Case Number:	Civil Appeal 23 of 2017
Date Delivered:	12 Jul 2017
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	George Benedict Maina Kariuki, Sankale ole Kantai, Fatuma sichale
Citation:	Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	E.L.R.C. Cause. No.12 of 2014
Case Outcome:	Appeal allowed
History County:	Kirinyaga
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B. M. KARIUKI, SICHALE & KANTAI, JJA)

CIVIL APPEAL NO. 23 OF 2017

BETWEEN

SOTIK HIGHLANDS TEA ESTATES LIMITED.....APPELLANT

AND

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....RESPONDENT

(An appeal against the Judgment of The High Court of Kenya at

Kerugoya (D.K. Njagi Marete, J.) dated 14th November, 2016)

In

E.L.R.C. Cause. No.12 of 2014)

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JUDGMENT OF THE COURT

The dispute between the appellant, Sotik Highlands Tea Estates Limited, and the respondent, Kenya Plantation and Agricultural Workers Union, revolves around the employment of one Dennis Siro (hereafter ***"Siro").*** That dispute escalates to The Industrial Court of Kenya at Nakuru (that Court has since been renamed ***"Employment and Labour Relations Court")*** in Cause No. 39 of 2014.

It is common ground that the respondent is a trade union within the meaning of the Labour Relations Act and represents unionisable employees within the agricultural sector and Siro was such an employee at the material time. It was also common ground that there was a valid Recognition Agreement between the appellant and the respondent within which several Collective Bargaining Agreements had been negotiated and agreed between the parties.

It was claimed in a Memorandum of Claim filed at the labour Court that Siro was employed by the appellant on 20th September, 2002 as a general worker and he also served as a shop steward representing interests of his fellow unionisable employees. It was further claimed that while engaged as such employee, on 22nd July, 2009 Siro was informed by his immediate Manager, Hilda Moraa, that he would attend a training the next day conducted by Kenya Revenue Authority, and that he should report to work in the morning and conduct light duties awaiting a motor vehicle that was to ferry shop stewards amongst others for the training that was to take place at a venue away from Siro's place of work. According to Siro he politely enquired from Hilda Moraa whether he would receive subsistence allowance as stipulated in a Collective Bargain Agreement but that there was no answer to his querry.

This version was disputed by Moraa. According to her Siro responded to her rudely stating that he had no intention and would not attend any training as he was satisfied going to the fields to collect tea as he did every day.

On 23rd July, 2013 shop stewards and other designated employees attended the training but Siro was not there. The appellant's management did not take this very well and Siro was summoned to a disciplinary meeting either on 24th or 25th July, 2013 where the respondent's shop stewards were also invited. Various meetings took place but the appellants' management decided that Siro was guilty of gross misconduct and this led to his dismissal from employment through a letter dated 26th July, 2013.

It was further claimed in the Memorandum of Claim that Siro had been targeted by the appellant because of his activities as a shop steward and that he was not accorded fair administrative action before his services were terminated. It was further claimed that the decision to terminate Siro's employment was severe and for all these an order should issue from the labour Court to do the following:

"1. An order directing the Respondent;

a. ***To unconditionally reinstate the grievant herein;***

b. ***To pay the grievant for the entire period within which he was dismissed;***

c. ***To pay the grievant leave travelling allowance;***

d. ***Directing and/or compelling the Respondent to produce the grievant's household goods that were withheld by the Respondent when the grievant was thrown out or compensation thereof.***

2. ***If prayer 1 above fails, an order directing the Respondent to do the following:***

a. ***Pay the grievant gratuity for the years she (sic) has served with the Respondent at the rates provided for in the CBA;***

b. ***Pay the grievant house allowance from the time of dismissal until judgment;***

c. ***Pay the grievant monthly salary for a period of twelve (12) months;***

d. ***Pay the grievant in lieu of leave for the period dismissed;***

e. ***Pay the grievant leave travelling allowance for the period of dismissal;***

f. ***Pay the grievant an equivalent of two months' salary in lieu of notice of termination;***

g. ***To produce all the household goods that were withheld by the Respondent when the grievant was thrown out or payment in lieu;***

h. ***Pay the grievant the damages for unlawful, illegal and unfair dismissal;***

i. ***Pay the grievant the costs of the cause;***

j. ***Interest on (a), (b), (c) (d) (e) (f) and (g) above".***

In a Memorandum of Defence the appellant admitted that it had terminated Siro's Employment but denied that such termination was wrong or unlawful contending that it had accorded him fair administrative action before reaching the decision to terminate his services.

Amongst the documents that accompanied Memorandum of Claim and Memorandum of Defence were witness statements of various persons which statements were produced as evidence in the trial that took place before D.K. Njagi Marete, J. That evidence can be summed as follows:

Siro confirmed that his Manager did inform him that there would be a training the next day which he was required to attend. According to him he reported to work the next day but when he went to the designated pick-up point where a vehicle was to pick employees to ferry them to a training venue he was informed that the motor vehicle had since left. He returned to his place of work and remained there for the rest of the day. He was later summoned to disciplinary hearings where he was not accorded a fair hearing and his services were unfairly terminated.

Hilda Moraa who, as we have already seen, was the appellants Manager, stated that on 22nd July, 2013 she was with another employee, Njuguna, when she told Siro that he was to attend a training the next day and that he should avail himself at a designated pick-up point to be ferried to a training venue. According to her Siro responded in a rude manner and did not attend training as instructed and that, after disciplinary processes were conducted management decided that Siro was guilty of gross misconduct and this led to termination of his services. She further stated that even at the disciplinary hearings Siro refused to record a statement which was required to explain why he had refused to attend training as instructed and that he had instead of furnishing a statement asked management:

"…….. to take whatever action they deemed fit……"

Doreen Kituku, the appellants' Legal and Administration Manager attended the said disciplinary hearings. She stated *inter alia* that those hearings were attended by various Managers and two Shop Stewards. According to her:

"5. During the hearing, the grievant was unapologetic and at one point, when management cautioned him that they were considering summary dismissal due to insubordination, the grievant responded by informing management in an insulting manner to take whatever action they deemed fit. The hearing had to take a break as the shop stewards stepped outside to hold a brief discussion with him regarding the proceedings. However, the situation did not change when the hearing resumed.

6. Once the hearing was concluded, we deliberated on the way forward and determined that the best action to take would be to summarily dismiss the grievant under provisions on summary dismissal in the Collective Bargaining Agreement between the parties.

7. The grievant refused to append his signature on Disagreement Form (Annexure "KPAWU 2" of the Claimant's Bundle of documents) and it later came to our attention that the grievant had threatened Joel Kyalo (Shop Steward) for signing, acknowledging his attendance on the hearing date.

8. The grievant's claims are misleading and the court should note that although the Respondent was housing the grievant, he locked his house when these proceedings began and the house remains so to date.

9. . . .".

Peter Achando was the appellants' Head Supervisor and was Siro's immediate boss in the tea fields. His testimony was that he instructed Siro on 23rd July, 2013 to go to the pick-up point to attend training but that Siro had refused to do so.

It is not necessary for purposes of this judgment to go into other statements or evidence that is on record.

Being a member of a trade union, Siro's termination from employment was taken up by other labour institutions where hearings took place but the appellants' management was convinced that it had taken the correct decision and refused to reinstate Siro to employment. Grace Mweresa, a conciliator who had been appointed to mediate in the dispute by the Ministry of Labour, Social Security and Services filed a Certificate of Disagreement dated 27th November, 2013, which stated in part:

"The above parties have agreed to disagree and I do hereby invoke 69(a) of the Labour Relations Act 2007 and the aggrieved party is free to move to the next level for arbitration."

That is how the matter reached Justice Njage Marete who analysed the evidence and reached the conclusion that Siro's termination from employment was wrongful because there was lack of substantive and procedural fairness in the disciplinary proceedings that had taken place leading to termination of employment. The learned Judge therefore ordered the appellant to reinstate Siro to employment to report back to work on 15th November, 2016 at 8.00 hours and to return Siro's household/personal effects. That judgment was delivered on 14th November, 2016. The appellant was dissatisfied with those findings and that provoked this appeal premised on a Memorandum of Appeal drawn by the appellants' advocates, M/S Kaplan & Stratton, Advocates, where 11 grounds of appeal are taken. The appellant faults the learned trial Judge who is said to have erred in law and exceeded his jurisdictions in ordering Siro's reinstatement whereas the time for reinstatement had lapsed under Section 12(3) (vii) of the Employment and Labour Relations Act, that the learned Judge erred in failing to take into consideration circumstances in which termination took place in which the appellant says Siro contravened provisions of the Employment Act; that the learned Judge erred in finding that termination of Siro's employment was as a result of his trade union activities when there was no evidence to that effect. The appellant takes as further ground of appeal that the learned Judge failed to consider evidence adduced by the appellants' witnesses; that the learned Judge erred in ordering goods belonging to Siro to be returned to him when there was no evidence that the appellant had taken such goods; that failure to consider evidence tendered by the appellant led to denial of the appellants' right to a fair hearing; that the learned Judge erred in failing to find that due process was followed leading to dismissal of Siro from employment and finally, that the learned judge erred in finding for Siro when the evidence did not support such finding. For all these we are asked to allow the appeal and set aside orders of the trial Judge.

This is a first appeal and it is our duty to re-appraise and analyze the evidence so as to reach our own conclusions and draw our own inferences of facts but must do so conscious that we have not had the advantage the trial Judge had of hearing and observing the witnesses as testified, an advantage the trial Judge had. We must therefore give the learned Judge's conclusions a measure of respect but are at liberty to depart from the learned Judge's findings if the evidence on the whole compels us to reach a different conclusion – See rule 29 of the Court of Appeal Rules and for a judicial enunciation of the principles governing the role of a first appellate court – the oft-cited celebrated case of **Selle v Associated Motor Boat Company Limited & Others** [1968] EA 123.

The appeal came up for hearing before us on 29th May, 2017 when learned counsel Mr. Nyakundi appeared for the appellant while learned counsel Mr. Aduda appealed for the respondent. Mr. Nyakundi chose to urge ground 1 of appeal relating to the order for reinstatement on its own while he combined all other grounds and urged them together. Learned counsel in respect of the order for reinstatement submitted that the learned trial judge exceeded his jurisdiction in ordering reinstatement because, according to counsel, such order could not be made when a period of 3 years had elapsed from the date of termination to the date of such order. According to learned counsel it was wrong for the learned Judge to make an order for specific performance of a contract of employment unless there were exceptional circumstances for making such an order.

On other grounds of appeal learned counsel submitted that the learned Judge erred in failing to consider the circumstances that led to termination of Siro's employment who had been instructed to attend a scheduled training but had refused to do so. Counsel submitted that Siro's conduct was gross and this entitled the appellant to terminate employment as procedural and substantive fairness were employed. Learned counsel concluded by wondering why the learned trial Judge could order reinstatement of Siro to employment when the respondent had abandoned that prayer in submissions filed in the labour Court.

Mr. Aduda did not agree. He thought that the learned Judge had acted within the powers donated to him by the Employment and Labour Relations Act and that he had not erred at all in making the orders that he had made. On the order for reinstatement learned counsel submitted that the order was lawful because the period of 3 years had elapsed when the action in court was on-going and time computation should not be held against a party whose action was in court.

On other grounds of appeal it was learned counsel's view that Siro was not confronted with any particular charges which he was required to answer before the disciplinary panel and Siro was in the event entitled to refuse to respond to charges particulars of which had not been served on him. According to learned counsel there was failure on the part of the appellant to comply with provisions of the Employment Act before terminating Siro's services and the trial court was entitled to reach the conclusions it had. Learned counsel concluded by asking us to give the awards prayed in the alternative in Memorandum of Claim should we find that the orders granted for reinstatement were not deserved.

Mr. Nyakundi had the last word in as far as submissions went. According to him, in the absence of a cross- appeal we could not give alternative prayers which were not available in the absence of a cross-appeal by the respondent.

We have considered the record of appeal, submissions made and the law and have taken the following view of the matter.

It is common ground as is evidenced by the letter of dismissal from service dated 26th July, 2013 that Siro's employment was terminated with immediate effect on 26th July, 2013 for what the appellant found to be gross misconduct on Siro's part who had been required to explain certain conduct set out in this judgment but which he had failed to do.

The judgment of the trial court was delivered on 14th November, 2016 where it was ordered, *inter alia*, that Siro be reinstated to employment and report back to work on 15th November, 2016.

Learned counsel for the appellant faults the learned trial judge for ordering reinstatement when a period of 3 years had elapsed since the appellant terminated Siro's employment.

Section 12 (3) of the Employment and Labour Relations Court Act which grants the labour court power to

order reinstatement of a dismissed employee provides that:

" (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

i. ***interim preservation orders including injunctions in cases of urgency;***

ii. ***a prohibitory order;***

iii. ***an order for specific performance;***

iv. ***a declaratory order;***

v. ***an award of compensation in any circumstances contemplated under this Act or any written law;***

vi. ***an award of damages in any circumstances contemplated under this Act or any written law;***

vii. ***an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or***

viii. ***any other appropriate relief as the Court may deem fit to grant.*** (Emphasis by underline***)***

(4) …".

The Labour Court is thus empowered in appropriate cases to order an employer to reinstate an employee within 3 years of the date of dismissal.

The other relevant provision is in Section 49 of the Employment Act 2007 which entitles a Labour Officer to recommend to an employer reinstatement of an employee subject to various considerations.

The appellants' contention is that the learned Judge had no power to order Siro's reinstatement to employment when a period of over 3 years had passed. Learned counsel for the respondent responded by saying that because the 3 years period had elapsed when the matter was before the trial court time would not be said to run against the employee when the matter was pending in court. Mr. Aduda did not furnish any statutory or judicial authority in support of this submission and we do not think that the submission is founded on a sound legal basis.

The ordinary meaning of the language of Section 12 of the Employment and Labour Relations Court Act is that the labour Court is empowered to order reinstatement of a dismissed employee within three years of dismissal. Parliament in its wisdom capped that period at three years and there is no provision or proviso qualifying that provision to say that time stops running or is interrupted by an action filed in court. We do not accept that submission on the part of Mr. Aduda and it is telling, as pointed out by learned counsel for the appellant, that the respondent had abandoned the prayer for reinstatement in submissions made before the trial court. The learned trial Judge made no mention of this at all in the judgment and we think that it was a misdirection for the learned Judge to make an order for reinstatement when the effect would be to order the appellant to reinstate Siro to employment when the period of three years allowed in law had long passed. To that extent the learned Judge acted without jurisdiction. In any event the learned Judge in granting the order of reinstatement which is the same as

ordering specific performance ignored factors which are set out in the Employment and Labour Relations Court Act and the Employment Act 2007 which should be considered before such an order is made. That is what this Court stated in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others** [2014] eKLR where we held that the remedy of reinstatement should not be given except in very exceptional circumstances. The learned Judge in the case leading to this appeal erred in law in failing to consider relevant circumstances and by ordering reinstatement after the expiry of 3 years which he had no power to do. He also erred by not considering or stating which exceptional circumstances existed to entitle him to order that Siro be reinstated to employment when a period of over 3 years had elapsed since Siro was dismissed from employment.

The appellant complains in further grounds that the learned Judge erred in finding that there was absence of fair administrative action before the decision to terminate Siro's services was made. This is the way the learned Judge addressed that aspect of the matter in the judgment appealed:

"Again, the circumstances and evidence adduced by the parties tilts in favour of the Claimant. This is because in the first place, the Respondent does not come out clear in a demonstration of a clear-cut pursuit of the elements of substantive and procedural fairness in her disciplinary proceedings as provided by Section. 41 and 42 of the Employment Act, 2007. There is again no demonstration of notice or adequate and proper notice of the disciplinary proceedings leading to dismissal or even appeal. There is no evidence of the right to a hearing or even proper representation of the grievant by persons (shop stewards) of his choice. The Claimant's case remains uncontroverted by the defence. This coupled with the principle of balance of probabilities tilts the matter towards a case of the Claimant. It renders the Respondent's case sloppy and I therefore find that the termination of the employment of the Claimant was wrongful, unfair and unlawful."

As we have shown in this judgment and as is borne out in the evidence Siro disobeyed a lawful order given to him by his immediate Supervisor to attend a scheduled meeting. This resulted in disciplinary meetings being called where Siro was present and was represented by two shop stewards. He was asked to explain his conduct but refused to do so asking the appellants' management to take whatever disciplinary action it deemed fit. Siro was accorded every opportunity to explain himself and retain his job but he maintained a rude and arrogant attitude to his employer which amounted to gross misconduct as defined in the Collective Bargain Agreement between the appellant and the respondent and in the Employment Act. The evidence produced before the learned trial Judge was more than sufficient to show that Siro was accorded every opportunity to explain himself and save his job but he did not avail himself of that opportunity at all. Fair administrative action was given to him and the learned Judge erred in finding that termination of employment was unfair or unlawful.

The learned Judge erred by placing too high a burden on the appellant to show that it had accorded Siro fair administrative action before it took the decision to terminate his services. The disciplinary proceedings were not criminal in nature or such as to require such a high standard as the learned Judge employed in the matter before him. This Court in the case of **Judicial Service Commission v Gladys Boss Shollei** [2014] eKLR held *inter alia* that disciplinary proceedings between an employer and an employee are civil in nature and the standard of proof as in other civil proceedings is on a balance of probability and the burden of proof lies on the party who alleges.

In the matter before the learned Judge the appellant showed to the required standard that it required Siro to attend a scheduled meeting but that he had refused to do so thus disobeing a lawful order; that it arranged disciplinary hearings to which Siro was invited and where he was represented by his colleague shop stewards but where he refused to cooperate and refused to explain his conduct. This amounted to

gross misconduct as defined in law and the appellant was entitled to terminate his services having accorded him a fair hearing.

We have reached the conclusion that this appeal has merit and we accordingly allow it and set aside orders of the Employment and Labour Relations Court given on 14th November, 2016 and substitute thereof an order dismissing the statement of Claim with costs. The appellant will also have costs of this appeal.

Dated and delivered at Nakuru this 12th day of July, 2017.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR