



REPUBLIC OF KENYA



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**Satia v West Kenya Sugar Company Limited (Appeal 13 of 2023)
[2025] KEELRC 485 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 485 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
APPEAL 13 OF 2023
DN NDERITU, J
FEBRUARY 20, 2025
(FORMERLY BUNGOMA E005 OF 2023)**

BETWEEN

DAVID SATIA APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED RESPONDENT

(Being an appeal from the judgment in Butali Chief Magistrate's Court ELRC Cause No. 13 of 2020 by Hon. R. S. Kipng'eno (PM) dated and delivered on 23rd February, 2023)

JUDGMENT

I. Introduction

1. In a judgment delivered on 23rd February, 2023, the lower trial court dismissed the appellant's claim but ordered the appellant to collect his certificate of service from the respondent and be paid service pay. Parties were ordered to bear their own costs.
2. Dissatisfied with the judgment, the appellant through Z.K. Yego Law Offices Advocates commenced this appeal by way of a memorandum of appeal dated 8th March, 2024 raising the following grounds of appeal –
 1. That The learned trial magistrate erred in fact and in law in finding that the Claimant's dismissal lawful and fair.
 2. That the Learned trial magistrate erred in law and in fact in finding that the dismissal of the Claimant complied with the substantive and procedural requirements of the Law.
 3. That the learned trial magistrate erred in failing to appreciate the overwhelming evidence.



4. That the learned trial magistrate erred in failing to appreciate the Claimant's written submissions.
5. That the learned trial magistrate erred in focusing on the Respondent's submissions in the entire judgment.
6. That the learned trial magistrate erred in failing to appreciate that the termination of employment must pass the fairness test which includes substantive justification and procedural fairness.
7. That the learned trial magistrate erred in failing to consider the Claimant's testimony with regards to the un-fair disciplinary hearing and that everything he said in his defense was not reflected in the minutes produced before the honourable court.
8. That the learned trial magistrate erred in ignoring and trivializing the mandatory requirement of the law that the disciplinary hearing requires attendance of a union representative of the employee's choice.
9. That the learned trial magistrate failed to consider the Appellant's testimony that the union representative of his choice was denied access to the venue of the disciplinary hearing.
10. That the learned trial magistrate erred in failing to consider the testimony of the Respondent's Human Resource Manager that the union representative present was not of the Appellant's choice.
11. That the learned trial magistrate erred in finding that the procedural safeguards at the hearing met the legal standard.
12. That the learned trial magistrate erred in law in failing to consider the substance of the disciplinary hearing.
13. That the learned trial magistrate erred in failing to appreciate that disciplinary hearing is a quasi-judicial proceeding and therefore the rules of evidence apply.
14. That the learned trial magistrate erred in failing to consider that there was no demonstration of fuel siphoning during the disciplinary hearing even though the Appellant stated that he did not know how the fuel level sensor works.
15. That the learned trial magistrate erred in placing reliance on the testimony of a Fuel Level Sensor which gave faulty reading on the morning of 9th January 2020 by indicating that the Appellant left the yard at 8.am while in fact he left at 11:21am, a fault which was admitted by the Respondent's witness.
16. That the trial magistrate erred in failing to consider that there was no certificate of repair produced to confirm that the faulty Fuel Level Sensor was repaired on the 9th January 2020.
17. That the learned trial magistrate erred in failing to consider that there was no calibration certificate for the Fuel Level Sensor to confirm its accuracy as per the requirements of the *[Weights and Measures Act](#)*.
18. That the learned trial magistrate erred in putting so much reliance on the evidence of Fuel Level Sensor to find that fuel was siphoned by the Claimant yet there was no document produced in court by the Respondent detailing how the said fuel level sensor works.



19. That the learned trial magistrate erred in putting reliance on the evidence of the Human Resource Manager with regards to functionality of the Fuel Level Sensor yet he is not the manufacturer of the said Fuel Level Sensor neither is he an expert in weights and Measures.
 20. That the Trial magistrate erred in failing to consider the fact that the Respondent could manipulate the readings of the Fuel Level Sensor to suit circumstances of their case as they are in control of the system.
 21. That the learned trial magistrate erred in failing the fact that the Respondent did not supply the court with Fuel Level Sensor's readings before and after fueling in order to justify the allegation that 39.4 litres of fuel was siphoned.
 22. That the learned trial magistrate erred in failing to consider that fuel siphoning is an offence of a criminal nature and its standard of proof is beyond reasonable doubt.
 23. That the trial magistrate erred in failing to consider that there was no investigation report filed in court even though he appreciated that the Claimant had been suspended for 21 days to pave way for investigation.
 24. That the trial magistrate erred in placing reliance on evidence of alleged Fuel Level Sensor yet there was no evidence to show that the said Fuel Level Sensor was indeed installed in the fuel tank.
 25. That the magistrate erred in putting much reliance on alleged FLS graph and GPS record which are computer-generated and were not compliant with the provisions of Section 78A of the *Evidence Act*.
 26. That the trial magistrate erred when he did not consider the fact that the Claimant has not been charged with the offense of stealing by servant.
 27. That the learned trial magistrate erred in failing to hold that the Claimant had proved his case on a balance of probability.
 28. That the learned trial magistrate erred in failing to hold that the Respondent had failed to rebut the Claimant's case.
 29. That the learned trial magistrate erred both in law and in fact in failing to find in favour of the Appellant.
3. The appellant is seeking the following reliefs –
1. That the decision made by the learned trial magistrate on issue (a) be set aside and/or reviewed.
 2. That a finding be made that the dismissal of the Appellant was unfair and that the Appellant is entitled to the reliefs sought in his memorandum of claim dated 27th August 2020.
 3. Costs of this appeal and in Butali Principal Magistrates' ELRC case No. 13 of 2020 be awarded to the Appellant.
 4. Further or other relief as this court may deem fit to award.
4. The respondent opposed the appeal through O & M Law LLP & Company Advocates.
5. By consent, the appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Chanzu filed written submissions on 5th June, 2024 and the respondent's counsel, Mr. Otieno, filed on 25th October, 2024.



II. Submissions by Counsel

6. On the one hand, counsel for the appellant condensed the grounds of appeal into the following issues – Whether the learned trial magistrate erred in law and fact in finding that the appellant had not proved his case on a balance of probabilities; Whether the dismissal of the appellant by the respondent was unfair, unlawful and illegal; Whether the Learned Trial magistrate considered the substantive reasons for the appellant’s dismissal; Whether the appellant is entitled to the reliefs sought; and Whether the appellant is entitled to an award of a certificate of service.
7. On the first issue, it is submitted that the burden of proving that an employee committed an offence is imposed on an employer by dint of Section 43 of the *Employment Act* (the Act). It is submitted that the respondent failed to adduce evidence on the fuel level sensor (FLS) system to prove that the appellant was guilty of fuel siphoning. It is submitted that the burden shifted to the respondents to prove the allegations against the appellant and thus the trial court arrived at the wrong finding that the appellant had failed to prove his case on balance of probabilities. To buttress this assertion the appellant relied on the decisions in *Galgalo Jarso Jillo v Agricultural Finance Corporation* (2021) eKLR; *Josephine M. Ndungu & others V Plan International Inc* (2019) eKLR; and *Peter Wafula Juma & 2 others v Republic* [2014] eKLR.
8. On the second issue, it is submitted that appellant was not accorded a fair hearing contrary to Section 41 of the Act and Article 50 of *the Constitution*. It is submitted that the respondent failed to allow the appellant to be accompanied by a union representative or a colleague of his choice, as the union representative present during the disciplinary hearing had been hand-picked by the respondent. It is submitted that the minutes of the disciplinary hearing adduced by the respondents did not provide a true account of what transpired during the hearing. It is further submitted that the respondent solely relied on the FLS report, which the appellant had no idea how it worked, yet no demonstration of the siphoning was conducted for the appellant to understand how the loss of the fuel was reflected on the FLS graph.
9. It is submitted that the testimony of DW1 and DW2 was contradictory as DW1 affirmed that no demonstration of how the FLS works was carried out yet DW2 stated to the contrary.
10. It is submitted that the appellant’s dismissal was solely based on the FLS, which the respondent admitted was faulty during the trial yet proceeded to unlawfully terminate the appellant. It is submitted that the fact of the faulty FLS was admitted by the respondent through DW1, Martin Chisaka, who stated that the FLS could send false report of siphoning in areas where a truck had entered a bumpy area or ditch, but the same could return to normal once the truck was on level ground.
11. It is submitted that while the respondent through DW1 admitted that vehicles were fueled only based on the fuel needs of a specific trip, it would have been impossible for the appellant to have driven back to the company if fuel had been siphoned. It is submitted that the respondent failed to avail a calibration certificate on whether the FLS was properly working and this led to the appellant’s unfair termination.
12. It is further submitted that the appellant was neither given an opportunity to appeal the termination nor informed that he could appeal.
13. On the third issue, counsel cited *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and Section 45 of the Act in asserting that for termination to be fair, it should pass both substantive justification and procedural fairness. It is submitted that the respondent had no evidence to justify terminating the appellant. It is submitted that since the FLS system was operated by the respondent, it could be manipulated to maliciously terminate the appellant. It is submitted that there were no



previous warnings to the appellant on a similar allegation of fuel siphoning and in such absence the respondent violated Section 45(5)(e) of the Act.

14. Citing *Alphonse Machanga Mwachanya v Operation 680 Limited* (2013) eKLR; *Nicholus Muasya Kyula v Farmchem Limited* (2012) eKLR; *Kabengi Mugo v Syngenta East Africa Limited* (2013) eKLR; and *Donald Odeke v Fidelity Security Limited* (2012) eKLR, it is submitted that there were no substantive reasons for terminating the appellant.
15. Based on the foregoing, the court is urged to find that the appellant was entitled to the reliefs sought in the memorandum of claim dated 27th August, 2020 and set aside the lower trial court's judgement and orders.
16. On the other hand, counsel for the respondent opposed the appeal on two issues – Whether the appellant's termination was procedurally and substantively fair; and Whether the evidence on the FLS was admissible both at the disciplinary hearing and at the trial.
17. The appellant invites the court to be guided by the principles in *Selle & Another V Associated Motor Boat Co. Ltd & Others* (1968) EA.123 and *Peters v Sunday Post Limited* (1958) EA 424 and reconsider the evidence, re-evaluate it, and draw its own conclusion bearing in mind that it neither saw nor heard the witnesses.
18. On the first issue, it is submitted that pursuant to Section 47 of the Act both the employer and employee must, on a balance of probabilities, satisfy the burden of proof in their respective cases. It is submitted that the appellant failed to prove that his termination was unlawful in failing to adduce evidence to counter the respondent's contention. To buttress this assertion, the respondent relies on the decisions in *Protus Wanjala Mutike V Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR and *Casmir Nyakundi Nyaberi v Mwakikar Agencies Limited* (2016) eKLR.
19. Citing *Walter Ogal Anuro v Teachers Service Commission*(supra), it is submitted that the appellant was procedurally and substantively dismissed as the reason for his termination was proved and the same related to his conduct, capacity, compatibility, and the operational requirements of the employer. Counsel cited Section 45 (2) of the Act in respect of this argument.
20. Further, citing *Eric Gichuru Thiga v Unga limited* (2013) eKLR it is submitted that on the procedural fairness an employee may be dismissed without notice as per Section 35(4)(b) of the Act if found to be in breach of his/her obligations under a contract of service.
21. It is submitted that based on Section 41 of the Act, an employee is entitled to notice of particulars of the allegations made against him/her and the right to be heard. Counsel cited *Alfayo Jagona Imbuya v Board of Management Ivugwi Secondary school* (2018) eKLR in support of this assertion.
22. The respondent asserts that the appellant was accorded fair disciplinary procedure as he was first issued with a suspension letter dated 22nd January, 2020 see page 59 of the record of appeal to allow investigations, and the appellant responded to the suspension letter on 26th January, 2020 (see page 60 of the record). It is submitted that the appellant was thereafter invited to a disciplinary hearing through a letter dated 12th February, 2020 and a hearing was held on 18th February, 2020.
23. It is submitted that the appellant was informed of his right to bring an employee or shop floor representative to the disciplinary hearing in the notice inviting him to the disciplinary hearing. It is submitted further that during the disciplinary hearing the appellant together with his union representative presented his defense and a decision was made as per the letter dated 25th February, 2020 (see page 64-65 of the record).



24. It is submitted that although the appellant was notified of his right to appeal, he did not appeal. The court is urged to be persuaded by the reasoning in *Mulwa Msanifu Kombo v Kenya Airways* (2013) eKLR where the court found that it could only interfere with administrative disciplinary procedure if it was established that the same was in breach of the rules on natural justice. It is submitted that no evidence was adduced by the appellant that the respondent flaunted the fair procedural process and the court is urged to find that the procedure was fair.
25. Citing *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others* (2019) eKLR, it is submitted that based on Sections 43(1) & 45(2) of the Act, the respondent genuinely believed that the appellant was guilty of the misconduct the evidence presented on a balance of probabilities.
26. It is submitted that the disciplinary hearing conducted by the respondent, though not bound by strict procedural and technical rules of evidence, the disciplinary panel upon hearing the appellant inferred a guilty verdict. It is submitted that during the disciplinary hearing the transport superintendent informed the panel that due to persistent denials of siphoning of fuel by employees, the respondent had installed the Fuel tracking systems on its trucks to detect abnormal fuel consumption.
27. It is submitted that the appellant was given an option to be surcharged for the fuel lost but he declined. It is further submitted that the appellant alleged that his assigned vehicle (Winch) had mechanical issues that may have contributed to higher fuel consumption, yet he never reported the same as required. It is submitted that the appellant's testimony during the disciplinary hearing was contradictory.
28. It is further submitted that the appellant's evidence during the trial was not corroborated and the court is urged to find that the respondent genuinely and reasonably believed that the appellant had siphoned fuel as charged.
29. It is submitted that the evidence of the FLS system as produced by Mr. Chisaka (DW1) was by consent and hence its production cannot be challenged in this appeal.
30. The court is urged to uphold the decision of the lower court and dismiss the appeal and each party to bear own costs.

III. Issues for Determination

31. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. The following issues commend themselves to the court for determination –
 - a. Whether the appellant's termination was unfair and unlawful?
 - b. Did the lower trial court arrive at the correct decision in regard to the above issues and the reliefs awarded?
 - c. What are the appropriate orders for this court to make in regard to the above issues and on costs?

IV. Dismissal

32. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle V & Another V Associated Motor Boat Co. Ltd & Others* (supra).
33. Both parties called one witness each during the trial. As per his pleadings and evidence in the lower trial court, the appellant's case is that he was initially engaged by the respondent as a cane-loader in 2009



- and later on became a winch-operator. He pleaded that he was terminated effective 25th February, 2020 without lawful reason. He stated that his last known monthly salary was Kshs16,000/=.
34. During the trial he stated that his termination was based on allegations that on 9th January, 2020 he had siphoned thirty litres of fuel from winch KTCB 029J. He stated that the winch he was operating had a known mechanical problem with the clutch which could have contributed to higher fuel consumption. He stated that he raised the issue of a faulty Fuel Level Sensor (FLS) and was unaware of how the FLS system worked. He stated that he was unfairly dismissed as he was not allowed to be accompanied by a union representative of his choice or to ask questions during the disciplinary hearing.
35. It is on the basis of the foregoing that the appellant prayed for the following reliefs in the lower trial court –
- i. Declaration that the claimant's services were unprocedurally, unlawfully and unfairly summarily terminated with effect from 25th February 2002, and in the circumstances, the claimant is entitled to compensation of his dues for the unfair termination.
 - ii. The sum of Kshs237,000/= as pleaded in paragraph 13 hereinabove.
 - iii. An order compelling the respondent to issue the claimant a certificate of service under section 52 of the *Employment Act*, 2007.
 - iv. Costs of this suit and interest at court rates from the date of filing this suit until payment in full.
36. In its memorandum of response to the claim, the respondent stated that the appellant was engaged as a winch operator on a one-year contract dated 1st July, 2016. He was then issued with a second contract dated 15th July, 2017 which expired on 30th June, 2018. The appellant was then issued with a third one-year contract dated 7th May, 2018 which expired on 30th June, 2019. The fourth and final contract dated 12th June, 2019 issued to the appellant was to expire on 30th July, 2020. It was pleaded that the appellant was earning a gross salary of Kshs. 16,260/= throughout his employment.
37. It was pleaded that on 9th January, 2020 the respondent's management was notified by the FLS and GPRS automated systems installed on winch operated by the appellant that about 39.4 litres had been consumed between 2.00 p.m. and 4.00 pm yet the winch had only covered 6.42 km. Its normal fuel consumption was 3.5 km to the litre.
38. It was pleaded that on 22nd January, 2020 the appellant was issued with a Suspension/show-cause letter on allegations of siphoning the fuel. The appellant replied to the show-cause letter on 26th January, 2020.
39. The Appellant was then served with a notice of disciplinary hearing on 10th February, 2020 informing him of his right to be accompanied to the hearing by a union representative of his choice. The disciplinary hearing was conducted on 18th February, 2020 when a union representative, Mark Wekesa, attended and the appellant was accorded a chance to present his defence to the charges/allegations.
40. It was pleaded that the appellant had not reported a mechanical fault with the winch and neither had he toed a tractor, which could have justified the high fuel consumption. It was stated that the appellant was after the disciplinary hearing issued with a letter of summary dismissal and allowed 14 days to appeal the said decision but he did not to appeal.
41. The respondent called Martin Chisaka (RW1), the human resources manager, as a witness. He adopted his filed statement and produced the filed documents as exhibits. He stated that the FLS system informed the siphoning of fuel by the appellant as charged.



42. RW1 stated that the appellant was issued with a show-cause letter, invited to a disciplinary hearing whereby he was accompanied by a union representative. Subsequently he was summarily dismissed and issued with a letter to that effect.
43. RW1 produced the FLS Graphs and asserted that the employees were aware of the intended purpose of the FLS in detecting theft or siphoning of fuel. He stated that the fuel siphoning demonstration could only have been done if requested by an employee/appellant which did not happen.

V. Substantive Fairness

44. On substantive fairness it was submitted on the appellant that his termination was based on evidence of a faulty FLS and that from the evidence by the employer (DW1) the reading of the FLS formed the substantive ground by the disciplinary committee for the dismissal.
45. The appellant's counsel submitted that the FLS was faulty as acknowledged by the respondent due to the alleged erroneous reading that the appellant had left the respondent's yard at 8.00 a.m. yet he actually left at 11.21 a.m. The appellant testified that he was not the one who fueled the winch and hence he could not tell how much fuel was in the vehicle.
46. In his testimony in the trial the appellant stated that since fueling of each vehicle was as per the needs of a specific trip, it could not have been possible for the winch to drive back to the yard after siphoning of 30 litres of fuel. It is the appellant case that no calibration certificate of the alleged FLS system was availed and that since it was managed by the respondent it could have manipulated the same to victimize him.
47. It is the appellant case that he was not familiar with the operation of the FLS system and that the FLS graphs produced being electronic evidence ought to have been produced in accordance with Section 78A of the *Evidence Act*.
48. In the lower trial court the respondent's case was that the FLS system indicated that about 30 litres had been siphoned. The respondent submitted that the reading in the FLS indicated that the appellant had left at 8.00 am was because the winch had been fueled at 8.00 am and the FLS system cursor was at 8.00 am. RW1 for the respondent stated that the no calibration certificate was needed as the system showed that the fuel had been siphoned after the winch had left the respondent's premises.
49. The respondent further submitted that no evidence by the appellant showed that FLS was faulty. It is submitted appellant did not object to the production of the evidence of the FLS. The respondent submitted that the appellant neither reported that winch (vehicle) had a mechanical fault nor call any person to corroborate the said allegation.
50. It is the respondent's case that the allegation of a faulty or defective mechanical state of the winch was neither raised during the disciplinary hearing, nor at the appeal nor in the pleadings filed, and this was an afterthought raised at appeal herein for the first time. Significantly the issue was neither raised in the response to the show-cause letter.
51. The trial court found that the respondent had deployed technology to help better manage the operation of its fleet. To this extent, they had installed fuel level sensors in the fuel tank and the GPRS tracking system to monitor the field activities of its drivers. The trial court pointed out that integrity, honesty, and accountability are hallmarks for modern day workplaces and found that the respondent has substantive grounds upon which to terminate the appellant.
52. The FLS system was installed by the respondent to monitor and flag out any abnormal fuel consumption. The system was for the use by the respondent and not by the appellant. The appellant was only required to know that the system had been installed to monitor fuel consumption. While the



appellant alleged that the functionality of the FLS system was inaccurate, he did not tender evidence to demonstrate how the system was faulty. The FLS graph was produced during hearing by Mr. Chisaka(DW1) and marked as an exhibit by consent of the parties. There was no objection raised by the appellant on the production of the FLS graph during hearing.

53. What this court is invited to determine is whether the dismissal met the reasonable test as enunciated by Lord Denning in *British Leyland UK Limited v Swift* (1981) I.R.L.R. 91, wherein it was held that –

“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably takes a different view...”

54. In the considered view of the court evidence and the facts establish that the respondent reasonably believed that the appellant had siphoned about 30 litres of fuel from the winch (vehicle) he was operating on the material day being 9th January, 2020. Further the appellant though allegedly aware that the winch that he operated had a mechanical fault with the clutch failed to report the same. He could not exonerate himself from the allegations of siphoning of fuel. Further, the appellant had an opportunity to call all the persons he alleged to have known about the mechanical faults with the winch but failed to call them to support his case. On the allegation of the accuracy of the FLS system.

55. The appellant contended that the FLS system read that he had left the respondent’s yard at 8.00 am instead of 11.21 thus allegedly pointing to the inaccuracy of the system. The respondent pointed out that 8.00 a.m. was the time that the vehicle had been fueled and confirmed that the appellant left at 11.00 a.m. This issue was indeed explained and clarified by the respondent and confirmed during the disciplinary hearing. There was no other objection to the accuracy of the FLS system. The appellant confirmed that the particular winch was in his possession between 2.00 p.m. and 4.00 p.m. when the fuel siphoning is said to have occurred. In the absence of further evidence that the FLS system was faulty the court is convinced that the reason for the summary dismissal of the appellant on charges of siphoning of fuel was within the reasonable action by an employer in the circumstances. The court finds and holds that the trial court arrived at the right finding that there existed a substantive reason(s) to warrant the dismissal of the appellant and shall thus not interfere with that finding.

VI. Procedural Fairness.

56. The appellant challenged the procedural fairness culminating in his dismissal for non-compliance with the provisions of Section 41 of the Act. The appellant submitted that there was no evidence of a warning for the siphoning as required under Section 45(5)(e) of the Act.

57. The appellant challenged the process for lack of valid reasons, lack of warning, for the absence of a union representative of his choice who was allegedly stopped at the gate, and the presence of a union representative not his choice. He challenged the fact that he was not supplied with the FLS graphs before the disciplinary hearing.

58. The respondent’s case is that the appellant was informed of the charges levelled against him vide a suspension/show-cause letter dated 22nd January,2020 (DEX7) and that the appellant filed a response thereto dated 26th January, 2020 (DEX8). That he was later invited to disciplinary hearing vide the letter dated 10th February, 2020 (DEX9).



59. The respondent's case is that the appellant attended the disciplinary hearing as evidenced by the minutes of the disciplinary hearing (DEX10) in which a union representative attended (Mark Wekesa). It is after the disciplinary hearing that the appellant was dismissed and he did not appeal the dismissal.
60. Procedural fairness is mandatory even in the event where the employer contemplates summary dismissal for gross misconduct under Section 44 of the Act. The procedural fairness is as provided for under Section 41(2) of the Act to wit –
- 41(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
61. The court finds and holds that the respondent complied with Section 41 of the Act leading to and culminating in the dismissal. The appellant was informed of the charges/allegations facing him through the show-cause letter to which he responded in writing and verbally at the disciplinary hearing. He was accompanied by a union representative during the disciplinary hearing.
62. In his testimony in the lower trial court the appellant admitted that he understood the charges against him, stating that "I understand because they were saying that I lost fuel". There is no evidence that the appellant objected to the contents of the minutes of the hearing as produced in court.
63. The court agrees with the law as enunciated in *Walter Ogal Anuro V Teachers Service Commission* (supra) cited by both parties in finding and holding that the appellant was accorded both procedural and substantive fairness during the entire disciplinary process. This court has no reason for disturbing the finding and holding of the lower trial court.

VII. Reliefs Awarded

64. The lower trial magistrate found that the appellant's termination was fair and lawful. This court has upheld that finding and holding since the dismissal was lawful, the appellant was not entitled to pay in lieu of notice or compensation as pleaded in the memorandum of claim.
65. The appellant had claimed leave pay for the year 2019 of Kshs16,000/=. The trial court did not consider this claim yet it dismissed the same. The court notes that the respondent did not produce any records as required under Sections 10 and 74 of the Act to prove that the appellant had indeed gone for leave in 2019. The appellant was entitled to 21 days' leave in his fixed term contract dated 12th June, 2019 (see page 58 of the record of appeal). The appellant's salary was Kshs16,200/= but the appellant claimed for Kshs16,000/= for a one month's salary. However, he was entitled to only 21 days' leave. The claim was uncontroverted and thus the appellant was entitled to the award of 21 days' leave as follows – 21 days x Kshs16,200/= / 30 = Kshs11,340/=. The lower trial court erred in failing to give due consideration to the said claim.
66. The appellant also claimed for salary for 25 days worked from 1/2/2020 up to 25/2/2020 (Kshs16 000/= x 25 days/30) = Kshs13,333/=. The lower trial court did not consider this claim on merits and yet it dismissed the same. It is noted that the appellant was sent on suspension on 22nd January, 2020 for 21 days on half pay (see page 20 of the record of appeal). The suspension lapsed on 12th February, 2020 but it was extended through a letter dated 10th February, 2020 again on half pay as per the terms in first letter of suspension. In the period from 1st February, 2020 to 25th February, 2020 the appellant was on half pay and even though his dismissal was found to be fair and lawful he was entitled to half-



pay for that period. The appellant's salary as per the fixed term contract dated 12th June, 2019 (see page 58 of the record of appeal) was Kshs16,200/=.

67. The court notes that the respondent did not adduce any records and expected under Sections 10 and 74 of the Act to prove that the appellant was paid the half-pay during the said period. The claim was uncontroverted and thus the appellant is entitled to half-pay for the period from 1st to 25th February, 2020 as follows – 25 days x Kshs16,200/30 days x 1/2 = Kshs6,750/=. The lower trial court erred in failing to consider the said claim.
68. The lower trial court awarded the appellant service pay to be calculated by the respondent. The appellant had not pleaded for service pay and the lower trial court in awarding the service pay exceeded its jurisdiction. A party is bound by its pleadings and thus the appellant could not have been awarded a relief that he had not pleaded.
69. The lower trial court held that the appellant failed to collect his certificate of service. However, the issuance of the same is unconditional under Section 51 of the Act and it is hereby ordered that the same be delivered by the respondent to the appellant's counsel on record within 30 days of this judgment.
70. This appeal partially succeeds to the extent in the foregoing paragraphs. The judgment of the lower trial court delivered on the 23rd February, 2023 in Butali Chief Magistrate's Court ELRC Cause No. 13 of 2020 is set aside to the foregoing extent and upheld in the other aspects.

VIII. Costs

71. The appellant is awarded half costs of the proceedings in the lower trial court and half costs in this appeal.

IX. Orders

72. Flowing from the foregoing, the court makes the following orders–
 - a. The appeal is partially allowed and the judgment of the lower trial court is hereby set aside as hereunder.
 - b. Judgment be and is hereby entered in favour of the appellant in the sum of Kshs18,090/=. The said sum is made of –
 - i. Leave pay for the year 2019.....Kshs11,340/=
 - ii. Salary for 25 days from 1/2/2020 up to 25/2/2020..... Kshs6,750/
=
Total..... Kshs18,090/=
 - c. Certificate of service be issued by the respondent to the appellant and the same be delivered to his counsel on record within 30 days of this judgment.
 - d. In view of the findings and holdings by the court, the appellant is awarded half costs in the trial in the lower court and half costs of this appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 20TH DAY OF FEBRUARY, 2025.

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DAVID NDERITU



JUDGE

