



**Njue v Masaku & another (Employment and Labour Relations Appeal E010 of 2023) [2024] KEELRC 1097 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1097 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2023  
ON MAKAU, J  
MAY 15, 2024**

**BETWEEN**

**CATHERINE MUTHONI NJUE ..... APPELLANT**

**AND**

**FLORA MASAKU ..... 1<sup>ST</sup> RESPONDENT**

**B.O.M EMBU COUNTY MIXED SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment and Decree of Hon. J. A Otieno, senior Resident Magistrate delivered on 29th June 2023 at EMBU in Employment Cause No. E001 of 2022, Catherine Muthoni Njue versus Flora Masaku & BOM Embu County Mixed School)*

**JUDGMENT**

**Introduction**

1. The Appellant brought action for unlawful termination against the Respondents in the Chief Magistrate Court seeking judgement in following reliefs:
  - a. An order that the Claimant be reinstated back to her position and the withheld salary be paid to her being and the same be calculated at Kshs. 27,608 per month for the months June 2020, July 2020, August 2020 and from January 2020 till judgement is delivered; in the alternative;
  - b. A declaration that the Respondent's termination of the Claimant's employment was illegal, unlawful, unfair and inhumane and that the Claimant is entitled to payment of her unpaid salary and all her due terminal benefits and Damages totalling to Kshs. 800,632/=.
  - c. A declaration that the Claimant is entitled to her retirement benefits for the services rendered.
  - d. An order for the Respondent to pay the Claimant the costs of this claim.
  - e. Interest to the Claimant at 14% per annum from the date of judgement, till payment in full.



2. The respondent denied the claim and the suit to full hearing. Each side called tendered evidence and filed submission. Subsequently, the trial court (Hon. Otieno SRM) entered the impugned judgment in favour of the appellant in the following terms:
  - a. The indefinite suspension of the appellant amounted to constructive dismissal which was unfair within the meaning of section 45 of the *Employment Act*.
  - b. Unpaid salaries for June, July, & August 2020 .....Kshs. 82,824.00
  - c. 8 months damages for unlawful termination .....Kshs. 220,864.00
  - d. Notice pay .....Kshs. 27,608.00

Total Kshs. 331,296.00
3. Being dissatisfied with the decision of the Court, the Appellant has preferred this appeal premised on the following grounds of appeal:
  - a. The Honourable Trial Magistrate erred in law and facts by not allowing the Applicant prayers in the Memorandum of claim as prayed and which were never objected/challenged.
  - b. The Learned Trial Magistrate erred in law and fact by totally ignoring the evidence placed before her which clearly demonstrated that the Respondents were holding the applicant unpaid salary from the months of January 2020 till the date of judgement.
  - c. The Learned Trial Magistrate erred in law and in fact by totally ignoring/disallowing the prayer on the appellant being entitled her retirement/service benefits for the services rendered.
4. The Appellant prays for the following:
  - a. That the appeal be allowed and the order made on 29<sup>th</sup> June 2023 be set aside/reviewed.
  - b. The respondents be compelled to release all the unpaid salaries withheld as prayed for in the memorandum of claim.
  - c. An order that the appellant is entitled for her retirement/service benefits as prayed in the memorandum of claim.
  - d. Cost of the appeal.

#### **At the trial court**

5. During the trial, the Appellant's case was that she was employed by the respondent on 28<sup>th</sup> February 2005 as an Accounts clerk and worked up to 18<sup>th</sup> January 2021 when she was suspended indefinitely. As at that time her salary was Kshs.27,608 but she was not paid any salary during the whole period of suspension although the employer faithfully remitted her statutory deductions. She stated that the indefinite suspension without pay amounted to termination of her employment contrary to the *Constitution, Employment Act* and the principles of natural justice. She then averred that she is entitled to one-month salary in lieu of notice, compensation for unfair termination, unpaid salary for June, July and August 2020 and January 2021 to January 2022 totalling to Kshs. 800,632.
6. She further stated, despite being cleared of all allegations, she was never reinstated to work. She also abandoned her prayer for reinstatement during cross examination and opted for compensatory damages.



7. The respondents' case was that the appellant was suspended for insubordination, unauthorised salary increments, lack of updates accounts records and rude language. A show cause letter was served on her and she responded by an apology letter. Further investigation was required after the Ministry of Education and the Auditors established other anomalies.
8. It was further respondents' case that the appellant's employment was never terminated but she was just on suspension. They contended that they gave appellant a chance to defend herself about the salary increments to staff and she contended that she only executed verbal command from the principal. Subsequently, the Board agreed to settle the matter but the appellant refused.
9. On cross examination, DW1 admitted that the appellant was not a signatory of the cheques. He contended that a letter was written directing that the appellant be recalled back to work but that was never done since the ministry took over the matter. DW2 admitted that the appellant was not paid any salary during the period of suspension but all his statutory deductions were remitted. She further admitted that some communications can be done verbally.

### **Submissions in the appeal**

10. The appeal was canvassed by way of written submission. The appellant submitted that the appeal turns on the following issues:
  - a. Whether the appellant is entitled to the withheld unpaid salary as prayed in the memorandum of claim dated 4<sup>th</sup> February 2022.
  - b. Whether the Appellant is entitled to her retirement and service benefit for the service rendered.
11. On the first issues, it was submitted that the Respondents acknowledged that the Appellant was its employee and that she was only suspended but not dismissed. Further, they admitted that they withheld her salary and remitted all her statutory deductions. Consequently, it was submitted that, on the basis of the said admission, the prayer for the withheld salary ought to have been allowed as prayed.
12. On the second issue, it was submitted that the Respondent did not give any reason as to why the retirement benefits should not be granted. In support, the Appellant relied on section 5 of the [Pensions Act](#) which provides for pension as of right. It was argued that the court having found that the suspension was illegal entitled him to pension for service rendered. The Court was therefore urged to allow the appeal as prayed.
13. In response, the 2<sup>nd</sup> Respondent submitted on the grounds of the appeal as set out in the memorandum of appeal. With respect to the first ground, it was submitted that Appellant's prayers were exaggerated as she claimed Kshs. 800,632/= but the Court took section 49 of the [Employment Act](#) into consideration by awarding notice pay and compensation for unfair termination. It contended that allowing the prayers as sought would be against the law.
14. On the second ground, it was submitted that the principle of law required that anyone who lays a claim against another must prove it in accordance with sections 107 & 108 of the [Evidence Act](#). It was further submitted that the Appellant had the burden of proving that the Respondents withheld her salary from month of January 2020 until judgement. To fortify the argument, reliance was placed on the cases of [Josephine M. Ndungu & Others v Plan International Inc](#) [2019] eKLR, [Peter Otabong Ekisa v County Government of Busia](#) [2017] eKLR, [Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another](#) [2005] 1 EA 334 and [Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike](#) [2017] eKLR.



15. It was submitted that the school faced financial challenges in 2020 which led to arrears in salaries for the support staff. Further that, it could not pay the Appellant's salary for the time she was away on suspension because the Board advised the school to recover the money that was paid as salary increments to the staff from her.
16. On the third ground, it was submitted that, what the Court awarded the Appellant was reasonable and in accordance with the law. It was therefore argued that the Appeal was without merit and hence should be dismissed with costs to the Respondent.

### **Analysis and determination**

17. This being a first appeal, this Court's mandate is to re-evaluate the evidence on record and proceed to make its own independent conclusions on the case before it. I draw this legal principle from the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212, where the Court of Appeal stated as follows:

“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”

18. In the instant appeal, I have perused and considered the evidence contained in the record of Appeal and also the submissions by the parties. The holding by the trial court that the appellant's employment was unfairly terminated has not been challenged. Likewise, the award of salary in lieu of notice, compensation for unfair termination and salary for June, July and August 2020 has not been challenged. The only issue falling for determination is whether the appellant is entitled to payment of salary for January 2021 to January 2022 and retirement benefits.

### **Salary for January 2021 to January 2022**

19. I have carefully gone through the impugned judgment and noted that it is totally silent on the prayer for salary for the period of the appellant's suspension from January 2021 to January 2022. The said item was part of prayer (a) in the Memorandum of claim but she only awarded salary for the June, July and August 2020. Likewise, the court said nothing about the prayer for retirement benefits. The court ought to have considered the claims and either rejected or granted the same with reasons. With due respect, the failure to do so was an abdication of judicial duty.
20. There is evidence on record upon which the trial court ought to have determined the outstanding two issues. As regards the claim for unpaid salary during the suspension period, the appellant testified that he was not paid her salary but the statutory deductions were remitted to the concerned agencies. The defence witnesses admitted that the salary was not paid after the Board advised that the same would be used to recover salary increments paid to other employees.
21. No minutes of the Board was produced as proof of such resolution and advice. Even if it was produced, this court would not be persuaded because the recovery ought to be direct to the employees who received the alleged erroneous increments. The amount paid to the said employees as increment was neither quantified nor was there any counterclaim. Finally, the respondents admitted in evidence that the appellant was cleared of all the allegations and therefore the alleged recovery has no legal basis.



22. In view of the foregoing matters, I find that the appellant is entitled to payment of all her salary for January 2021 to January 2022 being 13 months x Kshs.27608 = Kshs.358,904 less statutory deductions.
23. As regards the claim for retirement benefits, there is no evidence that the appellant was entitled to any pension. Consequently, her submissions on that subject and reference to the Pensions Act hold no water. However, there is evidence that the appellant was registered with the NSSF and the employer remitted contributions regularly even when her salary was withheld. Consequently, I find and hold that she is entitled to payment of her retirement benefits by the NSSF under the Fund regulations.

### **Conclusion**

24. I have found that, over and above the award granted by the trial court, the appellant is entitled to payment of her salary for January 2021 to January 2022 less statutory deductions plus further payment of her retirement benefits by the NSSF. Consequently, I allow the appeal, set aside the impugned judgment and substitute it with the following orders:
- i. Notice.....Kshs. 27,608.00
  - ii. Compensation for unfair termination.....Kshs.220,864.00
  - iii. June, July and August 2020 salary.....Kshs. 82,824.00
  - iv. January 2021- January 2022 Salary.....Kshs. 358,904.00  
Total Kshs. 690,200.00
  - v. Payment of retirement benefits by the NSSF under the Fund Rules and regulations.
  - vi. Cost of this Appeal and suit in the lower court.
  - vii. The appellant is also awarded Interest at court rates from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF MAY, 2024.**

**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**

