Lockwood Girls High School v Wasike (Civil Appeal 38 of 2018) [2024] KECA 360 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 360 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 38 OF 2018

FA OCHIENG, PM GACHOKA & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

LOCKWOOD GIRLS HIGH SCHOOL .... APPELLANT

AND

PETER WAFULA WASIKE .... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nakuru (S. Radido, J.) delivered and dated 20th July 2017inELRC Cause No. 1 of 2015)

JUDGMENT

1. The appellant, Lockwood Girls High School ("the School"), is before us expressing dissatisfaction with the judgment delivered on 20th July 2017 by Radido J. of the Employment and Labour Relations Court (E&LRC) at Nakuru. The grounds of appeal in the appellant's memorandum of appeal dated 12th May 2018 can be summarized as follows: that the respondent did not prove its case to the required standards; that the learned Judge erred by shifting the burden of proof to the appellant; that the learned Judge misdirected himself when he concluded that the respondent's termination was unfair; that the appellant's evidence and submissions were not considered by the trial Court; and, that the monetary awards were inordinately high and excessive.

2. The respondent is Peter Wafula Wasike.

3. The background to the dispute between the parties was that by a contract of employment dated 20th August 2012, the appellant's director confirmed the appointment of the respondent as the Principal of the School for a period of 3 years on a monthly salary of KSh. 70,000. Thereafter the parties appeared to work in harmony until the dispute erupted on 28th August 2014 when the respondent was summoned to an alleged meeting in Nairobi and issued with a letter terminating his contract. The respondent was also instructed to vacate the house provided to him by the School within 2 days.

4. After termination, the respondent moved the trial Court through a memorandum of claim dated 9th January 2015 asserting that his dismissal by the appellant was unprocedural and wrongful. He also averred that the decision to dismiss him was baseless and harsh as he had served the appellant without blemish during his tenure. He sought a declaration that the appellant's actions were unfair and inhumane; an award of terminal dues and damages to the tune of Kshs. 5,559,093.36; an order compelling the respondent to issue him with a certificate of service; interest on the monetary awards; and costs of the suit.

5. The appellant opposed the claim by lodging an answer to the memorandum of claim dated 18th February 2015. The appellant acknowledged employing the respondent as from 20th August 2012 on a contract that was to run for 3 years. However, it was the appellant's contention that the contract was void from the outset as it was obtained through fraud and gross misrepresentation of material facts by the respondent. The appellant asserted that under clause 5 of the letter of appointment, the contract was subject to periodical review and that the respondent was in breach of the contract by failing to deliver on the mutually set targets for the first year of his term. The appellant averred that as a result of the breach, it was entitled to terminate the contract. Further, that the respondent was given a hearing and the reasons for termination were duly communicated to him. The appellant denied owing the respondent salary arrears, asserting that all his salaries were paid through his bank and Mpesa accounts. In denial of the claim for overtime and unused leave days, the appellant stated that the respondent ordinarily went on leave during the school holidays. It was therefore the appellant's case that the respondent's contract was terminated procedurally and in accordance with the terms of the contract of employment.

6. At the hearing before the trial Court, each side called one witness. The respondent who testified in support of his claim as CW1 stated that he was employed by the appellant as a Principal for the School at a monthly salary of KSh. 70,000 for a period of 3 years starting from 20th August 2012. His evidence was that he worked in the position until 28th August 2014 when he was called to Nairobi for a strategy meeting only to be issued with a termination letter. The respondent testified that during the subsistence of the contract, he was never paid his salary in full and was owed KSh. 587,926.71 in salary arrears by the time his employment was terminated. He denied ever receiving any salary through his Mpesa account. The respondent further testified that he used to report to work at 6.00am and leave at 11.00pm on weekdays. On Sundays his work schedule started from 2.00pm. The respondent further testified that he worked during public holidays and had never taken any leave. He denied failing to deliver on his part of the bargain and stressed that he was not issued with any warning letter or taken through disciplinary proceedings before being summarily dismissed.

7. Upon cross-examination, the respondent affirmed his qualifications as a teacher and maintained that he served the appellant diligently during his tenure. The respondent confirmed that the Mpesa account which the appellant's director claimed was used to pay his salary was registered in his name. He, however, clarified that the account actually belonged to the appellant but was only registered in his name for ease of transactions. Further, the transactions in the account had nothing to do with his salary but related to the School's operations.

8. The School's director, James Gatune Wathigo, testified as DW1.

His testimony was that during the respondent's tenure as the Principal, the appellant lost almost half of its student population hence occasioning a massive loss of income, and the directors were forced to source for funds elsewhere to keep the institution afloat. He denied that the respondent was ever underpaid or owed any arrears by the appellant. DW1 further testified that the respondent would take leave during school holidays and would sometimes report back late. According to the director, the

appellant did not therefore have any unused leave days. DW1 stressed that the respondent was dismissed due to poor performance and failure to meet the agreed targets. It was his evidence that the respondent was paid all his dues as well as two months' salary in lieu of notice upon termination. According to the witness, the respondent used forged certificates to secure the job. Denying the respondent's claim that he was never paid his monthly salary in full, DW1 testified that the School had verbally agreed with the respondent that he would be paid part of his salary through the bank account and the balance would be paid through Mpesa. The director explained that this arrangement was meant to conceal the salary of the respondent from other members of the teaching staff who were equally qualified as the respondent but were earning less pay.

9. In a judgment delivered on 20th July 2017, the learned trial Judge found that the respondent's termination was procedurally unfair. He also found that the respondent was owed salary arrears by the appellant. The learned Judge, however, found no merit in the respondent's claim for compensation for unutilized leave days. The learned Judge subsequently awarded the respondent KSh. 587,926 as salary arrears, 12 months' salary as damages for unfair termination and costs of the suit.

10. When the matter came for hearing before us through the virtual platform on 21st November 2023, learned counsel Ms. Kagucia appeared for the appellant while learned counsel Mr. Simbah appeared for the respondent. They indicated that they were relying on their written submissions and proceeded to make brief oral highlights.

11. Relying on submissions dated 6th December 2021, learned counsel for the appellant submitted that the trial Judge misinterpreted section 47(5) of the *Employment Act* thereby erroneously shifting the burden of proof to her client. She argued that the misdirection offended section 107 of the *Evidence Act*. According to counsel, the trial court set a low threshold in finding in favour of the respondent. Further, that the learned Judge gave high regard to technicalities thereby arriving at the wrong conclusion that the termination of the respondent was not fair. Counsel submitted that the trial Court disregarded the appellant's evidence that a meeting held with the respondent prior to his termination resolved that the respondent was not in a position to change the deteriorating performance of the School. According to counsel, the learned Judge also erred in failing to find that the reasons for termination were valid.

12. With regard to the award of salary arrears amounting to KSh. 587,926, learned counsel submitted that the award was erroneous as there was no evidence on record to support it. According to counsel, the learned Judge disregarded the appellant's evidence that the respondent's salary was normally split and paid through his bank and Mpesa accounts. It was counsel's position that the appellant had actually overpaid the respondent. Counsel further argued that the trial Court erred by failing to take into consideration the fact that the salary was subject to statutory deductions.

13. Turning to the compensation of KSh. 840,000 for unfair termination, counsel relied on *Ol Pejeta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR in support of the submission that the award was excessive considering that only 16 months remained on the respondent's contract. Counsel also submitted that the learned Judge erred by failing to consider the reasons given by the appellant for the termination of the contract. Relying on the case of *Jared Aimba v Fina Bank Ltd* [2016] eKLR and Rule 29(1) of the *Court of Appeal Rules*, counsel urged us to re-appraise the evidence and arrive at a different conclusion.

14. On behalf of the respondent, learned counsel relied on the submissions dated 20th July 2022. Counsel commenced by dismissing the appellant's contention that the respondent did not discharge the burden of proof placed upon him asserting that section 47(5) of the *Employment Act* placed the onus of justifying the reasons for the termination of the contract upon the appellant. According to counsel, the appellant failed to comply with section 42(1) and (2) of the *Employment Act* in terminating the

respondent's employment. Counsel relied on *Mbogo v Shah* [1968] EA 93 and asked us to reject the applicant's prayer for reduction of the damages awarded to the respondent. It was counsel's submission that the jurisprudence derived from the cited authority shows that an appellate court can only interfere with the damages awarded by a trial judge where the judge acted on wrong principles of law, misapprehended the evidence, considered irrelevant factors or failed to consider relevant factors, made an award not based on the evidence, or made an erroneous estimate of damage resulting in an inordinately low or high award. Counsel urged us not to interfere with the awards made by the trial Court as they were backed by the evidence on record and were reasonable in the circumstances. Counsel consequently asked us to dismiss the appeal with costs.

15. This is a first appeal and by virtue of Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 we are required to independently re- appraise the evidence and draw our own inferences and conclusions. The only handicap we face is that, unlike the trial court, we never heard or saw the witnesses testify in order to be in a position to gauge their demeanour. We should therefore bear this limitation in mind when exercising our discretion. Recently, the Supreme Court in Petition E001 of 2023, *Hon. Justice Said Juma Chitembwe v The Tribunal Appointed to Investigate into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court*, though addressing an appeal from a tribunal, elaborated on the mandate of a first appellate court thus:

> "This process aims to validate the accuracy of the Tribunal's findings regarding the application of factual matters to the law, even as the court acknowledges the Tribunal's firsthand assessments of witnesses' credibility. The Court will exercise this authority to overturn factual conclusions with caution and will only do so if it is demonstrated that the Tribunal's conclusions were not supported by evidence or if it is evident that the Tribunal failed to appreciate the weight or bearing of circumstances admitted or proved, or if the Tribunal was plainly wrong in its conclusion."

16. In line with the stated mandate, we have given due consideration to the record of appeal and submissions by the advocates for the parties. In our view the issues for determination are whether the termination of the respondent's contract of employment was lawful; whether the respondent was entitled to the awards made by the trial court; and who should bear the costs of the appeal.

17. At the heart of this appeal is the question as to whether the respondent was fairly and procedurally terminated. Addressing this issue answers the appellant's complaints that the respondent did not prove its case to the required standard; that the burden of proof was shifted to the appellant; that the trial Judge misdirected himself by finding that the respondent was unfairly terminated; and, that the appellant's evidence and submissions were never considered.

18. It is not disputed that the appellant engaged the respondent as a Principal through a contract dated 20th August 2012. The relation between the parties was therefore that of an employer and employee thus governed by the *Employment Act*, 2007 ("the Act"). Under section 45(1) of the Act, an employee is protected against unfair termination by the employer. Section 45(4)(b) of the *Act* provides that a termination of employment is unfair where the employer does not act in accordance with justice and equity. Additionally, sections 45(2) and 43 of the *Act* obligates the employer to prove the reason or reasons for the termination and the fairness of the procedure adopted in the termination, failure to which such termination is held to be unfair.

19. Before we address the question as to whether the respondent's termination was unfair or not, it is imperative that we address the question of the burden of proof in employment disputes and where the

onus lies. The appellant asserts that the trial Court shifted the burden of proof by wrongly interpreting section 47(5) of *Act*. That provision states that:

> "(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."

20. In order to appreciate the meaning of the provision, we turn to the *Evidence Act*. Sections 107 and 108 of the *Evidence Act* are to the effect that the burden of proof is always placed upon the party whose claim would fail if no evidence was adduced by either side and that he who alleges must prove so that a party desirous of establishing any legal right or liability must prove the facts upon which their assertion rests. This is what is referred to as evidentiary burden of proof. The provisions of section 47(5) of the *Act* as reproduced above must be read in consonance with sections 107 and 108 of the *Evidence Act*. In that regard, the burden of proof in a dispute such as the one before us always keeps shifting. It starts on the side of the employee who alleges unfair termination and must prove on a balance of probability, that his termination was unfair. Once this is established, the burden then shifts to the employer to demonstrate that the grounds for termination were justified and the termination was procedural. Our statement finds support in the holding of the Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 Others* [2020] eKLR that:

> "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."...
>
> 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 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st 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 1st respondent."

21. The foregoing depicts how the burden of proof in employment matters starts with the claimant who alleges unfair termination before shifting to the respondent to demonstrate that the termination was lawful. Upon reviewing the impugned judgment of the trial Court, we note that at paragraphs 14 and 15 the learned Judge properly appreciated the law on the burden of proof in employment claims. We therefore find no misdirection on the part of the learned Judge in as far as the question of burden of proof is concerned.

22. We then turn to the main question as to whether the termination of the respondent's employment by the appellant was fair and procedural. Section 41 of the *Act* provides the procedure to be followed in the termination of an employment contract. Section 45(5) of the *Act* enumerates what an employer is expected to demonstrate in order for the termination of the employment to be held to have been fair. Among the factors to be considered in order to decide whether the termination of the employment of an employee was just and equitable are the communication of the decision and the handling of any appeal by the employee against the decision; the conduct and capability of the employee; the existence

of any previous warning letters issued to the employee; and, the extent to which the employer complied with any statutory requirements connected with the termination. The responsibilities placed on an employer who decides to terminate the employment services of an employee were expressed by this Court in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR as follows:

> "There can be no doubt that the *Act*, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

23. Whereas the appellant asserted that it was entitled to terminate the respondent's contract for poor performance, the learned trial Judge delved into the procedure of termination and found that the same did not comply with the law. We have looked at the record and we are not persuaded otherwise by the appellant. We therefore find no fault in the impugned decision as termination must substantially be justifiable and procedurally fair. It is no brainer that even where poor performance or any other reasons are floated to warrant summary dismissal of an employee, the employer is always under obligation to ensure that the procedural parameters provided by the *Act* are complied with. The existence of valid reasons cannot fly where the employer has failed to follow the established processes. Where the law is not followed, the employer cannot be absolved from liability as this amounts to unfair termination.

24. In the present case, the respondent gave evidence that he was summoned to Nairobi by the director of the appellant. It was his evidence that upon reaching the Nairobi office, he was kept waiting only to be called into the director's office and handed a termination letter. Indeed, no evidence was adduced by the appellant to show the procedure that was adopted in terminating the respondent's employment. Instead, the appellant was stuck to the point that it was within its rights to terminate the respondent due to poor performance and misrepresentation. As we have already stated, it is not enough for an employer to have good grounds for termination. The law requires an employer to adopt the statutorily prescribed procedure in terminating an employee's contract. We therefore concur with the learned Judge that the appellant failed to rebut the respondent's case that he was terminated without adherence to the protections afforded to him by the law.

25. We also find as not sufficient the allegation fronted by the appellant that the reasons for termination were communicated to the respondent through the letter of dismissal. In any event, the reasons for termination come at the tail end of an elaborate procedure that ordinarily commences with a show cause letter and in some instances, performance appraisals.

26. There was the allegation by the appellant that there were targets set and which the respondent failed to achieve. We have reviewed the contract entered into between the parties and we find no such targets. It was therefore incumbent upon the appellant to adduce evidence in support of this allegation. In our view, this is a case where the appellant even failed to adhere to its own disciplinary procedure as outline in part 8 of the contract of employment. For the stated reasons, we find no merit in the appeal against liability. We therefore agree with the trial Court that the respondent's termination was not done in accordance with the statutory procedure hence amounted to unfair termination.

27. The next issue is whether the respondent made a case for the reliefs granted by the trial Court. Some of the remedies available for wrongful dismissal and unfair termination are provided in section 49(1) of the *Act* as follows:

> “ (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this *Act* or his contract of service;
>
> b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
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> c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

28. The powers and awards under section 49 of the *Act* are discretionary in nature. In order for this Court to interfere with remedies given by the Employment and Labour Relations Court, an appellant must question and demonstrate the wrong exercise of discretion by that Court. In that respect, we are guided by the pronouncement of this Court in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR that:

> “ Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this appeal, it is guided by the principles enunciated in numerous case law from this Court. In the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* [2014] eKLR, it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.”

29. In the present case, the trial Court awarded salary arrears of KSh. 587,926 and KSh. 840,000 being 12 months’ salary as compensation for unfair termination. In justifying the award of salary arrears, the trial Judge pointed out that employees ought to be issued with pay slips and salaries should either be paid in cash or through bank accounts. The learned Judge concluded that no proof of payment was demonstrated by the appellant hence the case tilted in favour of the respondent. We do not find impropriety in the manner in which the trial Court arrived at this conclusion. The appellant’s case was that the respondent was, based on some verbal agreement, paid KSh. 50,000 through a bank account while the rest was paid either in cash or through Mpesa. The appellant’s witness brought Mpesa statements of other staff members to support the claim that money was sent to the respondent. In challenging this averment, the respondent denied ever reaching such an agreement with the appellant and further asserted that the money sent to him was for meeting the cost of the daily operations of the School including student mobilization. We are left wondering why the appellant would want to convince us that despite the existence of a written contract, the terms would have been altered by a verbal contract. Further, the respondent’s averment that the Mpesa account was only registered in his name to ease the School’s operations was never rebutted by the appellant. The appellant failed to clarify why the respondent’s salary would be sent not to his personal line but to the School’s number. Even if we were to accept the appellant’s version, then it would mean that the appellant’s main intention was

to commit an illegality of tax evasion. A verbal agreement attempting to override a written agreement in furtherance of an illegality cannot be sanctioned by the Court. We also do not find tenable the appellant's claim that the salary paid was subject to statutory deductions. If that was the case, the appellant would have easily adduced evidence of such remittance to the relevant statutory bodies. In other words, we find no reason to interfere with the award of Kshs. 587,926 as salary arrears.

30. The appellant has also challenged the trial Court's award of Kshs. 840,000 as compensation for unfair termination. The said amount is equivalent to 12 months' salary. The appellant contends that the amount is inordinately high considering that the respondent only had 16 months remaining on his contract. In our view, an award of the 12 months' salary provided for under section 49 of the *Act* is the maximum award and should be reserved for occasions where grave injustice has been demonstrated. In arriving at what is fair and justifiable, courts ought to consider the length of the employee's period of service (*Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR), the employee's conduct during the period of employment (*Gas Kenya Limited v Odhiambo* [2022] KEELRC 3930 (KLR)), whether the termination was abrupt (*Alois Makau Maluvu v Cititrust Kenya Limited & another* [2018] eKLR), as well as the employer's conduct during the termination process (*Heritage Insurance Company Limited v Christopher Onyango & 23 others* [2018] eKLR and *D K Njagi Marete v Teachers Service Commission* [2020] eKLR).

31. Taking the above factors into consideration, we note that the respondent's dismissal was abrupt. He was handed the termination letter while in Nairobi with instructions to vacate the School's premises in Nakuru within two days. The respondent also alleged that he had loans whose servicing was impacted by the termination. On the other hand, we note that the appellant promptly paid the respondent's salary in lieu of notice. It is also a fact that the respondent had served approximately 20 months of his 36 months contract. Although the respondent disputed the appellant's assertion, there was evidence that the number of students had drastically gone down during his tenure. Maybe a case for termination could have been made had the appellant stuck to the rules of the game. Considering the foregoing, we are inclined to vacate, which we hereby do, the award of 12 months' salary as compensation for unfair dismissal. Instead, we substitute that award with an award of 6 months' salary which will come to KSh. 420,000 based on a monthly salary of KSh. 70,000.

32. On the issue of costs, having partially allowed the appeal, the appropriate order would be to award a portion of the costs of the appeal to the appellant. However, the record shows that the appellant terminated the respondent in a cruel and inhumane manner. As such, this is a proper case for departing from the general rule that costs follow the event. Accordingly, we order that each party shall bear own costs of the appeal.

33. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024

F. OCHIENG

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JUDGE OF APPEAL**

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL**

W. KORIR

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JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR