



**Mutaki v Tire World Limited (Employment and Labour Relations Appeal
E015 of 2022) [2024] KEELRC 1047 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1047 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E015 OF 2022**

BOM MANANI, J

MAY 9, 2024

BETWEEN

DENNIS WANJALA MUTAKI APPELLANT

AND

TIRE WORLD LIMITED RESPONDENT

JUDGMENT

Background

1. This is an appeal from the decision of the Chief Magistrate’s court sitting at Nairobi in Employment Cause No. 2318 of 2019 which was delivered on 19th January 2022. By that decision, the Appellant’s claim against the Respondent for unfair dismissal from employment was declined. And hence the appeal.
2. The Respondent had hired the services of the Appellant as a front desk sales officer. On 16th October 2019, the Respondent’s management wrote to the Appellant notifying him of a decision to transfer him from its Ngong branch to the Westlands branch. Apparently, this decision did not sit well with the Appellant. As a result, he tried to challenge it through a series of email exchanges on the same day.
3. The Respondent’s management was unamused by the emails. It is indicated that they (the emails) were disrespectful. Further, the Respondent asserts that it was contrary to its protocol for the Appellant to have written to its Managing Director on the issue without first taking it up with its Human Resource Department. As a result, the Appellant’s contract was terminated.
4. Aggrieved by this decision, the Appellant lodged a claim before the Chief Magistrate’s Court, Nairobi in which he prayed for inter alia, an order that the decision was unlawful. He contended that the Respondent had no valid reason to terminate his employment. Further, he contended that he was not afforded an opportunity to be heard before the decision was tendered.



5. After hearing the parties, the trial court found in favour of the Respondent. The court arrived at the conclusion that the Appellant had acted in a manner that bordered on insubordination. Further, the court found that although the Appellant was summoned to a meeting at which he would have been heard, he snubbed the invite. Thus, the decision to terminate his employment was justified.

Issues for Determination

6. Aggrieved by the decision, the Appellant instituted the instant appeal. In the Memorandum of Appeal dated 9th February 2022, he raises six (6) grounds of appeal. The grounds yield the following questions for determination:-
 - a. Whether the learned trial magistrate erred in law and fact in arriving at the conclusion that the Respondent had valid reasons to terminate the Appellant's employment.
 - b. Whether the learned trial magistrate erred in law and fact in holding that the Appellant had been afforded an opportunity to be heard before the decision to terminate his contract of service.
 - c. Whether the learned trial magistrate erred in law and fact in arriving at the conclusion that the Appellant was undeserving of the reliefs that he had sought in the Statement of Claim.

Analysis

7. This is a first appeal. As such, the role of this court is to evaluate the evidence on record and reach its own conclusion on the matters in controversy. However, the court ought to do so with the usual caution that unlike the trial court, it did not have the benefit of taking the evidence of the witnesses in the cause. As such, it should only depart from the findings of fact by the trial court if they are not supported by the evidence on record or are inconsistent with the law.
8. Regarding the first issue, it is apparent from the record that after the Appellant was notified of the decision to transfer him to Westlands, he wrote an email to one Bhavin Gudka on 16th October 2019 at 9.27 am requesting for a meeting to air his grievances regarding what he described as his constant reshuffles. The record shows that the said Bhavin Gudka responded to the Appellant's email on the same day at 9.44 am advising him to take up the matter with the Respondent's Human Resource (HR) department.
9. It would appear that the Appellant was not satisfied with this response. Thus, he wrote back to indicate that the HR department had indicated that the decision to transfer him emanated from the Regional Manager. However, when he contacted the said manager, he was dismissive of the issue.
10. The Appellant expressed his doubts regarding whether the said manager understood his job description. Apparently, he (the Appellant) was expressing the view that transfers should perhaps not be handled by the Regional Manager. He therefore sought Mr. Bhavin's clarification on who was responsible for transfers in the organization.
11. This email was followed by a series of other emails generated on the same day. In the email trail, the Appellant complained about having been transferred just about six months before the impugned transfer. He complained about the cost implications of the frequent transfers. He appeared to suggest that whilst he had been subjected to a series of transfers, there were other members of staff who had not been treated in the same way.



12. The Appellant insinuated that he had been treated with insensitivity. For instance, he asserted that his last transfer was effected notwithstanding that he had a patient who was being attended to by a specialist in the neighborhood of where he (the Appellant) was working.
13. The Appellant suggested that his transfers may have been motivated by ulterior factors. He specifically insinuated that one John Njenga in the HR department appeared to have resorted to the transfers as a tool for settling some personal vendetta between the two. Finally, he asked Bhavin to make it clear to him if the Respondent was no longer in need of his services.
14. It is this email trail that seems to have caused the Respondent some discomfort. The Respondent accused that Appellant of disrespect for his seniors. As a result, he was issued with a letter of termination of his contract.
15. In his decision, the trial court found the Appellant's expressions in the emails to have been disrespectful of his superiors. In the trial court's view, the emails lacked courtesy, decorum and reverence. As a result, he agreed with the Respondent's HR officials that the correspondences were disrespectful.
16. The court went further to find that the Appellant was summoned to a meeting on the same day but snubbed the summonses. As such, he found the Appellant's conduct as constituting insubordination.
17. I have looked at the email correspondence in question. Undoubtedly, the language that was adopted by the Appellant in the correspondence was condescending. However, the fact that the language was condescending does not mean that it was abusive.
18. To suggest that someone has not understood his job description cannot be construed as an insult. This was merely expressing the Appellant's appreciation of the obtaining state of affairs.
19. The context in which the Appellant raised the above concern is critical. If the Respondent had a functional HR department, why was the Regional Manager handling staff transfers? If he was to undertake this task, what was the role of the HR department?
20. At the same time, the Appellant's contention that the decision to transfer him did not consider the cost implications on him was not an abuse. I understand him to have merely been expressing his concern about the financial implications of the impugned decision.
21. When the Appellant lamented about being treated differentially with respect to transfers, this was neither abusive nor insulting. It was merely an expression of concern by him about the purported unequal treatment at the workplace which the Respondent only needed to clarify without resorting to the drastic decision to terminate his services.
22. As such, I do not agree that the Appellant was abusive and insulting in his emails. There is no evidence on record to support the conclusion that he (the Appellant) acted in an insulting and abusive manner against his superiors.
23. The Respondent accused the Appellant of insubordination. However, I do not see evidence to support this assertion. The fact that the Appellant questioned the decision to transfer him did not amount to insubordination.
24. There is no suggestion in the email trail between the parties that the Appellant refused to take up the transfer. He only questioned the fairness of the decision given that he had been recently transferred to the Ngong branch and there were colleagues who had not been subjected to similar transfers. I do think that to raise these concerns constituted insubordination.



25. It is noteworthy that the events that resulted in the decision to terminate the Appellant's contract happened on the same day that his contract was terminated (16th October 2019). The Respondent's management assert that the Appellant was invited to a meeting on the same day but declined to attend. Hence, the accusation of insubordination.
26. It is important to note that nowhere in the correspondence between the parties is it suggested that the Appellant was summoned for a meeting but snubbed it. This is not even raised as part of the reason why his services were terminated (see the letter of termination).
27. Evidently, the assertion that the Appellant snubbed a meeting called on the same day was not established through evidence. It was therefore wrong for the trial court to have arrived at the finding that the Appellant snubbed the alleged meeting without cogent evidence in this respect.
28. It is curious that although the record shows that the parties were corresponding through email on the material day, the Respondent's HR officers allegedly elected to summon the Appellant orally for a disciplinary session on the same day. Why did these officers not consider it necessary to document the invite to the Appellant for the alleged meeting?
29. The Appellant may have exhibited impolite behaviour in his correspondence with the Respondent's officers. However, what the Respondent ought to have done was to issue him with a formal notice to show cause letter to explain why disciplinary action should not be taken against him for the alleged misconduct. As the record shows, no such letter was issued to the Appellant.
30. Sections 43, 45 and 47 of the *Employment Act* burden the employer with the obligation to justify the decision to terminate an employee's contract of service. In terms of section 41 of the *Act*, the employer must demonstrate that he had valid grounds to support his decision. Further, he must show that he processed the employee's release in accordance with fair procedure. There is no evidence on record to suggest that the Respondent discharged this obligation.
31. In the premises, I find that the trial court's decision to the effect that the Respondent's impugned decision was fair and just was erroneous. As such, I set aside the finding that the Respondent had valid reasons to terminate the Appellant's contract. Further, I set aside the finding that the Respondent upheld due process in releasing the Appellant from employment.
32. Instead, I find that the Respondent did not demonstrate that it had valid grounds to terminate the Appellant's contract. Further I find that the Respondent did not uphold fair procedure in releasing the Appellant from employment.
33. The next issue for determination relates to whether the trial court erred in declining to award the Appellant the reliefs that he sought. Having found that there was no evidence to support the finding that the Appellant was guilty of gross misconduct, it follows that he was entitled to notice in terms of section 35 of the *Employment Act* before his contract was terminated. As the record shows, no such notice was issued to him. Consequently, he is entitled to pay in lieu of notice in terms of section 36 of the *Act*. As such, I enter judgment for him for Ksh. 32,303.00 being pay in lieu of notice to terminate his contract.
34. I note that at the time his contract was terminated, the Appellant had just about two (2) months before his tenure ran out. As such, he can only seek compensation for unfair termination of his contract for the two months that were remaining. As such, I enter judgment for him (the Appellant) for compensation for unfair termination that is equivalent to his salary for the two months, that is to say, Ksh. 32,303 x 2 = Ksh. 64,606.00.



35. The trial court found that the Appellant had utilized his leave days for the period under review. There is no evidence to suggest a contrary view. As such, this finding is upheld.
36. The above award is subject to the applicable statutory deductions.
37. The Appellant is awarded interest on the aforesaid amounts at court rates from the date of the decision by the trial court.
38. The Appellant is awarded costs both before the trial court and on this appeal.

Summary of the Decision

- i. The trial court’s finding that the Respondent had valid reasons to terminate the Appellant’s contract of service is set aside.
- ii. The trial court’s finding that the Respondent upheld due process in releasing the Appellant from employment is set aside.
- iii. I find that the Respondent did not have valid grounds to terminate the Appellant’s contract.
- iv. Further I find that the Respondent failed to uphold fair procedure in releasing the Appellant from employment.
- v. I enter judgment for the Appellant for Ksh. 32,303.00 being pay in lieu of notice to terminate his contract.
- vi. I enter judgment for the Appellant for compensation for unfair termination of his contract that is equivalent to his salary for two months, that is to say, Ksh. 32,303 x 2 = Ksh. 64,606.00.
- vii. I uphold the trial court’s findings that the Appellant had utilized his annual leave days.
- viii. The above award is subject to the applicable statutory deductions.
- ix. The Appellant is awarded interest on the aforesaid amounts at court rates from the date of the decision by the trial court.
- x. The Appellant is awarded costs both before the trial court and on this appeal.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF MAY, 2024

B. O. M. MANANI

JUDGE

In the presence of:-

..... for the Appellant
 for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.



B. O. M MANANI

