

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: KIAGE, KORIR & ODUNGA,**

**JJ.A.) CIVIL APPEAL NO. 481 OF 2019**

**BETWEEN**

**MAINA MUNYUA.....APPELLANT**

**AND**

**AMREF HEALTH AFRICA  
(PREVIOUSLY AFRICA MEDICAL  
AND  
RESEARCH FOUNDATION KENYA).....RESPONDENT**

*(Being an appeal against the judgment and decree of the Employment  
and Labour Relations Court at Milimani (M. Odero, J.) dated 6<sup>th</sup> May  
2019*

*in*

***ELRC Cause No. 2268 of 2014)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

1. Giving rise to this appeal is the judgment of M. Odero, J. of the Employment and Labour Relations Court, through which she dismissed Maina Munyua's (appellant's) claim alleging unfair and unlawful termination of his employment by the respondent, AMREF Health Africa (previously Africa Medical and Research Foundation Kenya). In the memorandum of appeal dated 23<sup>rd</sup> September 2019, the appellant raises 14 grounds upon which he believes the judgment should be disturbed. In the written submissions, counsel for the appellant condensed those grounds into 5 as follows: that the learned Judge erred in law and in

fact

(a) in her assessment and determination of the issue of the

appellant's provisional licence; (b) by determining that the appellant's termination was valid; (c) by failing to consider the appellant's evidence and by raising the standard of proof above the expected balance of probability; (d) by holding that the appellant did not demonstrate discrimination and in disregarding the appellant's statement of facts and evidence; and, (e) by concluding that the appellant was not entitled to pay in lieu of leave days not taken and payment for days worked.

2. This being a first appeal, the appellant's expectation of us in discharging our mandate under **rule 31(1)(a)** of the **Court of Appeal Rules** is that we will re-evaluate, re-assess, and re-analyze the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons for our decision. This duty was aptly captured by the Court in **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)** as follows:

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

3. To live up to this mandate, we will rehash each party's case before we delve into our independent analysis. It must also be recalled that this was a cause based on pleadings and submissions with no *viva voce* evidence adduced. From the

appellant's

memorandum of claim dated 17<sup>th</sup> December 2014 and the respondent's reply dated 23<sup>rd</sup> February 2015, some undisputed facts emerge. The appellant was first employed by the respondent on 1<sup>st</sup> March 2002 as a Laboratory Support Staff for a period of 2 years. His contract of employment would thereafter be renewed every two years until 27<sup>th</sup> February 2014, when he was given a two-months' notice, effective 30<sup>th</sup> March 2014, terminating his contract. During the period of employment, the appellant, through a letter dated 2<sup>nd</sup> June 2008, was promoted to the post of Project Assistant-Laboratory Technician. On 31<sup>st</sup> March 2012, during his final renewal, he was also issued with a new service agreement to suit his new role as a Project Assistant-Laboratory Technician. Again, in a letter dated 20<sup>th</sup> May 2013, the appellant was promoted to a new job grade with a new salary structure. On 7<sup>th</sup> October 2013, a meeting was held, chaired by the respondent's Human Resource Manager (HRM), to discuss the appellant's qualifications and the requirement that he ought to have a valid practising licence issued by the Kenya Medical Laboratory Technicians and Technologists Board (the Board).

4. The point of departure between the parties is as follows. For the appellant, he avers that after the meeting of 7<sup>th</sup> October 2013, he acquired a provisional licence issued by the Board confirming that he was awaiting to sit his final exams. He shared this provisional licence, dated 26<sup>th</sup> February 2014, with the respondent's HRM. On the same day, he was summoned by his

line manager and the HRM and questioned about this provisional licence. The next day,

27<sup>th</sup> February 2014, he was issued with a termination notice. According to him, the termination was unfair, unjust, and unlawful, as he was qualified for the position he held. Further, his termination was discriminatory as he was replaced by an intern who did not meet the qualifications demanded of him. He averred that he served his notice period and did not take his leave, and that he further worked for an extra 10 days post the termination date. He, therefore, laid a claim for the eight leave days not taken, 10 days' prorated salary for May 2014, and 12 months' salary compensation for wrongful dismissal.

