Moi Teaching and Referral Hospital Board v Yego & another (Appeal E013 of 2021) [2023] KEELRC 2167 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2167 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

APPEAL E013 OF 2021

NJ ABUODHA, J

SEPTEMBER 22, 2023

BETWEEN

MOI TEACHING AND REFERRAL HOSPITAL BOARD ..... APPELLANT

AND

FIBIAN JELAGAT YEGO ..... 1ST RESPONDENT

DORIS CHEPKORIR ..... 2ND RESPONDENT

(Being an appeal from the judgment, orders and decree of Hon. B. Kiptoo.(S.R.M) issued in Eldoret Chief Magistrate's Employment and Labour Relations Court Case No. 53 of 2020 at Eldor)

JUDGMENT

1. Through the amended Memorandum of Appeal dated 19th September 2022, the Appellant appeals against the Judgment of Honourable B.K. Kiptoo (SRM) issued on 8th September 2021 in Eldoret Magistrate's Court Employment and Labour Relations Court case No.53 of 2020(Fibian Jelagat and Another versus Moi Teaching and Referral Hospital).

2. The Appeal was based on the grounds that:

   i. The learned trial Magistrate erred in law and in fact in finding and arriving at the decision that the Appellant unfairly terminated the 1st and 2nd Respondents' employment.

   ii. The trial court erred in fact and in law when it found that the Appellant was justified to terminate the services of the 1st and 2nd Respondents for gross misconduct but contradicted itself when it awarded the Respondents compensation for unfair termination and payment of withheld salaries.

iii. The trial court contradicted itself by finding that the 1st and 2nd Respondents' were guilty of misconduct and had lost the trust and faith of the Applicant hospital to discharge services but still went ahead to award the Respondents compensation for unfair termination and payment of withheld salaries.

iv. The Honourable Magistrate erred in law and in fact in dismissing the Appellant's application dated 12th April 2018;

v. The learned trial Magistrate erred in law by awarding 6 months compensation to the 1st and 2nd Respondents for unfair termination.

vi. The learned trial Magistrate erred in law and in fact by awarding withheld salaries to the 1st and 2nd Respondents from the month of October 2019 to March 2020.

vii. The learned trial Magistrate erred in law and in fact by awarding withheld salaries to the 1st and 2nd Respondents from the month of October 2019 to March 2020 while concurrently appreciating the Claimants' were guilty of dishonest conduct during employment.

viii. The learned trial Magistrate erred in law and in fact by failing to appreciate that the Appellants disciplinary proceedings was not a trial per se but a proceeding of quasi-judicial nature turning the disciplinary process in to a mini trial and without legal basis finding in favour of the 1st and 2nd Respondents.

ix. The learned trial Magistrate erred in law and in fact by failing to appreciate that the appellant's disciplinary committee is not a mini court and cannot be held to the same standards as court of law.

x. The trial court erred in law and in fact in formulating and making a finding of whether the union official was the choice of the Claimants when it was not an issue between the parties.

xi. The trial court misconstrued section 41(1) of the *Employment Act* in finding that it was the responsibility of the employer to inform the employee of the right to be accompanied by a union official.

xii. The trial court erred in law and in fact in awarding excessive compensation despite the fact that the court made a finding that the Respondents' were engaged in dishonest conduct during employment thus justifying the termination.

3. The Appeal was disposed of by written submissions.

4. The Appellant submitted on the duty of first appellate court as to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the Appeal. In this regard Counsel relied on the case of Selle &another v Associated Motor Boat Co. Ltd & others and in Peters v Sunday post Limited.

5. On the issue of the 1st and 2nd Respondent being subjected to fair disciplinary process counsel submitted that the Appellant had fair reasons to terminate the Respondents' employment in that there were cases of fraud in the Salaries Section of the Appellant.

6. On the issue of fair procedure the Appellant relied on section 41(1) of *Employment Act* on procedure to be followed and submitted that the trial court's finding that the Appellant did not inform the Respondents of their right to be represented by union official was an exercise in nit-picking and splitting hairs. Counsel relied on the case of *Violet Kadala Shitsukane v Kenya Post Savings Bank* (2020) eKLR.

7. On the issue of whether the Respondents were entitled to six months Compensation counsel for the Appellant submitted that the Respondents were not entitled to the award which was against public policy because the disciplinary proceedings found them guilty of engaging in fraudulent activities.

8. On the issue of the six months compensation being excessive the Appellant submitted that the award was unjustifiably excessive.

9. The Appellant relied on the decision of *Lilian W. Mbogo Omollo v Cabinet Secretary Ministry of Public Service and Gender & another* [2020] eKLR in which Hon. Jusitce Radido awarded former Principal Secretary in charge of Youth Affairs Kshs 1.

10. On the issue of whether the Respondents were entitled to payment of withheld salary from October to March 2020 the Appellant submitted that the trial court erred in law and fact in awarding the same since their engagement with the Appellant ended on 28th January, 2020 when they were terminated.

11. Counsel for the Appellants relied on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* (2019) eKLR to support their submission and submitted that the Respondents were not entitled for the withheld salary because they had been found guilty of offences levelled against them.

12. The Appellant relied on case of *Grace Gacheri Muriithi v Kenya Literature Bureau*(2021) eKLR to submit that if at the end of disciplinary action an employee was found guilty, he is not entitled to withheld salary but if found innocent they will be entitled to the withheld salaries and that they were entitled to house allowance and medical benefit as per the Appellant's Human Resource Policy and Procedures Manual.

13. On the other hand, the Respondents filed their submissions dated 5th January, 2023 and submitted that the Appellant failed to comply with section 41 of the *Employment Act* by failing to inform the Respondents in clear terms the reasons for their termination and failing to inform them of the need to attend the disciplinary hearing accompanied by a fellow employee or shop floor(union) representative.

14. It was the Respondent's submission that minutes arising from the disciplinary hearing ought to have been signed as soon as possible and it was prudent if the minutes were availed to the employee to read, sign and confirm that indeed the minutes reflect a true record of the proceedings. Counsel relied on the case of *Howard Andrew Nyerere v Kenya Airways Ltd*(2014) eKLR to support their submissions and submitted that the Respondents were never given the minutes to read, sign and confirm that the minutes reflected the proceedings of that day and that the minutes of 22nd January, 2020 were signed by the chairperson and the secretary way after proceedings were concluded on 27th January,2020. The Respondents submitted that there was high probability that the said minutes were doctored against the Respondents and urged the court to discard the minutes. The Respondents equally relied on the case of *Charles Kinyua & Another v Meru central Cooperative Union Ltd*, ELRC Cause No. 144 of 2014.

15. It was the Respondents' submission that the Appellant miserably failed to comply with the dictates of section 41(1) and (2) of the *Employment Act* and the trial court was right in holding that the appellant did not accord the Respondents fair hearing and their dismissal from employment was procedurally unfair.

16. It was the Respondents' submission that there was no evidence presented by the appellant to connect the Respondents with alleged fraud and dishonesty and that the responsibility of preparing pay slips was with the Appellant's Salaries Department.

17. On the issue of 1/3 pay rule the Respondents submitted that the pay slips presented were not below 1/3 of the basic salary.

18. On the issue of giving out personal accounts instead of loan accounts the Respondents submitted that nothing had been put forth by the Appellant to show that the Respondents actually gave out those accounts and in any case the said loan was not meant to offset the KCB loan as alleged by the Appellant and no evidence was produced to support this and wonders why then KCB bank was not involved in this process, why Appellant did not notice the Respondents were not entitled for the second loan because of the 1/3 rule? and that from the pay slips presented by parties after both loans were deducted, they were not below 1/3 as alleged by Appellant.

19. It was the Respondents' submission that the Appellant's witness Felix Kosgei testified that they approved the second loan because the Respondents qualified and that termination on that ground was then unjustified. In that regard he relied on the case of *Judicial Service Commission v Gladys Boss Shollei*, Civil Appeal No. 50 of 2014.

20. It was the Respondents submissions that the allegation against the Respondents and the alleged dishonesty being exposed by the Appellant were extraneous matters that did not have any nexus on the employment relationship between the parties as the same were personal and private matters between the Respondents and the banks.

21. On the issue of withheld salaries and payment of compensation for unfair termination the Respondents submitted that they were entitled as per Section 49(1) of the *Employment Act* and relied on the case of Nairobi Cause No. 203 of 2012 *Linet Ndolo v The registered Trustees of the National Council of churches of Kenya* and submitted that under section 49(1) (c) the compensation is discretionary and the trial court was right and justified to award the Respondents the 6 months compensation when they had requested for 12 months.

22. On the issue of withheld salary the Respondents submitted that withheld salary by Appellant from October 2019 to March 2020 was not justified and with no legal basis. The Respondents relied on the case of Peterson Ndung'u and 5 Others v the Kenya Power and lighting Company Ltd, cause No. 1149 of 2011 cited in David Wanjau Muhoro case.

23. On the issue of suspension of Respondents without pay the Respondents submitted that there should be contractual or statutory authority empowering the Appellant to do so and relied on case of Mackenzie v Smith(1976), Prof. Ezekiel Kiprop & 8 others v University of Eldoret, petition 8 of 2015 to submit that suspension of an employee pending investigation of alleged misconduct must only be resorted to where there is reasonable apprehension that the employee will interfere with investigations or pose some genuine threat and submitted that the suspension of Respondents was unjustified without being given a chance to be heard.

24. On the issue of termination of Respondents' employment being unfair the Respondents submitted that the trial court was right when it found that the termination was unfair since the letters inviting the Respondents for disciplinary hearing did not state the purpose of the meeting, what was required of them and their rights and that the Respondents were given only 4 days to prepare their defence, were not informed of their right to attend with a representative from their union and their union was never notified. The Respondents relied on the case of *David Wanja Muhoro v Ol Pajeta Raching Limited*, ELRC Cause No. 1813 of 2011 to submit that an employer has an obligation to avail the employee sufficient opportunity to prepare for the hearing in the disciplinary process.

25. The Respondents further submitted that in this case the Respondents never understood their charges as they were generalized and the Appellant kept on changing in each document served on them and at the disciplinary hearing the Respondents were not allowed to defend themselves and from the minutes it is only their pleas and written defences that were considered, the Respondents did not call union

members of their choice and it was the Appellant who chose the union members for them, even though the Appellant stated this was not an issue between parties it was an issue raised in the pleadings and the court had to make a determination on the same. The Respondents relied on the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* ELRC Cause No. 747 of 2015 to submit that it was the Employer to inform the employee to attend disciplinary hearing with a fellow employee or union official.

26. It was the Respondents submission that they were not supplied with documents intended to be relied on during disciplinary hearing.

Analysis & Opinion

27. The duty of a first appellate court has been severally stated to have been succinctly set in the case of *Selle v Associated Motor Boat Company Limited* [1968] E.A 123:

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are th at 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...or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

28. In determining the Appeal herein, this Court shall similarly seek to reanalyse the evidence tendered before the Trial Court vis-à-vis the court's conclusion and disposition noting that this court had no opportunity hear oral evidence and listen to cross-examination observe general demeanour of witnesses.

29. From the grounds in the memorandum of Appeal and pleadings of the parties, three major issues are discernible for determination.

    a. Whether the Respondents were unfairly terminated

    b. Whether the Appellant followed the fair procedure in terminating the Respondents Employment

    c. Whether the Respondents are entitled to the withheld salaries and compensation.

30. On the first issue, this court has stated previously that it is not within its realm to go over with a tooth comb, the reason for which employment has been terminated. The test is usually the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss?" If the answer be in the affirmative, the court will not interfere.

31. The Respondents' termination from employment was as a result of allegations of dishonesty in which they took a loan from KCB Bank in 2017 and again took another loan from Standard Chartered Bank in 2019 while the KCB loan was existing, gave out personal accounts where money was deposited in the said accounts and they withdrew all the money in those accounts while knowing the said money was intended to offset the KCB loan and further that they were aware that their KCB loan deductions had been reduced from Kshs 33,548.00 to Kshs 5,000.000 for the 1st Respondent and Kshs 30,115.00 to Kshs 5,000.00 for the 2nd Respondent. A fact which they knew though denied but was factually incorrect towards Standard & Chartered towards whom they forwarded their second loan applications with a letter purporting that their KCB loans had been cleared.

32. In addition there were allegations that KCB wrote to the Appellants informing them that the KCB letter head used by Respondents indicating that the loans had been cleared was a forgery.

33. Whereas the Respondents case was that the allegations of dishonesty and defrauding the banks against them were untrue but even if true, concerned their private and personal life and wer e not touching on employer-employee relationship, the Appellant maintained that the allegations were after investigations confirmed as true and such conduct made the Appellant lose trust with the Respondents.

34. The Respondents were served with a show cause letters dated 11th October, 2019 with brief narration of complaint against them and charges levelled against them were;

    i. Dishonesty reflecting adversely on the honesty and moral integrity of an employee's duties

    ii. Acceptance of any bribe, secret profit or unauthorized payments

    iii. Fraud and obtaining money by false pretense

    iv. A public officer shall not use his office to improperly enrich himself or others

    v. A public officer shall not knowingly give false or misleading information to the members of the public or to any other public officer.

35. The Respondents were required to explain why the said charges did not constitute justifiable grounds for disciplinary action and they were instructed to make their representations within 7 days.

36. The Respondents responded to the show cause letters claiming that the misconduct was a personal issue and therefore the employer ought not to have concerned itself with it. The Appellant found their responses unsatisfactory and invited them for disciplinary hearing.

37. The main issue in that regard for determination was whether the acts of dishonesty which touched on the banks amounted to gross misconduct to lead to their termination and whether the reasons were fair and valid.

38. The Law under Section 44 (4) (g) of the *Employment Act*, 2007 stipulates as follows with regards to what amounts to gross misconduct: -

> 'Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-
>
> (g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.'

39. The Appellant herein was established through Legal Notice Number 78 of 12th June, 1998 under *State Corporations Act*. The Appellant is therefore a State Corporation and its employees are public officers. Section 2 of *Public Officers Ethics Act* defines a "public officer"

> " to mean any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following—

(a) the Government or any department, service or undertaking of the Government;

(b) the National Assembly or the Parliamentary Service;

(c) a local authority;

(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law (emphasis supplied)

40. Section 20 of the said Act further provides that:

(1) A public officer shall conduct his private affairs in a way that maintains public confidence in the integrity of his office.

(2) A public officer shall not evade taxes.

(3) A public officer shall not neglect his financial obligations or neglect to settle them.

41. In the case of *Darius Kiseu Mwamburi v Cooperative Bank of Kenya Ltd*(2021) eKLR the court stated as follows;

> "It is not enough for an employer to cite that an employee committed one or more of those actions or omissions obtaining in the list provided for in section 44 (4) of the *Employment Act* 2007, or its Human Resource Policy. An employee's misconduct does not inherently justify a summary dismissal unless it is "so grave" that it intimates the employee's abandonment of the intention to remain in employment. In *Laws v London Chronicle Limited* [1959) 2ALL L.R 285 the English Court of Appeal stated the following in page – 287; "Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service." Whether an employee's misconduct warrants dismissal requires assessment of the degree and the surrounding circumstances"

42. Further in the case of *Judicial Service Commission = v= Gladys Boss Shollei*, Civil Appeal No. 50 of 2014, the Court cited with approval the following passage from the Canadian Supreme Court decision in *Mc Kinley = v= B. C. Tel*. (2001) 2 S.C.R. 161

> "Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example," that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

43. The respondents as observed earlier were public officers hence bound by the provisions of the Public Officers Ethics Act which required them to observe both in public and private life, such conduct that maintained public confidence in the integrity of the offices they held. To represent to their employer (the Appellant) that the loan they were to receive from Standard & Chartered Bank was intended to offset the loan earlier advanced by KCB only to cause the loan to be credited to their private accounts different from the one from where the loan to KCB could have been recovered and go ahead to withdraw the same for private use, was an act of dishonesty. Further to utter a false letter to Standard & Chartered Bank that the loan to KCB had been fully offset while knowing that was not true was an act of dishonesty, and was against one of fundamental principles of employment relationship.

44. The Appellant had an existing MOU with Standard & Chartered Bank (page 148-157 record of Appeal) on loans to staff and such conduct put the Appellant in an embarrassing position and jeopardised future loans to the appellants' staff from Standard & Chartered Bank.

45. Employment is a personal relationship and an employer or employee may not act in a manner that may injure or bring into disrepute the image of the employer or employee. One can imagine the image the public would have of an employer or employee who openly engages in criminal activities claiming that they are outside the purview of the contract of employment. For the employee, who would hire someone whose employer is reputed for openly breaking the law? And for the employer, what a reputation would such employer carry if their employees are perceived as reputed fraudsters? Some measure of integrity within and outside employment relationship need to be observed at all times. That is to say, a party to a contract of employment must not openly act in a manner that is injurious to the other and would obviously bring the other into disrepute.

46. The Court therefore is satisfied as found by the trial court that there existed a just cause for dismissal. They dishonesty violated an essential condition of the employment contract. It was a breach of faith inherent in employment relationship. It was inconsistent with their obligations to the appellant as their employer and more so as public officers.

Whether the Appellant followed the fair procedure in terminating the Respondents Employment.

47. This Court (Mbaru J) in the case of *Walter Ogal Anuro - v- Teachers Service Commission* (2013) eKLR held that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness. The Court is further guided by section 41 of the *Employment Act* which provides thus:

> 41(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 this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

48. In this case the Respondents were issued with show cause letters dated 11th October, 2019 (page 141-144 of the record of appeal). The letter detailed the accusations against the respondents and called

upon them to show cause why they thought the charges did not constitute justifiable ground for action against them by the respondent. The letters further suspended the respondents with effect from 11th October, 2019 pending the determination of their cases. The respondents made a similar response to the show cause letter admitting the allegations but denying they were fraudulent and further stating that the complaint by a third party which had nothing to do with the employer-employee relationship with the appellant. The Court has already made a finding on this point and would not delve further.

49. Through letters dated 16th January, 2020 the respondents were invited for disciplinary hearing and the same was scheduled for 22nd January, 2020. The Invitation letter is titled 'Human Resource Management Advisory Committee-Discipline'. It did not in the body set out the charges the respondents were facing afresh nor did it remind the respondents of their right to be accompanied by an employee of their choice or shop floor union official.

50. On this issue, the trial Court observed as follows:

> " It is not in dispute that a disciplinary hearing was conducted on 22/1/2020 and that the claimants were invited for the hearing after their response to the show cause letters failed to satisfy their employer. It is also not in doubt as to who was in attendance and that the claimants were accorded a chance to appeal which thy did. The claimants state that they were not given a chance to have a representation of their choice as dictated by section 41(1)(2) of the *Employment Act*. That the Union official present at the hearing was not their choice but that of their employer and that they found her inside the meeting room and in addition, he/she remained behind when they had been excused and that the panel engaged them in their absence.
>
> On its part the respondent insists that they were represented by a union official and that they never protested the choice...a cursory look at the provisions of section 41(1)(2) of the *Employment Act*, it is a requirement for the employer to inform the employee of the charges he is facing and of his right to representation by either a fellow employee or a shop floor union representative of the employee's choice and both the employee and his representative if any, should be heard before a determination is made...I have looked at the invitation for disciplinary hearing letters dated 16/1/2020 inviting the claimants for a hearing on 22/1/2020. It is clear, the claimants were accorded 4 working days to prepare for the hearing. They were not informed of their right to have a representation of their choice neither was their union notified in writing or by a copy of the letter done by one Dr. Wilson Aruasa.. The purpose of the meeting is not specifically stated safe(sic) for reference as "discipline."...From the minutes, I note that besides the pleas and written defence by the claimants, nowhere else do the minutes indicate they addressed the panel in response to the allegations..."

51. Section of the *Employment Act* stipulates as follows:

> 41(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 this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct

or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

52. A plain reading of the section 41(1) yields the interpretation that in the event an employer contemplates a termination of employment for reasons set out under subsection 1, that is to say on grounds of misconduct, poor performance or physical incapacity, such employee shall be entitled to an explanation in a language such employee understands, the reason for which termination is being considered and further such employee shall be entitled to have another employee or shop floor union representative of his choice present during the explanation. From the wording of this subsection, these provisions are intended for the protection of low cadre and unionisable employees who may not be able to understand or articulate issues and defend themselves in a workplace environment where the language such employee is proficient in or used is not the official or national language recognized in the Republic of Kenya.

53. Whereas subsection 1 of section 41 deals with explanation of reasons for which dismissal or termination is being considered, subsection 2 is concerned with the hearing and consideration of any representations which the employee or his chosen representative under subsection 1 may make on the grounds for which termination or dismissal is being considered.

54. It has been contended for long that it is the duty of the employer to notify the employee of his right to be accompanied and represented by a co-worker or shop floor union official of choice when going through disciplinary process as contemplated under section 41. However, a plain reading of the section does not seem to yield that interpretation. The section merely talks of the employee being entitled to have present during the process, a fellow employee or shop floor union official of choice. Concise *Oxford English Dictionary* defines "entitle" as:

> " v. (often to be entitled to) give (someone) a right to do or receive something.
>
> Further *Black's Law Dictionary* 10th Edition defines entitle as " to grant a legal right or qualify for.

55. Arising from the above, it is clear that there is no obligation on the employer to inform an employee facing disciplinary action to be accompanied by an employee or shop floor union official of choice. The role of the employer is to facilitate or enable that opportunity to exercise the entitlement. The notification of the right to be accompanied by an employee or shop floor union official is therefore not obligatory but is done as a matter of good HR practice especially in cases of low cadre and unionisable employees. Such employees join unions and regularly pay union dues in order to involve them during disputes as are presented in this case. It is neither mandatory nor fatal to the employer if it omits to inform the employee to be accompanied by a colleague or a shop floor union official to represent them during such cases.

56. Concerning the contention that the shop floor union official present was not of the respondents' choice, the Court takes the view that shop floor union officials are elected and once elected they represent all the workers in the shop floor whether such worker voted for them or not unless for special reason such worker cannot not be effectively represented by such union official. No such scenario was presented by the respondents to warrant calling another shop floor union official. In any event and as observed above that was the responsibility of the respondent and nothing on record shows that they sought to do so and were denied.

57. It is not true as observed by the trial court that the respondents were never given a chance to make representations during the disciplinary hearing. At pages 166 and 171 of the record of Appeal the respondents were captured as having made representations in response to the accusations leveled

against them. On the issue the letter of invitation not disclosing the nature of the disciplinary hearing, this may have been an omission on the part of the Appellant but the Court is of the view that no prejudice was occasioned to the respondents since they were all along on suspension over the accusations against them hence any invitation to a disciplinary hearing could only have been concerning the charges for which they were suspended. In any event the respondents attended the hearing and responded to the accusations against them.

58. The Court of Appeal in the case of *Kenya Revenue Authority v Menginya Salim Murgani*, Civil Appeal No. 108 of 2009 observed as follows:

> " There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed"

59. For the foregoing reasons the trial court erred in law and fact in finding that the respondents were never accorded a chance to call a colleague or union official of choice and that they were never fairly heard. This ground of appeal therefore succeeds.

Whether the Respondents are entitled to the withheld salaries and compensation

60. In the case of held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the Court observed that;

> " Being a fundamental term of the contract of service and a protected right, an employer can only withhold the entire of an employee's salary either with the consent of the employee or where the law permits it..... 69. Therefore, it does appear to me that to unilaterally withhold the entire pay of an employee merely because his is on suspension would be in breach of the contract of service unless sanctioned by law. What appears to be a reasonable middle ground to ensure the contract remains alive during the disciplinary process is the practice of withholding a portion of the pay even as the other is released.

The respondents were suspended without pay and later terminated. The only entitlement to them were house allowance and access to medical treatment. The appellant never invoked any law or Human Resource Manual or policy that entitled it to do so. An employee on suspension still holds a valid contract with the employer until a decision is reached to terminate his or her service. It is however noted that during suspension such employee is not working hence not earning as salary. This is why as observed in the case of Galgalo Jarso Jillo v Agricultural Finance Corporation cited above the court talked of "reasonable middle ground" that ensures the contract remained alive during the disciplinary process. The practice remains to be the withholding of a portion of the pay usually half salary as the other portion is released.

61. The trial Court awarded the Respondents withheld salary from October 2019 to ,March 2020. This was unprocedural since the respondents would only have been entitled to half salary during the period of suspension and up to the date of termination. The respondent's services were terminated on January 2020 hence half the withheld salaries were only payable up to January 2020 and not March 2020. This ground of appeal therefore succeeds to that extent.

62. On the issue of six months compensation, the Court having found that there existed valid reason for the termination of the respondents' employment and that the termination was carried out through a fair procedure, this relief was unavailable. This ground of Appeal therefore succeeds.

Disposition

63. In conclusion the Court makes the following orders;

    i. The trial court erred in law and fact in finding that the respondents were never accorded a chance to call a colleague or union official of choice and that they were never fairly heard. This ground of Appeal succeeds.

    ii. The respondent's services were terminated on January 2020 hence half the withheld salaries were only payable up to January 2020 and not March 2020. This ground of appeal succeeds to that extent. The respondents are therefore entitled as follows.

        a. Fibian Jelagat Kshs. 77,644 x 4 = 155,288

        b. Doris Chepkorir Kshs. 75,074 x 4= 150,148

        This award shall be subject to taxes and statutory deductions.

    iii. the Court having found that there existed valid reason for the termination of the respondents' employment and that the termination was carried out through a fair procedure, the relief for unfair termination was unavailable. This ground of Appeal therefore succeeds.

64. The Appeal having been partially successful, each bear their own costs.

65. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

ABUODHA J. N

JUDGE

Delivered virtually this 22nd day of September, 2023