IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 85 OF 2017

BETWEEN

DANIEL OUMA OKUKU.....APPELLANT

AND

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION.....1ST RESPONDENT

GLADYS MUMBUA

DAVID WANYONYI

FAITH KARUITHA

ROSEMARY KAMAU

RUTH WANJIRU

PATRICK AKALI

BERNARD EMBOSA

(All sued on their own behalf and as

executive committee members,

KENYA PLANTATION & AGRICULTURAL

WORKERS UNION THIKA BRANCH.....2ND RESPONDENT

(Being an appeal against the judgment and decree of the Employment and Labour Relations

***Court of Kenya at Nairobi (Mbaru, J.) dated 16th December, 2015* in ELRC Cause No. 1103 of 2012)**

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JUDGMENT OF THE COURT

The central issue in this appeal is whether the termination of employment of the appellant by the respondent was procedural and lawful.

By a statement of claim filed at the the Industrial Court of Kenya (now renamed Employment and Labour Relations Court) the appellant **Daniel Ouma Okuku** sued the respondents **Kenya Plantation and Agricultrual Workers Union** and its officers. He stated that he was elected as Branch Secretary of the 1st respondent located in Thika on 28th January, 2006 for a five year period and that he served in that

position and was re-elected for another 5 year term. That position is vindicated by a letter dated 20th February, 2006 which is a letter of appointment signed by the General Secretary of the 1st respondent confirming that the appellant was elected to the said position of Branch Secretary, Thika and the letter informs the appellant that he would serve on full time basis with effect from 1st February, 2006 on a salary. It was further stated in the statement of claim that the appellant had served the respondents diligently but that in December 2011 he was informed by the respondents that he had been suspended from office. A letter of suspension contained allegations against him but according to him he had not been informed of any allegations against him before that letter. According to the appellant he asked for an appeal against the decision for suspension but instead his services were terminated and he was paid terminal dues which he accepted because he did not have a choice. For all that he claimed in the suit money for termination notice, gratuity pay, unpaid salary, unpaid leave, house allowance and damages for unlawful suspension.

The claim was denied by the respondents in a response where it was alleged that the appellant had been involved in some improprieties and fraud leading to his termination from office. It was also stated that the appellant had received his full terminal dues upon termination of employment and that he was not entitled to the prayers he sought.

Hearing took place before **Mbaru, J**, who took evidence and upon consideration dismissed the appellant's claim. That is what provoked this appeal.

In the Memorandum of Appeal filed on behalf of the appellant by his lawyers **Milimo, Muthomi & Company Advocates** 12 grounds of appeal are taken which we shall paraphrase as follows: that the trial judge erred in refusing an application for amendment; that the judge erred in holding that removal of the appellant from the position of Secretary, Thika branch by the 1st respondent was not the core issue for adjudication; that the judge was wrong in holding that the appellant's acceptance of terminal dues and signing of payment voucher constituted termination of employment; that the judge should have held that the respondents breached the law in the way they terminated the appellant's services; that the judge had erred in shifting the burden of proof and further erred in holding that the appellant had compromised his own case by accepting terminal benefits; and that the judge should have held in favour of the appellant.

When the appeal came up for hearing before us **Mr. Benson Milimo** learned counsel for the appellant relied on written submissions that he had filed. In a brief highlight of those submissions Mr. Milimo submitted that the appellant's tenure was for five years and he could only be removed at a general meeting where members would vote by secret ballot. He referred to the constitution of the 1st respondent where a procedure is set out on removal or suspension of elected members. Counsel wondered why a committee meeting was convened on a Sunday which is not ordinarily a working day in Kenya. Further, that the appellant had not been served with any notice before being suspended. According to counsel, termination was contrary to provisions of **sections 41 and 45** of the **Employment Act** and also contavenes the 1st respondent's constitution. Counsel urged that we allow the appeal.

Mrs. Judith Guserwa, learned counsel for the respondents in opposing the appeal relied on written submissions that she had filed on behalf of the respondents. Counsel submitted that the judge was right in refusing the application for amendment because it was made late. Counsel referred to the document at page 66 of the record where the appellant signed off confirming receipt of final terminal benefits from the respondents. According to counsel, the appellant had been summoned to attend a regular meeting but he had refused to attend that meeting leading to his suspension and later termination of services. For all that we were asked to dismiss the appeal.

In a brief reply, Mr. Milimo submitted that the trial judge did not make a determination on the application for amendment. According to counsel, the discharge voucher where the appellant confirmed receipt of terminal dues was made post termination and it was subject to being set aside.

This is a first appeal and it is our duty to re-examine the record and make our own conclusions and may disagree with the trial judge on findings of fact if they are not backed by evidence or where conclusions made are perverse – **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123**:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect.***
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> ***In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

The facts of the case are clear and straightforward. As we have shown the appellant was elected to a position to serve the 1st respondent and that was confirmed in a letter which we have spoken to. There were allegations made against the appellant as shown in various correspondence signed by shop stewards alleging that the appellant was not calling meetings which it was his duty to do and also that he was receiving money from members of the 1st respondent over and above what the constitution of the 1st respondent required; that he was involved in financial impropriety in various named situations. There is evidence on record that a meeting was convened by the 1st respondent's Thika branch on 4th December, 2011 where the appellant's conduct was discussed and considered. It is noted in the minutes that the appellant was absent from the meeting without apology. It was resolved after discussions that the appellant's services as branch secretary be suspended and another officer was appointed to act in his place. However, those minutes are not signed. There is evidence on record that the appellant's terminal benefits were calculated at **Shs.63,375** which he received and signed for in addition to **Shs.100,000** where it was testified on behalf of the respondents that this latter sum was paid to the appellant *ex gratia* to enable him relocate from Thika to his home in Busia.

What we need to determine in this appeal is whether there was procedural fairness in the way the appellant's services were terminated. We have referred to the unsigned minutes of 4th December, 2011 but the record does not contain a suspension letter or the letter of termination of services.

The registered constitution and rules of the 1st respondent are on record. According to rule 7 of the same the executive committee has power to discipline any branch official who acts contrary to the laid down procedures of the 1st respondent. Such disciplinary action includes dismissal where the committee finds it necessary to dismiss the officer.

The executive committee may by rule 15 of the rules suspend, dismiss or transfer members of any branch who fail to comply with the constitution and the rules of the union. The rules further require that suspension or expulsion of a member would only take place after the member had been given an opportunity to personally state his case at an executive committee meeting of which he has received not less than seven days notice in writing. The notice must include details of the allegations with which a member is charged. Such member if dissatisfied with the decision of the executive committee is entitled to lodge an appeal:

> ***"....in the manner provided have the right to restate his case before the Quinquennial Conference when the matters shall be considered.***
>
> ***A member attending a meeting of the Executive Committee or Quinquennial Conference in the terms of subsection (a) and (b) of this rule shall be entitled to call witnesses in his support of his case.***
>
> ***Any decision taken by the Executive Committee to suspend or expel a member shall, when an appeal has been lodged in the manner provided be subject to ratification or otherwise of the Quinquennial Conference ….....”***

The trial judge analysed the evidence presented and reached the conclusion that the appellant had not proved his case. She held, correctly, we think, that in employment relations the essence of a suspension of an employee is to allow an employer time to investigate a matter in the absence of the employee. At paragraph 37 of the judgment the judge found that the appellant had lodged an appeal and that he had accepted his terminal benefits and after receipt of the terminal benefits the contract of employment ended.

We have carefully gone through the record and have not seen any evidence of any appeal process having been undertaken in the matter before the trial judge. As we have shown there are minutes of a meeting of the branch executive committee held in Thika on 4th December, 2011 but the same are not signed. There is no record of any other proceedings having been undertaken by the respondents in respect of the employment contract of the appellant save the documents showing that he received terminal benefits from the respondents.

Section 41 of the **Employment Act, 2007** requires that an employee be notified of allegations made against him and be heard before termination can issue on grounds of misconduct. Such employee is to be informed in a language that he understands; the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice to be present during that explanation. The employer must hear and consider representations which the employee may have.

It is the duty of the employer under **section 43** of the said Act to prove the reason or reasons for termination were fair and where the employer fails to do so the termination shall be deemed to have been unfair. Unfair termination is disallowed by **section 45** of the **Act**.

Various remedies are set out in **section 49** of the **Act** for wrongful or unfair termination.

The record in this appeal shows that there were allegations made against the appellant concerning his employment where he did not call meetings as required and he collected union dues way above what the constitution of the 1st respondent mandated him to do. Those allegations were not seriously contested and on the facts before the trial judge the 1st respondent was entitled to terminate the services of the appellant. What is of concern, however, is how that was done. Apart from the unsigned minutes where the appellant was suspended from office there is no other record to show how the 1st respondent proceeded to deal with the issue of termination. There is no record of any notice being served on the appellant in accordance with the Employment Act or even in accordance with the constitution of the 1st respondent, provisions which we have visited in this judgment. Failure to serve a notice on the appellant with allegations made against him and failure to give him an opportunity to respond to those allegations and the fact that there is no suspension or termination letter on record flouted the rights of the appellant and amounted to procedural unfairness against him. The trial judge erred in finding that there was an appeal process accorded to the appellant when there is no record at all of such a process having taken place in this appeal at all.

On the complaint that the trial judge did not allow an application for amendment the record shows that on 27th February, 2013 counsel for the appellant is recorded as stating that before closing the appellant's case he required leave to amend prayer 2(1) in the Statement of Claim to add the words "and or removal". That application was resisted by counsel for the respondents on grounds that the application was belated, and should not be allowed. The trial judge recorded:

> ***"Court: to rule on the application to amend as part of the court decision."***

At paragraph 28 of the judgment the trial judge found that amendments of pleadings should not be allowed to the prejudice of the adverse party. She found:

> ***"An application to amend pleadings should be made at the earliest opportunity at the right stage of the proceedings but delay defeats such an application ……..”***

Order 8 Civil Procedure Rules donates wide discretionary power to the trial court to allow amendment of pleadings for the purpose of determining the real questions in controversy between the parties or to correct any defect or error in the proceedings. The court may do so either on its own motion or on application by a party.

In the circumstances of the case before the trial judge an application to amend a prayer in the statement of claim was made as the appellant

was closing his case. The appellant was entitled to make that application and the judge was wrong, firstly, by not making a ruling on that issue and pending it to be part of the judgment and, secondly, by refusing the application for amendment. Under the said **Order 8 Civil Procedure Rules** parties can amend their pleadings with the leave of the court at any time before judgment. As stated by the single judge in the case of **Suleiman v Karasha [1989] eKLR** it did not matter whether the hearing had been concluded – the court had to consider such an application for leave to amend a pleading and give effect to such an application as it deemed fit. The court has wide discretion to amend pleadings at any stage of the proceedings so as to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.

Having said that and in view of the position we have taken in this appeal nothing stands or falls on that finding of the judge refusing the application for amendment.

Considering the whole record the appellant's procedural rights were flouted in the way the termination of employment was done. No formal or any notice was served on him with allegations levelled against him; no formal charge was laid requiring him to answer; no time to answer was given and there is no record that he was allowed to make any representations or be accompanied by another employee at such meetings. There is no record that an appeal process was allowed to take place at all. This appeal succeeds to that extent only.

We find that the appellant is entitled to an equivalent of 3 months salary being compensation for unfair termination of employment. This is the order that we make in this appeal. The appellant will also have costs of the appeal and costs below.

Dated and delivered at Nairobi this 8th day of November, 2019.

M.K. KOOME

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JUDGE OF APPEAL

F. **SICHALE**

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JUDGE OF APPEAL

S. **ole KANTAI**

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR