



REPUBLIC OF KENYA



KENYA LAW
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**Muki Sacco Society Limited (Civil Appeal 6 of 2020)
[2024] KECA 964 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 964 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 6 OF 2020
MA WARSAME, PO KIAGE & FA OCHIENG, JJA
JULY 26, 2024**

**IN THE MATTER OF
MUKI SACCO SOCIETY LIMITED RESPONDENT**

(Being an appeal against the judgment and decree of the Employment and Labour Relations Court at Nakuru (Hon. Lady Justice Monica Mbaru) dated 14th November 2019 in Cause No.49 of 2017)

JUDGMENT

1. The genesis of this appeal is the claim filed before the Employment and Labour Relations Court by the appellant, David Mutai Ng'etich against the respondent. Briefly, the appellant was employed as a General Manager in the year 2012. On 18th November 2016, the appellant was issued with a letter suspending him from employment for 14 days to pave way for investigations into the allegations of various losses allegedly incurred by the respondent under the appellant's leadership. On 3rd December 2016, the appellant was invited to attend a meeting with the board's executive committee on 6th December 2016.
2. On 6th December 2016, the appellant wrote to the respondent requesting for a copy of the investigation report and postponement of the scheduled meeting to allow him to obtain the requested information as requested and prepare the necessary response. The respondent declined the requests and opted to proceed with the meeting. On 7th December 2016 the appellant was summarily dismissed on account of refusal to answer questions put to him.
3. The termination prompted the appellant to file a statement of claim in which he sought unconditional reinstatement. In the alternative he sought terminal dues and compensation, among other reliefs. In response, the respondent maintained that the summary dismissal was justified.
4. The trial court found that the termination of employment was justified and that the remedy of reinstatement or payment of salary arrears was not available. The claim was therefore found to be



without merit and it was dismissed. However, considering that the respondent had opted to terminate the services of the appellant instead of summary dismissal, the court awarded the appellant 3 months' salary in lieu of notice as per the employment contract; pay for 5 days worked in December 2016 and accrued leave all aggregating Kshs.843,287/-. This prompted the filing of the appeal.

5. From the submissions dated 19th April 2024 on behalf of the appellant, his first major complaint against the decision of the trial court is that the impugned judgment was entered based on findings unsupported by evidence and conclusions unsupported in law. His second major grievance is that the judge accepted new charges sprung on him for the first time in the letter of termination, against which the appellant was never invited to defend himself, and made findings that justified and excused termination based on the new charges. The appellant urges the Court to reappraise itself with the evidence in furtherance of section 31 of the Court of Appeal Rules and allow the appeal.
6. The appellant inter alia faults the judge for giving wrong answers or totally failing to answer pertinent questions on whether the appellant was still under suspension on 6th December 2016, whether the investigations were still ongoing and lastly, whether it was absurd for the appellant to ask for the findings and outcome of the investigations. He further faults the court's finding that the claimant refused to cooperate as being based on a one-sided view of the matter, not supported by evidence.
7. In opposing the appeal, the respondent, vide submissions dated 15th April 2024 argue that the judgment by the trial court is well founded in fact and law and the learned Judge did not misdirect her mind at any stage and never lost sight of the main issues for determination and the applicable law. The respondent urges us to affirm the judgment and dismiss the appeal with costs.
8. Each side cited cases in support of its respective arguments, which we need not repeat, having set out the gist of the positions held by each party. From the foregoing, the appeal hinges on our disposition of the issue as to whether the appellant was unlawfully or unfairly terminated.
9. This being a first appeal, we are mindful of our mandate under Rule 31 of the Court of Appeal Rules to reappraise the evidence on record and where necessary make our own findings. The Court's appellate jurisdiction is circumscribed under section 3(1) of the *Appellate Jurisdiction Act*, flowing from Article 164(3) of *the Constitution*. In *KSC International Limited (Under Receivership) & 3 Others vs. Bank of Africa (K) Limited & 8 Others (Civil Appeal 27 of 2019)* [2022] KECA 911 (KLR) (22 July 2022) (Judgment) we stated as follows:

“28. . This being a first appeal, this Court has a duty to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold...” We now turn to the issues as delineated.
10. The bone of contention is on the circumstances surrounding the termination of the appellant and whether they amounted to unlawful or unfair termination. To put it in context, it is common ground that the appellant was suspended for 14 days effective 21st November 2016 to pave way for investigations on the various losses incurred by the respondent. As noted in the termination letter and quoted by the trial judge, the appellant was summoned to present himself to the executive committee, upon expiry of the suspension.
11. In our view, several matters arise. First, the summon to present himself before the executive committee did not of itself amount to a show cause or in furtherance of a disciplinary process. Secondly, the 14-day suspension as rightly acknowledged in the letter was no longer in place. Lastly, as the Chief Executive Officer, he was expected to be knowledgeable of the events and transactions undertaken in the course



of his day to day duties. We do not see any difficulties that would prevent his attendance before the respondent's executive committee.

12. When the appellant finally appeared before the executive committee, it emerges that he was unwilling to answer any questions on the pretext that he did not understand the issues at hand. Instead, he wrote back to the respondent requesting for a copy of the investigation report so as to enable him to prepare his defence. This in our view was quite an unusual approach. The appellant, once summoned quickly recoiled into defence mode, albeit prematurely. He then proceeded not to answer any questions. Nothing would have been easier than to answer the questions as it is only upon that engagement that the investigations would proceed.
13. As rightly noted by the trial judge, no charges had been drawn for the appellant to respond to. It is not unusual for internal investigation to be undertaken to conclusion, including getting the representation from the appellant before determining the next course. Having been suspended from work, it was necessary for the employer to conduct independent investigations upon which it would be put to the employee for reaction when the appellant resumed. In *Khainga vs. Kenya Utalii College (Cause 2240 of 2016)* [2022] KEELRC 4092 (KLR) (4 April 2022) (Judgment), the Employment and Labour Court stated as follows:

“24. A suspension is just but an intervening measure to remove the employee from the shop floor to allow for investigation and if the employee is not found culpable to be recalled back to work and if there is an issue(s) to be addressed, the employee must be issued with a notice to show cause and be allowed a hearing in terms of section 41 of the *Employment Act*, 2007 (the act);”

We reiterate that, in the present case, no Notice to Show Cause had been issued for purposes of a hearing in terms of section 41 of the *Employment Act*.
14. The appellant's conduct in our view amounted to conduct that warranted summary dismissal under section 44(4) of the *Employment Act*. He not only refused to obey lawful directions as noted by the trial judge, but also behaved in a manner insulting to his employer or to a person placed in authority over him by the employer, in this case the executive committee. The trial judge relied on precedence set out in *Jennifer Osodo vs. Teachers Service Commission* [2013]eKLR and *Paul Wanyangah vs. Market Development Trust t/a Kenya Markets Trust* [2017]eKLR which reiterated that an employee is not to hold the employer at ransom and the employee on suspension remains an employee of such an employer. Nothing in our view turns on whether the appellant's suspension was completed or not as he remained an employee whether at work or on suspension. What is evident is that it was no longer feasible for the appellant to work as the Chief Executive Officer. We do not therefore see any plausible reason to interfere with the trial court's finding in this regard and find that the termination was lawful under the circumstances.
15. We have perused the termination letter and note that it did not specify the manner of termination. Having found that the appellant's conduct justified summary dismissal, the respondent opted to instead terminate his services. Consequently, the court awarded the appellant three months' salary in lieu of notice as per the contract, pay for 5 days worked in December 2016 and accrued leave aggregating Shs.843,287. This was to be paid less what the claimant was owing to the respondent and subject to the provisions of section 49(2) and 19 of the *Employment Act*.
16. The respondent, in its submissions, indicates that the appellant managed to attach the respondent's funds through garnishee order without paying what he owed to the respondent. This is an issue that is not for our determination as the appeal is not against execution proceedings and the submission is not preceded by a formal prayer in the appellate process.



- a. The upshot of our finding is that the appeal is unmerited and ought to be dismissed. As for costs, the general principle is that costs follow the event and we see no reason to depart from the same.
- b. In the end, we make the following orders:
 - a. The appeal is unmerited and is hereby dismissed
 - b. The judgment and decree of the Employment and Labour Relations Court at Nakuru in Cause No. 49 of 2017 issued on 14th November 2019 be and is hereby affirmed.
- c. The appellant to meet the respondent's costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

M. WARSAME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

