IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 134 OF 2018

BETWEEN

KENYA PORTS AUTHORITY.....1ST APPELLANT

THE MANAGING DIRECTOR KENYA PORTS AUTHORITY.....2ND APPELLANT

AND

JOSEPH MAKAU MUNYAO.....1ST RESPONDENT

ELIUS NJOKA.....2ND RESPONDENT

STEPHEN BAYA MWANYULE.....3RD RESPONDENT

MWINYI SULEIMAN SIBABU.....4TH RESPONDENT

BWANA MOHAMED BWANA.....5TH RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nakuru (Radido, J.) dated 19th *February, 2016* **in Petition No. 11 of 2015)**

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JUDGMENT OF THE COURT

1. The dispute that pitted the parties herein against each other revolves around the disciplinary process and subsequent sanctions meted by **Kenya Ports Authority** (the 1st appellant) to **Joseph Makau Munyao, Elius Njoka, Stephen Baya Mwanyule Mwinyi Suleiman Sibabu** and **Bwana Mohamed Bwana** (the 1st, 2nd, 3rd and 4th respondents respectively) on account of a perceived go slow which occurred between 29th March, 2011 and 30th March, 2011. On the 1st appellant's part, the course adopted was not only in compliance with its disciplinary procedure but also commensurate to the respondents' breach of the terms and conditions of service. The respondents, on the other hand, thought otherwise.

2. Before delving into the merits of the appeal, a synopsis of the relevant facts will place the dispute in perspective. The respondents herein were employed on diverse dates in various capacities by the 1st appellant. As they rose up the ranks, they were transferred from one department to another. Of relevance is that they were ultimately deployed as gantry operators who the 1st appellant describes as the pulse of the Port. Their duties included operating cranes used for loading and offloading containers from ships.

3. On 29th March, 2011 there were reports from several ship managers that gantry operators were sluggish in their duties. As per the 1st appellant, when its officers reviewed the detailed performance report dated 30th March, 2011 which was in respect of moves made by each crane the previous day, 29th March, 2011, the same confirmed that performance had fallen drastically.

4. Apparently, performance was measured in terms of the prescribed moves for each crane per operator, that is, 17 moves per hour. However, on the material day, according to the 1st appellant, there was dismal performance. This to the 1st appellant was a clear depiction that the gantry operators were on a go slow which it believed was actuated by the fact that earlier on the operators' proposals for improvement of their terms had not been accepted.

5. As a result, at least as per the 1st appellant, it failed to meet its revenue targets and was at risk of being levied for delay in

loading/offloading ships. Moreover, its attempt to implore upon the gantry operators to perform their duties fell on deaf ears. Therefore, it was left with no option but to issue warning letters to about 104 gantry operators including the 1st, 2nd, 3rd and 4th respondents who it believed participated in the go slow.

6. Despite the warning letters issued to the 1st -4th respondents bearing different dates they were replicas and the relevant portion was as follows:

> **"RE: WARNING LETTER**
>
> **It has been reported by the Terminal Manager that on 29*th March, 2011 while allocated to operate Machine/Equipment No… at the yard, you neglected and/or refused to follow the laid down performance targets set by Management leading to dismal performance.***
>
> **Your actions and/or omissions constitute economic sabotage against the Authority contrary to Section K. 4 (a) (i) and (xvii) of the Disciplinary Handbook 2008.**
>
> **Following your unacceptable conduct, it has been decided you be WARNED. You are reminded that a REPEAT OF A SIMILAR CONDUCT shall attract a more severe action that may include Summary Dismissal."**

7. Barely hours after the service of the warning letters, the 1st appellant interdicted the gantry operators including the 1st -4th respondents who it avers ignored the warning and failed to operate at the optimum level. The interdiction letters relayed the 1st appellant's decision to suspend the operators pending investigations and also called on the gantry operators to show cause why they should not be dismissed on account of their conduct.

8. Unlike the other respondents, **Bwana Mohamed Bwana**, the 5th respondent, was served on 26th April, 2011 with a letter dated 14th April, 2011 asking him to give an explanation why disciplinary action should not be taken against him for insubordination and incitement. The letter in question read in part:

> **"RE: INSURBORDINATION AND INCITEMENT**
>
> ***On 31st* March, 2011, you appeared at the allocation point at container Terminal despite the fact that you were on- call (dormant) shift, ostensibly to incite other gantry crane operators to continue with the go slow which had started the previous night. You also engaged your seniors in an altercation as they discharged their official duties.**
>
> **In view of the seriousness of the actions vide Human Resources Manual 2008 K.4 (x) and (xvi), you are required to reply this letter within 72 hours of this receipt showing cause why disciplinary action should not be taken against you."**

9. The 5th respondent tendered his explanation on even date refuting the allegations thereunder. Nonetheless, on 29th April, 2011 the 1st appellant interdicted him pending further investigations and on the following additional ground:

> **"RE: INTERDICTION FROM DUTY**
>
> **You will recall that on 29*th and 30th March, 2011, being a member of an illegal group calling itself Supreme Committee, you directly took part in the illegal strike which was staged by Gantry Crane Operators, by going to your place of work and disrupting work when you were on dormant shift. It is further reported that you manhandled and insulted the shift in-charge Mr. Francis Wanguba,…***
>
> **Besides the above, it has come to Management's attention that you being a Gantry Operator, have time and again ignored, neglected and/or refused to follow laid down performance targets set by Management at the termina*l…"*** *[Emphasis added]*

10. During the interdiction the respondents were served with hearing notices for disciplinary hearings which took place on 1st and 8th July, 2011. In the end, each of the respondents were served with a letter dated 30th January, 2012 lifting their interdictions subject to the following conditions:

> **"**
>
> **…**
>
> **i. You are being warned for participating in an illegal strike.**
>
> **ii. You are required to report to the Human Resources Manager for redeployment.**
>
> **iii. You will be surcharged an amount equivalent to your three months basic salary (with regard to the *3rd respondent he was surcharged two and half months of his basic salary)* …**

iv. You are being placed on twenty four months probation from the date of this letter, during which period you will be required to maintain a high standard of discipline. Any report of involvement in a similar misconduct during the probation period shall attract severe disciplinary action that may include summary dismissal being meted against you.

v. Please note that your new head of department will be advised to monitor your performance and conduct and give quarterly reports during the probationary period.

vi. You should never ever involve yourself in any illegal grouping."

11. Although the respondents executed the letters lifting their interdiction, they were not pleased with the conditions attached thereunder which they termed as illegal and unfair. They all refuted that there was a go slow let alone taking part in it. As far as they were concerned, the 1st appellant had not complied with its own disciplinary procedure. They also imputed that the sanctions were discriminatory and aimed at penalizing them for advocating for improvement of their terms.

12. Consequently, the respondents challenged the whole process by instituting a petition claiming that a number of their constitutional rights including their right to fair labour practices had been infringed by the appellants. Nevertheless, the petition was converted into a plaint which was re-amended on 10th March, 2014. The respondents sought an array of orders which included special damages in terms of refund of the amounts surcharged, allowances and salary increments they deemed were due to them; general damages; declaration that the warning and interdictions of the respondents were illegal and unwarranted; declaration that their constitutional rights had been violated; and reinstatement of their designation as gantry operators with all the allowances attendant to that position.

13. At the trial, each of the respondents' tendered evidence in support of their case. The 1st respondent testified that on the material day 29th March, 2011 he was on standby for the third shift which ran from 2300hrs to 0700hrs and produced a duty roaster to that effect. He denied operating any crane as alleged by the warning letter or taking part in the go slow. Similarly, the 2nd, 3rd and 4th respondents denied taking part in the go-slow despite being on duty on the material day. The 5th respondent gave evidence that although he was present at the terminal on 30th March, 2011 he was on leave and on a dormant shift hence he did not take part in the go slow. He also denied the allegations of insubordination.

14. Reginald Wiayaki, Senior Superintendent of Equipment and Resources and Irene Mrunde Mbogoh, Senior Human Resource Officer testified on behalf of the 1st appellant. Reginald reiterated that there was a go slow and claimed that the evidence implicated the respondents as some of the perpetrators. He testified that on the 30th March, 2011 during the go slow at around midday he called upon the 1st respondent who was on standby to step in and salvage the situation but he declined to do so signifying his support of the strike.

15. With respect to the 5th respondent, Mr. Waiyaki stated that since he was on dormant duty he was not expected to report to work. It was no coincidence that despite being on leave the 5th respondent showed up at the terminal on 30th March, 2011 at around 7:00 a.m. To Mr. Waiyaki, the 5th respondent's presence particularly at the terminal was to incite the other operators to continue with the go slow which began on 29th March, 2011. Further, he witnessed the 5th respondent confronting his superior shift in charge one Mr. Francis Wanguba, and grab him by his shirt. On the other hand, Irene's evidence basically related to the procedure employed by the 1st appellant with regard to disciplinary process

16. Upon weighing the evidence, the trial court entered judgment on 19th February, 2016 in favour of the respondents. In doing so, the learned Judge (Radido, J.) found that there was no cause of action as against the 2nd appellant. In as much as there was evidence that a go slow took place on the material days the 1st and 5th respondents who were on standby and dormant shift could not have partaken in the said strike. The learned Judge went on to declare that the warnings issued to the respondents as unfair for the reason that they were not issued in conformity with the 1st appellant's disciplinary procedure. Finally, he held that the conditions attached to the lifting of the respondents' interdictions amounted to unfair labour practices. Accordingly, the learned Judge issued orders in the following terms:

"150. Arising from the above the Court orders that

a. 1*st and 2nd* Claimants be restored to their positions/responsibilities as gantry operators with immediate effect.

b. Each Claimant to be paid Kshs 800,000/- as general damages for unfair labour practice(s).

c. Claimants surcharged should be refunded the amounts surcharged (Kshs 245,580/- each) forthwith.

151. The Claimants to have costs of the Cause."

17. The foregoing decision did not go down well with the parties and each challenged a part thereof. In a nutshell, the appellants faulted the learned Judge for misapprehending the evidence on record and the law thus arriving at a wrong decision. Their appeal was centered mainly around four grounds to the effect that the learned Judge erred by-

i. Directing the reinstatement of the 1*st and 5th* respondents to their positions as gantry operators despite the lapse of the statutory 3 years limitation period for issuing an order of reinstatement.

ii. Assessing and awarding Kshs.800,000 to each respondent as general damages.

iii. Directing the refund of Kshs.245,580 to each of the respondents being the amount surcharged without any basis.

iv. Failing to exercise his discretion properly with respect to costs of the suit.

18. On the other hand, the respondents' cross appeal was premised on the grounds that the learned Judge erred to the extent of-

i. Declining to award special damages to the respondents.

ii. Failing to expressly declare that the warnings issued to the respondents were unlawful.

iii. Failing to find that the interdiction of the respondents was unwarranted and/or illegal.

19. At the plenary hearing the appellants were represented by Mr. Wetende while Mr. Aboubakar appeared for the respondents. Counsel relied on written submissions and also made oral highlights in support of their respective clients' cases.

20. The appellants' approach on the first ground was twofold, namely, they set out to demonstrate that the disciplinary action taken against the 1st and 5th respondents was justified. They also attacked the order of reinstatement on the ground that the trial court lacked the jurisdiction to issue such an order.

21. The appellants took issue with what they believed was the learned Judge's rigid focus on the timeline that the 1st respondent was indicated to be on standby in the duty roaster. In doing so, the appellants argue that the learned Judge failed to appreciate that firstly, when a gantry operator was on standby he was present at the terminal and ready to take action in whenever necessary; secondly, it was not improbable for a gantry operator to be assigned a machine outside his shift hours where there is a crisis, as was the case herein with the go slow.

22. Ms. Wetende argued that the defence or response put forth by the 1st respondent to his interdiction letter was that he was on standby on the material day and did not receive any complaint from his supervisor. He urged that it was the same position taken by the respondents in their pleadings. Therefore, in counsel's view, the learned Judge was wrong in considering the extraneous and/or unpleaded issue of the perceived contradiction between the timeline of the 1st respondent's shift in the duty roaster and when the 1st respondent was called upon to step in as the basis of finding that the 1strespondent was not a party to the go slow. Laying emphasis that the learned Judge should not have relied on an unpleaded issue to determine the dispute the case of **Independent *Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR** was cited.

23. Counsel went on to argue that it was not in dispute that the 5th respondent was at the material time on a dormant shift. Nevertheless, according to counsel, the learned Judge failed to appreciate that the allegations against the said respondent was not in relation to performance but incitement and engaging in an altercation with his senior. As such, the trial court's conclusion that he could not have been on a go slow since he was not on active duty was a misconception of the facts before the court. Ms. Wetende argued that the learned Judge failed to address his mind on the aforementioned allegations as well as the evidence tendered by the 1st appellant which proved the allegations.

24. Moving on counsel asserted that the decision to redeploy the 1st and 5th respondents was made on 30th January, 2012 while the trial court's orders for their reinstatement as gantry operators was made on 19th February, 2016, 4 years after their redeployment. Making reference to ***Section 12(3)(vii)*** of the ***Employment and Labour Relations Court Act***, it was counsel's position that the learned Judge lacked jurisdiction to direct the reinstatement in question. In that regard, reference was made to this Court's decision in ***Sotik Highlands Tea Estates Limited vs. Kenya Plantation and Agricultural Workers Union* [2017] eKLR**. Furthermore, counsel was convinced that in light of what had transpired and loss of trust in the respondents by the 1st appellant, reinstatement was not an appropriate remedy.

25. On the second ground, Ms. Wetende questioned the basis upon which the damages for unfair labour practices were issued. To begin with she stated that the trial court applied a limited, simplistic and academic interpretation of the 1st appellant's disciplinary handbook without addressing its mind on the prevailing circumstances. We understood the argument being advanced to be that the trial court's finding to the effect that 1st appellant should have followed the procedure laid down in the handbook for issuance of a warning to the letter was erroneous.

26. In addition, the appellants contended the learned Judge had misunderstood the objective of the warning letters issued to the respondents. Elaborating further, it was suggested that the warning letters were not issued as a punishment as contemplated in clause K.9 of the disciplinary handbook. Rather the said letters brought to the respondents' attention the complaint that they had refused to meet the prescribed performance targets and that the said conduct amounted to economic sabotage. As such, the warning letters in question were distinct from a warning issued at the end of a disciplinary process.

27. Nonetheless, the appellants' position was that not all of the employer's rights are set out in a disciplinary policy thus an employer is entitled to resort to any lawful action to remedy a breach by an employee. In other words, they intimated that a disciplinary policy or handbook was merely a guideline and does not constitute hard and fast rules to be followed by an employer unless expressly incorporated in a contract of employment. Reinforcing this position, we were referred to the persuasive decision of the Employment and Labour Relations Court (ELRC) in ***Republic vs.* Kenya Airports Authority & another Exparte Moses Echwa [2015] eKLR**.

28. According to the appellants, the procedure adopted by the 1st appellant was above board from the time of issuance of the warning letters up to the conditions attached to the lifting of their respective interdictions.

29. Disagreeing with the quantum of damages awarded, Ms. Wetende urged that the learned Judge did not take into account any of the guiding principles for determining an appropriate remedy as set out under ***Section 49*** of the ***Employment Act***. Additionally, there was no indication of how the learned Judge assessed the damages in question. According to the appellants, the learned Judge had failed to take into account that the go slow had occasioned loss to the 1st appellant and that the 2nd, 3rd and 4th respondents had participated in the strike. The

learned Judge was also criticized for awarding equal sums of damages to each of the respondents.

30. As far as Ms. Wetende was concerned, the respondents did not establish that they were entitled to reimbursement of the amounts surcharged and more importantly, the issue of the said refund had not been pleaded. It was the appellants' contention that the learned Judge ignored the glaring evidence adduced by the 1st appellant that it had lost revenue as a result of the go slow.

31. On the last ground the appellants contended that the learned Judge failed to exercise his discretion properly by departing, without any legal basis, from the general principle that costs should be awarded to a successful litigant. For instance, in spite of the learned Judge's finding that the 2nd appellant was wrongly sued he failed to award costs to the said appellant. It was also the 1st appellant's case that it had successfully defended a substantial portion of the respondents' claim hence the learned Judge was wrong to award costs to the respondents only without giving any reasonable explanation. To that extent, reference was made to the Supreme Court's decision in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR.**

32. Opposing the cross appeal, Ms. Wetende urged that the impugned judgment to the extent that it declined to grant the special damages sought by the respondents was sound and beyond reproach.

33. In response, Mr. Aboubakar argued that the appeal lacks merit because the appellants had not demonstrated that the findings by the learned Judge were not supported by the evidence on record or the law. More specifically, Mr. Aboubakar contended that the respondents claim was based on unfair disciplinary action and at the end of the trial it was evident that there was no legal basis to support the disciplinary action taken by the 1st appellant. Consequently, the evidence as a whole supported the learned Judge's finding that the 1st appellant's actions amounted to unfair labour practices.

34. However, addressing us on the cross appeal, Mr. Aboubakar faulted the learned Judge for not holding that the respondents' interdictions were illegal and unwarranted. More so, in light of the fact that the 1st appellant had not followed its own disciplinary procedure as delineated in the disciplinary handbook. He also asserted that the learned Judge having found that the 1st appellant had not proved that 2nd, 3rd and 4th respondents had taken part in the go slow should have similarly ordered their reinstatement to the positions they held as gantry operators.

35. As for special damages, the respondents contend that the issue of remoteness of damages does not arise in this case. Of importance was that they had proved to the required standard the loss they had suffered as a consequence of the illegal interdiction and the subsequent conditions attached to the lifting of the interdiction. In support of that proposition reliance was placed on this Court's decisions in ***Absons Motors Limited vs. Dominic B. Onyango Konditi*** **[2018] eKLR** and **Cotecna Inspection S.A vs. Hems Group Trading Company Limited [2007] eKLR**.

36. We have considered the record, submissions by counsel and the law. This being a first appeal, we are at liberty to delve into matters of fact as well as law and make our own conclusions. Nonetheless, we are cognizant that as an appellate Court we should ordinarily not differ lightly with the findings of fact by the trial Judge. More so, because unlike the trial Judge we did not have the benefit of seeing the witnesses as they testified. See ***Selle vs. Associated Motor Boat Company Ltd*****. [1968] EA 12**.

37. It goes without saying that whenever an issue of unfair termination arises a court ought to look at the validity and justifiability of the reasons for termination and also interrogate procedural fairness. See ***Section 45*** of the ***Employment Act*** and this Court's decision in ***Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers*** **[2015] eKLR**. Similarly, were there is an allegation of unfair disciplinary sanction/penalty other than termination, such as in this case, a court is equally enjoined to interrogate the substantive and procedural fairness. See this Court's decision in ***Lake Victoria North*** **Water Services Board & another vs. Alfred Odongo Amombo [2018] eKLR.**

38. At the heart of this appeal is the determination of who between the parties, if any, met their respective burden of proof as espoused under ***Section 47(5)*** of the ***Employment Act***. Did the respondents demonstrate that the disciplinary process and sanctions issued thereunder were unfair or did the 1st appellant justify the reason(s) for the disciplinary sanctions in issue?

39. Beginning with the question of procedural fairness, was the procedure adopted by the 1st appellant fair? The answer lies with the rules and/or requirements guiding the 1st appellant's internal disciplinary process. Ideally, a contract of service should specify the disciplinary rules applicable to the employee or at least refer him/her to document containing such rules. See ***Section 12(1)(a)*** of the ***Employment Act***. However, where there is no express provision of such rules the statutory minimum procedure as prescribed under ***Section 41*** of the ***Employment Act*** would be applicable. Be that as it may, it is clear from the record that the 1st appellant's disciplinary rules as pertains to the matter herein are contained in its disciplinary handbook, 2008.

40. The rationale of setting out the disciplinary rules as well as sanctions applicable to an employee boils down to the fact that an employer/employee relationship is contractual in nature. Therefore, anything that may alter or affect an employee's rights under the said contract should also be set out in the contract. Otherwise, an employee may label a disciplinary procedure or sanction not contained in the contract as a breach of the said contract. This much was appreciated in ***Halsbury's Laws of England Volume 40 (2014)*** wherein the author expressed at paragraph 699

> **"… most serious forms of disciplining are capable of affecting an employee's normal rights and expectations under the contract of employment, and, therefore, the employer needs contractual authority in order to impose any such measure lawfully."**

41. Further, contrary to the 1st appellant's submissions where a disciplinary procedure is contractually agreed upon by the employer and employee strict adherence to the same is expected. In that regard, we agree and adopt the sentiments of Radido, J. in **Kenya Plantation &**

Agricultural Workers Union vs. Finlays Horticulture Kenya Ltd. [2015] eKLR:

> **"Where there is contractually agreed disciplinary procedure, an employer is bound to comply with those procedures. A failure by an employer to observe its own disciplinary procedures may amount to repudiation of contract…"**

42. Having perused the excerpts of the disciplinary handbook on record, we note that there is no provision for issuance of warning letters at the onset as the 1st appellant did prior to a hearing and determination the of charges against an employee. In point of fact, issuance of a written warning is set out under clause K.9 as a form of punishment meted after the conclusion of a disciplinary hearing. The explanation given on behalf of the 1st appellant that the warning letters issued to the 1st – 4th respondents were not warnings per see holds no water. A reading of the said letters which we set out in the preceding paragraphs of this judgment leaves no doubt that they were warnings within the terms of clause K. 9 of the disciplinary handbook. Accordingly, we agree with the learned Judge that the said warning were unfair.

43. We also note that the procedure adopted by the 1st appellant seemed to be a hybrid of procedures prescribed for offences not warranting dismissal and those warranting dismissal under the disciplinary handbook. This state of affairs explains why Irene, the Senior Human Resource Officer was unable to explicitly state which procedure was adopted by the 1st appellant. Better still, perhaps this is why the appellants purported to argue that an employer is not bound to strictly follow its internal disciplinary procedures.

44. There is also the issue of the nature of charges leveled against the respondents which cannot escape our minds. From the warning letters the 1st - 4th respondents were alleged to have economically sabotaged the 1st appellant by not meeting the laid down performance targets. However, a look at the letters lifting their interdictions suggests that there were other additional charges, that is, participation in an illegal strike and membership of an illegal group. Equally, the charges against the 5th respondent and to which he gave a written explanation were with respect to incitement and insubordination. Yet his letter of interdiction had additional charges of being member of an illegal group and poor performance. We find that the foregoing gives credence to the respondents' contention that the charges against them kept mutating in form. Therefore, did the respondents know the nature and extent of the charges against them at the time of the hearing and/or were they given an opportunity to respond to the same?

45. Due process which entails the right to a fair hearing is a fundamental aspect of the rule of law. This Court while discussing the scope of the right to a fair hearing in ***County Assembly of Kisumu & 2 others vs.* Kisumu County Assembly Service Board & 6 others [2015] eKLR** expressed itself as follows:

> **"The irreducible minimum of a fair hearing is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations … In the epigram of the indomitable Lord Denning in Kanda vs. Government of the Federation of Malaya [1962] AC 322:**
>
> **"If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.""** *[Emphasis added]*

46. Taking into account the foregoing we do not think that the respondents were granted a fair hearing. We think we have said enough to demonstrate that the procedure adopted by the 1st appellant was flawed.

47. Prior to the enactment of the ***Employment Act, 2007*** an employer could dismiss an employee for a bad reason or no reason at all, provided notice was issued. That has changed and by virtue of ***Section 45*** of the ***Employment Act*** an employer is now under an obligation to prove the existence of valid reasons for dismissal even if he gives notice. How does an employer, the 1st appellant in this case, establish that the reason(s) for the disciplinary action taken against the respondents were valid?

48. Selwyn in **Selwyn's Law of Employment, 6th Edition, paragraph 7.23** suggests a threefold test:

> **i. the employer must establish that he genuinely did believe the employee is guilty of the misconduct;**
>
> **ii. that belief must have been formed on reasonable grounds; and**
>
> **iii. the employer must have investigated the matter reasonably.**

See **Halsbury's Laws of England Volume 41 (2014) at paragraph 776**.

Putting it differently, the question is not whether or not the trial court or this Court is satisfied that the respondents were guilty but whether it is satisfied that the 1st appellant had reasonable grounds for believing that the respondents had committed the offences and had acted reasonably in disciplining them in the manner it did. See ***Section 43 (2)*** of the ***Employment Act***.

49. Did the 1st appellant prove that the reasons for issuance of the disciplinary sanctions against the respondents were valid? As far as we can discern from the record the matter that trigged the disciplinary process and sanctions was the perceived go slow which occurred on 29th March, 2011 and 30th March, 2011. Did the go slow take place? We like the learned Judge are satisfied that there was a go slow and our

position is fortified by the performance reports produced by the 1st appellants which were not controverted by the respondents. The next issue that falls for consideration is whether there existed reasonable grounds to warrant the 1st appellant to believe as it did that the respondents participated in the strike.

50. It was the 1st respondent's evidence that at the material time on 29th and 30th March, 2011he was on standby a fact which was not denied by the 1st appellant's witnesses. Both the 1st respondent and Reginald went to great length to explain what a standby shift meant. They both stated that it meant that an employee who was on standby was not allocated a crane but was required to be present at the terminal in the event he would be required to take over from another operator who was on active duty. So could he have been deemed to have taken part in the go slow?

51. According to Reginald, he had called upon the 1st respondent on 30th March, 2011 at around midday to take over from another gantry operator who he considered was slow but he declined to do so. On the other hand, the 1st respondent maintained that he was at material times on standby for the third shift which ran from 2300hrs to 0700 hours. In our view and as the learned Judge correctly appreciated, whether this allegation was established called for examination of duty roaster as against the Reginald's assertion that the 1st respondent was called to step in. The duty roaster which was produced by Reginald indicated that the 1st respondent was on standby for the third shift. If that was the case, was he at the terminal and/or was he called in to step in outside his shift hours?

52. In as much, as Reginald reiterated that an employee who was on standby was required to be present at the terminal more is required to establish that the 1st respondent was present as early as midday before his shift. Further, without anything more to support the contention that Reginald had called upon the 1st respondent to step in the same remained Reginald's word against the 1st respondent's. Perhaps, the proceedings relating to the disciplinary hearing would have shed more light on the issue. Nevertheless, the same was not produced. It is also worth noting that the letter lifting his interdiction did not indicate the disciplinary committee's finding on that aspect. As it stood there were no reasonable grounds to warrant the 1st appellant's belief that the 1st respondent was involved in the strike

53. As for the 2nd, 3rd and 4th respondents, apart from the 1st appellant initially misstating the particulars of the cranes they were each allocated at the material time it was not in dispute that they were in active duty. It follows therefore that bearing in mind that there was a go slow it was not unreasonable for the 1st appellant to believe that the said respondents took part in the same.

54. With respect to the 5th respondent he faced two charges, that is, incitement and insubordination. The basis of the 1st respondent's conviction that the 5th respondent had incited the go slow on 30th March, 2011 was his presence at the terminal on the said date. If we understood the gist of the 1st appellant's case the 5th respondent was not supposed to be on duty since he was on leave hence his presence could only have meant he was there to incite the other gantry operators. There was no evidence to support such incitement and what remained was mere suspicion. In the circumstances we agree with the learned Judge that suspicion was not enough to give rise to the assumption that he was inciting his counterparts.

55. On the other charge of insubordination, the particulars were that, at least as per Reginald, on the 30th March, 2011 the 5th respondent got into an altercation with a shift in charge, one Francis Wanguba and he manhandled him in the process. In that respect, the 5th respondent testified that during the disciplinary hearing the said Francis Wanguba denied the occurrence of any altercation or being manhandled. Once again, without the evidence of the said in charge or the benefit of the proceedings of the disciplinary hearing, what is before us is Reginald's word against the 5th respondent. As a result, we find that the 1st appellant had not established any reasonable basis for finding that the 5th respondent was guilty of insubordination.

56. Consequently, we find that the evidence as a whole established that the disciplinary process invoked by the 1st appellant lacked procedural and substantive fairness.

57. Therefore, in the circumstances were the remedies issued by the learned Judge proper? The broad principles which a court should take into account in determining an appropriate remedy to issue where it finds, as in this case, that the disciplinary process and/or sanctions issued were unfair are succinctly set out under ***Section 49*** of the ***Employment Act***.

58. The learned Judge having found that there was no reasonable basis for the 1st appellant finding the 1st and 5th respondents culpable of the allegations against them directed their reinstatement to their former positions as gantry operators. Here it would seem that the 1st appellant in objecting to the said order equated the same to an order of reinstatement. In our considered view reinstatement is distinct from the order of reinstatement issued by the learned Judge. Reinstatement envisions a situation where an employee is unfairly/wrongfully terminated. In this case the 1st and 5th respondents were not terminated rather they were redeployed/transferred to other departments within the 1st appellant's organization.

59. Be that as it may, notwithstanding the fact that the sanctions meted against the 1st and 5th respondents were unwarranted, the trial court was still under an obligation to consider whether an order of reinstatement would be appropriate in the circumstances. In ***Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 others*** **[2014] eKLR** Murgor, J.A while discussing the practicability of directing reinstatement in any given case quoted with approval the case of **New Zealand Educational Institute vs Board of Trustees of Auckland Normal Intermediate School [1994] 2 ernz 414 (ca)**, wherein the New Zealand Court of Appeal stated,

> **"Whether…it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is no uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."** *[Emphasis added]*

In our view, the above principles apply in equal measure where the remedy sought is reinstatement to a previous position as in this case.

60. Was it practical to direct reinstatement of the 1st and 5th respondents? In the circumstances, we do not think so, more so in light of the fact that since the respondents' redeployment there is evidence that the 1st appellant has undergone restructuring. This fact is confirmed by a letter dated 28th January, 2013 addressed to the 1st respondent which reads in part as follows:

> **"RE: TRANSLATION ONTO THE NEW KPA ESTABLISHMENT**
>
> **This is to inform you that following the restructuring of the Kenya Ports Authority and the subsequent review of your Department's Establishment, the Human Resource Committee of the Board at its 130*th meeting held on 22nd and 23rd March, 2012, accorded its approval for you to be translated to Assistant Administrative Officer, Grade HM4*…**
>
> **Your salary and incremental date remains the same."**

It follows therefore that by the time the learned Judge directed reinstatement of the said respondents on 19th February, 2016, the 1st appellant had already been restructured. Accordingly, the learned Judge erred in issuing the said order without considering the implication of the aforementioned restructuring and whether reinstatement would be feasible.

61. What about the question of whether the learned Judge should have directed the reinstatement of the 2nd -4th respondents? This issue was not a ground of appeal either in the appellants' appeal or the respondents' cross appeal. It was raised in the respondents' submissions without leave of the Court thus pursuant to ***Rule 104*** of the ***Court of Appeal Rules*** we are not at liberty to express our views on the same. See also this Court's decision in ***Republic vs. Tribunal of Inquiry to*** **Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR**.

62. It cannot be gainsaid that the essence of an award of damages is compensatory in nature to the aggrieved party. This much was appreciated in **Albacruz (Cargo Owners) vs. Albazero (Owners), The Albazero [1976] 3 All ER 129** by Lord Diplock who aptly set out the object of an award of damages as follows:-

> **"As in tort, 'the general rule in English law today as to the measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so."**

63. Equally, Rika, J. in ***D.K Njagi Marete -vs- Teachers Service Commission*- Industrial Cause No. 379 of 2009** (unreported), observed that:

> **"This Court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way."**

64. Was the award of Kshs.800,000 as damages for unfair labour practices in conformity with the above principles? The answer is a resounding no. We say so because the basis of the said assessment is unknown. The learned Judge did not give an explanation or reason(s) of how he came up with the said figure. See this Court's decision in ***Samsung Electronics East Africa Ltd vs. K M*** **[2017] eKLR.** As such, we are inclined to interfere with the said award in line with the often-cited case of ***Kemfro Africa Ltd. vs. Lubia & Another (No.2)*** **[1987] KLR 30** where Kneller, J.A in his own words stated:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court Of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."**

65. In our view, taking into account the parameters within which an award of damages may be granted under ***Section 49*** of the ***Employment Act***, we find that with respect to the 1st and 5th respondents an award of 4 months gross salary at the time the disciplinary sanctions were issued, that is, on 30th January, 2012 would be reasonable. As for the 2nd -4th respondents having expressed that there was reasonable grounds for the 1st appellant to believe that they had taken part in the go slow one month gross salary would be adequate due to the procedural unfairness.

66. On the issue of refund of the surcharged amount, this was in the nature of special damages which must not only be specifically pleaded but also proved. It is common ground that the respondents were surcharged as per the terms of the conditions lifting their interdictions. Was there any basis for the surcharge? The answer is in the negative. This is because in as much as the 1st appellant's claim to the same was anchored on alleged financial loss it suffered as a result of the go slow there was no evidence with regard to the extent of the said loss. Neither Reginald nor Irene could quantify or tender evidence of the loss alleged to have occurred.

67. Moreover, clause K.11(c) of the disciplinary handbook, explicitly provides that:

> **".. Surcharges under this Handbook shall be made without other disciplinary action being taken against the employee."**

Consequently, surcharging the respondents in addition to the other sanctions set as conditions of lifting their interdictions was contrary to the 1st appellant's own internal disciplinary procedure. Therefore, we cannot fault the learned Judge for directing the 1st appellant to refund the amount surcharged.

68. The other special damages sought by the respondents included bonuses and salaries they deemed they should have earned save for the disciplinary action taken against them. Specifically, they sought allowances they would have earned as gantry operators. The only problem with that is that they all testified that the allowances in question were only payable to gantry operators when they were on duty. It is not in dispute that since their interdiction they have never worked as gantry operators thus what would be the basis of granting such allowances? There was also an alleged increment of Kshs.21,000 and an allowance they termed as uniform detergent allowance which again were not established to be an entitlement. We find that the learned Judge was right in declining to grant the said damages. As Lord Goddard C.J. in **Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177** put it:

> **"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it."**

69. Last but not least, on costs we draw guidance from the Supreme Court in **Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others (supra)** which while acknowledging that costs were within the discretion of the court held:

> **"It emerges that the award of costs would normally be guided by the principle that "costs follow the event… <u>However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice</u>. The claims of the public interest *will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation." [Emphasis added]***

Bearing in mind that on one hand, the respondents partially succeeded in their claim and on the other, the appellants also partially succeeded in their defence, the order that commended itself was that each party should bear their own costs.

70. The upshot of the foregoing is that the appeal herein substantially succeeds to the extent herein above mentioned. For avoidance of doubt, we set aside the impugned judgment to the following extent:

> **a. We hereby set aside the order directing the reinstatement of the 1*st and 5th respondents to their previous positions as gantry operators.***
>
> **b. We hereby set aside the award of damages for unlawful labour practices of Kshs.800,000 to each respondent and substitute the same with an award equivalent to 4 months gross salary in favour of the 1*st and 5th respondents and I month gross salary for the 2nd, 3rd and 4th respondents. The applicable gross salary shall be at the time of issuance of disciplinary sanctions, that is 30th January, 2012.***
>
> **c. We hereby set aside the order of costs and substitute the same with an order that each party should bear its own costs at the ELRC.**

We find that the cross appeal lacks merit and is hereby dismissed. Bearing in mind that this is an employment dispute between parties who are still subject to an employer/employee relationship, we direct that each party bears its own costs in this appeal and cross appeal.

Dated and delivered at Malindi this 11th day of July, 2019.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

W. KARANJA

…….……..

JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR