



**Shreeji Enterprises (K) Limited v Mulonzya (Employment and Labour Relations Appeal E001 of 2023) [2024] KEELRC 1035 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1035 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023**

**BOM MANANI, J**

**MAY 7, 2024**

**BETWEEN**

**SHREEJI ENTERPRISES (K) LIMITED ..... APPELLANT**

**AND**

**KIMANZI MULONZYA ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The parties to this appeal had an employment relationship which ended on 2<sup>nd</sup> July 2020 when the Respondent was dismissed from employment. The facts of the case show that the Respondent was hired as a truck driver.
2. On 20<sup>th</sup> May 2020, he was involved in a road traffic accident whilst driving the Appellant's truck from Nairobi to Uganda. According to the evidence on record, the police blamed the Respondent for the accident.
3. The record shows that the truck was extensively damaged. According to the Appellant, it was going to cost it more than three million Kenyan Shillings to repair the damage.
4. Aggrieved by this state of affairs, the Appellant took out disciplinary proceedings against the Respondent. On 22<sup>nd</sup> June 2020, the Appellant issued the Respondent a letter in which it asked him to show cause why his services should not be terminated for reckless driving which resulted in the suit accident. The letter also notified the Respondent of the right to have a co-employee of his choice during the disciplinary process.
5. On 1<sup>st</sup> July 2020, the Appellant convened a disciplinary meeting to which the Respondent was invited. According to the minutes that were produced in evidence, the Respondent honoured the invite and attended the session.



6. On 2<sup>nd</sup> July 2020, the Appellant issued the Respondent a letter of even date terminating his services. The dismissal was expressed to have taken effect from 21<sup>st</sup> May 2020.
7. It is as a result of these developments that the Respondent sued the Appellant before the Magistrate's Court to claim for compensation for unfair termination of his contract of service. In the Statement of Claim, the Respondent averred that the Appellant's decision was without justification and in contravention of due process.
8. On its part, the Appellant contended that it had a valid reason to terminate the Respondent's employment. Further, it (the Appellant) contended that it followed due process in making its decision.
9. After hearing the parties, the trial court returned a verdict in which it held that the Appellant had valid reasons to consider terminating the Respondent's employment. However, it (the Appellant) failed to uphold due process in making its decision.
10. According to the trial court, although the Appellant notified the Respondent of the right to be accompanied by a co-employee of his choice during the disciplinary hearing, it did not explain to him this right during the disciplinary session. And hence the procedural flaw.

### **Issues for Determination**

11. Aggrieved by this finding, the Appellant filed the instant appeal. The Memorandum of Appeal raises five grounds of appeal. In effect, the Appellant raises two broad issues for consideration. These are:-
  - a. Whether the learned trial magistrate erred in law and fact in holding that the Appellant had failed to sufficiently notify the Respondent of his right to be accompanied by a co-employee of his choice during the disciplinary proceedings despite evidence to the contrary.
  - b. Whether the learned trial magistrate erred in law and fact in condemning the Appellant to pay the Respondent compensation for unfair termination of his contract of service despite evidence showing that the decision to terminate the latter's services was substantively and procedurally fair.
12. When the appeal came up for directions on the mode of hearing, the parties agreed to canvass it through written submissions. Both have since presented their submissions.

### **Analysis**

13. 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.
14. There is no contest regarding whether the Appellant had valid grounds to consider terminating the Respondent's employment. After analyzing the evidence on record, the trial court found that the police had blamed the occurrence of the suit accident on the Respondent. The court found that the Appellant relied on this information to arrive at its conclusion that the Respondent had acted negligently thereby occasioning the suit accident. Therefore, the Appellant had a valid basis for considering terminating his employment on account of gross misconduct in terms of section 44 of the [Employment Act](#).



15. The record before me does not suggest that this finding by the trial court is the subject of challenge in the appeal. As such, I will not interfere with it.
16. The crux of the Appellant's grievance revolves around whether due process was followed in terminating the Respondent's contract of service. According to the Appellant, it followed the procedure that is stipulated under section 41 of the *Employment Act* in processing the Respondent's release. As such, the trial court's finding that procedure was not followed is erroneous.
17. I have considered the evidence on record on the issue. The record shows that on 22<sup>nd</sup> June 2020, the Appellant wrote to the Respondent asking him to explain the cause for the accident. In response, the Respondent wrote an undated statement on the matter. The two documents were produced in evidence.
18. The Appellant's letter of 22<sup>nd</sup> June 2020 shows that the Respondent was invited for a disciplinary hearing at the Appellant's premises. He was further informed that he was entitled to attend the hearing either in person or in the company of a co-employee of his choice.
19. The record shows that on 1<sup>st</sup> July 2020, the Appellant convened the disciplinary meeting. Minutes of the meeting were produced in evidence. According to the said minutes, the Respondent attended the session.
20. There is a preamble to the minutes which indicates that the session begun at 10.45 am and was conducted in accordance with section 41 of the *Employment Act*. It is this section that requires an employer who proposes to terminate the services of an employee to notify the employee of the infraction that he is accused of in the presence of a co-employee or trade union representative of the employee's choice and allow the employee the opportunity to offer his defense before the decision to terminate the contract is made.
21. The trial court observed that by its letter of 22<sup>nd</sup> June 2020, the Appellant notified the Respondent of his right to attend the disciplinary session in the company of a co-employee. However, the court was of the view that this right was not explained to the employee during the disciplinary hearing.
22. Section 41 of the *Employment Act* obligates the employer to explain to the employee the reasons for his proposed action against the employee in a language that the employee understands in the presence of a co-employee or trade union representative of the employee's choice if the employee elects to be accompanied by such person. However, the provision does not impose on the employer the duty to inform the employee of the right to be so accompanied.
23. Although it is a good practice for the employer to inform the employee that he is entitled to attend the disciplinary session with a co-employee of his choice, this is a gratuitous gesture. What the employer would be faulted for is refusal to allow the employee to exercise this right.
24. The contention by the Respondent that the Appellant ought to have explained to him this right during the disciplinary session even after the latter had alluded to the right in its letter of 22<sup>nd</sup> June 2020 is preposterous. And the trial court's suggestion that the Appellant was obligated to do so was erroneous.
25. Having regard to the evidence on record, I am satisfied that the Appellant observed the procedural strictures that are set out in section 41 of the *Employment Act* whilst terminating the Respondent's contract. As such, I arrive at the conclusion that the trial court's finding that there were procedural flaws in the process was misguided.



## **Determination**

26. Having regard to the foregoing, I arrive at the following conclusions and findings:-
- a. The trial magistrate erred in law and fact in arriving at the conclusion that the Appellant failed to uphold due process in terminating the Respondent's contract.
  - b. Accordingly, the decision to impugn the Appellant's decision on this ground was improper.
  - c. As such, the trial court's judgement in this respect is set aside.
  - d. In its place, judgment is hereby entered for the Appellant dismissing the Respondent's action with costs to the Appellant both before the trial court and this court.

**DATED, SIGNED AND DELIVERED ON THE 7<sup>TH</sup> DAY OF MAY, 2024**

**B. O. M. MANANI**

**JUDGE**

**Order**

In light of the directions issued on 12<sup>th</sup> 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**

