REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR JJA)

CIVIL APPEAL NO. 145 OF 2013

BETWEEN

PHILIP AMWAYI WOKINDA.....APPELLANT

VERSUS

RIFT VALLEY RAILWAYS LIMITED.....RESPONDENT

(Appeal from the Award/Judgment and Decree of the Industrial Court of Kenya at Nairobi (D.K. Njagi Marete, J.) Dated 15th March, 2013

in

Cause No. 1177 of 2012)

****

JUDGMENT OF THE COURT

This is an appeal arising from the Judgment of the Industrial Court as it was then known, now the Employment and Labour Relations Court – (ELRC) **D.K. Njagi Marete, J.** dated the 15th day of March, 2013.

The background to the appeal is that, the appellant joined the services of the respondent's predecessor, the Kenya Railways Corporation, effective 14th January, 1980, and worked in various capacities for a period of twenty years. He transferred his services to the respondent, while at the rank of a station master, effective 1st November, 2006. The terms of engagement with his new employer are contained in a letter dated 25th October, 20006. The transfer of services was acknowledged by the respondent vide a letter dated 31st October, 2006. He was subsequently confirmed in his employment with the respondent effective 30th April, 2007, vide a letter dated 27th October, 2008, and variously deployed, inclusive of a stint at Bungoma as a station master. He was thereafter transferred to Kisumu in the same capacity, vide a letter dated the 16th March, 2009.

On 11th March, 2011, he applied to the respondent for Grade adjustment which application was acknowledged, vide a letter dated the 19th day of April, 2011 but was never actioned.

On 7th October, 2011, he was suspended from duty; but which suspension was subsequently lifted vide a letter dated the 27th day of October, 2011. The lifting was short-lived, as on the same date the respondent addressed a letter to him asking him to show cause as to why he should not be disciplined for gross misconduct involving a consignment of maize allegedly irregularly received and stored at the respondent's Kisumu premises, resulting in the loss of revenue to the respondent. The appellant unsuccessfully countered those accusations. He thereafter faced Disciplinary proceedings regarding the same allegations conducted against him on the 9th December, 2011 at the conclusion of which he was dismissed from the respondent's employment vide the letter dated 2nd April, 2012. He appealed against that dismissal vide an undated letter acknowledged by the respondent vide its letter dated the 27th April, 2012.The appeal was however, never heard, prompting the filing of the statement of claim dated the 11th July, 2012, challenging the dismissal on the grounds that it was wrongful, unlawful, and unfair.

The claim was resisted by the respondent's response dated the 14th August, 2012, in which the respondent admitted that the appellant's appeal was never heard; that the letter of appointment dated the 25th day of October, 2006, and the Human Resource Policies & Procedures

Manual obligated the appellant to conduct himself with integrity in the discharge of his duties; that the same document bestowed upon the respondent the power to summarily dismiss the appellant for gross misconduct; that the respondent was found guilty of gross misconduct by the disciplinary committee; that his dismissal from the respondent's employment was therefore regular, lawful, fair and justified.

At the conclusion of the trial, the learned Judge after assessing the record concluded that the appellant's conduct in the circumstances amounted to gross misconduct and on that account dismissed his claim with costs to the respondent.

The appellant was aggrieved and preferred this appeal, raising eight (8) grounds subsequently compressed into two in his written submissions. It is the appellant's complaint that:-

> ***1. The learned Judge arrived at a wrong decision by misinterpreting the law and disregarding the appellant's evidence which was not challenged.***
>
> ***2. The trial court did not only misdirect itself in law, but also misapprehended the facts and took into account factors that it ought not to have taken into account, such as the testimony of the respondents sole witness whose evidence was based on mere hearsay.***

Directions were given by the Deputy Registrar of the Court on the 28th February, 2017, in the absence of the respondent's advocate that the appeal be disposed of by way of written submissions. The Deputy Registrar also gave directions that the respondents' advocate be served with those directions. The appeal came up for hearing on the 17th day of October, 2017 but was adjourned on account of non attendance by learned counsel for the respective parties. Directions were given by the court that it be relisted for hearing at the Registry on

any convenient date with directions that the respective parties be served with hearing notices for the subsequent hearing date. It was accordingly fixed for hearing on the 1st November, 2017. When called out for hearing on the 1st day of November, 2017, only learned counsel **Mr. Dismas Wambola** and leading learned counsel **Mr. Antony Mudanyi** for the appellant were in attendance. The Court being satisfied that the respondent had due notice of the rescheduled hearing date allowed the appellant to prosecute the appeal.

Mr. Wombola adopted his written submissions. In highlighting the same, he submitted that the learned Judge misapprehended the law as he failed to appreciate that the respondent had not discharged its obligation under **section 43(1)** of the Act, which obligated it not only to specify, but also to prove the reason (s) advanced for the dismissal of the appellant from its employment. He also failed to appreciate the appellant's consistent uncontroverted testimony that he was away when the consignment was received by a **Mr. Omondi,** and that upon reporting back to his duties, he was prevented from ascertaining the quantity of the consignment for purposes of revenue collection.

It was also **Mr. Wambola's** argument that no reason was given by the respondent for its failure to call as a witness the parcels clerk a **Mr. Omondi** who featured prominently in the appellant's testimony as the person who received and stored the consignment to shed light on what actually transpired on the day when the consignment was received and stored; that in this regard, we should draw a negative inference that had the said **Mr. Omondi** testified then, his evidence would have been against the interests of the respondent; that the respondent neglected and or failed to defend and pursue the payment of the storage charges from the owner of the consignment in Kisumu CMCC No. 393 of 2011; that the respondent having acknowledged receipt of the appellant's appeal and also having failed to give reasons for its failure to process it, the learned Judge ought to have faulted the appellant's dismissal even on this ground alone.

This is a first appeal. Our mandate is as set out in **Rule 29(1)** of the Rules of the Court namely to re-appraise the record and draw out independent inference of fact. In **Pandya versus Republic [1957] EA 336,** at page337 **Bacon J.A** had this to say:

> ***" …. of Appeal has to bear in mind that its duty is to rehear the case and the Court The Court must reconsider the materials before the Judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration; the court comes to the conclusion that the Judgment is wrong….***

When the question arises which witness is to be believed rather than another, and that question turns on the manner and demeanor of a witness the Court of Appeal always is, and must be guided by the impression made on the Judge who saw the witness……."

We have given due consideration to the record, in the light of the sole submission by the appellant, and being conscious of our mandate as a first appellate court it is our view that two issues fall for our determination namely:-

> *1. Whether the dismissal of the appellant from the respondent's employment was wrongful.*
>
> *2. If the answer to issue number 1 is in the affirmative, then what are the appropriate remedies in the circumstances***.**

With regard to issue number 1, it is not disputed that the appellant was an employee of the respondent as at the time disciplinary proceedings resulting in his dismissal. The terms of engagement were partly contained in the appellant's letter of appointment dated 25th October, 2006. **Clause 3.2** thereof stipulated that the appellant was expected to conduct himself honestly and to the best of his ability, and also to devote the whole of his time, attention and ability in the performance of his duties with the respondent.

Clause 12.2.2 on the other hand stipulated *inter alia* that his employment misconduct under the Act. **Clause 14** thereof made provision that the appellant's employment was at all times subject to the staff Regulations contained in the Human Resource Manual and any other Policies, Procedures, Codes and Regulations of the company's Human Resource office. These policy documents included the respondents Code of conduct effective July, 2009, and the Human Resource Policies and Procedures Manual effective September, 2006.

In the show cause letter dated the same 27th October, 2011, the appellant was alleged to have violated the provisions of the Code of Conduct namely **clause 4.0(a) (iii) (c) (i), (vii) (xviii**), Traffic Accounts Manual, clause 709 & 710, Traffic book **section 2-5 No.4** and the Labour Laws of Kenya 2007. Under **clause 4.0** it is stipulated that, an employee is guilty of gross misconduct if such an employee willfully neglects to perform work which it was his/her duty to have performed, or if he/she carelessly and improperly performs any work from its nature, it was his/her duty, under his/her contract to have performed carefully and properly.

Clause (C) (i), (vii) and (**xviii)** dealt with lack of integrity or dishonesty by an employee; negligence , dishonesty or want of care of an employee resulting in serious loss, shortage, injury or any damage to staff and the company, and theft, fraud or forgery respectively.

The letter of dismissal dated the 2nd day of April, 2012 indicated clearly that the appellant was found culpable for gross misconduct in the discharge of his duties under **clause 4.0(a) (iii**) (supra) and **section 44(4) (c)** of the Employment Act, 2007. **Section 44 (4) (c)** of the Act provided as follows:-

> ***"44(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subjection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal:-***
>
> ***"(c) An employee who willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract to have performed carefully and properly."***

When confronted with the matters assessed above, the learned Judge simply summarized the pleadings, evidence and the submissions of the respective parties, drew out two issues for determination and made observations *inter alia* that:-

> ***"The claimant clearly testified that he learned of the eventuality and dealt with the matter all the way upto the 5th October, when he was stopped from further dealings on the issue. He never reported the matter to the freight agent Kisumu, despite the latter having had power to deal with this nature of Consignment. He was also party to the unprocedural release of 400 bags to the consignee without any record, accountability or process. On this mismanagement, the claimant was suspended and subsequently dismissed from the office. The respondent witness, PW1 testified that the Kisumu station and office was only receiving parcels for conveyance by train and containers not for storage and this nature of duty, if any all was for the commercial manager who had a freight clerk always available for the kind of assignment. The claimant did not report this transaction to the relevant offices and the transaction was per chance discovered by the freight clerk while undertaking other functions. In this confusion, the respondent was forced to release the consignment under a court order thereby loosing lots of revenue. This to me amounts to gross misconduct warranting summary dismissal for the claimant."***

The learned Judge then set out in extenso the provisions of **clause 12** of the respondent's Code of Conduct for employees (supra) and **section 44(4) (c**) of the Act, and then rendered himself thus:-

> ***"This was further supported by the respondents' Code of Conduct, 2009 which the claimant was party to.***
>
> ***The conduct of the claimant in the entirety of these transactions ebbs out a case of lack of integrity and is suspect. As submitted by the respondent, it is a display of dishonesty on the part of the claimant to purport to have been investigating the serious matter five days down the line without reporting the same to his superior and line management of the respondent. I therefore find the dismissal lawful and totally disregard all contrary submission by the claimant.***
>
> ***A finding of lawful dismissal of the claimant automatically disentitles him to the relief sought therefore resolving issue number 2 above. I therefore in conclusion dismiss the claim with costs to the respondent."***

It is not disputed that the genesis of the appellant's dismissal was the large consignment of maize which according to the respondent was allegedly irregularly received and stored at its Kisumu premises, but in respect of which receipt and storage, the appellant consistently pleaded innocence of any wrong doing as the consignment was allegedly received and stored by a **Mr. Omondi**, then designated as a store clerk in his absence.

The appellant however admitted that when he got back on duty, which was on a Sunday, he found the large consignment of maize improperly arranged for purposes of ascertaining both the quantity and the revenue chargeable; and that when he sought facilitation to carry out that exercise, he was advised by the said **Omondi** to wait for the presence of the owner or his agent; that the agent of the owner came on the 5th October, 2011,on which day the same **Omondi** informed the appellant that the intended exercise had been tasked to the freight clerk a **Mr. Ojok** at the direction of the Head Human Resource. Two days later, that is on the 7th day of October, 2011, he was suspended from duty.

As contended by the respondent in its response to the appellant's claim, both the Code of Conduct and the Act, vested the respondent with power to summarily dismiss the appellant from its employment, subject only to compliance with the prerequisites set out in the said Act. **Section 43** of the Act obligated the respondent to prove the reason (s) for the termination, and where it failed to do so, the appellant's termination would be deemed an unfair termination. The same section stipulated that the reasons for termination of a contract should be the matters that the respondent at the time of termination of the contract, believed to exist and should be those matters which caused it to terminate the services of the appellant. **Section 47(5)** on the other hand shifted the burden of proof onto the appellant to prove that the circumstances relied upon by the respondent in terminating his employment with them did not lie.

The matters that the respondent relied upon to terminate the appellant's employment were those set out in the letter to show cause and that of his dismissal. Those were the same matters that the law obligated the respondent to prove. The witness called by the respondent to provide the necessary proof of those matters simply gave evidence with regard to what according to her should have been the proper mode of handling the said consignment. Nowhere in her testimony is there mention that she was privy to what transpired on the ground

regarding to how the consignment was received, by whom where and how it was stored and by whom. As contended by the appellant, such details could have been provided by the testimony of **Mr. Omondi** the employee/person who allegedly received and stored the consignment and the Commercial Manager Human Resource who tasked the Freight clerk **Mr. Ojok** to ascertain the quantity probably for purposes of revenue collection, all of whom were not called to testify. Neither was any reason given as to why these witnesses were not called to testify.

We appreciate **section 143** of the **Evidence Act Cap 80** Laws of Kenya makes provision that there is no obligation on a party to call a superfluity of witnesses. We also appreciate that in terms of this provisions, it is sufficient to demonstrate that witnesses called were those that were material and necessary to satisfy the burden of proof for the claim laid or in defence of any claim laid against a party.

In order to justify the contents of both the show cause and dismissal letters, it was necessary for the respondent to tender evidence that would place the appellant at the scene and pin responsibility against him first, for the irregular receipt of the consignment; and, second, for the improper arrangement of the same thereby rendering it impossible for the quantity to be ascertained and the determination of the revenue payable. In our view, such testimony could only have come from the mentioned persons namely a **Mr. Omondi** who was allegedly present when the consignment was received; and the Freight clerk a **Mr. Ojok** who ascertained the quantity. **Mr. Omondi** would have shed light on whether the appellant was present at the time when the consignment was received and caused it to be improperly arranged as asserted by the respondent. As already observed, no reason was given as to why these two witness were not called to testify and yet they had featured prominently in the whole transaction. There is therefore nothing to bar us from acceding to the appellant's request that the respondent's conduct in failing to tender the testimony of these two crucial witnesses is sufficient to give rise to an inference that, had they been called their evidence would have been adverse to the respondent's interests.

In the light of what we have stated, it is our findings that whereas the respondent failed to discharge its burden under **section 43** of the Act, the appellant discharged the burden of proof that was shifted to him under **section 47(5)** of the Act. We therefore agree with the appellant's submission that there was no basis upon which the trial court could have sustained his dismissal especially when the learned Judge gave no reasons as to why he disbelieved the appellant's testimony given on oath, and which had withstood the test of cross-examination, in favour of the respondent's sole testimony which was basically based on best practices not observed and had nothing to do with a true account of what in essence transpired on the material day with regard to the alleged irregular receipt and storage of the said consignment.

The appellant also raised the issue of the respondent's failure to process his appeal as one of the aspects of unfair termination of his employment. It is common ground that indeed the appellant filed an appeal against his summary dismissal, of which the respondent acknowledged receipt and in fact admitted so in its response to the appellant's claim. It is also not disputed that the same was never processed by the respondent on account of the appellant's alleged reporting to the Minister for Labour or a Labour officer of a Trade dispute between him and the respondent during the pendence of the said Appeal.

Section 47 of the Act permits multiple complaints by an employee to various forums. We find nothing in the said section to suggest that the mere fact of the appellant reporting to the Minister or a Labour Officer the existence of a Trade dispute between him and the respondent was in itself a bar to the respondent processing his appeal to its finality. It therefore follows that in terms of **section 45(5) (a),** the respondent's failure to process the appellant's timeously filed appeal amounted to an unfair termination of his employment with them. As correctly submitted by the appellant, we find that the learned Judge fell into error when he failed to consider this aspect of the case, especially when the appellant had raised it both in his statement of claim and evidence, and which was admitted in the respondent's response to the claim.

Having answered issue number 1 in the affirmative, our simple task now is to determine the appropriate remedy for the unfair termination. **Section 49** of the Act provides a wide range of remedies, which we have considered in light of the totality in the record. In our view, the following remedies are appropriate in the circumstances of this appeal;

1. A declaration that the respondent's dismissal of the appellant from its employment was not only unlawful but also unfair for the reasons given in the assessment.

2. The appellant will be entitled to: (a) one month's salary in lieu of notice (b) an order for payment to him of terminal dues payable on normal termination. (c) Payment of salary from the date of suspension to dismissal if not already paid. (d) Four (4) months' salary as compensation for the unlawful and unfair termination of his employment with the respondent.

3. The amount awarded will carry interest from the date of Judgment in the superior court till payment in full.

4. The appellant will also have costs both on appeal and the court below.

Dated and Delivered at Nairobi this 16th Day of February, 2018.

R.N. NAMBUYE

……

JUDGE OF APPEAL

P.O. KIAGE

…….……..……

JUDGE OF APPEAL

A.K. MURGOR

……...……...……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Deputy Registrar.