



**Securitas Kenya Limited v Nyakundi (Appeal E107 of 2021)
[2024] KEELRC 1259 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1259 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E107 OF 2021**

NJ ABUODHA, J

MAY 9, 2024

BETWEEN

SECURITAS KENYA LIMITED APPELLANT

AND

YOHANA NYAKUNDI RESPONDENT

(Being an appeal from the Judgment and decree of D.O. Mbeja (PM) delivered on 27th August, 2021 in Nairobi's Milimani Law Courts, Chief Magistrate's ELRC Cause no.231 of 2020)

JUDGMENT

1. Through the Memorandum of Appeal dated 24th September, 2021 the Appellant appealed against the Judgment of Honourable D.O Mbeja, Principal Magistrate (PM) delivered in Nairobi on 27th August, 2021 on grounds among others that:
 - i. The Learned Trial Magistrate erred in law and fact by not considering the weight of the evidence adduced by the Appellant that clearly showed that the Respondent was not terminated from his employment.
 - ii. The learned trial magistrate erred in law and fact by not considering the fact that the claim by the Respondent was fully settled by the labour office and part payment done and only interrupted by filing of the claim in court.
 - iii. The learned Trial Magistrate erred in law and facts and /or intentionally misinterpreted the settlement arrived at by both parties at the labour offices.
 - iv. The Honourable Trial Magistrate erred in fact in failing to find that the Appellant had proved that the Respondent had breached contractual rules and regulations for which he was not terminated but called upon to explain himself after warnings.



- v. The Honourable Trial Magistrate erred in fact and in law in using a higher standard of proof than on a balance of probabilities in arriving at the determination as to whether the Respondent had proved his case.
 - vi) The Honorable Trial Magistrate erred in fact and in law in failing to find that the evidence presented by the Appellant was more credible than that given by the Respondent.
 - vii) The Honourable Trial Magistrate erred in law in failing to take cognizance of the nature of the work entrusted to the Respondent and the level of discipline expected in the field.
2. The Appellant prayed that the appeal be allowed with costs and Judgment of the trial Court be set aside and the respondents case in the lower Court be dismissed.

Appellant's Submissions

3. The Appellant filed written submissions on 8th December, 2023 and submitted among others that the burden of proving the assertion of a fact lies with the party seeking to rely on the same as outlined under section 107 of the *Evidence Act*. According to Counsel, the respondent did not adduce any evidence to prove his assertion of unfair termination. In this regard Counsel relied on the case of *Kipkepe Limited Vs. Peterson Ondieki* [2016] eKLR and the case of *CMC Aviation Limited v. Mohammed Noor* [2015]eKLR where it was stated:
- “unfair termination involves breach of statutory law. Where there is a fair reason for terminating the employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract”
4. The evidence adduced before the trial Court was clear that the respondent was not dismissed as he brought no evidence to show the same. The respondent had been issued with two warning letters dated 24th July, 2017 and 17th April, 2019 over his performance which were attached to the appellant’s list of documents. Despite the warnings the respondent never improved and a client of the appellant threatened to terminate their contract unless the respondent was suspended without pay to afford him an opportunity to reflect on his conduct. The respondent was subsequently suspended for 7 days and when recalled to work he never reported back. In that regard Counsel submitted that section 45 of the *Employment Act* became inapplicable.
5. Mr. Maina further submitted that during the trial the appellant’s witnesses testified that when the respondent failed to report back to work, he reported the matter to the Labour Office and the appellant was summoned and after tripartite discussion it was agreed that the respondent be paid terminal dues amounting to Kshs.8,833/55. The appellant presented before the trial court this evidence. According to Counsel, the payment agreement was binding on the parties hence the respondent had no further claim against the appellant.
6. Counsel in conclusion submitted that the respondent did not disprove the fact that he failed to report back for deployment and that the respondent was bent on extorting money from the appellant by filing several similar suits against the appellant through different law firms.



Respondent's Submission

7. Mr. Kori for the respondent on the other hand submitted that the trial magistrate was quite right that the appellant did not adduce any evidence to assert that it followed due procedure in handling the alleged complaints brought against the respondent. Further that the trial magistrate observed that the appellant's witness, Judah Mulinge relied on hearsay evidence as he was not present at the alleged meetings. He stated that the respondent had absconded work after being suspended for misconduct and that the suspension was after disciplinary hearing and the respondent was to be redeployed after the suspension. RW1 further stated that the respondent had been issued with two previous warning letters prior to suspension. The letters were produced in Court as exhibit 1 and 2 respectively. The respondent however never signed or acknowledged receipt of the warning letters.

Determination

8. The duty of a first appellate court was well stated in the Court of Appeal in *Selle vs Associated Motor Boat Company Limited* [1968] E.A 123 thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

9. In determining the Appeal herein, this Court shall similarly seek to re-analyze the evidence tendered before the trial Court against the court's conclusion and disposition.
10. The main ground of appeal put forward by the appellant is that
the trial magistrate erred in law by not considering the weight of the evidence adduced by the appellant that clearly showed that the respondent was not terminated from employment. In this regard, the Court has reviewed the testimony of the appellant's sole witness Mr. Judah Mulinge (page 60-62 record of appeal) and notes that the witness informed the trial court that they had not provided minutes of the disciplinary meeting and further that the appellant did not produce any complaints from the customers. There was no hearing after suspension and that there was no evidence before the Court concerning the claimant's redeployment. The trial magistrate noted this in the judgment and the reason for the conclusion that the appellant failed to discharge the burden cast upon it by law to demonstrate that there existed valid reasons for termination and that it was carried out through a fair process.
11. Concerning compensation, the trial magistrate failed to justify the award of 12 months compensation for unfair termination. The respondent had worked for the appellant for two years and seven months. He was a lower cadre employee and could perform any general work. He possessed no special skills. At the time the matter came to trial he stated that he was working as a mason. Further the respondent did not deny that he was suspended as a disciplinary measure. He never challenged the suspension. His only complaint was that the appellant never took him back after the suspension. In the circumstances the respondent did not deserve maximum compensation for unfair termination.



12. The Court will therefore reduce this award to six months' salary (Kshs.44,400) as compensation for unfair termination. The appeal succeeds to that extent otherwise the rest of the appeal is found without merit and is hereby dismissed with no order as to costs.

13. It is so ordered.

DATED THIS 9TH OF MAY, 2024

DELIVERED THIS 9TH DAY OF MAY, 2024

ABUODHA NELSON JORUM

JUDGE

ELRC APPEAL NO. E107 OF 2021