5. For the respondent, it was averred that the appellant's promotion to the position of Project Assistant-Laboratory Technician was based on the mutual understanding that he would meet the requirements and acquire the necessary qualifications. The respondent deposed that the appellant breached Clause 13 of his Service Agreement by not obtaining a valid practising licence, which was crucial for the accreditation of the respondent's laboratory. Following a meeting on 7<sup>th</sup> October 2013, the appellant acknowledged that he had failed to pass three examination papers and requested time off to retake them. The respondent averred that in that meeting, the appellant was informed that failure would result in his termination. Following inquiries about the exam results in December 2013 and February 2014, the appellant confirmed he did not pass all the papers. The respondent contended that the

appellant's lack of a valid licence hindered the accreditation process. It denied wrongful termination, asserting

that the appellant was paid all his dues and received a certificate of service. The respondent maintained that the appellant worked until 30<sup>th</sup> April 2014 and was not entitled to payment for unused leave days as he was instructed to take his leave days before the notice period lapsed.

6. When the appeal came up for hearing, learned counsel, Ms. Ouko, appeared for the appellant holding Ms. Kirui's brief. Learned counsel informed the Court that she was relying wholly on the written submissions dated 27<sup>th</sup> August 2020. The respondent was represented by learned counsel Ms. Wetende, who, like her counterpart, opted to rely on her written submissions dated 4<sup>th</sup> November 2020, only clarifying that the applicable law was the **Medical Laboratory Technicians and Technologists Act, Cap 253A**. We proceed to highlight the submissions in the succeeding paragraphs.

7. In supporting the appeal, counsel for the appellant argued that the respondent failed to prove the urgency in obtaining accreditation status or demonstrate that the appellant's lack of it harmed the organization. This, counsel submitted, was unlike the situation in **Kenya Petroleum Oil Workers Union vs. Kenya Petroleum Refineries Limited [2013] eKLR**, where urgency was established by the respondent. Counsel argued that the respondent did not provide evidence of actively pursuing the necessary accreditation, which, in any event, was only obtained on 30<sup>th</sup> April 2020, five years after the appellant's

termination,

suggesting there was no urgency justifying the termination, thus making the termination unfair. Counsel submitted that the appellant demonstrated exemplary performance during his 12 years of service without the issue of qualifications arising. Counsel asserted that at the time, a licence was not mandatory, but that, notwithstanding, the appellant voluntarily secured a provisional certificate and shared it with the respondent. It was counsel's contention that the appellant complied with Clause 13 of the Service Agreement and that the Learned Judge erred in holding that he lacked a practicing licence at the time of the termination of his employment. Counsel maintained that once the provisional licence was provided, there was no justification for the respondent to terminate the appellant without demonstrating that the licence was inadequate. Further, that the respondent failed to present any evidence supporting the urgency of its accreditation, casting doubt on the validity of the termination.

8. Additionally, counsel argued that the respondent's accreditation post-termination demonstrated the legitimacy of the appellant's case since the respondent's accreditation process was voluntary and lacked timelines or consequences for non-completion. Citing John Bowers QC in "**A Practical Approach to Employment Law**", 7<sup>th</sup> Edition, counsel emphasized that the employer must prove the reason for termination, and, if the employer fails to provide any reason, the dismissal is automatically deemed unfair. Counsel submitted that the appellant's termination was

unfair as the respondent did not follow the proper procedure outlined in

**section 41** of the **Employment Act** by failing to conduct a hearing before termination. This point was supported by reference to **National Bank of Kenya vs. Anthony Njue John [2019] eKLR**, where the Court found the termination process procedurally flawed.

9. Relying on **Kenfreight (E.A.) Limited vs. Benson K. Nguti [2016] eKLR**, counsel submitted that the appellant only needed to assert unfair termination, thereby shifting the burden of justifying fairness upon the respondent. He criticized the trial Judge for not adequately considering evidence in light of this burden of proof. Counsel additionally cited **Ahmed Mohammed Noor vs. Abdi Aziz Osman [2019] eKLR** for the assertion that the responsibility of proving legal compliance fell on the respondent. Relying on **Oi Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR**, counsel argued that the unequal treatment of the appellant and his successor constituted discrimination under **section 5** of the **Employment Act**. Additionally, counsel submitted that the appellant is entitled to payment for unused leave days. Ultimately, counsel requested that the appeal be allowed and judgment be entered in the appellant's favour as per the memorandum of claim.

10. In opposition to the appeal, learned counsel for the respondent submitted that the appellant's employment was terminated on valid grounds because he did not possess the practising certificate required for his role as a laboratory technician.

According to

counsel, the termination was lawful and justified, and the appellant had failed to discharge his initial burden of proof. While appreciating that substantive justification is required for termination, meaning there must be a valid reason for dismissal as held in **Kenya Revenue Authority vs. Reuwel Waitaha Gitahi & 2 Others [2019] eKLR** and **Overdrive Consultants (K) Ltd vs. Mazhar Sumra [2020] eKLR**, counsel pointed out that the Service Agreement signed between the parties explicitly required the appellant to possess a valid licence from the Board to perform his duties. Counsel emphasized that the appellant's claim of having a provisional licence was insufficient, as he had not passed all necessary exams, and that the burden of proving the existence of a valid licence rested with the appellant, which onus he failed to discharge. Pointing to **sections 15 and 19** of the **Medical Laboratory Technicians and Technologists Act**, counsel proffered that the provisions made it mandatory for the appellant to hold a practising certificate and also made it a criminal offence for one to practice without a licence.

11. Counsel also argued that the termination met the threshold of substantive fairness as required by **section 43(2)** of the **Employment Act**. She reiterated that the genuine reason for termination was the appellant's failure to acquire the requisite practicing licence, which was detrimental to the respondent's operations and accreditation efforts. Learned counsel also asserted that the termination process was procedurally fair and

consistent with **sections 45(5)** and **41** of the **Employment Act**.

12. It was further the respondent's submission that the learned Judge correctly found that the appellant did not prove discrimination. To buttress this submission, counsel argued that the appellant did not tender any sufficient proof that an intern, whose recruitment was mentioned by the appellant, lacked professional qualifications.
13. In closing her submissions, counsel maintained that the appellant was not entitled to the reliefs sought in the appeal, arguing that the termination was justified due to the lack of a practicing licence, which would have negatively impacted the respondent's operations and that the appellant did not provide evidence of working in May 2014, having been discharged and fully remunerated by 30<sup>th</sup> April 2014. Counsel also urged that the appellant failed to prove that he had unutilized leave days, asserting that he was advised through the termination notice to proceed on leave during the notice period. It was the respondent's ultimate submission that the appeal be dismissed with costs.
14. As already stated, our mandate is akin to a retrial. In discharging that duty, we have duly considered the record, submissions and the applicable law. In our view, the determination of this appeal hinges on whether the appellant proved a case of unfair dismissal and discrimination.
15. Before we address the question of the fairness of the termination,

it is imperative that we say something about the burden of proof and where it lies. The appellant has taken issue with the trial

court for allegedly misinterpreting **section 47(5)** of the **Employment Act** and shifting the burden of proof to him. The subsection states:

**“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”**

16. Regarding the burden of proof in employment disputes, the Supreme Court expressed the law in **Gwer & 5 Others vs. Kenya Medical Research Institute & 3 Others [2020] KESC 66 (KLR)** as follows:

