Dungani v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 12 of 2023) [2024] KEELRC 172 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 172 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL 12 OF 2023

JW KELI, J

FEBRUARY 8, 2024

BETWEEN

JOSEPH MULIRA DUNGANI ..... APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT

(Appeal against the entire judgment and decree of Hon. Z.J Nyakundi(SPM) delivered on the 23rd February 2023 at Butali CMELRC No. 4 of 2020)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of Hon. Z.J. Nyakundi (SPM) delivered on the 23rd February 2023 at Butali CMELRC No. 4 of 2020 filed Memorandum of Appeal dated 21st November 2022 against the entire decision seeking that the appeal be allowed and the judgment of the learned Magistrate be set aside and substituted with an order allowing the Appellant's case with costs at appeal and in the subordinate court matter.

2. The appeal was premised on the following grounds: -

    1. The learned trial Magistrate erred in dismissing the claimant's case in favour of the Respondent without any legal basis.

    2. The Learned trial magistrate erred in failing to appreciate the overwhelming evidence in favour of the Appellant.

    3. The Learned trial magistrate erred in failing to appreciate the Claimant's written submissions.

    4. The Learned trial magistrate erred in focusing on the Respondent's submissions in the entire judgment.

5. 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.

6. The Learned trial magistrate erred in failing to consider the Claimant's testimony with regard to the unfair disciplinary hearing and that everything he said in his defense was not reflected in the minutes produced before the Honourable Court.

7. The Learned trial magistrate erred in failing to appreciate the Claimant's submissions that there was no documentary evidence produced/served upon him before and during the disciplinary hearing.

8. The Learned trial magistrate erred in failing to appreciate that disciplinary hearing is a quasi-judicial proceedings and therefore the rules of evidence apply

9. The Learned trial magistrate erred in finding that the claimant was given an opportunity to defend himself and filed to consider the substance of the said disciplinary hearing.

10. The Learned trial magistrate erred in failing to consider that there was no demonstration of fuel siphoning during the disciplinary hearing.

11. The trial magistrate erred in failing to consider that the Claimant was a winch helper and not the winch operator.

12. The Learned trial magistrate erred in finding that the court has no doubt as to the functionality of the Fuel Level Sensor yet there was no calibration certificate produced to prove that it was in good working condition and its accuracy as per the requirements of the *Weights and Measures Act*.

13. 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.

14. The Learned trial magistrate erred inputting reliance on the evidence of the Human Resource Manager and ICT officer with regards to functionality of the Fuel Level Sensor yet none of them was the manufacturer of the said Fuel Level Sensor neither were they experts in weights and measures.

15. 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 were in control of the system.

16. 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 that indeed the claimant siphoned 11.7 liters of fuel.

17. The Learned trial magistrate erred in failing to consider that fuel siphoning is an offense of a criminal nature and its standard of proof is beyond a reasonable doubt.

18. 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.

19. The trial magistrate erred in failing to consider the fact that the Respondent did not adduce any evidence of purchase of the said Fuel Level Sensor hence it could not be ascertained whether a Fuel Level Sensor was used or not.

20. The trial Magistrate erred in failing to consider the evidence of DWI that the Claimant was not notified on the allegations of fuel siphoning on the material day.

21. The trial magistrate erred in failing to consider the fact that the Claimant was never been served with any warning letters with regards to siphoning of fuel.

22. 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.

23. The Learned trial magistrate erred in failing to consider that the union representatives present during the disciplinary hearing was not of the claimant's choice as mandatorily required by the *Employment Act*, 2007.

24. The Learned trial magistrate erred in failing to hold that the Claimant had proved his case on a balance of probability.

25. The Learned trial Magistrate erred in holding that the Claimant may be issued with a certificate of service if it was not issued, section 51 of the *Employment Act* makes it mandatory and not optional as the court held.

26. The Learned trial magistrate erred in failing to hold that the Respondent had failed to rebut the Claimant's case.

27. The learned trial magistrate erred both in law and in fact in failing to find in favour of the Appellant.

Background to the Appeal

3. The Appellant vide statement of claim dated 5th February 2020 sought before the subordinate court the following reliefs:-

    a. Declaration that the Claimant's services were unprocedurally, unlawfully, and unfairly terminates with effect from 16th November 2019, and in the circumstances, the Claimant is entitled to compensation of his dues for the unfair termination.

    b. The sum of Kshs 8,128,820.56/- as pleaded in paragraph 13(of the claim).

    c. An order compelling the Respondent to issue the Claimant a Certificate of Service under section 51 of the *Employment Act*, 2007.

    d. Costs of this suit and interests at court rates from the date of filing of the suit until payment in full.

    e. Any other relief (s)this Honourable Court deems just and fit to grant (page 11).

4. The trial magistrate Hon. Z.J. Nyakundi (SPM) in a decision delivered on the 23rd February 2022 entered Judgment dismissing the Claimant's suit with costs to the Respondent (page 140).

Hearing of the Appeal

5. The Court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Z.K Yego Law Offices were dated 20th June 2023 and received in court on 22nd June 2023. The Respondent's written submissions drawn by O& M Law LLP were dated 31st October 2023 and received in court on an even date.

Determination

6. The principles which guide this court in an appeal from a trial court are settled In *Selle and another vAssociated Motor Boat Company Ltd & others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

> "An appeal to this Court from a trial by the High Court is by way of a 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. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

7. Further in *David Kahuruka Gitau & Another vNancy Ann Wathithi Gatu & Another Nyeri* HCCA No. 43 of 2013 the court opined:- 'It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions."

Issues for determination

8. The Appellant in written submissions identified the following issues for determination in the appeal: -

   a. 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.

   b. Whether the dismissal of the Appellant by the respondent was unfair, unlawful and illegal.

   c. Whether the Learned Trial Magistrate considered the substantive reasons for the Appellant's dismissal.

   d. Whether the Appellant is entitled to the reliefs sought.

   e. Whether the Appellant is entitled to an award of a certificate of Service.

9. The Respondent in written submissions identified the following issues for determination in the appeal:-

   a. Whether the Appellant's termination was unfair/unlawful- procedural fairness.

   b. Whether the trial magistrate considered the substantive reasons advanced for the dismissal – substantive fairness.

   c. Whether the Appellant is entitled to the reliefs sought.

10. The court adopted for determination in the appeal the issues raised by the parties summarized as follows: -

    a. 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.

    b. Whether the Appellant's termination was unfair/unlawful- procedural fairness.

c. Whether the trial magistrate considered the substantive reasons advanced for the dismissal – substantive fairness.

d. Whether the Appellant is entitled to the reliefs sought.

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

11. This issue was addressed by the Appellant only. The Appellant submits that the Learned Magistrate in holding that he failed to prove his case on the balance of probabilities, the import of the finding was to effect that the burden of proof rested with the Appellant to prove he had not committed the alleged gross misconduct for which his employment was terminated. That the law imposes the burden of proof on the employer to prove that the employee had committed the offence and /or committed gross misconduct and relied on the provisions of section 43 of the *Employment Act* to wit:- '43.1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

12. The Appellant to buttress the ground of appeal on the burden of proof further relied on the decision in *Galgalo Jarso Jillo vAgricultural Finance Corporation* (2021) eKLR to effect that once an employee places before court evidence suggesting prima facie case of occurrence of unfair termination the burden of proof shifts to the employer to justify the termination. The Appellant further relied on the decision in *Josephine M. Ndungu & others vPlan International Inc* (2019) eKLR where the court held that section 45 of the *Employment Act* suggests two burdens: -the employee has the burden of proving the unlawfulness of the termination and the employer has the burden of justifying the burden.

13. The Appellant submits that he established a prima facie case against the Respondent and that the burden of proof ought to have shifted to the Respondent to prove the allegations of misconduct and the reasons for the termination. That this was not done. That no evidence was brought forward to authenticate the findings of the Fuel Lever Sensor system in finding the Appellant guilty of the alleged misconduct and consequently the Learned Magistrate misdirected himself in finding the Appellant had not proved his case on a balance of probabilities against the Respondent.

The burden of proof in employment claims

14. The burden of proof in employment claims is provided for under section 47 (5) of the *Employment Act* to wit: ''47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

15. The court upholds the interpretation of the burden of proof as stated in the *Josephine M. Ndungu & others vPlan International Inc* (2019) e KLR to wit: -'68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of *the Act*. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under

section 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed."

16. The burden of proving unfair termination thus lies with the employee (section 47(5) of the *Employment Act* reads:-"For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."). The said burden is discharged once the employee establishes a prima facie case that the termination of employment did not fall within the four corners of lawful and fair termination of employment legal threshold set out under section 45(2) of the *Employment Act* namely:-(i) related to the employee's conduct(1), capacity or compatibility(2); or (ii) based on the operational requirements of the employer(3); and (c) that the employment was terminated by fair procedure(4).

17. On whether the Magistrate erred in holding the Claimant had not proved his case on balance of probabilities, I adopt my decision in a similar case in Kakamega ELRC Appeal NO. 22 OF 2023 *Edwin Mukhwana Lumanyasi vWest Kenya Sugar Company Limited*(ur delivered on the 21st September 2023) where I determined the standard of proof in employment claims as follows:- 'Employment claims are civil in nature and thus the standard of proof is on balance of probabilities. In the allegations of suspicion of criminal offence the employer ought to produce evidence to prove the basis of the suspicion. The test of reasonableness also applies as envisaged under section 45(4)b to extent the termination is unfair if '(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee". The employer and the lower court dealing with employment misconduct were not sitting as a criminal court to apply the standard of beyond reasonable doubt. I find no fault on the learned magistrate in finding no proof on balance of probabilities of the wrongful dismissal/ termination claim by the Claimant as that is the burden envisaged under section 47(5) of the *Employment Act* to wit:- '47(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer"(emphasis provided)." The Learned Magistrate on finding the Claimant had not discharged his burden as stated under section 47(5) of the *Employment Act* was right to make the impugned holding.

Whether the Appellant's termination was unfair/unlawful- procedural fairness.

18. Section 41 of the *Employment Act* describes the procedural fairness to be met by employer contemplating termination of employment on grounds of misconduct, poor perfromance or physical incapacity of employee as follows:- ''41) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (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. '' Subsection 2 applies in event the employer is considering summary dismissal under section 44 of the *Employment Act*. In the instant case this was a termination under subsection 1. The court will evaluate the evidence to reach its each own conclusion whether the process met the procedural test under section 41(1) *supra*.

The Appellant's case

19. The Appellant in memorandum of appeal raised the following grounds to challenge the decision on procedural fairness-

    a. 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.

    b. The Learned trial magistrate erred in failing to consider the Claimant's testimony with regards to the unfair disciplinary hearing and that everything he said in his defence was not reflected in the minutes produced before the Honourable Court.

    c. The Learned trial magistrate erred in failing to appreciate the Claimant's submissions that there was no documentary evidence produced/served upon him before and during the disciplinary hearing.

    d. The Learned trial magistrate erred in failing to appreciate that disciplinary hearing is a quasi-judicial proceeding and therefore the rules of evidence apply

    e. The Learned trial magistrate erred in finding that the Claimant was given an opportunity to defend himself and failed to consider the substance of the said disciplinary hearing.

    f. The Learned trial magistrate erred in failing to consider that there was no demonstration of fuel siphoning during the disciplinary hearing.

    g. The Learned trial magistrate erred in failing to consider that the union representatives present during the disciplinary hearing was not of the claimant's choice as mandatorily required by the *Employment Act*, 2007.

20. The Court holds that the grounds of appeal must flow from the pleadings and evidence before the trial court. The Appellant in his claim stated the basis of the challenge of procedural fairness specifically in paragraph 9 as follows: - 'The claimant avers that none of the mandatory procedures provided for under section 41(1 and 2) were ever applied to him before the Respondent took the decision to terminate his employment with the Respondent. Furthermore, and more importantly the reasons for his dismissal were not explained to him by the Respondent's representative in a language he understands before terminating the claimant's services with respondent.''

21. The Court at the appeal stage will thus confine itself to the averments in the statement of claim.

22. In his submissions the Appellant relied on the minutes of the disciplinary proceedings and the court found that the submissions focused on the FLS demonstration and the appeal process not the disciplinary process being unfair. I did not find submissions on the issues before the lower court being the reasons for his dismissal were not explained to him by the Respondent's representative in a language he understands before termination of claimant's services with the respondent.''' And ground raised in paragraph 14(B) of the statement of claim of the Respondent failing to consider the representation of the Claimant in opposition to the reasons for the termination. (Emphasis given)

23. In response to issues raised in the pleadings by the Claimant(*supra*) the Respondent at trial court produced the letter dated 14th October 2021 of suspension from duty which also contained the show cause to the Appellant (page 34), the Appellant's written response (page 32-33), notice to attend the disciplinary hearing (page 31), the minutes of the disciplinary hearing (page 24-30), and the letter of dismissal (page 23). The letter of dismissal gave the Appellant 14 days to appeal.

24. The Respondent submits that the minutes confirm there were two union representatives and the Appellant was dismissed after the hearing. The issue of the two union representatives not having been chosen by the Appellant was not raised at the trial court. That the alleged faultiness of the FLS system was not pleaded at the lower court nor at the internal appeal.

25. The Court perused the documents relied on by the parties and found the Respondent allowed the Appellant to respond in writing to the show cause which he did. In the response, the same was in the handwriting of the Appellant and English language and hence the language he understood. The Appellant in the notice inviting the Appellant to the disciplinary hearing was informed of right to representation and to call witnesses. The reasons for the dismissal were stated in writing. The foregoing was confirmed by the Appellant at cross-examination (page 126). The Appellant never raised the issue of internal appeal at the lower court. Parties at the appeal stage are bound by their pleadings before the lower court. Consequently, the Court holds that there was procedural fairness before the dismissal from employment of the Appellant consistent with the provisions of section 41 of the *Employment Act*.

26. The Court upholds the decision of the Learned Magistrate that there was procedural fairness in the dismissal of the Appellant from employment as the process complied with the mandatory requirements of section 41 of the *Employment Act*.

Whether the trial magistrate considered the substantive reasons advanced for the dismissal – substantive fairness.

27. The appeal under this ground centered on the alleged failure by the Learned Magistrate to find there was no documentary evidence produced before him or at the disciplinary hearing, failing to consider there was no demonstration of fuel siphoning at the disciplinary hearing, in finding there was no doubt on the functionality of the Fuel Level Sensor yet there was no calibration certificate produced to prove that it was in good working condition and its accuracy as the per the requirements of the *Weights and Measures Act*, no document in court detailing how the Fuel Level Sensor works, failing to consider the respondent could have manipulated the Fuel Level Sensor in their control; Failing to consider fuel siphoning is a criminal matter and its standard of proof is beyond a reasonable doubt. The respondent did not produce evidence of purchase of the Fuel Level Sensor system hence it could not ascertain whether it had been used or not. That the Appellant was not notified of fuel siphoning on the material day or issued with a warning letter on the same.

28. In his written submissions at appeal, the Appellant in relation to fairness of termination relied on the provisions of section 45)(2) of the *Employment Act* to wit:- '(1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove— (a) (b) that the reason for the termination is valid; that the reason for the termination is a fair reason— (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure." The Appellant further submits that for the termination to pass muster it must pass the fairness test of substantive justification and procedural fairness as held in *Walter Ogal Anuro vTeachers Service Commission*.

29. The Appellant further relied on the provisions of section 45(4)(b) of the *Employment Act* to wit:- '4) A termination of employment shall be unfair for the purposes of this Part where (b) or it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee."

30. The Appellant submits that based on the evidence before the trial court it was evident there was no valid reason given for his termination from employment. That the Respondent failed to produce evidence before the trial court to justify the conclusion that the Appellants siphoned fuel from the truck KTCB 749T save for the readings of the faulty FLS. That the FLS is programmed by the Respondent and thereafter allegation against a party must be corroborated. There was no evidence of warning to the Appellant on similar allegations. That DW1 stated the Appellant got verbal warnings. That section 45(5) of the *Employment Act* 2007 requires that there be written warnings. DW1 admitted that written warnings were necessary in such an important case. That the Learned Magistrate only considered procedural fairness and failed to address valid reasons for the termination.

31. To buttress the foregoing submissions, the Appellant relied on the various decisions:- In *Alphonce Machanga Mwachanua vOperation 680 Limited* (2013) e KLR where the court summarized legal fairness under section 41 of the *Employment Act*. Further in the case of *Nicholas Muasya Kyula vFarmchem Ltd* [2012] e KLR where Justice Ongaya delineated the threshold of sections 43 and 41 of the *Employment Act* as follows: - ''In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. Typically, the process would entail the following steps:

    (a) A report to the relevant authority that a misconduct has been committed by an employee.

    (b) A preliminary report to gather relevant information on the alleged misconduct.

    (c) If the evidence is obvious and the misconduct is gross, the employer can summarily dismiss.

    (d) If the evidence is not obvious and the misconduct is not gross or its weight is not clear during the preliminary investigation, the proper notification is drawn. The notification commonly called a show cause letter must clearly spell out the intended ground for termination being misconduct, poor performance or physical incapacity. The particulars must be clear enough for the employee to be able to effectively defend himself or herself. The notice must give the employee reasonable time within which to respond.

    (e) Upon responding or the time allowed lapsing, the employee should be called to a hearing. At the hearing, all relevant information should be recorded in a fair process where the complainant is not leading or chairing the proceedings. The employee should be given ample chance to exculpate oneself. A third party of the employee's choice should be permitted to attend the hearing.

    (f) A report of the hearing proceedings should be drawn and formally maintained by the employer as evidence of due process of fairness. The report must set out the findings on the allegations, any mitigating or aggravating factors, and the recommendations which may include the termination.

    (g) The decision made must then be communicated to the employee.

    In the instant case, the court finds that the reasons for termination were not proved and the procedure requiring notification and a hearing was not complied with. The termination was unfair.''In the case of *James Kabengi Mugo vSyngenta East Africa Limited*[2013]eKLR where Justice Rika stated:-''The Kenyan Employment Law no longer accepts that employers can fire employees at will, for any reason or no reason.''

Response submissions

32. The Respondent relied on provisions of section 47(5) of the *Employment Act* on the burden of proof(*supra*).

33. The Respondent submits that the Appellant was dismissed for reasons of fuel siphoning. The reasons were explained in the suspension letter. DW2 produced graphs (D-Exhibit No. 17) of the Fuel Level Sensor (FLS) system and explained how the system works. The reasons and evidence used in charging the Appellant were obtained and substantiated by the FLS system.

34. The Respondent submits that the Appellant never raised an issue with the functionality of the Fuel Level Sensor system at the disciplinary hearing nor pleaded the same in his pleadings at the lower court.

35. The Respondent submits that there was substantive fairness in the process followed and the Respondent fulfilled the burden of justifying the grounds for the termination of the employment.

Decision on substantive fairness.

36. The letter of dismissal of the Appellant from employment of the Respondent was dated 16th November 2019. The reasons for the dismissal were stated in the letter as follows: - '.....on October 12 2019 wherein almost 11 liters of fuel were siphoned from Winch KTCB 749T while you were on official assignment with it,..... from subsequent investigation that followed this incident and the report gathered in the due process it has been proven beyond doubt that the 11 liters of fuel were indeed siphoned from the winch. The management believes you had a role to play in this through either abetting or being an active accomplice to this act. Be informed that this act has led to loss of trust accorded to you by the company to honestly handle its property and the employer-employee relationship has severely been damaged. The management has therefore decided to summarily dismiss you from service in accordance with provisions of the law and your initial contract of engagement." (page 23)

37. The Respondent produced the minutes of the disciplinary proceedings where the FLS system was explained and questions asked. There were two union representatives present (from page 24).

38. The court examined the statement of the claim. Paragraph 11 of the statement of claim stated the particulars of the illegality of the termination of the employment. (Page 9) The entire grounds were based on the provisions of section 41 of the *Employment Act* being procedural fairness. Nowhere in the entire statement of claim was the accusation of siphoning of fuel denied or the FLS system challenged. I also noted in the statement of claim there was no issue of warning letters which is one of the issues the court is to take into account in deciding if the termination was just and equitable. Section 45(5) of the *Employment Act* relied on by the Appellant states:- ''45(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider— (a) (b) (c) (d) (e) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; the conduct and capability of the employee up to the date of termination; the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee."

39. The defence at trial court repeated the same reasons for dismissal as stated in the letter of dismissal and produced evidence of how the FLS worked (D-exhibits 1,2 and 3) produced by DW1. (page 128). In his oral evidence, the Appellant never raised the issue of the faultiness of the FLS system.

40. In the judgment on page 138, the Learned Magistrate addressed the validity of the reasons for the dismissal by analysis of the evidence on the FLS system and concluded that the court did not doubt the functionality of the FLS system. The court concluded that being an accomplice of fuel siphoning amounted to gross misconduct under section 44(4) (c) of the *Employment Act*. The Learned Magistrate held the Respondent discharged his burden of proof by justification of the reasons for dismissal.

41. The Court finds from the foregoing, that the functionality of the FLS was not challenged in the pleadings but nevertheless the Respondent having applied the system to find fuel siphoning explained the basis of the conclusion before the trial court satisfactorily. The Court holds that a party who failed to plead an issue at the lower court cannot raise the unpleaded issue as a ground of appeal. The Court upholds the decisions cited by the Appellant on procedural fairness and on substantive fairness as explained in detail in *Nicholus Muasya Kyula vFarmchem Ltd* [2012] eKLR where Justice Ongaya delineated the threshold of sections 43 and 41 of the *Employment Act* as follows:- ''In making the finding the court considers that it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes for undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at ....'' The court is satisfied that there was procedural and substantive fairness in the dismissal of the Appellant from employment of the Respondent which met the threshold under section 41 and 45(2) of the *Employment Act*. The Court finds that the decision of the employer also met the reasonable test in the decision cited by the Learned Magistrate in *British Leyland UK LTD vSwift* where Lord Denning defined the correct test to be:- ''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 take a different view.''

42. The Appellant was a winch helper to a driver who admitted to have received previous warning of fuel siphoning and the FLS established fuel was siphoned while the Appellant was on duty. He was an accomplice of the stealing by not reporting and that damaged the trust he had with the Respondent. It was reasonable for the employer to dismiss him. The lack of written warning did not affect the procedural process as section 44 of the *Employment Act* provides for summary dismissal for stealing. Section 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 subsection (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 if— (G)An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offense against or to the substantial detriment of his employer or his employer's property.''

43. In the upshot, the Court holds the dismissal of Appellant from employment of the Respondent was lawful and fair. The Court upholds decision of the Learned Magistrate that there was procedural and substantive fairness in the termination of employment of the Appellant by the Respondent.

Whether the Appellant is entitled to the reliefs sought

44. The Appellant sought various reliefs before the lower court. The lower court having held there was procedural and substantive fairness found that the Appellant did not deserve any of the reliefs sought.

45. At paragraph 13 the statement of claim the Appellant sought various reliefs.

46. On the claim for notice pay for one month: - The Respondent averred notice pay was not due to the Appellant having been dismissed from employment after a fair hearing. Section 49 of the *Employment Act* provides for remedies for unfair dismissal which include notice pay. The termination was fair hence the notice pay was not justified.

47. On the claim for leave days, the Appellant sought leave pay from 2009 to 2019. At the hearing, this was not substantiated. The respondent in written response stated that following the termination the claimant received full payment for accrued 20 leave days and was paid Kshs, 7,707.60. DW2 stated that the cheque was forwarded to the County Labour office and posted. The Appellant made a general denial of this specific position which the court finds did not controvert the allegation of the payment (page 97).

48. On the claim for housing allowance, the Court found that the Appellant was paid a consolidated pay of Kshs10,020 and the minimum wage for turnboy(position of the Appellant as winch helper) per month in 2019 for other areas was Kshs 8366.35 (page 75). The Court holds the claim for housing allowance was unfounded.

49. The claim for compensation fails as the dismissal from employment of the Appellant has been held as lawful and fair.

50. On the claim for overtime- the Appellant was paid overtime in monthly payment hence the same was unfounded. (page 75)

51. On the claim for rest days- there was no evidence led by the Claimant in his pleadings and evidence on the basis of the claim.

52. On claim for underpayment, I already stated that the salary paid was in compliance with the relevant wages order.

53. On the claim for certificate of service. The same is a statutory right. The learned Magistrate stated that the same be issued if not collected (page 121)hence not an issue for determination on appeal.

Conclusion

54. The Court enters Judgment that the appeal is held to be without merit and is dismissed. The judgment and decree of Hon. Z.J Nyakundi (SPM) delivered on the 23rd February 2023 at Butali CMELRC No. 4 of 2020 between Joseph Mulira Dungani vWest Kenya Sugar Co. Ltd is upheld.

55. To temper justice with mercy I order each party to bear own costs in the appeal.

56. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8TH FEBRUARY 2024.

JEMIMAH KELI

JUDGE

In The Presence Of :-

For Appellant: - Z.K. Yego Law Offices

For Respondent: - M/S O&M Law LLP

Court Assistant: Lucy Macheso

Appellant: Chelimo(Ms)

Respondent: Otieno