Wanyonyi v Principal Kamusinde Secondary School & another (Employment and Labour Relations Appeal E010 of 2023) [2024] KEELRC 648 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 648 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2023

JW KELI, J

MARCH 14, 2024

BETWEEN

ARSYBEL MASABULE WANYONYI ..... APPELLANT

AND

THE PRINCIPAL KAMUSINDE SECONDARY SCHOOL ..... 1ST RESPONDENT

THE CHAIRPERSON (BOM) KAMUSINDE SECONDARY SCHOOL .... 2ND RESPONDENT

(Appeal against the Judgment and Decree of Hon. G.P Omondi (PM) delivered on the 5th April 2023 in Bungoma CMC No. 10 of 2019)

JUDGMENT

C/A Macheso

For Appellant:- Wattangah & Co. Associates

For Respondent:- Principal State Counsel, Stafford Nyauma

1. The Appellant being dissatisfied with the Judgment and Decree of Hon. G.P Omondi (PM) delivered on the 5th April 2023 at Bungoma ELRC No. 1 of 2019 between Arsybel Masabule Wanyonyi V The Principal, Kamusinde Secondary School & Another, filed the Memorandum of Appeal dated 27th April 2023, seeking the following orders:-

    a. That the Appeal be allowed.

    b. That the Judgment by the Lower Court delivered on 5/4/2019 be set aside and a proper finding be made by this Honourable Court.

    c. That this Honourable Court do make such further orders as may be just and expedient.

d. That the appellant be awarded costs of the appeal. (pages 1 – 3 of the Record of Appeal)

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

i. The Learned Trial Magistrate erred in law in dismissing the appellant's case thus occasioning miscarriage of justice.

ii. The Learned Trial Magistrate erred in law in dismissing the appellant's case on the grounds that he didn't attend the disciplinary meeting yet the appellant had already been constructively dismissed and had even filed a case in court.

iii. The Learned Trial Magistrate erred in law in fact as the judgment was against the weight of the evidence adduced by the claimant which facts were justifiable, substantive and overwhelming as provided for in law.

iv. The Learned Trial Magistrate erred in law and in fact by falling to test all the facts and evidence pleaded and adduced on a balance of probabilities.

v. The Learned Trial Magistrate erred in law and fact by failing to test all the facts and evidence pleaded and adduced on a balance of probabilities.

vi. The Learned Trial Magistrate erred in law and fact by failing to consider the pleadings and evidence on record rendered by the Appellant.

vii. The Learned Trial Magistrate erred in law in failing to take into consideration the submissions and the Court of Appeal decision cited by the Appellant.

Background to the appeal

3. The Appellant/Claimant vide a Statement of Claim dated 2nd July 2019 and supported by a Verifying affidavit sworn on 4th July 2019, all filed on 10th July 2019, sought before the trial magistrate court the following reliefs:-

a. A declaration that the termination of employment was discriminative, malicious, unlawful, unfair, unprocedural, and a fundamental violation of the rights of the claimant.

b. A declaration that the claimant is entitled to House allowances.

c. An order that the respondents pay the claimant as per paragraph 13 herein above.

d. A certificate of service as per Section 51 of the *Employment Act*.

e. Costs and interest of this suit.

f. The claim to be allowed in its entirety.

g. Any other relief and or further relief this Honourable Court deems fit and just to grant.

(Pages 4-9 of the Record is the Statement of Claim and Verifying affidavit).

4. The Statement of claim was accompanied by a list of witnesses dated 4th July 2019, the Appellant/Claimant's Witness Statement dated 2nd July 2019, his list of Documents dated the 4th July 2019, and his bundle of documents, all filed on 10th July 2019(Pg. 10 – 13, 15-43).

5. On 29th July 2019, the Claimant filed a Further List of Documents dated 23rd July 2019(pg. 44, 49) and one document, and the Claimant's further Witness Statement dated 23rd July 2019(Pg. 14,48).

6. The claim was opposed. The Respondents entered appearance through the firm of Sifuna & Sifuna Advocates on 1st August 2019(pg. 50-51) and contemporaneously filed the Response to Claim dated 31st July 2019(Pg.-52-55).

7. On 19th August 2019, the Respondents filed its list of Witnesses dated 7th August 2019(Pg.56), the undated Witness statement of Tom Amoya Ouko Amadi(Pg. 57-63), the list of documents dated 7th August 2019(pg. 64-65) and the Respondents' bundle of documents(Pg. 65-178).

8. The Appellant/Claimant filed a Reply to the Response to Claim dated 6th August 2019 and received in court on 7th August 2019(Pg. 179-181). Additionally, on 29th September 2019, the Appellant/ Claimant filed a further List of documents dated 23rd September 2019, attaching two documents (Pg. 46- 48).

9. The matter proceeded by way of viva voce evidence with parties calling their witnesses (Pg. 212- 236 of the Record). The parties filed written submissions after the hearing (Pg. 182-210) and judgment was delivered on 5th April 2023(Pg. 237-243).

Written Submissions At Appeal

10. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions dated 23rd October 2023 were drawn by Wattangah & Co. Associates Advocates. The Respondent's written submissions drawn by Principal State Counsel, Stafford Nyauma, of the Office of the Attorney General & Department of Justice were dated 28th November 2023 and filed in Court on 29th January 2024.

Determination

11. The principles which guide this court in an appeal from a trial court are now well settled. In Selle And Another V Associated 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."

12. Further in David Kahuruka Gitau & Another v Nancy Ann Wathithi Gatu & Another Nyeri HCCA No. 43 of 2013, the court opined:- '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

13. The Appellant submitted on the unprocedural process that led to his constructive dismissal and that the learned magistrate failed to consider the weight of the evidence he presented evidencing the lack of procedural fairness in his summary dismissal for misconduct.

14. The Respondents in their submissions identified the following issues for determination in the appeal: -

    a. Whether the Appellant was lawfully and fairly dismissed from employment as held by the Trial Magistrate

    b. Whether the Trial Magistrate erred in dismissing the Appellant's claim entirely.

15. The court finds that the fact of the employment of the Appellant is not in issue and was of the considered opinion that the issues for determination in the appeal are as follows:-

    a. Whether the Appellant was Constructively Dismissed

    b. Whether the trial learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness and prayers before the trial court

    c. Whether the Appellant was entitled to the reliefs Sought?

Whether the Appellant was Constructively Dismissed

16. The Appellant submits that he was constructively dismissed as he was suspended on 1st November 2018. He was to appear on 29th November 2018 before a board meeting, but the same did not take place and no postponement notice was issued. That the board met again on 12th December 2018 and he was in attendance. The board had a further meeting on 21st December 2018 which he states was to discuss the response to the suspension letter dated 14/12/2018, which he had written on instructions of the board at the meeting of 12th December 2018. He stated that the board had resolved to suspend him until 28th June 2019 when he was invited to attend another Board Meeting on 8th July 2019. He stated that at this point he had already instructed his advocate who had issued a demand letter dated 21st June 2019(P-Exh- 7).

17. The Appellant stated that the Respondents kept him in the dark for six months with no communication and further slashed his half salary, which frustrated him and forced him to resign. He stated that the Magistrate failed to consider that he had been constructively dismissed for him to have been required to attend any disciplinary proceeding. To buttress his assertion that he was constructively dismissed he relied on the decision in Coca Cola East & Central Africa Limited v Maria Kagai Lugaga(2015) eKLR.

18. The Respondents on their part contended that the Appellant was suspended from employment due to his misdoings and on being invited to attend the Disciplinary hearing to deliberate on the allegations leveled against him, he refused and only sent his advocate to attend; and was thus summarily dismissed.

19. The allegation for constructive dismissal was raised by the Appellant in his further written statement dated 23rd July 2019 stating that since he had not been paid his dues from August 2018 to the date of the affidavit, he had been constructively dismissed.

20. The Trial Learned Magistrate did not address the issue of constructive dismissal as pleaded by the Appellant and this court will consider the same.

21. The Appellant relied on Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR which sets out the principles guiding a determination on constructive dismissal.

22. I have taken an excerpt from Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR in paragraph 30 which is reproduced below:-

> " 30. The legal principles relevant to determining constructive dismissal include the following: - '
>
> a. What are the fundamental or essential terms of the contract of employment
>
> b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer
>
> c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
>
> d. An objective test is to be applied in evaluating the employer's conduct.
>
> e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
>
> f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
>
> g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
>
> h. The burden to prove repudiatory breach or constructive dismissal is on the employee."
>
> i. Facts giving rise to repudiatory breach or constructive dismissal are varied."

23. Delving into the principles outlined above, under principles (f) and (g) of the authority, an employee may without giving an employer notice leave employment if the conduct of the employer makes the working environment intolerable or difficult for the employee to continue working. The employee can either choose to give notice or not.

24. This position is set out in Paragraph 28 of Coca Cola case (supra), where the court observed that: -

> " 28. In this appeal, we have considered the local and persuasive foreign authorities cited by counsel. The authoritative meaning of constructive dismissal was articulated by Lord Denning MR in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, as follows:
>
> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any

further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1)."

25. Looking at the other principle under Coca Cola case (supra):- "g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach". An Employee is required after leaving his employment to terminate the employment through resignation to bring the employment relationship to an end, specifying his reasons for leaving employment to have been occasioned by the employer's conduct.

26. In Coca Cola case Paragraph 27:-

> "……..The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination….. The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the *Employment Act* 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified….."

27. It goes therefore without saying that, even after an employee leaves work without giving any notice, what is required of them is to terminate the contract by resigning within a reasonable time to prevent the assertion by an employer that the employee breached the contract on their part. In this case, the Appellant was on suspension.

28. The court in Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR held that:-

> "On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect."

29. The Appellant in the instant claim was suspended from work on 1st November 2018(P-Exh-3- pg.32). On 7th December 2018, he acknowledged receipt of the suspension letter (P-Exh-5- pg.33) and sought copies of documents for his defence(P-Exh-5- pg.33). On 6th December 2018(P-Exh-4-pg. 38), the Appellant was invited to appear before the Board's sub-committee in a meeting of 12th December 2018. He appeared and sought for more time to respond (DW- pg. 60). It was after the said meeting that he filed his response dated 14th December 2018(P-Exh-6) which was received on 20th December 2018(pg. 72-75). Under the Minutes of 21st December 2018(pg. 92), the Respondent's Sub-Committee perused the response from the Appellant and it was resolved he was to provide more details.

30. It is stated by DW before the trial Court that, the Board's mandate expired on 30th December 2018, and the new board was only inaugurated on 19th May 2019 and it was then that the Appellant was called to attend the disciplinary hearing before the Board. (pg.61). The appellant states that he wrote a demand letter on the 21st of June 2019 (P-Exh-7) and it was only then that the Board invited him to the disciplinary hearing.

31. During the period of 20th December 2018, when he submitted his response until the time of filing his suit, the Appellant did not submit any letter of resignation to end his employment with the Respondents.

32. The Appellant stated that he could not attend the disciplinary meeting when he had already filed a suit. The Suit against the Respondent was filed on 10th July 2019, the disciplinary hearing was scheduled for 8th July 2019 and he had been served with the notice for attendance(pg.95) on 4th July 2019(pg. 96). This assertion that he had filed a suit before the invite to attend the disciplinary hearing can thus not be true.

33. In Lear Shighadi Sinoya(Supra) the court held that: -

> " .....The claimant is also at fault. Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be resolved by failing to attend work without her letter of resignation. Failure to attend work is addressed under section 44 of the *Employment Act* as a matter subject to summary dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimant's claim for constructive dismissal exposed and compromised."

34. Where an employee fails to issue a notice of resignation, they are considered to be in employment, and their contract of employment is in force. The contract of employment can only come to an end on termination or through resignation as the case is.

35. The Appellant was under suspension, the first act having been initiated by the Employer, and during the pendency of the suspension, he could not claim constructive dismissal having not ended the employment contract. The Employment contract was ended by the Summary dismissal letter of 8th July 2019(P-Exh- 12- pg. 45).

36. The Court having applied the principles for constructive dismissal enunciated in the Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR (supra), holds that the claim for constructive dismissal cannot stand.

37. The court holds that there was no constructive dismissal.

Whether the trial learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness and prayers before the trial court

38. The Appellant accused the Trial Magistrate of failing to consider all the evidence submitted on a balance of probabilities which he submits occasioned a miscarriage of justice.

39. The Appellant had claimed that the termination of employment was discriminative, malicious, unlawful, unfair, unprocedural, and a fundamental violation of the rights of the claimant.

40. The Appellant submits that the reasons for his termination cannot be substantiated as he worked for the Respondents with dedication until they summarily dismissed him in December 2018. He says his termination violated the provisions of Section 45(2) of the *Employment Act*.

41. The Appellant states that the termination of his employment was premature and violated Article 12 of Recommendation No. 166 of the ILO Convention No. 158 – Termination of Employment Convention, 1982, which requires consultation before termination.

42. The Appellant states that the Respondents violated sections 35(b), 36, 41, 45, and 51 of the *Employment Act* by denying him a right to earn a living.

43. The Appellant argued that under Section 78(a) of the *Employment Act*, his suspension was to be for a period of fourteen days. He testified that he could not attend the disciplinary hearing because his advocate advised him that the same was illegal.

44. The Respondents on their part submit that the Appellant's dismissal was necessitated by a myriad of allegations ranging from wilfully, wrongfully, and unlawfully to wit:-

    i. Preparing counterfeit bank payment schedules other than the official ones and signing them without the authority of the principal;

    ii. Making false entries in the school payrolls;

    iii. Deducting salaries of his fellow employees and paying them less salaries than what they were supposed to earn;

    iv. Increasing salaries of some employees and later taking the excess amounts from them secretly.

    v. Increasing his monthly salary over his monthly stipulated salary from Kshs. 26,000 to Kshs. 36,945/-.

    vi. Preparing unofficial payrolls and payment schedules and signing them in the principal's titles without any authority of the principal or the Board.

    vii. The Respondents submit that the Claimant was suspended on the above allegations and called to appear before the Board on 8th July 2019 to defend himself, only for him to send his lawyer Mr. Ndalila who told the Board Off, however, the Meeting proceeded in the presence of representatives from the Labour office and KUDHEIHA union and it was resolved that the Appellant could be dismissed.

45. The trial magistrate entered judgment in favour of the Respondents as follows:

> "…..in this case, there were accusations against the claimant. The claimant was then suspended vide suspension letter dated 1st November 2018. The suspension letter stipulated the allegation against the Claimant. The Claimant was then invited to appear before the board of Management of Kamusinde Boys High School on 8th July 2019 to

defend himself against the allegations. The letter of invitation is dated 28th June 2019. In attendance at the meeting was a labour officer and KUDHEIHA Official, who was from the claimant's trade union. I find that the Respondent met the procedural fairness test.

Consequently, I find that the termination of employment of the claimant was lawful and fair."

46. The Court understood the appeal to be against both the procedural and substantive fairness. I wish to first deal with the burden of proof and standard of proof in employment claims of unfair termination.

The standard and burden of proof in employment claims

47. The employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to the extent that 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".

48. The Burden of proof is prescribed under section 47(5) of the *Employment Act* as follows:- '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."

49. Section 43 of the *Employment Act*, 2007 provides that:-

'(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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

50. Section 45 (2) of the Act provides that:-

''(2) A termination of employment by an employer is unfair if the employer fails to prove-

a) that the reason for the termination is valid;

(b) 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."

50. As rightly held in Josephine M. Ndungu & others v Plan International Inc (2019)e KLR where the Court observed: '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...."(emphasis given)

51. The reasons for the Appellant's suspension were clearly set out in the Suspension letter of 1st November 2018 and they related to the Appellant's position as the School Bursar and the operational requirements of the Respondents. The Appellant argued that the said reasons were never substantiated.

Procedural Fairness

52. For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

53. While the accusations that were leveled against the Appellant related to his capacity and operational requirements of the employer, he denied the allegations on paper. The court must consider whether the procedural fairness test was met.

54. In Josephine M. Ndungu & others v Plan International Inc (2019)e KLR (supra) the Court observed that_- "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." The court holds that the 4 corners of legal threshold referred to in the foregoing decision are stated in section 45)2(b) of the *Employment Act* namely:- (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer;"

55. Section 41 of the *Employment Act* which provides as follows:-

> "(1) 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 the 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."

56. The Appellant was suspended from employment on 1st November, 2018(P-Exh-3- pg.32). On 7th December 2018 the Appellant acknowledged receipt of the suspension letter(P-Exh-5- pg.33) and sought for copies of documents for his defence(P-Exh-5- pg.33). On 6th December 2018 he was invited to appear before the Respondent's Board's sub-committee. In a meeting held on 12th December 2018, the Appellant appeared and sought more time to respond(DW- pg. 60). It was after the said meeting that he filed his response dated 14th December 2018(P-Exh-6) which was received on 20th December 2018(pg. 72-75). Under the Minutes of 21st December 2018(pg. 92), the Sub-Committee perused the response from the Appellant and it was resolved he was to provide more details.

57. DW before the trial court testified that the Respondents' Board of Management's term mandate expired on 30th December 2018 and the new board was inaugurated on 23rd May 2019 and it was then that the Appellant was called to attend the disciplinary hearing before the Board(pg.61). During this Period the Appellant was on Suspension and the reasons for his suspension had been set out.

58. It was argued by the Appellant that his dismissal was for a protracted period of six months which was against the required 14 days under Section 78 (a) of the *Employment Act*.

59. The Appellant testified that he did not attend the Disciplinary hearing but sent his lawyer. The invitation of 28th June 2019 served on him on 4th July 2019, required him to appear in person. DW testified that the Appellant's advocate did not address the Board and only signed the attendance book and called the Disciplinary hearing illegal. The Appellant during cross-examination did not produce any evidence that the Disciplinary hearing was illegal. The Appellant was given the suspension letter and invited to the disciplinary meeting. During the Disciplinary meeting, one Mr. Naftaly Jabaye, who was a Union representative of KUDHEIHA appeared for the disciplinary hearing. The Appellant confirmed he had informed the Union to appear on 8th July 2019(pg. 224). The Appellant states that he sent his advocate to attend the disciplinary hearing. The advocate did not attend the meeting.

60. Under Section 41 of the *Employment Act*, once the employer has given the reasons he is considering terminating the employment of the employee, the employer is to "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." The Appellant's own chosen representative, the Advocate, failed to make any representations regarding the accusations against the Appellant. The accusations could not be wished away in the absence of the Appellant's representations.

61. There is no statutory period for how long a suspension can be effected but the same must be reasonable. Section 78(a) of the *Employment Act* relates to the Notification of termination of employment to the nearest labour office within two weeks of the termination. The Appellant was on suspension and the said notice could not apply in that case.

62. What the Trial court was called to do was to consider what a reasonable employer would have done in the circumstances as per the test defined by lord denning in Lord Denning in British Leyland UK LTD V Swift (1981) I.R.L.R 91 where the reasonableness test was defined to wit:- ' the correct test is: ' was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair.."

63. The Appellant refused to attend the disciplinary hearing and all allegations against him did not change. The Court finds no basis to disturb the finding on substantive and procedural fairness by the learned trial magistrate.

64. In the upshot, the Court upholds the finding of the trial court on procedural and substantive fairness.

Whether the Appellant was entitled to the reliefs Sought?

65. The Appellant had sought the following reliefs in his statement of Claim before the trial court:-

    b. A declaration that the claimant is entitled to House allowance.

    c. An order that the respondents pay the claimant as per paragraph 13 herein above.

    This entailed:-

    i. Unpaid House allowance for the years worked(1989 to 2018) 20% x Monthly Salary x 12 months

    20% x 16,761 x 12 Months for 28 days 9 Months.

    =Kshs. 1,156,509/-

ii. Annual Dues leave for the years worked- One month's salary in lieu of Notice plus house allowance - Kshs. 16,761 plus(20% x 16,761/-)= Kshs. 578,225.75/=

iii. Payment in lieu of Notice 558.70 daily rate x 30 = Kshs. 16,761/-

iv. Severance Pay- 15 days x years worked x basic /30 days, 15days x 28 days 9 months x 16,761/30= Kshs. 240,939.37/-

v. Compensation for unfair termination – Gross pay x 12 months -16,761 x 12= Kshs. 201,132/-

Total = Kshs. 2,193,567.12

d. A certificate of service as per Section 51 of the *Employment Act*.

e. Costs and interest of this suit.

f. The claim to be allowed in its entirety.

66. The Learned Trial magistrate held that:-

> " Whether the claimant is entitled to reliefs sought.
>
> In Francis Nyongesa Kwenyu v Eldoret Water and Sanitation Company Ltd(2017)Eklr where it was held that "having lost in a case of unlawful termination, he became disentitled to the reliefs sought."
>
> Following the decision in Francis Nyongesa Kwenyu vs- Eldoret Water and Sanitation Company Limited and holds that the claimant is not entitled to the reliefs sought in the claim.
>
> Consequently, the claim dated 4th July 2019 is dismissed for lack of merit. The Respondent is hereby ordered to issue the claim with his certificate of service under section 51 of the *Employment Act*. Each Party to bear own costs in the suit dated, signed and delivered via email of this 5th day of April 2023 to..... ."

67. On finding that the termination was lawful and procedural, the trial Magistrate did not belabor himself in determining whether the Appellant was entitled to the other reliefs which are not necessarily related to compensation for unlawful termination. The holding of the Learned Magistrate on the reliefs was misdirected.

68. The Court being called to re-look into the facts and the law should consider whether the Appellant was entitled to the other reliefs sought.

69. During the hearing, the Appellant testified that the salary he was entitled to was Kshs. 36,945/-. When cross-examined, he was shown that the budget for the salary of Kshs. 36,945/- had not been approved, but on his part, he believed it was approved. The Salary approved for 2018 in February 2018 was confirmed to be Kshs. 32, 270/-(pg. 122 , pg. 223).

House Allowance

70. As regards house allowance, his appointment letters one of 1989 and another of 2005(39 & 40) were produced and the Appellant confirmed that the salary of Kshs. 880 and 12,000/- did not provide for a house allowance.

71. The Respondents submitted that the salary was consolidated. I agree with the Respondent, the Appellant was not entitled to the house allowance as his salary was consolidated.

Annual leave

72. The Respondents submitted that the 2nd Respondent being a school, the Appellant was on leave in more than 30 days annually and specifically that the Appellant was on leave cumulatively for three months every year during the school vacations of April, August, and December.

73. The Appellant did not provide an account of when he had not gone for leave and this claim fails.

Payment in lieu of Notice

74. Having found that there was procedural fairness as held by the Trial Magistrate, the Appellant was not entitled to Payment of the salary in lieu of Notice.

Severance Pay

75. A claim for severance pay is only payable in instances of declarations of Redundancy under Section 40(1) (g) of the *Employment Act* and not in the case of summary dismissal, as was in this case. The Claim fails.

Compensation for unfair termination

76. Having found that the termination was lawful, the Appellant was not entitled to compensation.

Half Pay during Suspension

77. The Appellant argued that he was never paid the half salary which he was entitled to during his suspension from August to his dismissal in July 2019. The Suspension was on 1st November 2018. DW confirmed that the Appellant was paid for the months of November and December 2018. But no other payments were made from January 2019 to July 2019(pg. 230, 232). DW confirmed that the Appellant was entitled to half salary for January to July which was not paid.

78. Therefore, the Appellant was entitled to half salary from January 2019 to 7th July 2019 as admitted by DW when he was under suspension calculated at the Monthly salary of Kshs. 32, 270/-. The cumulative period is 6 months and 7 days thus 32,270/2 x 6(96,810))plus 7/30 x 32,270 (7530) total ½ pay for 6 months and 7 days being Kshs. 104,340/- which is awarded to the Appellant.

The Certificate of Service

79. The Trial Magistrate position is upheld.

Whether the appeal is merited.

80. The Appeal was partially successful. The court upholds the finding on lawful and fair termination. The Judgment of the lower court is set aside and substituted as follows:- The court holds the termination of employment of the claimant was fair and lawful. The Claimant to be paid by the Respondent the unpaid ½ salary for the period January 2019 to 7th July 2019 for the sum of Kshs. 104,340/- . No order as to costs.

81. The Court orders that the awarded amount of Kshs. 104,340/- above is payable within 30 days failing which interest at court rates will apply from date of this judgment until payment in full.

82. On costs at the appeal, costs follow the event. The Court upheld the Judgment of the Lower court save for the unpaid ½ salary. I order each party to bear own costs in the appeal.

83. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14TH MARCH 2024.

J.W. KELI,

JUDGE.

In the presence of

Court Assistant: Macheso

Appellant : Wanjala h/b Wattanga

Respondent: Absent