Lumanyasi v West Kenya Sugar Company Limited (Employment and Labour Relations Appeal 22 of 2023) [2023] KEELRC 2206 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2206 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS APPEAL 22 OF 2023

JW KELI, J

SEPTEMBER 21, 2023

BETWEEN

EDWIN MUKHWANA LUMANYASI ..... APPELLANT

AND

WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT

(Appeal against the Judgement and decree of Hon. Z.J Nyakundi (SPM) delivered on the 23rd June 2022 in Butali MELRC NO. 11 of 2020)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment and decree of Hon. Z. J. Nyakundi (SPM) delivered on the 23rd June 2022 in Butali MELRC NO. 11 of 2020 filed Memorandum of Appeal dated 13th July 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 the 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 that 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 failing to consider that there was no demonstration of fuel siphoning done during the disciplinary hearing.

11. The learned 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 failed Fuel level sensor was not faulty yet no calibration certificate was produced as per requirements of the Weights ad Measures Act.

13. The learned trial magistrate erred in finding that the evidence of fuel level sensor demonstrated that fuel was siphoned yet there was no document produced by the Respondent detailing how the fuel level sensor works.

14. The Learned Trial Magistrate erred in putting reliance on the evidence of the Human Resource Manager on how the fuel senor works and there was no expert witness called by the respondent to give evidence on the fuel level sensor works.

15. The learned trial magistrate erred in failing to consider that the respondent did not supply the court with the fuel level sensor readings before and after fueling in order to justify that indeed 15 litres of fuel were siphoned.

16. 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.

17. The learned trial magistrate erred in failing to consider that the union representative present during the disciplinary hearing was not of the claimant's choice.

18. The learned trial magistrate erred in failing to hold that the claimant had proved his case on a balance of probability.

19. 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.

20. The learned trial magistrate erred in failing to hold that the Respondent had failed to rebut the claimant's claim.

21. 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 Memorandum of Claim dated 2nd September 2020 sought before the trial magistrate court the following orders:-

    a. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated 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 150,300/- as pleaded in paragraph 13 herein above.

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

    d. Cost of the suit and interest at court rates from the date of filing this suit until payment in full. (page 11)

4. The Claimant in addition filed his verifying affidavit, his statement and list of documents all of even date of 2nd September 2020 together with the bundle of documents (page 13-26).

5. The claim was opposed. The Respondent entered appearance and on the 16th October 2017 filed Statement of Response together with witness statement of Martin Chisaka and list of documents together with the bundle of documents (pages 31-49).

6. The Claimant on the 22nd October 2022 filed reply to the response (51-52).

7. The matter proceeded by way of viva voce evidence with parties calling their witnesses(page 81-). The parties filed written submissions after the hearing.

Written Submissions at Appeal

8. 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 Respondent's written submissions drawn by O &M Law LLP were dated 14th June, 2023 and filed in court on even date.

Determination

9. 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

10. The Appellant in his submissions identified the following issues for determination in the appeal:-

    a. Whether the Learned 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 certificate of service.

11. 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.

12. 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.

    On substantive fairness,

Appellant's submissions

13. The appellant submits that the finding that the appellant had failed to prove his case on a balance of probabilities had the effect that the burden of proof rested on the appellant to prove he had not committed the allege gross misconduct. That the law imposes the burden of proof on employer to prove the employee committed gross misconduct under section 43 of the Employment Act:- '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."

The appellant submit they discharged burden to prove prima facie case as required and relied on the interpretation of s section 43 in *Josephine M. Ndungu & others v Plan International Inc* (2019) eKLR and in *Peter Wafula Juma & 2 others v Republic* to submit that the appellant established a prima facie case against the Respondent and as such the burden of proof ought to have shifted to the respondent to prove the allegations of misconduct by the appellant and the reasons for the termination. That this was not done hence he submits that the leaned trial magistrate misdirected himself in finding the appellant had not proved his case on a balance of probabilities as against the respondent.

14. On procedural fairness the appellant submits that he was not accorded fair hearing as per the requirements of Article 50 of the *Constitution* and Section 41 of the Employment Act. That he was not given opportunity to have a colleague or his union representative present at the illegally constituted disciplinary hearing, that the union representatives were chosen by the Respondent contrary to the law. That the minutes were not a reflection of what transpired at the disciplinary hearing as most defences raised by the appellant were not included in the minutes.

15. On the substantive fairness, the appellant submits that the disciplinary committee relied on the FLS system report which the appellant does not know how it operates and no demonstration at the hearing was done save for graphs that were shown to the appellant. That estimations should never be used in allegation of a criminal nature as this, before the court. That the appellant was unfairly terminated on the evidence of a faulty fuel level sensor. That the reading of the FLS system formed the substantive verdict of the disciplinary committee as per evidence of DW1 and DW2. That the respondent acknowledged the FLS system was faulty and still dismissed the appellant.

16. The appellant further submits that it was his sworn testimony that at the time of fueling of the said truck KCY 206Y he fueled 138 liters and the FLS of the truck indicated 148 litres. 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. (The court did not find this submission on truck KCY 206Y in the Appellant's witness statement at pages 14-15).

17. The appellant further relied on a 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. I found the submissions in relation to KCY 206Y irrelevant and misplaced as the Motor vehicle under which the appellant was dismissed was KBH 452Q(PAGE 41). The submissions on KCY 206Y were of no evidential value consequently.

18. 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 there should be both substantive and procedural fairness. In *Alphonse Machanga Mwachanya v Operation 680*

Limited (2013) eKLR where the court summarized the legal fairness requirement under section 41 of the Employment Act namely:- '(i) Explained to the employee in a language the employee understood the reasons why it was considering the termination.

(ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.

(iii) Heard and considered any explanations by employee or his representative.

(iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules." To further buttress his submission that his termination was unfair the appellant relied on the case of *Nicholas Muasya Kyula v Farmchem Limited* Industrial Cause No, 1992 of 2011(2012) eKLR 235 where the court observed:- '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."

19. The appellant further relied on the decision in *Kabengi Mugo v Syngenta East Africa Limited* Industrial Cause No. 1476 of 2011 and in *Donald Odeke v Fidelity Security Limited* Industrial cause No. 1998 of 2011 to effect that if the employee is not heard the termination is ipso facto unfair.

Respondent's submissions

20. 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) eKLR.

21. The Respondent submits that the appellant was informed of the charges leveled against him through a suspension /notice to show cause dated 14.10. 2019 (R- exhibit 4), he filed a response and was invited for disciplinary hearing through invitation letter dated 12.11. 2019(R-Exhibit 6), the disciplinary hearing minutes(R- exhibit 7) confirm presence of 2 representative of the union. The appellant was dismissed after the hearing. He appealed and the appeal was heard by a different panel which upheld the dismissal. The process was fair even from the appellant's evidence before the trial court. That the submission that the 2 union representatives not having been chosen by the appellant was not subject of the pleadings before the lower court hence afterthought. That there was no evidence of protest on representation even at the internal appeal against the decision of the disciplinary committee.

22. That there was no evidence to show the fuel level sensor gadget used to note the fuel siphoning was faulty as alleged by the appellant and the faultiness of the gadget was not pleaded at the lower court or raised in the internal appeal hence afterthought.

23. On substantive fairness the Respondent relied on the provisions of section 47(5) of the *Employment Act*, 2002 to wit:- '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."

24. The Respondent submits that the appellant was dismissed for reasons of fuel siphoning and was an assistant to appellant in appeal no. E46 of 2022 and they were expected to jointly account together. The reasons were explained in the suspension letter. DW2 produced graphs(D-exhibit 11) of the FLS and explained how it works. The reasons and evidence used in charging the appellant were obtained and substantiated by the system. The appellant never raised any issue with the functionality of the fuel level sensor at the disciplinary hearing, internal appeal or in the pleadings before the lower court. That there was fairness and the Respondent justified the reasons for the termination.

Decision of the trial court

25. 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 appellant submits that they discharged their burden to prove prima facie case as required and relied on the interpretation of section 43 of the *Employment Act* in *Josephine M. Ndungu & others v Plan International Inc* (2019) eKLR and in Peter Wafula Juma & 2 others v Republic to submit that the appellant established a prima facie case against the Respondent and as such the burden of proof ought to have shifted to the respondent to prove the allegations of misconduct by the appellant and the reasons for the termination. The court in *Josephine M. Ndungu & others v Plan International Inc* (2019) eKLR 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. Fair procedure, on the other hand referrers 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;"

26. The burden of proof in employment claims is as stated in 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.." Thus in the first instance the burden of proof is on the employee to prove occurrence of unfair termination or wrongful dismissal. It is upon discharge of that burden that the burden shifts to the employer to justify the reasons of the dismissal.

The standard of proof

27. The 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 an employment misconduct was not sitting as a criminal court to apply the standard of beyond reasonable doubt. I find no fault on the learned magistrate of finding no prove 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 thus:- '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).

Decision on procedural fairness.

28. The appellant case was that he was not accorded fair hearing as per the requirements of Article 50 of the *Constitution* and section 41 of the *Employment Act*. That he was not given opportunity to have a colleague or his union representative present at the illegally constituted disciplinary hearing, that the representatives were chosen by the respondent contrary to the law. That the minutes were not a reflection of what transpired at the disciplinary hearing as most defences raised by the appellant were not included in the minutes.

29. 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) eKLR .

30. The Respondent submits that the appellant was informed of the charges leveled against him through a suspension /notice to show cause dated 14.10. 2019 (R- exhibit 4), he filed a response and was invited for disciplinary hearing through invitation letter dated 12.11. 2019(R-Exhibit 6), the disciplinary hearing minutes(R- exhibit 7) confirm presence of 2 representatives of the union. The appellant was dismissed after the hearing. That he appealed and the appeal was heard by a different panel which upheld the dismissal. That the process was fair even from the appellant's evidence before the trial court. That the submission that the 2 union representatives were not chosen by the appellant was not subject of the pleadings before the lower court hence afterthought. That there was no evidence of protest on representation even at the internal appeal against the decisions of the disciplinary committee.

31. On this issue I proceed to consider the evidence before the lower court considering the principles to guide the court sitting at appeal as stated in Sella case(*supra*). The learned trial Magistrate considered the provisions of section 41 of the *Employment Act* on procedural fairness (page 74) and the evidence at trial being letter of suspension/show cause, appellant's response , invitation for disciplinary hearing and the minutes of the disciplinary hearing and held :-' in conclusion the court holds that the claimant was informed of the charge he was facing , he was accorded an opportunity to defend himself , he appeared before the committee and a decision of dismissing the claimant was made after full hearing." (page 75).

32. During examination in chief the claimant told the court he was not given opportunity to avail union representative. During cross-examination the claimant told the court he was served with notice to show cause, he replied to the notice to show cause, he was called to the disciplinary hearing , he was told to avail a union person or fellow worker, that after the hearing the committee concluded he was guilty of fuel siphoning and he was dismissed. During re-exam the claimant told the court that he was informed of his right to avail his representative but the representative was not given a chance to speak at the disciplinary.

    The court finds that the evidence by the claimant both at cross-examination run contrary to the allegations that he was not allowed a representative of his choice. There is evidence he admitted he was represented by a union representative. On the record, the representation of the claimant are captured at page 45 and are consistent with his written response. The court holds that lower court rightfully found there was procedural fairness meeting the requirements of section 41 of the *Employment Act* .

Decision on substantive fairness

33. The appellant submits that the disciplinary committee relied on the FLS system report which the appellant does not know how it operates and no demonstration at the hearing save for graphs that were shown to him. That estimations should never be used in allegation of a criminal nature as this before the court. That the appellant was unfairly terminated on the evidence of a faulty fuel level sensor. That the reading of the FLS system formed the substantive verdict of the disciplinary committee as per evidence of DW1 and DW2. That the respondent acknowledged the FLS system was faulty and still dismissed the appellant.

34. The Respondent submits that there was no evidence to show the fuel level sensor gadget used to note the fuel siphoning was faulty as alleged by the appellant . That the faultiness of the gadget was not pleaded at the lower court or raised in the internal appeal hence afterthought. The respondent submits that the appellant was dismissed for reasons of fuel siphoning he was an assistant to appellant in appeal no. E46 of 2022 and they were expected to jointly account together. The reasons were explained in the suspension letter. DW2 produced graphs(D-

exhibit 11) of the FLS and explained how it works. The reasons and evidence used in charging the appellant were obtained and substantiated by the FLS system. The appellant never raised any issue with the functionality of the fuel Level Sensor at the disciplinary hearing, internal appeal or in the pleadings before the lower court. That there was fairness and the respondent justified the reasons for the termination

35. The trial court further observed, 'the reason for the termination of the claimant's employment was that of accomplice e to the siphoning of fuel. The claimant was served with a suspension letter which stated the charges, he was invited to a disciplinary hearing, he made a representation in the presence of union officials. The siphoning of fuel was captured by the fuel senor level, which transmitted the same to their systems in the office, DW1 produced a graph as document 3 in the list of documents which shows a sharp drop of fuel as a demonstration of the siphoning , the court has no reason to doubt the functionality of the fuel senor level gadget as no evidence was tendered to show the faultiness of the gadget." (page 76) The trial court found the respondent discharged its burden to prove the reason for the termination under section 44 for gross misconduct of suspicion of having committed an offence and acted in a reasonable manner. The court relied on the reasonable test by 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.."

36. This 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.

37. I have to cautioned myself sitting at appeal that 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(*supra*). The appellant in his response to show cause did not raise issue of faultiness of the FLS. At the disciplinary hearing he admitted he knew his winch was fitted with the FLS. He did not raise issue with the system. 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 that 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 76, the court relied on the graph (DEX 3)which showed a sharp drop of fuel as an indicator of fuel siphoning. The court lower found no evidence was tendered by the claimant to demonstrate the FLS system was faulty.

38. 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 have found no basis to interfere with the finding on substantive fairness by the learned trial magistrate.

39. 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.

On whether the appellant was entitled to reliefs sought.

40. The appellant in the claim before the lower court sought the following reliefs against the respondent:-

    a. A declaration that the claimant's services were unprocedurally, unlawfully and unfairly terminated 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 150,300/- as pleaded in paragraph 13 herein above.

    c. An order compelling the respondent to issue the claimant a certificate of service under section 51 of the Employment Act, 2007.

    d. Cost of the suit and interest at court rates from the date of filing this suit until payment in full. (page 11)

41. The learned magistrate dismissed the claim with costs and held the claimant may be issued with certificate of service. The appellant took issue with use of word may be issued stating the issuance of the certificate is mandatory under section 51 of the *Employment Act*. The court has upheld the finding on termination fairness. The letter of summary dismissal indicated that the claimant was to be paid for days worked up to 16th November 2019, any accrued leave less statutory dues or money owed. The court finds there was no evidence of the certificate of service having been issued. This is a statutory right of employee under section 51 of the Employment Act. The lower court stated that the same may be issued. The language ought to have been mandatory in nature. The appeal succeeds on only this issue.

42. The appeal dated 13th July 2022 is dismissed on all grounds save for the issuance of certificate of service and consequently costs. The judgment of Hon. Z.J. Nyakundi (SPM) delivered on the 21st October 2022 in Butali MELRC No.E011 of 2020 between the parties is upheld on issue of the termination fairness and dues. The court allows the appeal on the issue of issuance of certificate of service and consequently costs. The court sets aside the judgment of the trial magistrate Hon Z.J Nyakundi dated 23rd June 2022 and substitutes the same as follows:-

    a. The termination of the employment of the claimant was lawful and fair.

    b. the claims for one month in lieu of notice, claim of leave allowance for the year 2019, salary for one month, November 2019 fails.

    c. the Respondent to issue the claimant with certificate of service pursuant to section 51 of the Employment Act within 14 days of this order.

    d. each party to bear own costs in the suit.

43. Each party to bear own costs in the appeal.

44. Right of appeal in 30 days.

45. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 21ST SEPTEMBER 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of

Court Assistant: Lucy Macheso

Appellant : Chebet h/b Chanzu

Respondent: Javer