



Simon v Board of Management St Agnes Gaukene Girls Secondary School (Employment and Labour Relations Appeal E006 of 2023) [2025] KEELRC 2427 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E006 OF 2023
ON MAKAU, J
SEPTEMBER 12, 2025**

BETWEEN

FLORIDAH GACHERI SIMON APPELLANT

AND

THE BOARD OF MANAGEMENT ST AGNES GAUKENE GIRLS SECONDARY SCHOOL RESPONDENT

(Being an appeal from the Judgment/Decree of Honourable T.M.Mwangi(SPM) delivered on 18th April, 2023 in Meru ELRC Cause No. E001 of 2020)

JUDGMENT

Introduction

1. The appellant filed suit in the lower court alleging unfair termination by the respondent and praying for compensation plus terminal dues. The suit was dismissed but the appellant was awarded Kshs.476,425 as service pay. The appellant was aggrieved and brought this appeal seeking for setting aside of the said judgment and in its place, she be awarded damages as prayed in the primary suit.
2. The appeal stands on the following grounds:
 - a. That the learned trial Magistrate erred in law and facts by arriving at a decision to dismiss the appellant's suit.
 - b. That the Learned trial Magistrate erred in law and fact by holding that the appellant deserted her work after she was suspended by the respondent.
 - c. That the Learned trial Magistrate erred in law and fact by holding that upon suspension, the appellant could have reported to duty and performed her duties as per the employment contract.



- d. That the Learned trial Magistrate erred in law in not finding that the appellant was entitled to salary arrears, which claim was never denied by the respondent.
- e. That the decision by the Learned trial Magistrate to dismiss the appellant's claim was clearly against the weight of the pleadings filed and the evidence on record.

Background

3. The appellant was employed by the respondent as an Accounts clerk on 3rd October 2003. She worked until 9th April 2020 when the respondent suspended her on half salary for an unspecified period. Vide a letter dated 30th May 2020, the respondent notified the appellant that it would no longer pay her half salary due to financial constraints caused by the effects of Covid-19. However, it promised that same would resume once the situation normalized.
4. By a letter dated 17th September 2020, the appellant demanded for the immediate lifting of her suspension and reinstatement. She also demanded payment of her outstanding salary arrears of Kshs.168,150 or else proceed to file legal proceedings. The demand letter was never complied with and on 6th October 2020, she filed suit in the lower court.
5. Upon service with summons and pleadings on 12th October 2020, the respondent failed to file pleadings and instead served the appellant with a show cause letter dated 23rd October 2020 accusing her of several infractions including filing suit against the employer without communication. Subsequently, the respondent obtained leave of the court to file defence in which it admitted suspending the appellant on 9th April 2020 but denied that it dismissed the appellant from service.
6. It further averred that after suspending the appellant on half pay, it further halted the intended disciplinary process as all the public and private schools were closed indefinitely due to Covid-19 Pandemic.
7. It also averred that due to the said pandemic, the school could not afford to pay its workers and it notified the appellant that payment of her half salary would resume when the situation normalized. It averred that the school reopened on 12th October 2020 after the Ministry of Education issued a directive and that is when it was served with Memorandum of Claim filed on 6th October 2020. Subsequently, it issued the appellant with show cause letter dated 23rd October 2020 but she refused to receive and thereby, further stalling the disciplinary process.
8. During the hearing, the appellant admitted that she never received any dismissal letter but rather a letter suspending her on half pay. She admitted that she was never dismissed but denied the alleged refusal to receive documents upon service by the employer. She also contended that she was never called to appear before the respondent or any other panel to defend herself on the alleged misappropriation of funds.
9. Finally, she contended that she did a handing over to the Principal and left the Report with her. but she was not paid her salary arrears.
10. The respondent called its former vice chairman, Mr.Simon Kinyua as its witnesses. He admitted that the decision to suspend the appellant was made on 29th February 2020, in a meeting not attended by the Principal. He admitted that after receiving suspension letter, the appellant lodged complaint at the County Director of Education and the suspension was reversed until the matter was heard and determined. He admitted that the County Director stated that the Board could not meet in the absence of the Principal.



11. He contended that another meeting was held to discuss the appellant and she attended but upon cross examination he did not prove that allegations by producing minutes of the alleged meeting.
12. He admitted that the appellant was not aware of the charges facing her before she received the suspension letter as the Board had not communicated the same to her. He further admitted that the claimant's suit was filed before the show cause letter dated 23rd October 2020 but contended that the appellant was never dismissed from service. He stated that the disciplinary process was delayed by the Covid-19 Pandemic.
13. After considering the evidence and submissions by the two sides, the trial court (Hon.Mwangi-SPM) concluded that the appellant was never dismissed but rather deserted her employment. Consequently, she dismissed the suit with costs.
14. The appeal was disposed of by written submissions. For the appellant, it was submitted that the trial court erred by concluding that the appellant deserted her employment yet it had already made a finding that she stopped attending work after receiving a suspension letter dated 9th April 2020. It was argued that it was not reasonable for her to have continued reporting to work after being suspended. Besides, RW1 admitted during cross examination that the directive by the County Director of Education reversing the suspension was never complied with by the respondent.
15. In the circumstances, it was submitted that, the said suspension amounted to constructive and unfair dismissal within the meaning of section 45 of the *Employment Act*. For emphasis, several precedents were cited including *Kenfreight (EA) Limited v Benson K Nguti (2016) eKLR*.
16. On the other hand, it was submitted for the respondent that, the appellant deserted her duties and as such her services were never terminated as she alleged. It was further submitted that the appellant was issued with a show cause letter and instead of explaining her absence she opted to desert duty to the detriment of the respondent. It was further submitted that, the appellant admitted in her evidence that her services were not terminated but she was only suspended. It was argued that appellant opted to desert her employment instead of undergoing the intended disciplinary process. Accordingly, it was submitted that after the appellant deserted duty, the respondent had no option but to repudiate her contract of employment.
17. As regards the claim for terminal benefits, it was submitted that the appellant was covered by NSSF and therefore she was not eligible for service pay.
18. This being a first appeal, the court's mandate is to re-evaluate the evidence on record and draw its own conclusions as guided by the Court of Appeal in *Kenya Ports Authority v Kunston (Kenya) Limited (2009) 2EA 212*, where it held that:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
19. Having considered the evidence on record and the submissions made herein, the following issues fell for determination: -
 - a. Whether appellant voluntarily deserted employment or she was unlawfully dismissed by the respondent.



- b. Whether the appellant is entitled to the reliefs sought in her Statement of Claim.

Desertion or unlawfully dismissed

20. The respondent avers that the appellant deserted duty to its detriment which left it with no other option but to repudiate the contract of employment. However, the appellant maintained that she was suspended from work by the respondent vide the letter dated 9th April 2020 and despite the directive by the County Director of Education that she be reinstated to work, the respondent failed to comply and instead suspended her on half pay. Subsequently, the half pay was also suspended due to financial constraints caused by the Covid-19 Pandemic.
21. I have considered the evidence before the court and it is clear that the reason for the appellant's absence from duty was that she was suspended by the respondent vide the letter dated 9th April 2020. Despite the County Director of Education writing to the respondent reversing the suspension and directing it to follow the correct procedure, the respondent never complied and instead it wrote the following letter to the respondent:
- “Re: Hal Pay
- Following your suspension from your duty as an Accounts Clerk at St. Agnes Gaukune Girls Secondary School, it was decided that you will be on half pay until your case is heard.
- Well, this is to inform you that the school is not in a position to continue paying you your half pay salary as from 1st June 2020 as the school is struggling financially due to the effects of Covid-19.
- Once the situation normalizes, we will resume your payments.
- Thank you.
- Principal”
22. The appellant admitted in evidence that she was not dismissed but just suspended on half pay which was also suspended from 1st June 2020 due to Covid-19 pandemic. The respondent's evidence that all the schools were closed by the Government due to Covid-19 Pandemic until October 2020 has not been rebutted by the appellant. The court, further takes judicial notice that the Government closed down all learning institution until the last quarter of the year 2020 as one of the measures put in place to contain the spread of the Covid-19 Pandemic.
23. It follows that the intended disciplinary process against the appellant was not possible due to the restriction of movement and meetings. Besides due to the closure of schools, the respondent's ability to pay its BOM workers was obviously affected justifying suspension of salaries payments. The appellant was also served with a notice of one month before the suspension of her half salary.
24. In the circumstances, I find that the suspension of the appellant from duty on half salary and the subsequent suspension of payment of the said half salary did not amount to constructive dismissal on unlawful termination. Likewise, the failure by the appellant to report to work up to the date she filed suit did not amount to desertion of duty as she was on suspension by dint of the respondent's letter dated 9th April 2020. Consequently, I find that up to the date of filing the suit on 6th October 2020, there was neither dismissal by the respondent nor desertion of duty by the appellant.
25. However, by the claimant filing the suit on 6th October 2020 claiming terminal dues, she brought her employment contract to an end without prior notice. Consequently, I hold that the claim for unlawful



termination does not arise as the appellant voluntarily terminated her employment contract during Covid-19 Pandemic.

Reliefs

26. For the reasons stated above, the appellant is not entitled to declaration that her suspension amounted to unlawful and unfair termination of her employment. She is also not entitled to compensatory damages for unlawful termination of the employment.
27. However, I find that she is entitled to full salary from 1st June 2020 to 6th October 2020 when she terminated her contract by filing the suit herein. She is also entitled to half salary for April and May 2020 that was withheld due to the said suspension. Her salary as at the time of the suspension was Kshs.28,025 and therefore I award her;
 - a. Half salary for April and May 2020...Kshs.28,025.00
 - b. Salary for June -September 2020.....Kshs.112,100.00
 - c. Salary for 6 days in October 2020....Kshs.5,605.00
Kshs.145,730.00
28. The trial court awarded the appellant service pay of Kshs.476,425 and the respondent did not challenge by way of a cross appeal. Therefore I will not disturb the same.

Conclusion

29. I have found that the appellant voluntarily walked out of her employment contract when she filed the primary suit herein and therefore the alleged unlawful termination by the respondent did not arise. I have further found that the appellant is entitled to the salary for April-October 2020 and assessed it at Kshs.145,730. Finally, I have found that the award of Kshs.476,425 being service pay for the 17 years worked was not challenged by the respondent and therefore it shall stand. Consequently, the appeal is allowed to the extent highlighted above and the trial court judgment varied by making the following orders: -
 - a. The appellant is awarded salary arrears for April-October 2020 equalling to Kshs.145,730.
 - b. The award of service pay of Kshs.476,425 by the trial court is not disturbed.
 - c. The appellant is awarded costs of the appeal and the court below plus interest at court rate from the date of the court judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

