



**Nyamari v Kenya Kazi Services Limited (Appeal E192 of 2022)
[2024] KEELRC 1147 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E192 OF 2022
NZIOKI WA MAKAU, J
MAY 13, 2024**

BETWEEN

WYCLIFFE MESHAK NYAMARI APPELLANT

AND

KENYA KAZI SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Appellant, Wycliffe Meshak Nyamari, filed a Memorandum of Appeal dated 3rd November 2022 that was amended on 26th January 2024. He is appealing against part Orders of the Judgment of Hon. Principal Magistrate A.N Makau in Nairobi MCELRC No. E131 of 2021 (Wycliffe Meshak Nyamari -vs- Kenya Kazi Services Limited) delivered on 4th October 2022, on the grounds:
 - a. That the Learned Magistrate erred in law and in fact by holding that Respondent had a valid reason to summarily dismiss the Claimant despite the fact that the allegedly missing plates were not part of the items handed over to the Claimant via a signed counter-book on the fateful night.
 - b. That the Learned Magistrate erred in law and in fact by holding that the Respondent had a valid reason to summarily dismiss the Claimant notwithstanding the fact that there was no official complaint from the Embassy over the missing plates.
 - c. That the Learned Magistrate erred in law and in fact by holding that the Respondent had a valid reason to summarily dismiss the Claimant despite the fact that the issue of alleged theft of the metals by the Claimant was never reported at the police station and investigated.
 - d. That the Learned Magistrate erred in law and in fact by holding that the dismissal of the Claimant was fair and procedural.



- e. That the Learned Magistrate erred in law and in fact by failing to appreciate in totality the evidential bundle produced by the Appellant thereby arriving at the wrong conclusion.
2. The Appellant prays that the Orders contained in the said Judgement of 4th October 2022 be set aside, that he be granted costs of the Appeal, and that the prayers contained in the Appellant's Memorandum of Claim dated 28th January 2021 be permitted by directing the Respondent to pay the Appellant as follows:-
 - a. 12 months' compensation for unfair termination.
 - b. One (1) month salary in lieu of notice.
 - c. Salaries for days worked in November 2018.
 - d. Unpaid overtime.
 - e. Allowances.
 - f. Gratuity as provided in the Contract.
3. The matter was disposed of by way of written submissions.
4. Appellant's Submissions

The Appellant condensed the five grounds of appeal into two issues for determination as follows:

- a. Whether the learned Magistrate erred in law and in fact by failing to find that there were no valid reasons for the termination of the Claimant's employment; and
 - b. Whether the learned Magistrate erred in law and in fact in her findings that the termination was procedurally fair.
5. As regards the first issue, the Appellant submitted that the learned Magistrate did not at all address the question on whether there was a valid reason to terminate the Claimant's employment, as can be seen from the excerpt of the said Court's Judgment at page 103 of the Record of Appeal. That the trial Court erroneously and wrongly concluded that the notices and warning letters constituted a valid reason for termination when in fact 'valid reason' constitutes the principle of substantive fairness that is considered separately from procedural justification. He opined that under the limb of a valid reason, the learned Magistrate ought to have scrutinized the reasons why the Respondent terminated the Claimant's employment and whether the Respondent had established existence of a valid reason, as required of it under sections 43 and 45 of the Employment Act. It was the Appellant's submission that having been accused of theft and/or negligence at work, the learned Magistrate should have reviewed the evidence on record to analyse the validity of the two reasons fronted for dismissal before then turning to the notices and procedural fairness. That instead, the trial Court failed to interrogate the reasons anchoring the termination as fronted by the Respondent and thus wrongly concluded that the summary dismissal was fair.
 6. Further, the Appellant reviewed the testimony of the Respondent's Witness, whom he asserted made several admissions including that: the Appellant/Claimant's work station was at the embassy, no report was ever made to any police station concerning the stolen metal plates, nobody from the embassy testified in court, the CCTV cameras at the work place were never reviewed, the Counter Book signed for reference was not produced in court, and the said missing metal plates were not part of the items handed over to the Claimant in so far as the Counter Book is concerned. According to the Appellant, his evidence before the trial Court was clear that the metal plates were never handed over to him as per



the Counter Book and did not therefore go missing when he was in-charge. That the issue of negligence arising from the said loss was thus unsubstantiated since he was not found with the metal plates or seen stealing them, which also waters down the issue of theft. The Appellant cited the case of *Mwangi Odhiambo Dancun v Xfor Security Solutions Kenya Ltd* [2016] eKLR in which the Court held that the reason cited in the dismissal letter was not supported by evidence and was therefore an invalid reason. Similarly, the Appellant urged this Court to find that the reason fronted for dismissal against him by the Respondent, of theft and negligence, were invalid and unsupported by evidence. He further cited the finding of the Court in the case of *Joshua Mbengo Orori v Karibu Rafiki Limited* [2018] eKLR that the reasons for termination were invalid since the respondent did not prove theft of the two laptops or that the laptops went missing when the guard was in charge. The Appellant again equally urged this Court to find that the Respondent failed to prove that the metal plates were handed over to his custody on the night of 27th September 2018 and they went missing when he was on duty.

7. On the issue of procedural fairness, the Appellant submitted that no notices were ever issued to him because he was summarily dismissed but the learned Magistrate erroneously found that notices were served. He urged the Court to consider that he gave a written response to the allegations, which the Respondent did not consider and also did not offer him the reasons for dismissing both his explanation and appeal. He alleged that the Warning Letter issued in 2018 was malicious and a choreographed attempt to find fault in him in response to his demand for underpayment of his salary. He thus asked the Court to render the said letter inconsequential and also noted that no disciplinary hearing was conducted in his case. It was the Appellant's submission that the Court should find that the termination of employment does not meet the tests of substantive and procedural justification and was thus null and void. He urged the Court to allow the Appeal with cost to the Appellant.

8. Respondent's Submissions

The Respondent noted that the subject Counter Book only contains the names of the security officers that are taking over from one shift to another and does not have the inventory of all the items being guarded as claimed. It submitted that the Appellant neither pleaded nor testified on the said issue in his Statement of Claim before the trial Court and should therefore not be allowed to raise it on appeal, as he is bound by his pleadings. The Respondent cited the holding of the Court in *Kenya Tea Development Agency v Sofia Nyaboke Kenanda* [2010] eKLR that it is trite law that an appellate court can only deal and decide on issues canvassed before the trial Court and cannot deal with an issue raised in the appeal for the first time. The Respondent thus urged the Court to dismiss ground 1 of the appeal in view of the foregoing. It was the Respondent's submission that ground 2 of the appeal is misleading and should be dismissed. According to the Respondent, it had adduced a Report relating to the loss of the metal plates (pages 43-46 of the Record of Appeal) and it was clear that the Appellant was aware of the lodged complaint relating to loss of metal plates at the US Embassy. As regards grounds 3 and 4 of the appeal, the Respondent submitted that the Investigation Report at pages 43-46 of the Record of Appeal implicated the Appellant amongst other security guards and he was subsequently issued with a Notice to Show Cause why disciplinary action should not be taken against him but which he did not respond to. That it also exhibited the Minutes of the Claimant's disciplinary hearing and asserted that it considered the Appellant's one sentence appeal before upholding the decision to summarily terminate his employment. The Respondent also noted that section 43(2) of the *Employment Act* makes provision for such matters, where the reason for termination of the employee's contract is based on issues that the employer genuinely believed to exist at the time. It fronted that the Appellant admitted during cross-examination before the trial Court that as a person working in the security industry, he was expected to take care of the property and persons of where he is stationed. That the Appellant also testified that he did not conduct patrols after his shift and thus he and the day guard



- expected to replace him could not ascertain whether the metal plates were there at the end of his shift. The Respondent believed that the Appellant therefore failed to perform his duties.
9. On the application of the Reasonable Responses Test, the Respondent cited the case of *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR in which the Court of Appeal affirmed the distinction between the internal disciplinary proceedings of an employer and criminal proceedings, in terms of the burden of proof for the former being on a balance of probability while for the latter requiring proof beyond reasonable doubt. In this regard, the Respondent submitted that this case being a disciplinary hearing based on an employment contract, the standard for criminal matters, of proof beyond reasonable doubt, does not apply. It argued that the Appellant never demonstrated to the trial Court the efforts he made to ensure that the metal plates remained intact. That as established in the Statements recorded and the Investigation Report, it had a valid reason to dismiss the Appellant and this Court should therefore uphold the finding of the trial Court that the reason for the termination was valid. It further submitted that it had also demonstrated that it followed the lawful procedure when terminating the Appellant's employment contract and urged this Court to find that the termination of employment was fair and just in accordance with sections 41 and 45 of the *Employment Act*.
 10. It was the Respondent's submission that in light of the foregoing, the Appellant was not entitled to the remedies sought. Regarding the prayer seeking payment of leave and travelling allowances, the Respondent argued that an employee's right to leave and travelling allowances is predicated upon actual work done and not otherwise per the holding of the Industrial Court in *Pravin Bowry v Ethics & Anti-Corruption Commission* [2013] eKLR. On the issue of gratuity, the Respondent submitted that pursuant to the Appellant's Contract, an employee who is summarily dismissed for lawful cause is not entitled to gratuity and considering the Appellant was summarily dismissed, this claim must fail. It relied on the case of *Maria Mukwana v Kenya Medical Research Institute* [2017] eKLR in which Rika J. affirmed the position that gratuity is payable pursuant to the contractual terms of the parties. The Respondent thus urges the Court to uphold the trial Court's findings and dismiss the Appellant's Appeal with costs.
 11. The Court notes that the Respondent submitted on each of the prayers/reliefs sought before the trial Court even though the Appellant asserted that his Appeal was against specific parts of the Orders of the trial Magistrate. That in my opinion is what this Court should consider in making its determination. I will therefore ignore the submissions by the Respondent relating to the matters that are not before me for determination. The issues for determination are whether the learned Magistrate erred in law and in fact by failing to find that there were no valid reasons for the termination of the Claimant's employment; and whether the learned Magistrate erred in law and in fact in her findings that the termination was procedurally fair.
 12. In an appeal such as this one, the Court is bound to re-evaluate the evidence that was adduced before the Trial Court and come to its own conclusion. The Appellant asserts his dismissal was without any basis. He asserts the Respondent did not have a valid reason to summarily dismiss the Claimant despite the fact that the allegedly missing plates were not part of the items handed over to the Claimant via a signed counter-book on the fateful night. He also attacks the finding by the Learned Principal Magistrate that the Respondent had a valid reason to summarily dismiss the Claimant notwithstanding the fact that there was no official complaint from the Embassy over the missing plates. He also found fault with the fact that the loss was not reported to the Police.
 13. Under section 44 of the *Employment Act*, summary dismissal is available. Where an employee may be dismissed for theft, the employer has to have a valid reason for termination. In this case the employee was accused of being complicit in the loss of metal plates. Whereas the Appellant conflates a disciplinary



issue with the criminal aspect, it is clear that where the employer opts not to report to the Police it does not detract from the reason it may rely on for termination. Just because there was no complaint from the US Embassy to the Police does not invalidate the reason the employer used to determine the unsuitability of the Appellant to serve it. The Claimant was subjected to a disciplinary process in which he was required to defend himself against the accusation levelled against him. There is record of the Claimant being given a show cause letter, being invited for a disciplinary hearing where he was heard. He did give an explanation and his explanation was found wanting resulting in a summary dismissal. He later was allowed to appeal his summary dismissal and the appeal process upheld the dismissal. Once the employer had cause to terminate his services, the Claimant could be dismissed as was done in this case. The hearing before the Learned Principal Magistrate did not stray from this thread of analysis. It therefore follows that the Learned Principal Magistrate did not fall into any error in finding that there was a cause and reason for termination. The Appellant was subjected to procedure that was fair and as such there is no basis to interfere with the finding of the Court below. The Court will therefore dismiss the appeal though the parties are to bear their own costs for the unsuccessful Appeal. Appeal dismissed, no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

