Ongera v Gianchore Tea Factory Co. Limited (Civil Appeal 3 of 2019) [2025] KECA 88 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 88 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 3 OF 2019

MA WARSAME, SG KAIRU & FA OCHIENG, JJA

JANUARY 24, 2025

BETWEEN

JOSEPHAT ARATI ONGERA ..... APPELLANT

AND

GIANCHORE TEA FACTORY CO. LIMITED ..... RESPONDENT

(An Appeal against the Judgment of the Employment and Labour Relations Court at Kericho (D. K. Marete, J.) dated 29th June, 2018 in ELRC No. 10 of 2017)

JUDGMENT

1. This is an appeal against the decision of the Employment and Labour Relations Court (Marete J.) in which the Court dismissed the appellant's claim for unprocedural, unfair and unlawful termination.

2. The brief background to the appeal is that the appellant was employed by Gianchore Tea Factory Co. Limited (the respondent) in the year 2008. On 11th January, 2014, the appellant received a show cause letter from the respondent's production Manager, why disciplinary action should not be taken against him. The letter read in part as follows :

> " Re: Intention To Steal Tea
>
> On 11th January 2014 at around 9.30 a.m., a 30 kg bag of made tea was found by management at the tea waste dumping site. The tea belonged to a dust grade. On inquiring, it was found out that the tea was left there by you as you were throwing away tea fluff authorized by management...
>
> Leaving the tea intact shows that you had every intention of stealing tea from the factory.
>
> It's on the above premise that you are asked to write to Factory Unit Manager within 48 hours explaining why stern disciplinary action cannot be taken against you."

3. The appellant claims that he responded immediately via a letter dated 11th January 2014 but did not retain a copy of his response. On 21st January,2014 he received a written response from the Factory Unit Manager, Mr. Daniel Kanja; which response we find necessary to reproduce the relevant excerpts as hereunder:

> " Re: Theft By Servant Suspension
>
> We are in receipt of your defence letter dated 11/01/2014 which is in response to our charge letter dated 11/01/2014.
>
> You together with two of your colleagues, were allocated to throw away fluff and any other tea waste at the time the FUM found the bag of dust 2 grade tea lying at the dumpsite...
>
> Going by the above facts, we are convinced that you had intentionally removed the good dust 2 grade tea and left it in a bag within the action of stealing. We have read your defence letter that is lacking and unconvincing.
>
> Theft by servant is a serious offence punishable by summary dismissal according to the CBA. We hereby place you under Suspension for a period that will not exceed three months from the date of this letter pending our further investigation and action. If no action will have been communicated at the end of 3 months, you are requested to report to the FUM on 22nd April 2014 for instruction. While on suspension you will be paid half salary."

4. The appellant maintains that he reported to the Factory Unit Manager (FUM) on 22nd April, 2014 for instruction as directed but was asked to go away until further notice. There was no further notice and he began serving an indefinite suspension.

5. He subsequently filed a suit before the ELRC on 20th January 2017 alleging that he had been constructively dismissed from the respondent's service unprocedurally and without just cause, that he was condemned unheard as no hearing took place, that the alleged "further investigations" were a sham and that the respondent's conduct was an affront to the terms of the Collective Bargaining Agreement.

6. He consequently sought a declaration that the indefinite suspension was for all intents and purposes, a constructive dismissal from service and that such dismissal was unfair and unlawful; payment of his full salary for the period of indefinite suspension, maximum general damages for unfair termination and costs incidental to the suit.

7. The respondent denied the claim and parties agreed to proceed by way of written submissions. The witness statements and lists of documents were adopted as evidence of the parties by mutual consent.

8. The appellant did not comply and failed to file his submissions.

   On its part, the respondent conceded that the appellant was placed on suspension pending determination of investigations into the incident of the stolen tea but contended that the appellant was afforded a chance to be heard before his suspension with half pay as per the letters dated 11th January 2014 and 21st January 2014 which were produced by the appellant.

9. It was also contended that the reason for his suspension was clearly communicated to the appellant and his representation considered before the decision to suspend him was taken. The respondent urged the trial court to dismiss the claim which had been prematurely instituted.

10. The trial court in determining the matter, dismissed the appellant's claim and held that there was no termination of employment as claimed by the appellant.

11. In its judgment, the court determined that the communication to the appellant and the explanation cannot amount to disciplinary proceedings as such. Noting that the respondent had submitted a case of premature institution of the suit in the circumstances, the court determined that the issue before it was whether the claimant pursued all avenues and disciplinary processes before filing the suit. Answering in the negative, the court held that the appellant had failed to do so.

12. The trial court concluded that the appellant had failed to establish on a balance of probability, a case of termination of employment as required by Section 47(5) of the *Employment Act*, 2007.

13. Dissatisfied with those findings, the appellant has lodged the current appeal on the grounds that:

    a. The learned Judge failed to hold that the appellant had been placed on an indefinite suspension which amounted to constructive dismissal.

    b. The trial judge misdirected himself by holding that the appellant ought to have exhausted all avenues and disciplinary processes when no evidence of such avenues existed or that such pursuit was a pre-condition to institution of the suit.

    c. The learned Judge erred in holding that the appellant's claim was premature

14. When the matter came up for hearing before this court, learned counsel Miss Kebungo appeared for the appellant while Mr. Kipkorir held brief for Koech for the respondent. The parties who had failed to file their submissions proceeded by way of oral submissions.

15. Counsel for the appellant submitted that despite being given a notice to show cause letter which was followed by a suspension letter to pave way for investigations, the folly of the process was that the appellant was never called back to be appraised on whether he was to go back to work or whether he was to be dismissed from employment. Two years down the line the appellant was still waiting for the respondent's decision.

16. Counsel pointed out that the respondent had not tendered any evidence to show that the appellant was given a fair hearing before he was put on suspension or before being dismissed from work.

17. On his part, counsel for the respondent submitted that the suit was premature, given that the appellant himself had admitted that he was on suspension with half pay. He contended that the half pay continued from January 2014 until January 2017 and faulted the appellant for filing the suit before the investigations were complete. He acquiesced that the delay of almost three years was considerably long but highlighted that the suspension was predicated on an act of gross misconduct and that the allegations were of a serious nature and that it was fair for the for the respondent to be given considerate time to consider all the factors to reach a conclusive determination.

18. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence".

19. The crux of the appellant's appeal is that he was constructively dismissed resulting in wrongful, unfair and unlawful termination. He alleges that the proof of constructive dismissal is obvious. First, he was not afforded a hearing after his three month suspension; second, he was not informed of the outcome of the investigations; third he was not given any instruction after the end of the suspension period and lastly, payment of his salary stopped abruptly. Consequently, in terminating his employment the respondent had violated sections 41 and 43 of the *Employment Act*, 2007. Furthermore, it was his case that the respondent failed to prove that the reasons for his termination of employment are valid as required under Section 47(5) of the *Employment Act*.

20. Section 47 (5) of the *Employment Act* provides as follows;

> (5) 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.

21. Before any party to the proceedings proves unlawful termination, evidence must be led to prove first the fact of termination. It is our considered opinion that since it was the appellant who contended that he was terminated, the burden lay on him to prove, first, that his services were terminated and second, that the said termination was unfair by virtue of being constructively dismissed. This view is fortified by sections 107 and 108 of the *Evidence Act*, Chapter 80, Laws of Kenya which provides that:

> " 107. 'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'
>
> 107. 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'

22. Did the appellants discharge his evidential burden as required by the law? We do not think so. The appellant, in his witness statement alleges that when he reported to the Functional Unit Manager on 22nd April 2014 as directed in the letter of suspension dated 21st January 2014 he was told to go away until further notice. The appellant did not protest verbally or otherwise; nor did he seek further clarification on the matter from the respondent or make an attempt to resume his duties. He chose to remain mum in the sidelines for three years before filing the suit before the ELRC. At the very least, the law provides for certain procedures and processes which he could and should have followed to compel a decision from the respondent.

23. Again, it is also unclear at which point in the three years the respondent stopped paying half of the appellants salary. Counsel for the appellant submitted that the appellant received half payment for "some time" and then the payment stopped. On the other hand the respondent alleges that payment continued until January 2017. Despite these varied positions, no party produced any documents to show the correct position of this fact. The only evidence of payment attached by the appellant that we are privy to is a bank statement from Equity Bank showing one payment of Kshs. 18,111.55 on 5th February 2014 by the respondent while on suspension. Our view is that it serves no useful purpose in as far as establishing that the appellant was terminated or that the respondent stopped making payments during the suspension period. In fact, the appellant did not submit how much he earned or his contract of employment. He only provided a list of factory staff and their corresponding salaries in the year 2013 and 2014, and left it to the courts to guess his designation and monthly pay.

24. Consequently, without evidence as to what exactly happened when the appellant reported to work on 22nd April 2017, or proof of exactly when the respondent stopped paying the appellant's half salary; we are unable to assess whether the appellant's services were terminated, lawfully or otherwise. Given the foregoing, we are forced to concur with the trial court that there was insufficient evidence to prove termination and that the evidence provided does not lay the necessary foundation to require the employer's response under section 43 of the *Employment Act*. Having found that proof of termination was insufficient, it therefore follows that the suit was filed prematurely.

25. The law is clear that it is not enough for an employee to claim that they were terminated constructively or unfairly, they must place tangible evidence/material before the court in support of their case and prove their claim on a balance of probabilities. Mere stopping to work by an employee does not automatically amount to termination of employment.

26. Given our findings above, it only remains for us to dismiss this appeal for lack of merit and affirm the decision of the Employment and Labour Relations Court. We make no order as to the costs of the appeal.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR