IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B.M KARIUKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 206 OF 2014..

BETWEEN

RIFT VALLEY RAILWAYS KENYA LTD..…….APPELLANT

VERSUS

BERNARD MUDIRI CHANZU……...……RESPONDENT

(*Being an appeal from the judgment of The High Court of Kenya at Nakuru (Byram Ongaya, J) dated 7th March 2014*

In

Industrial Cause No. 129 of 2013

****

JUDGMENT OF THE COURT

In a Memorandum of Claim filed at the Industrial Court of Kenya at Nakuru (that court is now called ***"Employment and Labour Relations Court*** – we shall call it the ***"Labour Court"*** in this judgment), the respondent, Bernard Mudiri Chanzu, sued the appellant, Rift Valley Railways Kenya Limited seeking various reliefs. It was claimed amongst other things that the respondent was employed by Kenya Railways Cooperation, the predecessor of the appellant, which re-employed him as a Train Guard on 1st July, 2006 (the Letter of Appointment in the record shows that employment was on 25th October, 2006). It was claimed that the respondent, upon employment by the appellant, was trained on various occasions and promoted and:

> ***"2.6 THAT the claimant herein serve (sic) the Kenya Railways for a good (13) Thirteen years as from 23rd – August 1993 upto 1st November 2006, and a cool (6) six years' service with Rift Valley Railways starting 1st November, 2006 upto 23rd August, 2012 a good 19 years' of service under this institution.***
>
> ***2.7 THAT the claimant had served the Railways institution for such along (sic) period of years with a clean working record that even at the time of this unfortunate accident of 3rd June 2012 or at the termination there was no valid warnings in his employment records. ---."***

The ***"unfortunate accident"*** occurred on 29th June, 2012 and, from the record, this is how events unfolded that day.

The respondent was booked to be the train guard on train No. C 3B 9214 with a load of 16 wagons which was to travel from Nakuru station to Eldoret station. The train driver was one J. Nyolo. They departed Nakuru but upon reaching ***"Km 726/6½ hours"*** the train shut down. The respondent alighted immediately and, as required by operation procedures, secured the train by applying hand brakes and placing stones to ensure that the train did not roll backwards. Efforts to re-start the train failed and the respondent called for help and when it arrived the train was re-started using a jumper-cable and the journey re-commenced. They reached ***"Km-769/5½"*** but the engine failed again leading to a shut down. Help was called from Nairobi headquarters which instructed Sabatia Station to attend to the scene. The Sabatia station pulled the train to Sabatia where the train was jump-started again and the journey re-commenced but upon reaching "***Km 781/6½"*** the train shut down again. The respondent alighted and, as was his duty, he was securing the train by applying hand brakes and placing stones but as he was doing so, some of the wagons rolled backwards, in railway lingo, ***" …run away …"*** The respondent alerted the Controller in Nairobi that some wagons were on the rail moving uncontrolled and ***"… we had to chase some from behind both of us (with driver) plus the police escort…."***

They found some of the run-away wagons at ***"Km 775/8"*** capsized and the rest were found a further 1½ kilometres derailed. The respondent was all along informing the Nairobi headquarters of the happenings through his phone handset.

The appellant established a Probe Committee to investigate and report on the cause of the accident and in a report titled "***DRAFT REPORT ON INQUIRY OF RUNAWAY AND SUBSEQUENT CAPSIZEMENT OF TRAINS X 3B LOCO 9214 ON 30TH JUNE 2012"*** the committee found the following on technical examination of the train and wagons:

> ***"7.1 The Locomotive***
>
> ***(a) Exhibited intermittent engine shut downs***
>
> ***(b) Engine control Governor removed and tested after recovery and found to be in good working order***
>
> ***(c) Oerlikon Drivers Blake Valve (ODEV) Pro # 16439, Serviced on (****date not inserted****) though date fitted not indicated (still valid) was found by investigating officers in service (FULL) position. Upon recovery it was bench tested and found ok. (inconsistent with the situation and ought to have been placed in emergency)***
>
> ***(d) Locomotive hand brake – found not applied though operative***
>
> ***(e) Locomotive independent brake – applied.***
>
> ***7.2 The wagons***
>
> ***(a) All wagon hand brakes observed to be working EXCEPT on N 822164 but not applied***
>
> ***(b) Only CLBR 544449 had its hand brake PARTIALLY applied***
>
> ***(c)No signs of skids, overheating on the wagon wheels, brake blocks etc. to indicate the application hand brakes…."***

On the train driver, the committee found that he had been on duty for a total of 20 hours before the accident. The committee also found that the respondent had been on duty continuously for 20 hours and 50 minutes and concluded the following as contributing factors for the accident:

"1.1 Locomotive engine intermittent shut downs

1.2 Failure by Locomotive Driver to apply Emergency brake in

order to

(a) Enable the Guard to easily screw the wagon hand brakes hard-on

(b) Preserve the Main Reservoir pressure a little longer [in this position the sealing valve is closed, hence communication between the MR and train pipe is severed]

(c) Apply the Locomotive hand brake (GR 190)

1.3 Failure by train guard to apply wagon hand brakes.

Observations by investigation team confirmed that only one wagon (CLBR 544449) had its hand brake partially applied

(a) Fatigue-crew had worked for 20 hours 50 minutes as at the time of train runaway."

On 24th July, 2012 the appellant served the respondent with a show cause letter where it required him to explain in writing events leading to the said accident which events the appellant stated constituted gross misconduct in contravention of the appellants' code of conduct and the Employment Act. The respondent wrote an explanation two days later but by a letter dated 3rd August, 2012 the respondent was dismissed from employment, his explanation not having been found satisfactory. The respondent mounted appeals to the appellant but they were unsuccessful and the issue ended up in the labour Court where in the Memorandum of Claim drawn by a lawyer (may we say, with respect, that he could have done a better job in drawing the same and it is too long, repetitive and imprecise), various reliefs were sought including a declaration that dismissal was harsh, wrongful and unfair; that the respondent be reinstated to employment; that dismissal be reduced to termination; that the respondent be awarded 3 months' salary in lieu of notice and be paid for accrued leave; that the respondent be allowed to draw money from a pension scheme; that the respondent be paid 12 months gross salary as compensation for unfair termination; that damages be awarded for 20 years' not served before reaching retirement age – a grand total of Ksh.9,684,394/- was claimed.

The appellant filed a Defence to the claim which denied any liability stating that the respondent had been properly dismissed from employment for gross misconduct.

The matter at the labour Court was heard by Byram Ongaya J. who in a judgment delivered on 7th March, 2014 found that the respondent had been unfairly dismissed from employment. Judgment was entered for the respondent for a declaration that the termination from employment was unfair. The respondent was awarded a total of Ksh. 491,394/- with interest and costs of the suit. The appellant was dissatisfied with those findings and filed this appeal premised on a Memorandum of Appeal drawn by the appellants' Advocates M/S Nyachiro Nyagaka Advocates where 8 grounds of appeal are set out. The appellant states that the learned judge erred in law in declaring the termination of the appellant as unfair; that the learned judge erred in not properly considering the findings of the probe committee; that the learned judge erred in finding that the respondent was not accorded a fair hearing; that the learned judge erred in disregarding evidence on record in regard to the appellant's disciplinary process; that one month's salary in lieu of notice should not have been awarded and finally that the learned judge erred in law and fact in failing to consider the law, facts, submissions and authorities cited before him before making his decision.

The appeal came for hearing before us on 31st May, 2017 when learned counsel Mr. K. Ndege appeared for the appellant while learned counsel Mr. G. Otieno appeared for the respondent. Learned counsel for the appellant chose to urge grounds 1, 4 and 8 while abandoning the rest. Learned counsel submitted that the appellants had accorded the respondent a fair hearing as required in law and that the appellant was

entitled to take the action that it took against the respondent. Learned counsel submitted that the learned judge did not analyze the evidence and that the learned judge had failed to consider authorities cited.

Mr. Otieno in opposing the appeal relied on the respondents' Notice of Grounds for Affirming Decision filed in court on 8th May, 2017. In highlighting the same learned counsel submitted that the learned judge had considered the evidence presented before him and that the judge had given reasons for reaching the findings that he did and for all that we should dismiss the appeal.

We have considered the record of appeal, submissions made and the law. Being a first appeal it is our duty to re-appraise and analyze the evidence presented before the trial court so as to reach our own conclusions and draw our own inferences of facts but with a rider that we have not observed the deamenour of the witnesses that the trial judge did. We are entitled to disagree with the findings of the trial judge if the findings are not based on the evidence or that the findings are such as are a reasonable tribunal would not make. See the case of **Ephantus Mwangi & Another v Duncan Mwangi Wambugu** [1982-99] IKAR 278 for a Judicial Pronouncement of the duty of a first appellate court.

The respondent testified before the trial judge and explained how the train had shut down at various times and had to be jump started. He stated that he had done everything that operation procedures required him to do but that on the last occasion when the train engine shut down he was unable to secure some wagons that detached and rolled back ***("run away").*** He further stated that he did everything possible to avoid the accident but he was not successful.

The appellant called three witnesses.

Mr. Peter Kungu Onyango, the appellant's Regional Polling Stock Inspector based at Eldoret testified that he had on the fateful day received a report of the train that had run away and capsized and that he attended the scene and found that there was a wagon that had a defective hand brake. He stated that:

> ***"in event of a shut down time required to apply hand brake on wagons will depend on the gradient, if on a steep slope it needs first reaction as opposed to that (sic)ground. In this case it was steep slope to secure one wagon can be secured in 30-35 minutes, my conclusion was that hand brakes were not serviced."***

The appellant also called Joseph Ngulute, The Regional Locomotive Inspector based in Nakuru. He also received report and proceeded to travel on the rail looking for the runaway wagons. He found the locomotive capsized. He explained procedures to be undertaken in case of an engine shut down. According to him the driver and the respondent were negligent in failing to secure the wagons. But he also stated in court and also through a report produced in court that the locomotive should not have been allowed to continue after the first shut down.

The last witness was Caroline Aketch, the appellants' Human Resource Business Partner who basically testified on the way the matter was handled after the said accident leading to the dismissal of the appellant from employment.

The appellants' witnesses confirmed that the train had suffered shut downs and the respondent had on various occasions during that journey managed to secure the train ensuring that it did not roll backwards but that he had been unable to do so on the last occasion. The probe committee that we have referred to in this judgment found the contributing factors to the cause of the accident as failure by the locomotive driver to apply the emergency brake; and failure by the co-driver to preserve the main reservoir pressure a little longer; failure to apply locomotive hand brake and also failure by the respondent to apply wagon hand brake. The committee also found that the crew of the train had worked continuously on the part of the respondent for 20 hours and 50 minutes and that fatigue had set in and this could also be a contributing factor to the accident.

It was the testimony of the respondent and the witnesses called for the appellant that the final shut down of the train that led to the accident occurred at a place where the gradient was very steep. The respondent

stated that he tried all he could within his training but that he was unable to secure the wagons that run away. The learned judge considered all the evidence that was tendered and which we have summarized in this judgement. The learned judge reached the conclusion that the primary cause of the accident was that the locomotive was defective which kept shutting down and failure to apply driver's emergency hand brake. The learned judge also considered that the respondent had worked continuously for many hours and was fatigued. The learned judge also found that the appellant did not accord the respondent the kind of hearing envisaged by section 41 of the Employment Act 2007.

Upon our own analysis of the evidence we are of the considered opinion that the learned judge reached correct finding and conclusions. The respondent had worked for the appellant for many years and there was no proof that he had received any warning letters before the accident leading to his dismissal. The respondent explained in detail how the accident occurred after his attempt to secure the wagons failed.

In the letter to show cause that we have referred to in this judgment it was stated *inter alia* that the respondent was entitled after showing cause to appear before a disciplinary committee to give further evidence in defence. It was also stated that the respondent was to be accompanied by other employee or union representative during such hearing. The appellant did not produce any evidence to show that it had accorded the respondent such a hearing as was his right in law. The respondent was therefore not given a fair hearing before he was dismissed from employment.

The learned judge reached the correct decision and there is no merit in this appeal which we accordingly dismiss with costs to the respondent.

Dated and delivered at Nakuru this 12th day of July, 2017.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR