Nairobi Consumers Co-operative Union Ltd v Mbugua (Civil Appeal 513 of 2019) [2025] KECA 1977 (KLR) (21 November 2025) (Judgment)

Neutral citation: [2025] KECA 1977 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 513 OF 2019

DK MUSINGA, K M'INOTI & AO MUCHELULE, JJA

NOVEMBER 21, 2025

BETWEEN

NAIROBI CONSUMERS CO-OPERATIVE UNION LTD ..... APPELLANT

AND

RUTH NJERI MBUGUA ..... RESPONDENT

(An appeal against the judgment and decree of the Employment and Labour Relations Court at Nairobi (J.N. Abuodha, J.) dated 26{{^th}} July 2019 in Cause No. 1947 of 2014)

JUDGMENT

1. This is an appeal from the decision of the Employment and Labour Relations Court (ELRC) (J. N. Abuodha, J.) dated 26th July 2019, in which it was held that the employment of the respondent, Ruth Njeri Mbugua, had been constructively terminated by the appellant, Nairobi Consumers Cooperative Union Ltd. The respondent was awarded two months' salary for unfair termination of service.

2. The appellant was aggrieved by the decision and filed this appeal. The grounds were that, one, after the court found that the respondent had failed to account for the loss of Kshs.930,000/=, it was wrong for it not to award the amount which had been sought in the counterclaim. Two, that there having been uncontroverted evidence that the respondent had absconded from duty, the court erred in finding that she had been constructively terminated. Three, that the court had on the evidence erred in finding that the respondent was entitled to an award of two months' salary as compensation.

3. Our duty on first appeal is to consider afresh the evidence that was tendered before the trial court and reach our own independent conclusions thereon, while remembering that we did not have the advantage of seeing and hearing the witnesses (see Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR). Although the parties were duly notified to file submissions, only the appellant filed submissions and a list of authorities.

4. The evidence in this case was substantially not in dispute. The respondent was in April 1999 employed by the appellant as a messenger cum cleaner. She subsequently undertook accounting courses and qualified in 2001. By 2009 she was an accounts clerk. She eventually became a manager. In June 2014 the Secretary and Treasurer of the appellant discovered that the respondent had collected rent on its behalf to the tune of Kshs.914,110/= which she could not account for. The issue was reported to the police, as a result of which she was arrested. While in police custody, the respondent requested the appellant that they settle the matter without her having to be prosecuted for the loss. An agreement was signed between the parties in which she agreed was to refund the money. She handed over two title deeds as security. On that understanding she was released. Before the appellant had reported the loss to police, it had by letter dated 13th October 2014 suspended the respondent as it investigated the loss. On 3rd November 2014, the respondent filed this claim, alleging that she had been unlawfully, maliciously and unprocedurally terminated from employment. She sought maximum compensation, damages, reinstatement, service pay and certificate of service.

5. The appellant denied the claim, and counterclaimed for Kshs.930,610/= which the audit report had revealed was the amount that the respondent had not accounted for. The audit report was not challenged during the evidence before the trial court.

6. It is clear that the respondent filed the claim soon after the suspension, and before disciplinary proceedings had been conducted. In the judgment, the learned Judge observed that:-

> " 20. ..... the respondent after suspending the claimant never called her for any disciplinary hearing where she could have tendered her defence no matter how weak.
>
> .....

21. The respondent denied dismissing the claimant while the claimant avers she was dismissed. The respondent claimed it called the claimant back to work after the suspension but never produced any letter or evidence that any such attempt was made.

22. The suit herein was filed on 3rd November, 2014 and concurrently therewith an application seeking among others an order for reinstatement pending hearing of main suit.

23. In its ruling delivered on 17th July 2015 the court declined to issue any orders in the nature of prohibiting the respondent from embarking on a disciplinary process against the claimant. No evidence was produced after trial that this was done even after the court's ruling.

24. The court however, takes note that the claimant herein deemed herself as terminated when she commenced proceedings herein. That means her suspension ended on 3rd November 2014 and was thereby replaced by constructive termination."

7. We note that on record there was a letter dated 1st December 2014 from the appellant to the respondent. It was further to the letter of suspension. It stated that the respondent had failed to report back to the office whenever required, despite the text messages to do so. It indicated that the respondent had absconded from duty. It then asked her to report on duty every Monday, commencing 8th December 2014, from 8.00 am to 12.00 noon. It is evident that there was no response to the letter which was sent through the respondent's advocates. Secondly, in the ruling delivered on 17th July 2015 by the learned Judge, following the interlocutory application filed along with the claim and in which the respondent

sought to prohibit the claimant from commencing disciplinary proceedings against her, among other prayers, the learned Judge observed as follows:-

> "4. The Court has reviewed the motion, the supporting affidavit as well as the documents in support thereof. The Court has further considered the replying affidavit by the respondent and is of the view that it cannot intervene to prevent the respondent from taking internal disciplinary action against the applicant/claimant as well as report to authorities on any allegation of financial embezzlement. However, both procedures have to be conducted in accordance with the respondent's internal processes, *Employment Act* and the rules of natural justice."

8. It is evident to us that the respondent rushed to file the claim instead of reporting to work, and instead of subjecting herself to the internal disciplinary process following the loss of the appellant's money. The trial court's finding that she was constructively terminated was without any evidential basis. She absconded from work and refused to face the internal disciplinary process.

9. We agree with the observation by Monica Mbaru, J. in Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 as follows:-

> "37. A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer."

10. In Mutwol v Moi University [2022]KECA 537 (KLR), this Court ruled that an employer can suspend an employee for alleged misconduct pending investigations but this suspension must be for a reasonable duration, not indefinite. The employer must expedite the disciplinary process to either conclude the investigations or terminate the employment.

11. In the instant appeal, the appellant had lost a large amount of rent that the respondent was supposed to account for, and it was for this reason that the respondent was suspended to enable investigations. The evidence was that the respondent was retained on the payroll, and the suspension was not for a long time. She was supposed to keep reporting to the place of work during the investigations.

12. The finding by the trial court that the respondent was constructively terminated was an error. This Court in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR held that constructive termination or dismissal occurs where the employee resigns due to the employer's fundamental breach of employment contract, and this breach makes continuing employment unbearable. There was no evidence led by the respondent to show that the conduct of the appellant leading to the suspension had the intention of not wanting to be bound by the contract of employment signed between the parties.

13. Lastly, the trial court found that the respondent had admitted that she was responsible for the loss of the Kshs.930,160/=, and she had signed an agreement to pay the money as a way of escaping prosecution.

In those circumstances, we find that it was incumbent on the court to allow the counterclaim raised by the appellant.

14. The result is that, we allow the appeal. The judgment and decree of the trial court dated 28th July 2019 is hereby set aside. The respondent's claim is dismissed with costs and the appellant's counterclaim dated 17th February 2015 is allowed to the extent that the respondent shall pay to the appellant Ksh.930,160/= with interest at court rates.

15. The respondent shall pay to the appellant the costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2025.

D. K. MUSINGA, (PRESIDENT)

JUDGE OF APPEAL

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K. M'INOTI

JUDGE OF APPEAL

.....

A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.