IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA, & GATEMBU, JJ.A)

CIVIL APPEAL NO. 189 OF 2013

BETWEEN

BRITISH AMERICAN TOBACCO (K) LTD...APPELLANT

AND

KENYAN UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS (KUCFAW)..RESPONDENT

(An appeal from the judgment of the Industrial Court of Kenya (O. Makau, J.) delivered on the 20th day of December, 2012

in Industrial Cause No. 538 of 2009)

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JUDGMENT OF THE COURT

1. This appeal arises from the judgment of the Industrial Court of Kenya at Nairobi (as it was then known) in Cause No. 583 of 2009 where **Kenyan Union of Commercial Food and Allied Workers (KUCFAW)**, hereinafter referred to as **"the respondent"**, was the claimant against **British American Tobacco (K) Ltd.**, hereinafter referred to as **"the appellant".**

2. In its memorandum of claim filed before the Industrial Court on behalf of one **Gabriel Kilonzo**, hereinafter **"the grievant"**, the respondent stated that on 1st June 1989, the appellant employed the grievant as an office messenger in their depot in Nyeri town and over the years promoted him to the post of Senior Stores Supervisor. His gross monthly salary in April 2006 when he was dismissed was Kshs.109,622/=.

3. The dispute arose on 27th February 2006 when the grievant was suspended on grounds of suspicion of fraud, one of them being that a clerk by the name **George Nyamongo** who was under the supervision of the grievant raised an LPO order No. 6013 to a supplier called Nawa Hardwares for supply of goods worth Kshs.200,000/= without the prerequisite authority.

4. On 6th March 2006, the grievant was served with a suspension letter, making specific reference to the suspected fraud accusation levelled against him. The grievant alleged that he continued to work even though his suspension was extended until 11th April 2006 when he was called by the Employee Relations and Benefits Manager, **Mr. Kabugi,** who handed him a letter of dismissal in accordance with **Section 39 (a)** of the Collective Bargaining Agreement for the reasons that he failed to exercise utmost care in the performance of his duty.

5. On receipt of the dismissal letter, the grievant reported the matter to the Union who contacted the respondent on 22nd May 2006 and further reported the matter to the Minister of Labour. After investigating the matter it is claimed that the Minister absolved the grievant from the aforesaid allegations and recommended a termination instead of a dismissal.

6. The respondent further states that the appellant did not respond to any of the correspondence by the Union, forcing the Union to sign a letter recommending that the dispute proceed to court for determination. According to the respondent, the particulars of the allegations were not furnished to the grievant, neither was he given a chance to be heard. In that regard his instant dismissal was therefore unfair and against the rules of natural justice.

7. The respondent urged the trial court to reinstate the grievant to his former position without loss of benefits or in the alternative terminate his services and order that he be paid notice pay, service pay, leave due and not taken and/or prorated leave pay and compensation for 12

months for wrongful loss of employment.

8. The appellant filed a memorandum of defence to the respondent' claim. It admitted that the grievant had been in its employment since 1989 until his dismissal on 11th April 2006. He was the Repairs & Replacement Stores Supervisor, and was responsible, *inter alia,* for stock management of machine spare parts and other hardware equipment that was kept in the store.

9. The appellant stated that sometimes in January 2006 it discovered that it had been defrauded of approximately Kshs 4,007,013/= through a system of forged /manipulated delivery notes, in that it had paid a supplier for goods that were never delivered. The appellant averred that the grievant, who was in charge of clearing and verifying items before payment was effected, had cleared goods that had not been received by the respondent from the said supplier. Furthermore, some of the delivery notes had been altered.

10. Following the said incident, the grievant was given a notice to show cause why he had cleared payments for fictitious goods, to which he purportedly gave a written statement consisting of an admission that he had failed to execute his duties as required. Subsequently, the grievant was dismissed vide a letter dated 11th April 2006 on grounds that he had failed to exercise utmost care in the performance of his defined role as per **Clause 39 (a) 2** of the Collective Bargaining Agreement (CBA) between the appellant and the respondent.

11. The appellant denied that it wrongfully and unlawfully dismissed the grievant; and asserted that he was summarily dismissed in accordance with the CBA. The appellate further denied that the grievant was absolved from any fraud. It further denied that the grievant was forced to make or sign a statement admitting his fault.

12. Regarding the respondent's claims for compensation, the appellant contended that the grievant was not entitled to any of the reliefs sought and urged the trial court to dismiss the same.

13. At the trial only the grievant testified in support of the respondent's case. The grievant denied that he was negligent in the performance of his duties as alleged by the appellant. He said that before his dismissal he had been suspended for two weeks, which was extended beyond 30 days. The grievant argued that during his suspension when investigations were being conducted regarding the undelivered stock he did not make any statement admitting his negligence. But in cross examination he admitted that he wrote four (4) statements albeit against his wish.

14. The appellant called three witnesses. **Safia Akaka Mukoba,** the appellant's Head of Finance for East African Markets, was an Auditor in 2006 and is the one who conducted investigations into the alleged fraud. She discovered that some material indicated as received from suppliers could not be accounted for. She also realized that for some deliveries made the quantities on the delivery notes would be altered after delivery. The witness further testified that the grievant had in one of his statements admitted that some items had been added into the delivery notes but he had not notified his employer, yet he was the custodian of the delivery stamp and the delivery notes.

15. **Malaba Wekesa** was a trainee at the appellant's place when the material incident occurred in 2006. His duties included receiving and issuing out goods to the factory and workshop. The grievant was his supervisor. The supervisor was the only custodian of the delivery stamp, Wekesa stated. He testified about an incident that occurred on 20th February, 2006 when a delivery note was altered to include items that had not been supplied.

16. The last witness for the appellant was **Joseph Kabuku Karanja** who was then the Employee Relations and Benefits Manager. He testified that the CBA specified the maximum suspension period as 30 working days but the grievant's suspension exceeded that period because the shopsteward was away on duty and it was impossible to conclude the hearing without him. However, the grievant was paid for the days that exceeded the maximum suspension period.

17. Mr. Karanja further testified that following the investigations aforesaid, the grievant in the presence of the Chief Shopsteward, one Mr. Peter Musyimi, was given a hearing by the appellant. The grievant had recorded several statements where he admitted that there were anomalies in the receipt and issue of various products. Upon conclusion of the hearing, the grievant was dismissed for wrongly verifying goods delivered by various suppliers and for preparing delivery documents that had discrepancies.

18. In his judgment, the learned judge held that the process of suspension and subsequent dismissal of the grievant was followed but the grievant's dismissal was done before the final audit report was completed; that there was therefore no conclusive evidence against him; and that the grievant's suspension exceeded the 30 days permitted under the CBA.

19. The trial court awarded the grievant the following:

(a) 3 months' salary in lieu of notice …………….. Kshs.328,866

(b) Salary arrears for March & April 2006 …….. Kshs.40,194.75

(c) 3 months' salary for wrongful dismissal …… Kshs.328,866

(d) Leave pay for 33.5 days …………………………….. Kshs.108,763.40

915,453.60

Subsequently, the trial court granted an order of stay of execution of the decree pending appeal but subject to the appellant depositing the decretal amount in a joint interest-earning account. The appellant complied with the terms of the stay order.

20. Being dissatisfied with the said judgment, the appellant preferred an appeal to this Court. In its memorandum of appeal, the appellant faulted the learned judge for, *inter alia*, failing to appreciate what the legal position was in relation to claims for wrongful dismissal under the **Employment Act, Cap 226** as opposed to the **Employment Act, 2007;** for deciding on issues which were not raised by either party; for failing to appreciate that the respondent failed to discharge his burden of proof, and for holding that the grievant's dismissal was not justified.

21. During the hearing of the appeal parties largely relied on their filed written submissions that were briefly highlighted by their respective counsel. **Mrs. E.W. Kinyenje-Opiyo** appeared for the appellant while **Ms. Lucy Gitonga** was in attendance for the respondent.

22. In its submissions, the appellant argued that disciplinary proceedings are not criminal in nature and that the burden of proof in such a case is not based on proof beyond reasonable doubt, but rather, on a balance of probabilities. The appellant cited the case of **ANTHONY MULAKI v ADDAX KENYA LIMITED, Cause No. 822 of 2012** where it was held:

> ***"In examining validity of reasons, the court was correctly directed by the Respondent to the case of BRITISH HOME STORES LTD v BURCHELL (1980) I.C.R. 303 E.A.T. where it was held that for the court to uphold the decision by the employer as being fair, it must be shown that:-***
>
> ***(a) The employer must believe at the time of termination, that the employee is guilty of the allegations against him/her;***
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> ***(b) The employer had reasonable grounds upon which to sustain that belief; and***
>
> ***(c) The employer carried out as much investigation as reasonable in the circumstances ….. the employer need only be satisfied on the balance of probability."***

23. The appellant also cited this Court's decision in **JUDICIAL SERVICE COMMISSION v GLADYS BOSS SHOLLEI & ANOTHER [2014] eKLR**, that:

> ***"In the instant appeal, the disciplinary process against the 1st respondent was not a proceeding before a court of law. It did not relate to a criminal proceeding. It was a civil matter between an employer and an employee ….While criminal proceedings are normally mounted to determine the guilt or innocence of a person in relation to specific criminal offence/s the culpability of which results in punishment as may be provided in a given statute, disciplinary proceedings are of civil nature between an employer and an employee and where the employee is not vindicated, the outcome is normally dismissal from employment…. While the standard of proof in the disciplinary proceedings was not beyond the balance of probabilities, the test in quasi-criminal proceedings is much higher."***

24. Based on the foregoing, the appellant submitted that it reasonably believed that the grievant was guilty at the time of his dismissal, based on the various investigations carried out.

25. Secondly, the appellant submitted that the learned judge misdirected himself in law as the repealed **Employment Act Cap 226** did not allow him to substitute his own decision for that of the employer in finding that the grievant was guilty of gross misconduct. The appellant cited this Court's decision in **CFC STANBIC LIMITED v DANSON MWASHAKO MWAKUWONA [2015] eKLR,** where the Court referred to **HALSBURY'S LAWS OF ENGLAND, 4th Edition, Vol. 16 (1B)** paragraph 642 which provides:

> ***"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts.***
>
> ***The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."***

26. Submitting on the grounds that the learned judge erred by disregarding the principles of admissions and by failing to take into account the appellant's submissions, the Court was urged to consider the evidence tendered by the appellant's three witnesses; the statements made by the grievant; and the fact that the grievant was the senior store supervisor who owed a higher duty of care to the appellant compared to that of other employees who were working under him. The appellant was therefore justified in dismissing the grievant. On the other hand, the grievant did not discharge its burden of proof to show that his dismissal was unlawful, the appellant submitted.

27. Lastly, the appellant submitted that the grievant was not entitled to the reliefs that were granted by the trial court since he was properly dismissed. Under the repealed **Employment Act Cap 226**, an employee was only entitled to damages on the basis of the provisions of the contract of employment; and that no compensation for unfair dismissal was payable. That notwithstanding, the learned judge awarded the grievant three months' salary for unlawful and wrongful dismissal.

28. Similarly, the appellant lamented that the grievant was not entitled to any pay during his suspension in March-April as he was properly dismissed. The appellant's **Rules of Employment Constituting the Terms and Conditions of Service for Unionsable Employees** at page 29 stipulates that **"if the employee is dismissed or services are terminated, the half pay made during suspension shall be recovered from final payment".**

29. On the basis of the foregoing submissions, the appellant's learned counsel urged this Court to allow the appeal and set aside the award of the Industrial Court in its entirety or any part thereof. The appellant also prayed for costs of the appeal.

30. The respondent opposed the appeal and submitted that the dismissal of the grievant from his employment was unjust and unfair; and that the respondent so proved, since the stipulated procedure under **Sections 45(2) and 46** of the **Employment Act, 2007** was not followed. The grievant was therefore entitled to the reliefs granted by trial court, the respondent submitted.

31. The respondent further submitted that failure to follow the prescribed procedure in dismissing an employee from employment amounts to an unfair termination and a court can award damages upto 12 months' salary as damages for wrongful dismissal. The respondent cited **GRACE GACHERI MURITHI v KENYA LITERATURE BUREAU [2012] eKLR** and **MARY CHEMWENO KIPTUI v KENYA PIPELINE COMPANY LIMITED [2014] eKLR.**

32. From the respondent's submissions, it is evident that the respondent is basing its arguments on the provisions of the **Employment Act, 2007** whose commencement date was 2nd June, 2008, which was not the appropriate law. The applicable law was the **Employment Act, Cap 226** since the cause of action arose in 2006.

33. In **KENYA ENGINEERING WORKERS UNION v NARCOL ALUMINIUM ROLLING MILLS LTD [2016] eKLR**, this Court held:

> ***"Accordingly, in a first appeal from the Labour and Employment Court, we are obliged to evaluate and reconsider the evidence, assess the same and come to our own independent conclusion, but always bearing in mind that we do not have the singular advantage that the trial court had of seeing and hearing witnesses as they testified."***

34. The respondent's case before the trial court was that the dismissal of the grievant was wrongful and unlawful. Consequently, it prayed for his reinstatement to his former position without loss of benefits; in the alternative it sought that the grievant be paid **"notice pay, service pay, leave due and not taken or prorated leave pay and compensation of 12 months for wrongful loss of employment."**

35. It was upto the respondent to prove that the grievant's dismissal was unlawful and as a result was entitled to the reliefs sought. The learned judge rightly stated:

> ***"I agree with the respondent's submissions that the substantive law applicable in this case is the Labour Law in June 2006. In which case, I will be guided by Section 17 of the Employment Act Cap 226 in allowing the employee to allege that he was unfairly and wrongfully dismissed and in requiring the employer to justify the dismissal."***

36. The grievant contended that the procedure for his dismissal was unfair and the reasons for his dismissal were not proved. On the other hand, the appellant submitted that there were sufficient reasons for dismissing the grievant and the procedure that was adopted was the correct one. The trial court held that the process of suspension and dismissal was proper but the dismissal was not justified. The respondent did not file any cross appeal against that finding. Since it is not disputed by either side that the process was proper, our task is to determine whether or not the dismissal was justified.

37. Having taken into account the sum total of the evidence that was tendered by both sides, we do not think that the grievant discharged his burden of proof. The grievant's dismissal was based on his own admission in a statement dated 15th March, 2006 to the effect that some items had been added to delivery notes and that he had personally raised Goods Received Notes (GRNs) in respect thereof. The audit outcome also supported this conclusion. As a result, the appellant ended up paying for goods that had not been supplied. There was no dispute that the grievant was the Stores Supervisor and was the only custodian of the delivery stamp. Even if there were other people working under him, he had the overall responsibility over them. Having reviewed the statements that were attributed to the grievant, we do not think that he prepared or signed them under duress as he alleged.

38. In these circumstances, it cannot be said that the appellant's action was unwarranted in law. The employer had reasonable grounds for dismissing the grievant **"for failure to exercise utmost care in performance of your defined roles"** as stated in the dismissal letter. We reiterate what we stated in **JUDICIAL SERVICE COMMISSION v GLADYS BOSS SHOLLEI & ANOTHER** (supra) that in disciplinary proceedings between an employer and an employee the standard of proof is on a balance of probabilities. If upon appropriate investigations being undertaken by an employer, there are reasonable grounds for terminating one's employment, and the statutory procedure is followed, an employer cannot be accused of unlawful dismissal of an employee.

39. We agree with the appellant that the audit report which the learned judge said ought to have been produced as conclusive proof of the greivant's negligence was immaterial in the circumstances. This was not a criminal case where the standard of proof is beyond any reasonable doubt.

40. In view of the foregoing, we are of the considered view that the greivant's dismissal was well justified in law. The learned judge's finding that it was unfair or unlawful was not supported by the evidence on record.

41. Having come to the above conclusion, it concomitantly follows that we must interfere with the award that the trial court made in favor of the grievant as it was based on an erroneous conclusion, as we have demonstrated, that the dismissal was wrongful.

42. Consequently, we hereby set aside the award of 3 months' salary in lieu of notice as well as the 3 months' salary for wrongful dismissal. The grievant is however entitled to salary arrears for March and April 2006 in the sum of **Kshs.40,194.75** and leave pay for **32.5 days** at **Kshs.108,763.40,** all amounting to **Kshs.148,958.15.** The grievant is also entitled to interest on the said sum from 20th December, 2012 until payment in full. To that extent, this appeal is allowed. As regards costs, although ordinarily costs follow the event, in the circumstances of

this appeal, we order that each party bears its own costs.

DATED and DELIVERED at NAIROBI this 7th day of June, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR