesses first hand unlike this court. In any event, the appellant failed to demonstrate that the Superior Court decision on this issue was based on a whim, was prejudicial and/or was capricious. Consequently, this ground fails.

51. The appellant also cited a raft of matters of fact which he felt were not appreciated by the trial court. These are:

    i. the work ticket was proof of authorization;

    ii. that the administration department board meeting directed the fast-tracking of the installation and commissioning of motor vehicle maintenance workshop in Sondu Miriu, and

    iii. an e-mail by Fredrick Oloo was ignored by the investigators and the Superior Court. This Court in *Kenya Power & Lighting Company Limited v Aggrey Wasike* (supra) said:

> " it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required..".

52. Under Section 43 of the *Employment Act* 2007, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist," causing him to terminate the employee's services. In the present case,

it seems quite clear from the evidence on record that the respondent believed, and had ample and reasonable basis for so believing, that the appellant used its vehicle for his personal errands, a fact which the appellant not only admitted but also sought clemency. An employer is required to prove on a balance of probabilities that the reasons for termination are those that it genuinely believed to exist. We find and hold that this test was proved in this case.

53. Next, we will address the appellant's contestation that despite being charged with the misuse of office contrary to clause e (i) of the human resources &- administration policies and procedures (code of conduct), the termination was on a different charge, that is, negligence of duty contrary to clauses 4.12.4.2(11) and 4.12. 6 of the transport management policy and clause 7.3.2{g) procedure for employee discipline. His grievance is that he was dismissed on charges which he was never invited to respond to. He argued that he responded to the clause (E) (i) Code of Conduct charge and, instead of being cleared, he was dismissed on alien charges. He cited *Vicky Kemunto Ocharo v Independent Policing Oversight Authority* [2018] eKLR where the court held that an interdiction letter that introduced 5 new allegations after the claimant had already responded to an earlier issued NTSC amounted to "serious procedural unfairness' as the claimant was not accorded an opportunity to respond to the new allegations.

54. The respondent countered the above argument by arguing that the appellant was found guilty of an act of gross misconduct, warranting summary dismissal. However, the respondent took into account the appellant's disciplinary record and long years in service, and reduced summary dismissal to termination on notice. He exercised his right of appeal, which did not result in interference with termination decision. Therefore, the procedure was fair, and met the minimum statutory standards of fairness, under Sections 41 and 45 of the *Employment Act*.

55. The Superior Court did not address this issue nor did the respondent address it in its submissions.

56. Insofar as procedural fairness is concerned, an employer should usually conduct an investigation to determine whether there are grounds to dismiss an employee. If the investigation reveals that the employee may have committed misconduct, he should be notified that a disciplinary enquiry will be held, and must be served with a charge sheet setting out the allegations against him. Employees must be notified of the charges they are being called upon to answer before the disciplinary hearing commences. The charge sheet must be formulated in precise and simple terms and charges may not be vague. The standard of clarity of a disciplinary charge sheet is not as high as one in a criminal trial. Nevertheless, the charges must contain sufficient factual information to allow the employee to prepare for the disciplinary hearing and to respond to the charges. Employees must also be afforded a reasonable amount of time to prepare for the hearing.

57. The employer is generally not permitted to change or supplement the charges after the commencement of the disciplinary enquiry, if the effect of such an amendment is to prejudice the employee. If charges are substantially changed, the employee should not be required to deal with these charges without a reasonable opportunity to prepare his defence on them. The Labour Appeal Court of South Africa in *Fidelity Cash Management Service v CCMA and others* [2008] 3 BLLR 197 (LAC) upheld the elementary principle of South African labour law that the fairness or otherwise of an employee's dismissal should be determined on the basis of the reasons for dismissal given by the employer at the time of the dismissal. So, when the fairness of a dismissal is challenged,this will be determined on the basis of the reasons given when the employee was dismissed. As a result, the charge sheet plays a fundamental role in the disciplinary process, and employers should ensure that charge sheets specifically and accurately reflect the allegations of misconduct against the employee. They will not be permitted to rely on new charges at the disciplinary hearing, during review or appeal to prove that there was a fair reason to have dismissed the employee.

58. The charge sheet is the most important basic document or the foundation or the bed rock on which disciplinary proceedings are initiated against the employee/workman accused of misconduct. The entire enquiry hinges upon the charge sheet. The charge sheet should clearly state the charges leveled against the erring workman. The charges must be specific, setting out all necessary particulars even if the workman knows the details. If the charge sheet is vague the same is invalid and the disciplinary proceedings also become invalid. In a case where the charge-sheet was vague there is no proper enquiry. The charge-sheet must contain specific allegations. The proceedings should succeed or fail on that basis and facts not intended to be proved should not be alleged.

59. In the instant case, the NTSC dated 25th August 2017 gave a 9 point detailed account of the allegations constituting the complaint against the appellant and informed him that his actions amounted to "misuse of office as per clause E (i) of the H.R & A policies." The appellant replied to the NTSC in detail. During the disciplinary committee hearing, the appellant responded to all the allegations and participated in the proceedings demonstrating that he fully understood the charges. In its findings, the disciplinary committee found that the appellant had committed offences against the Transport Management Policy. Specifically, it held that he had violated the Transport Policy. The disciplinary committee found that the appellant was unsuitable to perform his duties. It is this finding that the appellant argues was not the one he was asked to reply to in the NTSC.

60. The appellant was found guilty of an offence provided in the employer's transport management policy. The facts and the evidence adduced before the disciplinary tribunal disclosed an offence provided under the said policy. It is not unlawful for facts and evidence adduced during a trial to disclose an offence other than the one in the charge sheet. In fact, such a scenario does not invalidate the proceedings or the conviction. There is no argument before us that the finding is not supported by the evidence and the facts. The argument that the punishment is alien to the appellant is incorrect. Technicalities or irregularities which do not cause prejudice, cannot be allowed to defeat the ends of justice. Where the facts and evidence disclose an offence other than the one stated in the charge sheet, the accused is entitled to the lesser severe penalty. In this case, the appellant despite being found guilty of the offence of gross misconduct which attracted summary dismissal, the respondent took into account his years of service and disciplinary record and reduced the punishment to normal termination which is a lesser severe penalty. We find and hold that the appellant was not prejudiced in any manner.

61. Next we will address the appellant's argument that the punishment meted upon him is disproportionate and in excess of the prescribed sanction. He contended that the Superior Court failed to deduce, nor did it even attempt to address the said issue which he described as procedural unfairness. As a result, he argues that he was prejudiced because the prescribed penalty for the breach of the code of conduct would have been the issuance of a first warning letter and not dismissal/termination as provided under clause 2.3. 7 of the respondent's policy on employee discipline [233(4-6)] and clause 7.1. 7(4) of the respondent's procedures for employee discipline [21(36-43)-122(1-10)].

62. The respondent submitted that misuse of company property is classified as a major offence warranting summary dismissal, but, it extended clemency to the appellant by considering the number of years he had served and by substituting summary dismissal with a normal termination.

63. The principle of proportionality helps to assess whether, in the context and circumstances, an employee's misconduct was so serious that it should give rise to just cause for dismissal. That is, employers claiming just cause for dismissal are required to show that the sanction imposed upon an employee was proportional to his or her mis-conduct. Only if the misconduct was very serious would an employer have a just cause to summarily dismiss the employee without an advance notice or pay in lieu of that notice.

64. The contextual evidence is needed to assess the severity of the harm to the employee versus the importance of the objective to the employer in the specific circumstances. The question is whether in the circumstances of the case, it can be said that no reasonable employer would ever impose such punishment or whether the punishment can be characterized as "shockingly disproportionate" to the employee's conduct and his past record. Whether or not punishment is disproportionate more often than not depends upon the circumstances in which the alleged misconduct was committed, as also the nature of the misconduct. Punishment must be proportionate to the gravity of the offense, taking into account any mitigating, extenuating, or aggravating circumstances. Despite being found guilty for gross misconduct which attracted summary dismissal, the respondent took into account the appellant's years of service and his disciplinary record and decided to reduce it to normal termination. With find and hold that the sentence was not disproportionate to the offence.

65. Lastly, in view of our findings on the issues discussed above, we see no reason to address the prayer for reinstatement.

66. In conclusion, from our analysis of the facts, the law and the conclusions arrived at herein above, we find and hold that this appeal has no merits. We find no reason to disturb the decision of the ELRC. Accordingly, we confirm the Judgment of the ELRC and dismiss this appeal with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR