New Kenya Co-operative Creameries v Sigei (Appeal E002 of 2022)
[2024] KEELRC 27 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 27 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

APPEAL E002 OF 2022

DN NDERITU, J

JANUARY 25, 2024

BETWEEN

NEW KENYA CO-OPERATIVE CREAMERIES ..... APPELLANT

AND

RICHARD KIPLAGAT SIGEI ..... RESPONDENT

(Being an appeal from the judgement of the Principal Magistrate (Hon Mr. Evans Muleka) delivered on 8th March, 2022, in Sotik PMCC (ELRC) No. 1 of 2018)

JUDGMENT

I. Inroduction

1. The Appellant herein was the respondent in the lower court in Sotik PMCC (ELRC) No. 1 of 2018 which was commenced by the respondent herein (the claimant in the lower court) praying for the following –

    a. Reinstatement and payment of the claimant's salary and allowances as from March, 2015 and interest therein to date.

    b. A declaration that the termination by the respondent was unfair.

    c. A sum of Kshs.1,033,802.93/-.

    d. Costs of the suit

    e. Any other relief that the Honourable Court deems fit to grant.

2. The appellant defended the cause in the lower court and in a judgment delivered on 8th March, 2022 the learned trial magistrate found in favour of the respondent and declared that the dismissal of the respondent by the appellant was unfair and unlawful. Further, the trial court awarded to the

respondent Kshs.568,201.33 in compensation, notice pay, and leave dues. The trial court also ordered that he be issued with a certificate of service.

3. The appellant was dissatisfied with the findings and the judgment of the lower court and filed this appeal in the hope of overturning the same based on the following grounds as contained in a memorandum of appeal dated 17th March, 2022 –

    1. That the learned trial magistrate erred in law and fact by entering the judgment in favour of the respondent as against the appellant and thereby making a finding that the respondent had proved his case on a balance of probabilities contrary to the evidence tendered therein.

    2. That the learned trial magistrate erred in law and infact in making a determination that the respondent was unlawfully terminated ty the appellant.

    3. That the learned trial magistrate erred in law and fact by entering a judgment in favour of the respondent despite the evidence adduced by the Appellant at the hearing and the submissions by the appellant thereof.

    4. That the learned magistrate erred in law and fact by wholly relying on the audit report and thereby ignored the appellant's evidence and thereby arrived at an erroneous decision.

    5. That the learned trial magistrate erred in law and fact in failing to hold that the Appellant had a fair and valid reason to terminate the claimant from the employment.

    6. That the learned magistrate erred in law and fact in filing to making a determination that the respondent/appellant followed the right procedure as required by Section 45 of the *Employment Act*.

4. The appeal is opposed by the respondent.

5. When the appeal came up in court for directions on 12th October, 2022 it was, by consent, directed that the appeal be canvassed by way of written submissions. Counsel for the appellant, Mr. Onyinkwa, filed his submissions on 14th December, 2022 while Mr. Kirwa for the respondent filed on 8th February, 2023. The same advocates appeared for their respective parties in the trial before the lower court.

II. Submission By Counsel

6. After laying the background of the appeal, counsel for the appellant condensed the grounds of appeal into three issues for determination by this court – Whether the respondent was unfairly and unlawfully terminated; Whether the trial magistrate failed to consider the evidence adduced by the appellant; and, Whether the respondent proved his case to the required standard hence deserving of the orders granted by the trial court in the judgment.

7. It is submitted that the appellant fairly and lawfully terminated the respondent in accordance with, inter alia, Section 45(2)(b) of the *Employment Act* (the Act). It is submitted that the appellant relied on the evidence in the audit report that was availed as an exhibit in the trial. It is further submitted that the respondent failed to exonerate himself from the charges and allegations against him.

8. It is submitted that the respondent was given a fair hearing, from the show-cause letter to a physical hearing, and as such the appellant purportedly complied with the requirements of the law in regard to substantive and procedural fairness.

9. It is further submitted that an audit report confirmed that the respondent was engaged in manipulation of milk-received records wherein over 2000 litres of milk was indicated as received yet the same was not

actually delivered and received, thereby occasioning loss to the appellant through fraudulent entries. It is submitted that the learned trial magistrate ignored this evidence which culminated in unlawful award of compensation to the respondent.

10. Further, it is submitted that the respondent did not prove his case on a balance of probabilities so as to deserve the orders that were granted by the trial court. It is submitted that the evidence on record is that the respondent was supplied with the audit report alongside the show-cause letter and if that was not the case there is no evidence that the respondent asked to be supplied with the same.

11. It is submitted that the respondent violated the appellant's code of conduct, effectively terminating his own contract of employment through fundamental breach of the same. It is submitted that the evidence adduced by the respondent in the trial failed to discharge the burden of proof under Section 107 of the *Evidence Act*.

12. This court, as a court of first appeal, has been called upon to re-evaluate, re-appraise, and re-analyze the evidence adduced during the trial and urged to conclude that the trial court arrived at the wrong conclusion and findings and as such allow this appeal, set aside the judgment, and substitute therefor an order dismissing the cause with costs.

13. On the other hand, counsel for the respondent identified the following issues for determination by the court –

    i. Whether the Respondent's services were unlawfully and procedurally terminated from employment.

    ii. Whether the reason for termination given by the Appellant amounts to a fair reason.

    iii. Whether the trial magistrate failed to consider the evidence adduced by the Appellant.

    iv. Whether the Respondent's case was proved on a balance of probability and whether the lower court erred in granting judgment in his favour.

14. It is submitted that the appellant failed to comply with, inter alia, Article 47 of *the Constitution* and Sections 41, 43, and 45(2) of the Act before, during, and after terminating the respondent. Counsel has cited Walter Ogal Anuro V Teachers Service Commission (2013) eKLR in laying emphasis that an employer ought to comply with the substantive and procedural law before terminating an employee.

15. It is submitted that the show-cause letter lacked details and particulars of the allegations and charges against the respondent and that the respondent was not granted adequate time and facilities to prepare for his defence. Counsel has cited several decisions on the need to grant an employee adequate time to prepare for defence in disciplinary proceedings, inter alia, Margaret Auma Ingwe V Kenya Power & Lighting Co. Ltd (2015) eKLR and Joseph Nyandiko Nyanchama V Pipeline Company Limited (2019) eKLR.

16. It is submitted that the decision by the appellant to hold en masse disciplinary hearing for all those employees suspected to have been involved in the fraudulent milk entries was flawed as it denied each employee, including the respondent, an opportunity to be heard.

17. It is further submitted that the respondent was not informed to attend the disciplinary hearing with a co-worker of his choice, and that he was not allowed to call a union representative of his choice as the one union official who attended, Anne Njagi, was called and brought along by the appellant contrary to the law.

18. Further, it is submitted that the appellant failed to supply the respondent with the audit report, the primary evidence on which the allegations of misconduct were founded, rendering the entire disciplinary process a sham. It is submitted that the appellant failed to avail the said audit report to the respondent even after the respondent requested for the same before the disciplinary hearing and again before the internal appeal after termination. Counsel has cited Jane Nalonja Rutto V New Kenya Cooperative Creameries Limited (2022) eKLR in this regard and asked the court to be persuaded and find the disciplinary hearing to have been unfair and unlawful.

19. In terms of substantive fairness, it is submitted that the appellant failed to establish adequate reason(s) or ground(s) for the termination so as to satisfy Section 45(2) of the Act. It is submitted further that in terminating the respondent without a substantive cause the appellant violated Articles 41(1) and 47(1) of *the Constitution*. Counsel has cited Rebecca Ann Maina & 2 Others V Jomo Kenyatta University of Agriculture & Technology (2014) eKLR.

20. It is submitted that during the trial the respondent proved his case on a balance of probabilities as the appellant was unable to prove the reason for termination and the respondent was able to prove that he was denied both substantive and procedural fairness.

21. It is submitted that the trial court considered all the evidence adduced on merit and found, and rightly so, in favour of the respondent. It is therefore concluded that the trial court was right in making the awards that it did in the judgment.

22. It is on the basis of the foregoing that the court is urged by the respondent to uphold and affirm the judgment of the lower court and dismiss this appeal with costs.

III. Issues For Deterrmination

23. This court has carefully gone through the entire record of appeal and more particularly the memorandum of appeal, the judgment of the lower court, and the proceedings in the trial court, and the respective written submissions by counsel for both parties. In my understanding of all the foregoing, the appellant is firstly complaining that the respondent did not prove his case during the trial and as such the trial court entered judgment in favour of the respondent against the weight of the evidence adduced from both sides. Secondly, it is the appellant's position that the respondent did not merit the awards made in the judgment.

24. Therefore, there are only two broad issues for determination in this appeal followed by the question of what orders this court should make as follows –

    a. Based on the evidence adduced from both sides during the trial, was the dismissal of the respondent by the appellant unfair and unlawful?

    b. Were the orders/awards made by the lower court lawful and justified?

    c. Depending on the outcome of (a) and (b) above, what orders may this court issue?

    d. Costs

IV. Determination

25. The fact of employment of the respondent by the appellant and the terms and conditions thereof were not contested in the trial and the same are not subject of this appeal. The real contest is in the manner and style in which the respondent was terminated and hence issue (a) above for determination.

26. This being a first appeal, this court has a duty and an obligation to re-examine, re-evaluate, and re-access the evidence, bearing in mind that it neither heard nor recorded the evidence at the trial – See Selle & Another V Associated Motor Boat Co. Ltd & Others [1968] EA 123, the court held as follows:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

27. The evidence on record is, as per the proceedings in the trial, that sometimes in mid-2017 the appellant got information that there was fraudulent manipulation of records that was on-going in its Sotik facility wherein the respondent was working alongside other workers. The information was allegedly that the respondent and his co-workers had manipulated records to the effect that over 2000 litres of milk had been delivered yet no such delivery had actually been made. It was alleged that the respondent and other employees were the beneficiaries of those fraudulent entries and the proceeds therefrom.

28. Based on the above background the appellant caused to be prepared an audit report dated 24th July, 2017 (pg. 179-186 of the record) which was produced as an exhibit by the appellant during the trial.

29. Pursuant to the audit report, the appellant issued to the claimant a show-cause letter dated 29th September, 2017 which was worded as follows –

> Ref: NKCC/PER.9712/HR/3436/2017/MKM/sgs 29th September, 2017
>
> MS. Richard Kiplangat Sigei – P/No.9712
>
> Booking Clerk
>
> New KCC Ltd
>
> Sotik Factory
>
> Dear Richard,
>
> RE: Show Cause
>
> Reference is made to the above-mentioned subject.
>
> Audit report dated 24th July 2017 indicates that between January and June 2017, you conspired with your colleague M/s Lorna Chepkemoi by manipulating intake records for supplier Nos. 7665,7681 and 7686 captured in the system and submitting the same for payment yet there were no deliveries of milk to the company.
>
> This manipulation of the systems and hosting of ghost farmers, exposed the company extensively.
>
> As the officer in charge of entering records and capturing the same in the farmers records, balancing of farmers records for payment, issuing farmers statements and bookings of the farmers records into JI forms you abused your office by engaging in fraudulent activities for a long time curtailed the management efforts to make Sotik a vibrant factory. The rampant milk adulteration, manipulation and falsification of intake records by yourself and your colleagues has proved that your integrity is questionable. The offense are punishable as per Clause 44(4) c & g of the *Employment Act*.

From the aforesaid anomalies, the Management has raised concerns and demand to know why disciplinary action should not be taken against you for conspiring with your colleagues to defraud the company. Your written explanation should reach the undersigned on or before 6th October, 2017.

For: New Kenya Co-operative Creamaries Limited

Signed

Michael Mukopi

Industrial Relations Manager

n.o.o.

c.c Managing Director

Chief Manager – HR & Administration

Chief Manager Raw Milk Procurement and Extension

Chief Manager – Factory Operations

Factory Manager – Sotik

30. The cited Section 44(4)(c) of the Act provides that it constitutes justifiable or lawful ground for dismissal if

> " "an employee 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 was his duty, under his contract, to have performed carefully and properly".

31. It is illustrative to note that the show-cause letter does not indicate, mention, or allege that the audit report was attached, enclosed, or in any other manner supplied or delivered to the respondent. The allegation by the witness for the appellant to the contrary therefore holds no water as oral evidence cannot be used to contradict or rebut written evidence. In any event, in his letter of appeal dated 28th March, 2018 (pg. 157-158 of the record) the respondent lamented about the failure by the appellant to supply him with the said audit report, and there is no evidence on record that the appellant over obliged to that request. The court shall proceed on the basis that the respondent was not at any point supplied with the audit report.

32. It is the mutual evidence on record from both sides that the respondent replied to the above show-cause letter and denied the charges and allegations therein. However, neither of the parties availed the said response to the show-cause letter as an exhibit during the trial.

33. So, in terms of substance the appellant was suspicious that the respondent had been engaged in negligent, careless, or improper performance of his duties as a records keeper whereby milk that had not been delivered was entered as delivered and or records manipulated to indicate false and or fraudulent entries as opposed to actual deliveries. In the entire report it is only in page 8 (pg. 186 of the record) that the respondent, a booking clerk, is mentioned alongside Sally Chesang and Barnaba Kiprob Bii, both also booking clerks. In relation to the three booking clerks it is remarked that they were "Involved in intake record manipulation. They facilitated fraudulent transactions by capturing non-existent or exaggerated intake figures. These are the staff directly involved in the cases of ghosts receipts and double weighing of already receipted milk". In conclusion, the audit report recommended that "Appropriate

disciplinary action should be taken on the listed staff for their misdemeanors to enable the company to get value from Sotik cluster and gain trust from farmers".

34. It is important to note that the respondent had served the appellant, by whatever name, for a period of close to 30 years and there is no evidence of bad blood or malice on the part of the appellant to want to terminate the respondent.

35. While the appellant may have suspected that the respondent and the other named persons were involved in manipulation of records or fraudulent entries, it should have been absolutely necessary for the respondent and each of the other co-workers to be supplied with the particulars of entries made by each one of them amongst the entries that were deemed to be false, manipulated, and or fraudulent. How else was the respondent expected to defend himself without the details of the dates and the particular entries that he is alleged to have made?

36. While the appellant may have had reason or reasons to suspect that the respondent and the others mentioned had manipulated or doctored the records with fraudulent intention, such believe ought to have been backed and firmed up with evidence, beyond the generalized conclusions in the audit report, for the same to form genuine, reasonable, and lawful grounds for disciplinary action, let alone dismissal or termination – See Section 43 of the Act.

37. The show-cause letter was followed up with a suspension letter dated 17th November, 2017 which was worded as follows –

> Ref: NKCC/PER.9712/HR/3436/2017/MKM/fnk 17th November, 2017
>
> MS. Richard Kiplangat Sigei – P/No.9712
>
> Booking Clerk
>
> New KCC Ltd
>
> Sotik Factory
>
> Dear Richard,
>
> RE: Suspension From Duty
>
> Reference is made to the above-mentioned subject.
>
> Audit report dated 24th July 2017 indicates that between January and June 2017, you conspired with your colleague M/s Lorna Chepkemoi by manipulating intake records for supplier Nos. 7665,7681 and 7686 captured in the system and submitting the same for payment yet there were no deliveries of milk to the company. This manipulation of the systems and hosting of ghost farmers, exposed the company extensively.
>
> As the officer in charge of entering records and capturing the same in the farmers records, balancing of farmers records for payment, issuing farmers statements and booking of the farmers records into JU Forms you abused your office by engaging in fraudulent activities for a long time curtailed the Management efforts to make Sotik a vibrant factory. The rampant milk adulteration, manipulation and falsification of intake records by yourself and your colleagues has proved that your integrity is questionable.
>
> Your response dated 10th October, 2017 to the show cause letter issued to you on 29th September, 2017 management found it unsatisfactory. You did not provide relevant evidence of your allegations, and you actions still shows you abused laid procedure. Your response seem to claim that the company did not loose therefore, contradicts the audit

report findings. According to *Employment Act* Clause 44(4) C this is a serious offence which borders on gross misconduct.

This letter therefore serves to advise you of your immediate suspension from the duty paving way for further investigation. You are required to handover any company property under your custody to your immediate supervisor before you proceed on your suspension.

For: New Kenya Co-operative Creamaries Limited

Signed

Michael Mukopi

Industrual Relations Manager

L.o.o.

c.c Managing Director

Chief Manager – HR & Administration

Chief Manager Raw Milk Procurement and Extension

Chief Manager – Audit Risks & Compliance – provide the evidence.

Chief Manager - Factory Operations

Factory Manager - Sotik

38. The letter of suspension promised further investigation yet there is no evidence of what came out of such investigation and if indeed such further investigation was carried out. The intended investigation must have been beyond the audit report as at the date of the letter of suspension the audit report had already been prepared on 24th July, 2017 and had formed the basis for issuance of the show-cause letter to the respondent.

39. Vide a letter dated 3rd January, 2018 the respondent was invited for disciplinary hearing which was to take place on 8th January, 2018. It is illustrative that the letter did not inform the respondent of his right to come along with a witness, whether a co-worker of his choice or indeed any other witness, or his lawful right to bring along a union representative of his choice.

40. Nonetheless, the respondent attended the hearing and the minutes of the meeting indicate that a shop-steward, Ann Njagi, attended. The respondent is categorical that this was not his invitee or representative and was not known to him as his shop-steward was one Mr. Caleb whom the respondent was neither informed to come along with nor given a chance to invite. This fact is not denied or disputed by the appellant.

41. The disciplinary hearing in regard to the respondent was not fully covered on 8th January, 2018 as the appellant had opted to carry out omnibus disciplinary hearings en masse for all those workers who had been mentioned in the audit report. The respondent's disciplinary hearing was continued on 17th April, 2018. The audit report was tabled and the respondent was expected to respond to the same. It is important to note that the respondent was coming into contact with the audit report for the very first time during the disciplinary hearing and even then, there is no evidence that he was given a copy of the same during the hearing. There is no evidence that he was given an opportunity to put questions to the person who prepared and presented the report, Mr. Mukopi.

42. The minutes show that instead of the respondent being afforded a chance to ask questions and cross-examine the person who presented the report, the panel subjected the respondent to questions as if he

was under a duty to prove his innocence. There is no evidence of the panel inquiring if the respondent had any witness(es) to call or if he had any questions to ask.

43. The disciplinary hearing was followed with a letter of termination dated 20th March, 2018 which indicated that the respondent had been terminated for gross neglect of duty under Section 44(4)(c) of the Act. The letter did not inform the respondent of his right of appeal or review and timelines applicable thereto.

44. Nonetheless, the respondent appealed the termination vide a letter dated 28th March, 2018 wherein he lamented the failure by the appellant to supply him with particularized details of his misconduct and or negligence, and more so failure by the appellant to supply him with the audit report.

45. However, the termination was upheld and the decision communicated to the respondent vide a letter of 17th September, 2018. The appellant reiterated that the respondent had failed to provide documents or records to exonerate himself from the charges and allegations against him.

46. It is on the basis of the foregoing that the respondent filed the cause in the lower court vide a statement of claim filed in court on 8th October, 2018 seeking various remedies culminating in the judgment alluded to above, now the subject of this appeal.

47. This court (ELRC) has developed and somehow settled the jurisprudence on what does (or does not) constitute unfair and unlawful termination or wrongful dismissal through a multitude of decisions – See Mary Chemweno V Kenya Pipeline Company Limited (2017) eKLR, Loice Otieno V Kenya Commercial Bank Limited (2013) eKLR, and Walter Ogal Anuro V Teachers Service Commission (2012) eKLR.

48. It is the principles established in the foregoing decisions that this court shall apply to the evidence and facts of this appeal in arriving at a fair decision on whether the termination of the respondent by the appellant was fair, lawful, and justified as argued and urged by the appellant. The facts, evidence, and circumstances material to this appeal have been set forth and analyzed above and the court shall not reproduce the same here.

49. It is by now clear that the only evidence against the respondent that was used for the disciplinary action against him, culminating in the termination, is the audit report alluded to above. As noted in an earlier part of this judgment the said report did not contain a particular and singular allegation against the respondent personally. The allegations of manipulation and false and or fraudulent entries in the records were against the respondent and his two co-workers who allegedly made the entries. There is no evidence of the date, time, and contents of the entries specifically made by the respondent and for which he was held responsible and accountable. It is the view and holding of this court that the omnibus and or collective charges against the respondent and his co-workers did not and cannot form a good basis for disciplinary action, let alone the termination.

50. The appellant was under legal obligation to prove that indeed it had genuine and reasonable cause and believe for taking the disciplinary action culminating in the dismissal. Certainly, and this court has stated as much in many a decision, disciplinary proceedings are not court trials and an employer is not expected to prove the allegations/charges against an employee beyond reasonable doubts. However, disciplinary proceedings are an administrative action that must adhere to the standards set by Article 47 of *the Constitution*, Section 4 of the *Fair Administrative Action Act*, and the various provisions of the *Employment Act*.

51. While the appellant may have had very strong suspicion that the respondent and his two co-workers were involved in manipulation of records or false and or fraudulent entries, it is my view and holding

that suspicion alone does not suffice as genuine and reasonable grounds for disciplinary action, let alone termination. In fact, to fortify this finding, the appellant promised further investigation in the letter of suspension. Sadly, no evidence was availed at the trial as to whether further investigation was executed and the outcome thereof.

52. In terms of the substance, therefore, the court finds and holds that the appellant failed to demonstrate that it had good, genuine, and reasonable grounds for the termination as expected under Section 43 of the Act.

53. Of course, substantive fairness cannot be complete without procedural fairness in assessing the fairness and lawfulness, or otherwise, of a termination or dismissal. As stated above, an employer is not expected to follow the strict rules of procedure and evidence as a court of law should. However, an employer is expected to give a fair hearing and accommodate an employee in accordance to the general rules and ingredients of natural justice as enshrined in the above cited constitutional and statutory provisions.

54. It is the duty of an employer, inter alia, to inform an employee in clear details and particulars of the grounds upon which a disciplinary action is founded. It is also the duty, and indeed an obligation, for an employer to supply the employee with all evidence gathered, both oral and documentary, to enable and facilitate the employee to mount whatever defence that such an employee may wish to advance. It is also the duty of an employer to inform the employee of his right to call witnesses of his choice, to be accompanied by a co-worker of his choice to the disciplinary hearing, and to come along with a trade union representative of choice if the employee is a member of such union.

55. Without the necessity of repeating the facts and evidence adduced and availed during the trial, the court finds and holds that the appellant failed to comply with all the requirements in the foregoing paragraph. The respondent was not at any point supplied with the audit report that formed the basis of the disciplinary action, he was not informed of his right to call witnesses and come along with a union official, officer, or representative of his choice. The respondent lamented and decried, even on his internal appeal to the termination, of the failure by the appellant to supply him with the said audit report.

56. During the disciplinary hearing the appellant decided to conduct the same en masse against all those employees alleged to have been involved in the alleged misconduct. While this court is cognizant that the only evidence against all the workers was the audit report, it should have been prudent to accord each of the workers a separate hearing at any given time and place for the process to gain the tract and sanctity of fair hearing. Moreover, the hearing for the respondent, from the minutes, turned out to be a grilling session for the respondent to "exonerate" himself from the charges and avail evidence in support of his defence.

57. Clearly and evidently, the appellant failed to follow proper procedure in carrying out the disciplinary hearing and terminating the respondent. As at the time of the disciplinary action the respondent had served the appellant for close to 30 years with a clean disciplinary record. While it is the prerogative of an employer to take disciplinary action against its employees, in accordance with the law, employers ought to understand that employees are real human beings who are prone to error. It is not every error, misdemeanor, or misconduct that should result in a disciplinary action, let alone a dismissal or termination or dismissal. It is the view and holding of this court that even if the appellant had substantive grounds for the disciplinary action and even applied a reasonably compliant procedure, which is however not the case as held above, it would still have been too draconian, excessive, and oppressive in the circumstances to terminate the respondent who had served it for 30 years with a clean record. It is the high time that employers started applying alternative sanctions and measures in enforcing discipline in their workforce. Warnings, surcharges, admonishment, demotion, denial of

promotion, transfer, redeployment, et al, are equally good measures that may be applied as a first-time measure before drastic actions such termination or dismissal.

58. To state the obvious, employers need to be certain and specific of the charges and or allegations against employees. Mere suspicion is not acceptable and shall not suffice as a ground for disciplinary action. The suspicion must be firmed up and supported with probable and plausible evidence for the employer to hold genuine and reasonable believe that the employee is guilty of the alleged misconduct. In the same breath, employers need to be careful not to create undue suffering to employees and their dependents in a poor economy such as ours. It is important for human resources departments to evaluate and delineate what constitutes general misconduct and gross misconduct, in accordance with the law and the policies, as not every error, misdemeanor or misconduct ought to result in termination or dismissal.

59. The court finds and holds that the termination of the respondent by the appellant was unfair and unlawful, both in substance and procedure. The finding by the trial court that the procedure applied was lawful is clearly wrong and erroneous and the same is hereby reversed.

60. However, the submission by counsel for the appellant that the trial court failed to consider the evidence by the appellant is clearly wrong and not factual as the learned trial magistrate clearly analyzed and considered the evidence adduced by both parties and the rival submissions by counsel in the judgment before arriving at the decision that it did.

61. Having found and held as above the court shall now consider the remedies that the trial court awarded. In doing so, it is important to note that no cross-appeal was filed by the respondent.

62. The court agrees and upholds the declaration by the trial court that the termination of the respondent by the appellant was unfair and unlawful. However, this court finds and holds that the unfairness and unlawfulness was in both substance and procedure.

63. In terms of compensation, the trial court awarded the respondent an equivalent of 12 months' gross salary. However, the learned magistrate did no give any reasons therefor except mentioning in passing Section 49(1)(c) of the Act. Considering the lengthy period that the respondent had served the appellant, of over 30 years; the appellant did not pay any terminal dues to the respondent; neither of the parties expressed willingness to re-engage or reinstatement; failure by the appellant to accord the respondent a fair hearing and consideration; and, considering all other relevant factors and guidance under Section 49(4) of the Act, the court finds and holds that the award by the learned magistrate was fair, reasonable, and just in the circumstances of the case. The award in the sum of Kshs.489,360/= was reasonable and the same was neither excessive nor oppressive to the appellant. The same is upheld.

64. The pay in lieu of notice is based on the gross pay for one month and in view of the unfair and unlawful termination there should be no contest on the same. The award is upheld in the sum of Kshs.40,780/=.

65. On leave pay the trial court found that the respondent proved his claim as no records were availed and produced by the appellant, as the lawful custodian of employment records under Sections 10 and 74 of the Act to dislodge the claim. The award is upheld in the sum of Kshs.38,061.33.

66. The order that the respondent be issued and supplied with a certificate of service is well founded in accordance with Section 51 of the Act.

67. The net sum of all the foregoing is that the appeal herein has no merits and the same is hereby dismissed in its entirety.

V. Costs

68. The appeal is hereby dismissed with costs to the respondent and the order on costs by the trial court is also upheld.

VI. Orders

69. The court issues orders that -

    a. The judgment of the lower court be and is hereby upheld.

    b. This appeal is hereby dismissed in its entirety with costs to the respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 25TH DAY OF JANUARY, 2024.

.....

DAVID NDERITU

JUDGE