**“[49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**[50] ...**

**[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> respondent to prove the contrary. In the light**

**of the turn of events at both of the Superior**

**Courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.”**

17. It is necessary to recall these principles in order to appreciate at whose doorstep the burden will lie from time to time in this judgment. It is also imperative to point out that in a claim of unfair termination, the law is not just concerned with ascertaining the validity of the reason for termination but also with ensuring that the employer processes the separation in a manner that is procedurally fair to the employee. Indeed, this position has been made clear by this Court in several decisions. For instance, in **National Bank of Kenya vs. Samuel Nguru Mutonya [2019] KECA 404 (KLR)**, the Court affirmed the holding in **Janet Nyandiko vs. Kenya Commercial Bank Ltd [2017] eKLR** that in determining whether a decision by the employer to terminate a contract of employment is just and equitable, *“the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee.”*

18. In this appeal, the parties agree that they were in an employment relationship that was renewable every two years. The appellant’s last contract with the respondent began on 31<sup>st</sup> March 2012 and was to end on 30<sup>th</sup> March 2014. This is captured both in the respondent’s letter dated 31<sup>st</sup> March 2012, as well as the Service Agreement dated 31<sup>st</sup> March 2012, in which Clause 3.1 provided thus:

**“The Employee's employment period shall be for a period of two (2) years from the date of**

**commencement unless extended by mutual Agreement in writing or determined before the end of that period in the manner hereinafter provided.”**

19. Regarding termination of the contract, Clause 16.2.1 provided as follows:

**“This Agreement may be terminated by either party giving to the other party two (2) months notice in writing to that effect or by either party paying to the other party, the equivalent of two (2) months salary in lieu of such notice.”**

20. The letter dated 27<sup>th</sup> February 2014, which dismissed the appellant, stated in part as follows:

**“Regrettably, your position has been affected by your lack of a valid licence to carry out the required duties and responsibilities despite the Organization having given you chances to sit for the Board exams- As per our Organization's terms and conditions of employment we are required to give you two (2) months notice of separation with effect from 01<sup>st</sup> March, 2014. Your last working day will be 30<sup>th</sup> April, 2014**

**As per the Human Resources policies and procedures your final dues will be calculated as follows:-**

- 1. Salary up to and including 30<sup>th</sup> April, 2014.**
- 2. Your provident fund dues will be paid in accordance with the Trust Deed and Rules and the Retirement Benefit Authority's (RBA) guidelines.**

**Please note that you are required to make arrangements to settle any debts you have with the Organization on or before 30<sup>th</sup> April 2014. Also**

**take any pending leave that you have during this notice period.”**

21. The contents of this letter conform with the provisions of  
Clause  
16.2.1 of the Service Agreement signed by the parties on 31<sup>st</sup>

March 2012. We are, therefore, satisfied that procedurally, the termination complied with the terms of the contract between the parties.

22. The question then is whether the reasons for termination were valid or justified. We have reproduced part of the letter of termination, which indicates that the appellant was terminated due to failure to secure a licence from the Board. The appellant contends that he acquired a provisional licence, which allowed him to continue practising pending his sitting for the final paper. On the other hand, the respondent contends that the appellant was in breach of Clause 13 of his Service Agreement and that, since the respondent was in the process of acquiring international accreditation, the continued employment of the appellant was untenable as he had been accorded various opportunities to regularize his status.

23. Clause 13 of the Service Agreement provided as follows:

**“The Employee shall be responsible for ensuring at all times during the continuance of his services to AMREF (and if so required by the Foundation shall provide proof of), that he is in possession of valid personal or professional licences, registration certificates or other authorisations required by any Government or local authority to enable the Employee to perform his duties. The Employee shall, if he has professional medical qualification, ensure during his period of employment and for one year thereafter, that he is a member of a relevant professional body, society, Association of College, which in the opinion of the Foundation**

**affords adequate legal protection to the  
Foundation against**

**claims arising from the Employee's negligence or misconduct. The Employee will be entitled to claim reimbursement from the Foundation for any expenses incurred in maintaining such membership."**

24. Clause 19 of the Service Agreement provided that the agreement was subject to the laws of Kenya. This brings us to **section 19** of the **Medical Laboratory Technicians and Technologists Act (MLTT Act)**, which provides thus:

**"(1) No person shall act as a laboratory technician or technologist in any health institution in Kenya unless such person is registered under this Act.**

**(2) A person who contravenes the provisions of subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings.**

**(3) No person shall, while in charge of a health institution or any medical laboratory in Kenya, employ any person as a laboratory technician or technologist who is not registered under this Act.**

**(4) A person who contravenes the provisions of subsection (3) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or imprisonment for a term not exceeding five years or to both.**

**(5) Any person who in an application for registration, willfully makes a false or misleading statement or utters a false certificate, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or to both."**

25. There is no doubt that the appellant had worked as a laboratory technician from 1<sup>st</sup> October 2007. However, such an arrangement

offended **section 19** of the **MLTT Act** and was illegal *ab initio*. It would then follow that the appellant's termination on grounds of failure to secure registration as required by **section 15** of the **MLTT Act** was in furtherance of a legal cause. In fact, in an email dated 26<sup>th</sup> February 2014 from Catherine Wamwangi to Julius Tome and Dr. Jane Carter, the HRM decries the mistake of retaining the appellant and warns that the respondent had been spreading the risk for a long time. In a bid to mitigate this situation, the appellant produced a letter allegedly from Board dated 12<sup>th</sup> February 2014, allowing him to practice provisionally while his registration was being processed. We find difficulty in accepting the legitimacy of the contents of this letter for two reasons. First, as at this date, it is apparent that the appellant had yet to pass all the required papers to warrant registration by the Board; and secondly, upon perusal of the **MLTT Act**, we do not find a provision permitting provisional registration by the Board.

26. On the part of the respondent, the evidence shows that it had done everything required of it, including sponsoring the appellant's diploma programme. Additionally, it is clear from the minutes of the meetings held on 7<sup>th</sup> October 2013 and 26<sup>th</sup> February 2014 that the respondent accorded the appellant time to regularize his status. It is also clear that as at the time of termination, the appellant had not qualified to practice as a laboratory technician. The appellant argues that he had worked for close to 5 years without a licence. However, as we have

already

pointed out, the promotion to the position of a laboratory technician was done in violation of a statutory provision. Therefore, the offer extended to him by the respondent for him to acquire the requisite qualifications after the fact cannot apply to sanitize the irregular and wrongful violation of the statute. At any rate, he failed to acquire said qualifications within the time granted.

27. From the foregoing, it is our view that the appointment of the appellant by the respondent without meeting the required statutory threshold rendered such appointment invalid. It cannot be justified or sanctioned by subsequent communication directing him to get the required qualification post-employment. Such an appointment ought not to have taken place in the first instance. It would then follow that, upon the respondent realizing the mess it had created, it was within its rights to terminate the contract and put an end to the statutory violation. We cannot fault the respondent for acting in the manner it did.

28. The finding above addresses the appellant's claim of discrimination. Once it was established that the employment was contrary to statute, he was barred from asserting that claim. In any event, as submitted by the respondent, the appellant never proved that the person appointed to step into his shoes after his termination was not qualified to hold the position.

29. Based on the foregoing analysis, it is clear that this appeal lacks merit and is for dismissal. We hereby dismiss the appellant's appeal.

30. In deference to the general rule that costs follow the event, the costs of the appeal are awarded to the respondent.

**Dated and delivered at Nairobi this 5<sup>th</sup> day of December 2025.**

**P. O. KIAGE**

.....  
..... **JUDGE OF APPEAL**

**W. KORIR**

.....  
..... **JUDGE OF APPEAL**

**G. V. ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a True copy of the  
original*

*Signed*  
**DEPUTY REGISTRAR**