Tassia Catholic Primary & Nusery School v Kanini (Employment and Labour Relations Appeal E201 of 2022) [2024] KEELRC 1761 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1761 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E201 OF 2022

BOM MANANI, J

JULY 11, 2024

BETWEEN

TASSIA CATHOLIC PRIMARY & NUSERY SCHOOL ..... APPELLANT

AND

FLORENCE KANINI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Resident Magistrate's Court at Milimani, Nairobi in CMELRC No. 1983 of 2019 which was delivered on 21st October 2022. The trial court arrived at the conclusion that the Appellant had irregularly terminated the Respondent's contract of service. Thus, she awarded the Respondent compensation for unfair termination of her contract. Aggrieved by the finding, the Appellant instituted the instant appeal.

Facts of the Case

2. The parties are in agreement that the Appellant hired the services of the Respondent as a cook in January 2008. They also agree that the Respondent's health during the currency of the employment relation was not quite good. As a result, she had to seek constant medical care.

3. However, the Appellant believes that the Respondent took advantage of her health condition to avoid work. And hence the events that resulted in their separation.

4. The dispute between the parties was triggered by the events of 3rd July 2019. On this day, the Respondent asked for permission to go for medical review. However, the Appellant declined the request indicating that it was a busy day at the school. As such, the Respondent was asked to reschedule her hospital visit to 4th July 2019.

5. Despite the Appellant's position on the request, the Respondent went ahead to take part of the day off to seek medication. The Appellant did not take this development kindly. It considered the

Respondent's conduct as constituting willful disregard for instructions. As a result, the Appellant considered the Respondent as having absconded duty.

6. The Respondent indicates that she resumed duty on the afternoon of 3rd July 2019 after she had been seen by her doctor. From the record, this contention appears not to have been contested by the Appellant.

7. The following day, the Appellant issued the Respondent with a letter of suspension from duty. The letter indicates that the suspension was to remain in force until further notice. Meanwhile, the Appellant was to convene a disciplinary session for the Respondent.

8. Aggrieved by this development, the Respondent sought the intervention of human rights defenders who wrote to the Appellant insinuating that it (the Appellant) had irregularly terminated the Respondent's contract of service. It would appear that the Appellant's management was unimpressed by the Respondent's action. As a consequence, they did not react to the letters from the human rights defenders. Neither did they convene the disciplinary session that had been proposed in the Appellant's letter of 4th July 2019.

9. The record shows that following the human rights defenders letters to the Appellant, the matter went quite. There was no further communication by the Appellant to the Respondent on the way forward on the case. It is also apparent that the Respondent's salary for July 2019 was not paid.

10. There is no indication that the Respondent's salary for the period after July 2019 was paid either. As a matter of fact, in the witness statement by the Appellant's witness, she implies that the employment relation between the two ended on 4th July 2019 after the Respondent allegedly absconded duty suggesting that the Appellant stopped remunerating the Respondent after this date.

11. The Respondent contends that the Appellant's actions terminated her contract of service. As a consequence, she moved to court in November 2019 to sue for unfair termination of her employment.

12. The Appellant filed a defense denying that it terminated the Respondent's services. It contended that it is the Respondent who terminated her contract after she absconded duty.

13. The Appellant accused the Respondent of gross misconduct. It asserted that the Respondent's actions bordered on insubordination.

14. The Appellant appeared to suggest that because the Respondent had sought the intervention of the human rights defenders in the dispute, this interfered with the internal disciplinary process against her. As such, progression of the disciplinary process was rendered impracticable.

15. Both parties testified orally during the trial. They also produced documentary evidence in support of their respective cases.

16. After hearing the case, the trial court found that the Appellant's decision to suspend the Respondent indefinitely without pay constituted constructive termination of her contract of service. As such, the court arrived at the conclusion that the Respondent's contract of service was unfairly terminated.

The Appeal

17. The Appellant was aggrieved by the trial court's finding. Hence, it preferred the instant appeal.

18. The appeal is premised on several grounds of appeal. The grounds yield the following questions for determination:-

a. Whether the trial court was right in arriving at the conclusion that the Appellant's decision to indefinitely suspend the Respondent from employment constituted constructive dismissal from employment.

b. Whether the trial court erred in finding that the Respondent had established a case for unfair termination of her contract of service.

c. Whether the learned trial magistrate improperly relied on extraneous matters to arrive at her decision.

d. Whether the learned trial magistrate erred in finding that the Respondent was entitled to the reliefs that the court granted.

Analysis

19. I will not address the issues framed above separately. Rather, I will consider them cumulatively.

20. Being a first appeal, this court is required to re-evaluate the evidence on record and arrive at its own conclusions on the contested matters. However, the court must remain alive to the fact that unlike the trial court, it did not have the benefit of hearing the witnesses. As such, it must give allowance for this reality.

21. The key question for determination in the dispute relates to the consequence of the Appellant's decision to suspend the Respondent from employment indefinitely. The court is called upon to determine whether this decision constituted an implied termination of the Respondent's employment.

22. The evidence on record shows that on 4th July 2019, the Appellant suspended the Respondent from duty ''until further notice''. The reason for this decision was that the Respondent had stayed away from work on the morning of 3rd July 2019 without the Appellant's permission.

23. The letter of suspension does not indicate that the suspension was with pay. At the same time, it does not indicate when the suspension was to terminate. In effect, the suspension was indefinite and without pay.

24. Suspension from duty is a tool that is at the disposal of the employer for two principal purposes. It may be resorted to for administrative purposes to allow the employer to carry out investigations into the employee's activities pending further disciplinary action. Usually, this form of suspension is aimed at removing the employee from the workplace in order to prevent him from interfering with the investigative process. This form of suspension is not considered as constituting disciplinary action against the affected employee.

25. Suspension may also be resorted to as a form of disciplinary action against an employee. In this case, the employer does not invoke the suspension in order to provide room for investigations against the employee. Rather, it (the suspension) is used as a disciplinary measure against the employee. A good example of this is found under section 87(6) (b) of the *National Police Service Act* which recognizes suspension from duty as a disciplinary tool that can be deployed against serving officers.

26. Because of the different ways in which suspension may be deployed during the currency of an employment contract, it is generally desirable, albeit not mandatory, that the power to suspend be provided for in either the contract of employment or in some other rule that regulates the employment relation. This is important in order to regulate the exercise of the power by the employer.

27. Referring to the foregoing, George Ogembo in his publication, ''*Employment Law Guide For Employers*'' second edition (pages 319 to 320), states as follows:-

> '' Suspension is guided by the terms and conditions of employment and cannot be done whimsically by the employer as it has a detrimental impact on employees' reputation, career advancement and job security. It is a tool in the hands of an employer which if not strictly governed may conveniently be applied to marginalize or punish an employee who falls out of favour with the employer. There must exist contractual or statutory authority which empowers an employer to suspend an employee and in the absence of such authority, unilateral suspension of an employee with or without pay constitutes a breach of the contract or statutory unfairness flowing from the constitutional normative provisions on fair labour practices.''

28. In *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] KECA 537 (KLR) (28 April 2022) (Judgment), whilst the Court of Appeal acknowledged the power of the employer to suspend an employee from employment for administrative purposes irrespective of whether this power had been conferred through the contractual instrument or statute, the court went ahead to quote the paragraph below from the *Halsbury's Laws of England*, 3rd Edition, Volume 25 at paragraph 989 (page 518):-

> ''Whether or not the master has power to suspend a servant during the duration of the contract of service depends upon the construction of the particular contract. In the absence of any express or implied term to the contrary, the master cannot punish a servant for alleged misconduct by suspending him from employment and stopping his wages for the period of the suspension. Where, however, such a term is included in the in the contract, it is not rendered void by the statutory provision restricting deductions from workmen's wages for or in respect of fines, for the intention of the parties is taken to have been that for the period of suspension mutual duties and rights, including the right of wages, would be suspended."

29. The court went further to refer to the Canadian decision of *Cabiakman v. Industrial Alliance Life Insurance Co*., 2004 SCC 55, [2004] 3 SCR 195 with approval which underscores the need to strictly regulate the exercise of the power to suspend an employee from duty for administrative reasons. In the decision, the Canadian court observed as follows regarding the power to suspend an employee for administrative reasons:-

> " This residual power to suspend for administrative reasons because of acts of which the employee has been accused is an integral part of any contract of employment, but it is limited and must be exercised in accordance with the following requirements: (1) the action taken must be necessary to protect legitimate business interests; (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension; (3)the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or dismissal pure and simple; and (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay."

30. From the foregoing, it is apparent that although the employer has the prerogative to suspend an employee from employment for administrative reasons, he must nevertheless exercise this power sparingly and as a measure of last resort. Further, the power is not to be exercised whimsically. There must be compelling reasons to justify the decision to resort to this action such as the possibility of the employee interfering with ongoing investigations. It is for this reason that it is desirable for the employer to state clearly the reasons for sending an employee on suspension.

31. After evaluating the Appellant's letter through which the Respondent was suspended from duty, the trial court found that it (the letter) was silent on the reasons why the decision was taken. The letter did not for instance indicate whether the suspension was necessitated by the need to facilitate investigations into the infraction the Respondent had been accused of. As a consequence, the trial court considered the Appellant's decision as arbitrary and unreasonable. I agree with this finding.

32. The manner in which the Appellant exercised its prerogative to suspend the Respondent smirked of arbitrary exercise of this prerogative. Employers are not entitled to suspend an employee as a form of punishment unless this right is provided for in the contract between the parties or is anchored on some rule which regulates implementation of the contract. Similarly, employers are not entitled to exercise this power as an administrative measure unless it is apparent that it is necessary to facilitate investigations or prevent recurrence of the infraction in question.

33. It is also imperative that where an employer resorts to suspending an employee from duty for administrative reasons, the period of such suspension should be certain or capable of being ascertained. Put differently, the suspension should not be indefinite. Further, unless it is provided for in the contract of service between the parties or some other rule regulating performance of the contract, suspension from duty for administrative reasons ought not to be without pay.

34. Thus, suspending and employee from duty indefinitely and without pay may be construed as constructive dismissal of the employee. Alluding to this fact, the Court of Appeal in *Mutwol v Moi University* (*supra*), quoting the decision in*Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10,[2015] 1 S.C.R.500, stated as follows:-

> ''In the Canadian case of Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10, [2015] 1 S.C.R.500, an employee had been placed on indefinite suspension. The Supreme Court held, inter alia, that a prolonged or indefinite suspension could amount to constructive dismissal of an employee.....Such suspension therefore should be definite and ought not to be for a lengthy period of time.''

35. A similar finding was made in the case of *Charles Muturi Mwangi v Invesco Assurance Co. Ltd* [2019] eKLR when the Court of Appeal, discussing the effect of an indefinite suspension, observed as follows:-

> ''The Judge held, and rightly so in our view, that the indefinite suspension amounted to a termination in the absence of any communication as to the next cause of action.''

36. In the instant appeal, it is clear from the Appellant's letter to the Respondent that the Respondent was suspended for an indefinite period and without pay. It is also apparent that after suspending the Respondent from duty, the Appellant did not take steps to process her case through the recognized disciplinary procedures. Thus, the Respondent was placed in a state of abeyance without clarity on what was to happen to her employment.

37. The Appellant has argued that because the Respondent referred the matter to human rights defenders, it became impossible to process her disciplinary case. This argument is without merit. The fact that the Respondent had sought the assistance of human rights defenders did not constitute a bar to the Appellant taking her through an expeditious disciplinary process.

38. Thus and in line with the above pronouncements by the Court of Appeal, I find that the Respondent's indefinite suspension from duty constituted termination of the contract of service between the parties. I am therefore in agreement with the finding of the trial court that the Appellant's impugned

suspension of the Respondent in effect amounted to constructive termination of her contract of service.

39. The Appellant has suggested that the Respondent terminated her contract when she failed to report to work. However, this argument cannot fly.

40. An employee who is accused of absconding duty is basically accused of committing an act of gross misconduct under section 44 of the *Employment Act*. In terms of section 41(2) of the Act, such employee is entitled to be subjected to the normal disciplinary process before the contract between the parties is considered as closed. In other words, the fact that one is said to have absconded duty does not operate to automatically close the employment relation without the benefit of a disciplinary hearing.

41. As was observed in *Luka Mbuvi v Economic Industries Limited* [2020] eKLR, an employee who absconds duty does not terminate his employment. The employer, who is the innocent party in the circumstances, is still expected to take steps to close the employment relation by subjecting the employee to the normal disciplinary process.

42. From the evidence on record, it is apparent that the Appellant did not convene a disciplinary session through which it could legitimately close the employment relation with the Respondent. Consequently, the contract between the two was not lawfully closed. As such, I am in agreement with the trial court's finding that the Respondent's contract was unlawfully terminated.

43. Although the Appellant insinuated that the trial court considered extraneous matters in arriving at its decision, nothing was said of this ground in the submissions in support of the appeal. No extraneous matters that the trial magistrate allegedly took into consideration were flagged. As such, I consider the ground as having been abandoned.

44. Having found that the Respondent's contract was unfairly terminated, the trial court awarded her pay in lieu of notice to terminate her contract. This award is in line with sections 35, 36 and 49(1) (a) of the *Employment Act*. As such, I find no basis for interfering with it.

45. The court also awarded the Respondent salary for the four (4) days she had worked in July 2019. This award is anchored on section 49 (1) (b) of the *Employment Act* which allows the court to award an employee salary for days worked but not remunerated. As such, it was properly made.

46. The court also awarded the Respondent compensation for the unfair termination of her contract of service which was equivalent to her salary for twelve months. The power to grant this relief is provided for under section 49 (1) (c) of the *Employment Act*. However, the court is required to take into account one or more of the several factors listed under section 49(4) of the Act in assessing the quantum of compensation to award.

47. I have considered the award of compensation in the instant appeal in the context of the foregoing. I note from the trial court's decision that indeed the trial magistrate considered some of the factors under section 49 of the *Employment Act* in arriving at her decision. As such, there is no plausible basis for me to interfere with the award.

48. The court also awarded the Respondent interest on the amount awarded at court rates. As a general principle, an award of interest is in the discretion of the trial court and may not be interfered with unless there is evidence that the discretion was abused (*Shariff Salim & another v Malundu Kikava* [1989] eKLR). No evidence was tendered before me to suggest that the trial court abused its discretion in this respect. As such, I will not interfere with the order.

49. The court also ordered the Appellant to furnish the Respondent with a Certificate of Service. Under section 51 of the *Employment Act*, this is an entitlement of every individual who exits employment. As such, I uphold the order.

50. I note that under section 49 (2) of the *Employment Act*, an employer is entitled to subject compensation that is awarded thereunder to the applicable statutory deductions. Accordingly, I order that the award made by the trial court shall be subject to the applicable statutory deductions.

51. Finally, I note that the Respondent acted in person both before the trial court and in this appeal. Therefore, she is not entitled to recover costs as provided for under the *Advocates Act*.

52. However, she is entitled to recover the actual expenses she incurred in prosecuting the matter both before the trial court and this court. As such, I vary the trial court's order to the extent that the Respondent shall recover only the disbursements she incurred in prosecuting the matter before the trial court. She is also allowed to recover the actual disbursements she incurred in prosecuting this appeal.

Determination

53. The upshot is that after evaluating the evidence on record, I arrive at the conclusion that the instant appeal is devoid of merit.

54. Accordingly, it is dismissed save that the trial court's decision is varied to the following extent:-

    a. The award by the trial court shall be subject to the applicable statutory deductions.

    b. The order of costs in favour of the Respondent is varied to the extent that the Respondent is only to recoup disbursements she incurred in prosecuting the case before the trial court and this appeal.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF JULY, 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

JUDGE