Ayungu v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 19 of 2023) [2023] KEELRC 1693 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1693 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL 19 OF 2023

JW KELI, J

JULY 13, 2023

(FORMERLY ELRC APPEAL NO. E046 OF 2022)

BETWEEN

JOSEPH ASHIRO AYUNGU ..... APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT

(Appeal against the entire judgment of Hon. Z.J. Nyakundi (SPM) delivered on the 21st October 2022 in Butali MELRC No. 5 of 2020)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of Hon. Z.J. Nyakundi (SPM) delivered on the 21st October 2022 in Butali MELRC No. 5 of 2020 filed Memorandum of Appeal dated 21st November 2022 against the decision of the learned Magistrate seeking for the appeal to be allowed and the judgment of the learned magistrate be set aside and substituted with an order allowing appellant's case with costs in the appeal and in the subordinate court.

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 judgement

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 regards 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 and there were no documentary evidence produced and/served upon him before and during the disciplinary hearing.

8. The learned trial erred in failing to appreciate that disciplinary hearing is a quasi -judicial proceeding 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 failed to consider the substance of the said disciplinary hearing.

10. The learned trial magistrate erred in finding that there was a demonstration of fuel siphoning during the disciplinary hearing whereas no evidence was produced before the Honourable court to show that indeed a demonstration was done.

11. The learned trial magistrate erred in finding that the court has no doubt as to the functionality of the Fuel Level Sensor yet the same fuel level sensor had given a faulty reading that the claimant had refueled 148 litres whereas the actual amount refueled was 138 litres which error was admitted by the Respondent.

12. The Trial Magistrate failed to appreciate that the Fuel level sensor was accurate it could give accurate readings after refueling.

13. The learned trial magistrate erred in finding that the fuel level sensor was not faulty yet no calibration certificate wa produced to confirm its accuracy as per the requirements of the *Weights and Measures Act*.

14. The Learned Trial Magistrate erred in putting reliance on the evidence of Fuel Level sensor to find that the 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.

15. The Learned Trial Magistrate erred in putting reliance on the evidence of the Human Resource Manager and the 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.

16. The Trial magistrate erred in failing to consider the fact that the Respondent could manipulate the readings of the Fuel Level Sensor to suit circumstances of their case as they are in control of the system.

17. The learned trial magistrate erred in failing the fact that the Respondent did not supply the court with the Fuel Level Sensor's readings before and after fueling in order to justify the allegation that 31 litres of fuel was siphoned.

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

19. The trial magistrate erred in fact and law for failing to consider the testimony of DW2 that they cut the Fuel Level Sensor to fit the fuel tank yet there was no calibration certificate produced for Fuel Level Sensor after cutting.

20. 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.

21. The trial magistrate erred in failing to consider the evidence of DW2 that the Respondent only gives their drivers a specific amount of fuel for every trip. There Respondent lacked an explanation as how the calamint arrived back after siphoning 31 litres 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 trial magistrate erred in failing to consider that the Union representative 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 is at liberty to collect his certificate of service DEX9 yet Section 51 of the Employment it makes it mandatory that the claimant be issued with a certificate of service.

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 Respondent/Claimant vide a plaint dated 5th February 2020 sought before the trial magistrate court seeking for issuance of certificate of service, for declaration of unfair termination and compensation for unfair termination, notice pay in lieu, leave for the years 2016 to 2019, house allowance, overtime, rest days and underpayment total sum of Kshs. 2,489,592/=.(page 10) The learned Magistrate in his decision held that the claimant had failed to prove his claim on balance of probabilities and dismissed the case with costs to the respondent.

Written Submissions at Appeal

4. 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 17th April 2023 and received in court on the 19th April, 2023. The Appellant's written submissions drawn by O &M Law LLP were dated 22nd May , 2023 on even date.

Determination

5. 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."

Issues for determination

6. The Appellant in its submissions identified the following issues for determination in the appeal:-

   a. Whether the Learned magistrate erred in law and fact by holding 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 certificate of service.

7. The Respondent addressed the following issues:-

   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 relies sought.

8. The court finds that the issues placed by the parties for determination in the appeal are with regard to both substantive and procedural fairness before the termination of employment and framed the issues as follows:-

   a. Whether the trial learned Magistrate arrived at the wrong

      conclusion on substantive and procedural fairness.

   b. Whether the appellant was entitled to reliefs sought

Issue 1.

Whether the trial learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness.

9. On substantive fairness,

10. The appellant submits that the appellant was terminated on evidence of Faulty Fuel Level sensor(FLS) and that from evidence of the employer (DW1 and DW2) the reading of the FLS fromed the substantive verdict of the disciplinary committee and the dismissal. The appellant submits that the FLS system was faulty and this was acknowledged by the respondent. The claimant testified he fueled 138 litres and the FLS indicated 148 liters an indication of faulty FLS and an inaccurate reading.

11. That before the trial, the Respondent indicated the FLS indicated

    31.

        9 litres had been siphoned. The respondent witness stated a variance of 10 litres was allowable in the system leading to dismissal for 21 liters which the appellant submits was a cover up of the faulty FLS. That a litre is just a litre as a unit of measurement and a gadget programmed to read a litre would read just a litre as defined under Order 2 of the Weights and Measures Order, 1961; litre being, ' the volume occupied by mass of one kilogram of pure water at its maximum density under normal air pressure." That the Vehicle having been fueled with 138 litres and reading 148 litres meant that the FLS was faulty.

12. The appellant further relied on the statement of Abel Obadiah which indicated false alerts in the FLS system, the appellant submits that the incident in Obadiah case said to have been false alert was not established. That DW2 testified the fuel is per needs of specific trip yet it was not explained how the truck returned after siphoning 31.9 litres. That there was no calibration certificate yet the system is managed by ICT person of the respondent and hence the allegation ought to be supported by a third party. That there was no purchase receipt to prove the FLS was new. That DW2 testified they cut the FLS to fit the fuel tank yet there was no calibration certificate after the interference with the gadget. That there was no evidence of the allegation demonstration that 31 litres could be siphoned in 2 minutes.

13. That the appellant did not produce evidence of buying airtime as the scratch card was not kept. That the mere believe siphoning happens at Awasi without any police reporting was not enough for the dismissal.

14. The appellant relied on the decision in Walter Agal Anuro v Teachers Service Commission 2023 Eklr to the effect that for termination of employment to pass muster there should be both substantive and procedural fairness.

Respondent's submissions

15. The respondent submits that the procedural fairness is per section 41 of the *Employment Act*. That it was a settled principle of law that for termination to be fair there must be both substantive justification and procedural fairness. see Justus Mutahi Ihaji v Kenya Airways Limited (2018)e KLR .

16 The respondent submits that the appellant was dismissed on reason of fuel siphoning as stated in the suspension letter, DW2 produced graphs D-Exh 11 of the FLS sensor system and explained how it worked. The reason and evidence used in charging the appellant were obtained and substantiated by

the system. The appellant never raised issued with the functionality of the fuel level sensor system at the disciplinary hearing, internal appeal nor pleaded the same at lower court hence the allegation was afterthought.

Decision of the trial court

17 The learned Magistrate considered the evidence at trial at pages 84 to 85 as follows:- 'DW1 produced letter dated 31/10/2019 suspending the claimant from duty , the charges are clearly stated on the said letter, that of siphoning fuel from truck registration KCR 206Y DEX3, the claimant filed his response DEX4, the claimant was invited to disciplinary hearing DEX6, where there were two representatives from the union and the claimant, it is after the hearing that the claimant's case was dismissed."

18. The trial court further observed, 'respondent during the hearing demonstrated how the FLS system works , through DW2, one Stephen Shitoshe, 'in the morning the fuel levels in the tank are level, as the vehicle moves, the fuel reduced gradually and where there is sudden fall of fuel the system sends an alert, on fuel siphoning the graph goes down and cannot rise , it will be shown with a red line unlike the blue line which indicates normal consumption of fuel, if it shows red line, that is an indication of fuel siphoning. He produced the graph as DEX 11(a)(b) and(c). The court has no doubt as to the functionality of the FLS system." (page 86 The trial court relied on the graph DEX11 and found no evidence was tendered by the claimant to demonstrate the FLS system was faulty. The court found that the termination was lawful and consistent with what a reasonable employer would have done in the circumstances upholding decision of Lord Denning in British Leland 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.."

19. The court understood the challenge to the foregoing decision to be that the FLS was faulty and the Respondent took the position that there was no such claim, either at the disciplinary hearing, the appeal or in the pleadings before the lower court and this was an afterthought at appeal.

20. I have to cautioned myself sitting at appeal, I have not seen the witnesses and give allowance for that guided by the holding in Selle And Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123.

21. The appellant in his response to show cause stated he trusted the system works and called for investigations. The appellant said that he had worked with the system before without a problem (page 48). At Page 51, the appellant during the disciplinary hearing stated he was aware that the vehicle was fitted with FLS and was working well. Shitoshe DW2 stated at the disciplinary hearing they fueled per trip/specific assignment. DW2 also explained how the graph moves on siphoning of fuel. DW2 explained how false alerts occurs as was in the case of KCR 210Y when the moving vehicle indicate it lost 16 liters of which they did not accuse the driver of. At the conclusion of the disciplinary hearing it was indicated the fuel was siphoned when the vehicle was parked in hidden place where the fuel tanks were hidden. That the committee had provided the siphoning of 20 litres could have happened in less than 2 minutes.

22. I perused the statement of claim dated 5th February 2020 and did not find any pleading that the FLS system was faulty. Consequently, I do uphold the finding of the trial court that the court had no doubt as to the functionality of the FLS system and no evidence was tendered by the claimant to demonstrate the FLS system was faulty. The lower court observed, "the court has no doubt as to the functionality of the FLS system." At page 86, the court relied on the graph DEX11 and found no evidence was tendered by the claimant to demonstrate the FLS system was faulty.

23. The lower court found that the termination was lawful and consistent with what a reasonable employer would have done in the circumstances as per the test defined by lord denning in Lord Denning in British Leland 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.." I do uphold the foregoing decision and the decision of the lower court and hold that there was substantial fairness in the dismissal of the appellant from employment of the respondent

Procedural Fairness.

24. The appellant challenged the procedural fairness towards the dismissal for non – compliance with provisions of section 41 of the *Employment Act* for lack of valid reasons as required under section 45 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) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason— (i) related to the employees 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."

25. The Appellant relied on several decisions; Walter Ogal Anuro V Teachers Service Commission(2013)eKLR; , Alphonce Machanga Mwachanya Vs Operation 680 Limited(2013) eKLR , Nicholus Muasya Kyula V Farmchem Limited industrial Cause Number 1992 of 2011; (2012)eKLR 235 (Ick); Kabengi Mugo Vs Syngenta East Africa Limited Industrial Cause Number 1476 of 2011 and Donald Odeke V Fidelity security Limited Industrial cause Number 1998 of 2011; (2011)LLR 277.

26. The Appellant relied on the provisions of Section 45(4)(b) of the *Employment Act*, 2007 which provides that:-"(4) A termination of employment shall be unfair for the purposes of this Part where 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."

27. The appellant submitted there was no evidence of warning for the siphoning of fuel before dismissal as required under section 45(5)e of the *Employment Act* to wit: "(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) 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; (b) the conduct and capability of the employee up to the date of termination; (c) 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; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any previous warning letters issued to the employee."

28. In the upshot the appellant challenged the process for lack of valid reasons, lack of warning and for having not chosen the representatives also.

Respondent's submissions

29. The Respondent submitted that the Appellant was informed of the charges levelled against him vide a Suspension/notice to show cause letter dated 31.10.2023(DEX3) and he filed a Response and was later invited to the disciplinary proceedings vide the letter dated 12.11.2019(DEX5).

30. The respondent submitted that the Appellant attended the Disciplinary proceedings as evidenced by the Minutes of the Disciplinary hearing(DE6), during which two union representatives attended. The Appellant was dismissed after that hearing and he appealed to another panel to hear him, which was done and the dismissal upheld.

31. The Respondent submitted that as evidenced by the Appellant's submissions and evidence in the trial court, due process was followed and thus the process was procedurally fair.

32. The Respondent submitted that the assertion by the Appellant that the two union representatives were never chosen by the Claimant was never pleaded or raised as an issue in the lower court and thus is an afterthought.

33. The Respondent further submitted that there is no evidence submitted by the Appellant to show that the Fuel Level Sensor was faulty; nor was the issue of its faultiness raised by the Appellant in the lower court, disciplinary hearing or the Internal appeal and is thus was an afterthought.

34. The court upon review of the evidence before the lower court holds there was compliance with section 41 of the *Employment Act* before the dismissal. The appellant was informed of the charges facing him, he responded in writing and verbally at the disciplinary hearing and was accompanied by the two union representatives and there was no challenge of the representation at the disciplinary hearing. There was no pleading on the representation and the minutes of the hearing were produced in court. The court also held there was a valid decision and that the FLS System was not faulty.

35. The court upholds the holding in Walter Ogal Anuro V Teachers Service Commission(2013)eKLR cited by the appellant to hold there was procedural and substantive fairness as found by the trial court. The appeal dated 21st November 2022 is dismissed in its entirely with costs to the Respondent. The judgment of Hon. Z.J. Nyakundi (SPM) delivered on the 21st October 2022 in Butali MELRC No. 5 of 2020 between the parties is upheld.

36. Right of appeal in 30 days.

37. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13th July 2023.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF

Court Assistant: Lucy Macheso

Appellant : Chebet h/b Chanzu

Respondent: