



**Njiru v Mwea Rice Millers Limited (Civil Appeal 136 of 2019)  
[2024] KECA 1863 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1863 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 136 OF 2019  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
DECEMBER 20, 2024**

**BETWEEN**

**JOHN MUTHIKE NJIRU ..... APPELLANT**

**AND**

**MWEA RICE MILLERS LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of (Nzioki Wa Makau, J.) in the Employment & Labour Relations Court at Nyeri dated 11th March, 2019 in ELRC No. 263 of 2017)*

**JUDGMENT**

**Background**

1. The issue to be determined in this appeal is whether John Muthike Njiru (the appellant) was unfairly and unlawfully terminated by Mwea Rice Millers Limited (the respondent), by virtue of the appellant's alleged absenteeism from work. The background facts underlying the dispute are common cause as pleaded in the Statement of Claim dated 18<sup>th</sup> July, 2017 filed by the appellant before the Employment and Labour Relations Court (ELRC).
2. The appellant was employed by the respondent in June 2012 as a cleaner. According to the appellant, he served the respondent with loyalty, diligence, and dedication until 1<sup>st</sup> September 2016 when his employment was terminated.
3. The alleged unlawfulness on the respondent's part was particularised to be; failing to explain to the appellant the reasons for dismissal/termination and the alleged violation of Sections 41 (1), 44 (4), 43, 45 (2) ( a), 45 (4) (b), 35 (1), (b) & (c), 36 and 27 of the Employment Act, underpaying the appellant contrary to Labour Institutions Act, Legal Notice No. 197 of 2013 and failing to give the appellant his 5 months' salary pay for wrongful/unlawful termination contrary to Section 15 (c) of the Labour Institutions Act.



4. The appellant further particularised the particulars of breach on the respondent's part as breach of Collective Bargaining Agreement (CBA) between the Union and the respondent, failing to: issue the appellant with a letter of appointment, payslip, pay him on public holidays as required by law and failing to adhere to working hours making him work overtime without pay.
5. The appellant therefore prayed for; a declaration that the termination/dismissal process carried out by the respondent against him was unlawful, remuneration as required by law, payment of the sum of Kshs.180,202/- as particularised under paragraph 7 of the claim, costs, interest and any other relief the court may deem fit to grant.
6. The respondent's defence is not part of the documents in the record of appeal. From the summary of it from the trial court's judgment, it was averred that the appellant deserted employment without reasonable cause. The respondent stated that the appellant was involved in Criminal Case No. 268 of 2016 at Wang'uru causing him to be absent from work. The respondent further stated that it settled all the appellant's dues at the County Labour Office at Kerugoya on 30<sup>th</sup> September, 2017 and thus, there was no legitimate claim against it before the ELRC.
7. The appellant testified in support of his claim. He testified that he was unwell on 26<sup>th</sup> August, 2016 and was rushed to the hospital. When he returned to his employment, he was informed that he had been dismissed. The appellant then went to the Labour Office to make a report but even after being summoned severally, the respondent did not turn up at the Labour Office. It was his testimony that through the firm of Maina Kagio & Co. Advocates he issued to the respondent a demand letter dated 30<sup>th</sup> November, 2016 claiming Kshs.261,004/-. He testified that the respondent paid him Kshs.80,802/- and that he was seeking the balance thereof.
8. On cross-examination, the appellant testified that he did not send anyone including his wife and children to let his employer know that he was sick. He stated that he was taken to the hospital by the respondent's Manager.  
He testified that he was in Wang'uru in 2016 and that the case concerned a land dispute.
9. In its defence, Lawrence Chogo (Lawrence) who worked with the respondent in the Marketing Department testified on behalf of the respondent. He stated that the appellant was well known to him. That the appellant left work on 9<sup>th</sup> May, 2016. That he and others tried locating him to no avail and they later found out that he was arrested at Wang'uru. He stated that they found out about a month after the appellant's arrest that he was involved in a land dispute at his home.
10. Lawrence further testified that he went to the Labour Office in September 2017 but prior to that, the respondent received a demand letter seeking payment of Kshs.261,004/-. That there was a second letter dated 23<sup>rd</sup> December, 2016 which provided that the sum to be paid was Kshs.80,000/-. The respondent stated that it paid the appellant the said amount through a cheque. Lawrence further testified that it was due to the appellant's criminal charge that he deserted work but this had not been disclosed. On cross-examination, Lawrence testified that the Labour Office computed the sum paid to the appellant and that the appellant accepted the payment. On re-examination, Lawrence stated that the overtime, and other claims including weekly rest days were considered and computed in the pay.
11. The ELRC (Nzioka wa Makau, J.) rendered himself on 11<sup>th</sup> March 2019. In dismissing the appellant's claim, the ELRC held that the appellant failed to establish that he was dismissed unfairly. The absence of the appellant from his workplace, was unexplained. The ELRC posited that the appellant had been arrested and incarcerated for a matter which was unrelated to his employment.



12. The ELRC held that the appellant lied that he was hospitalised at Embu Hospital. The ELRC opined that whether he was away from work on account of illness or incarceration, the bottom line is that the appellant absented himself from work. Upon making those findings, the ELRC dismissed the appellant's claim with no orders as to costs.
13. Aggrieved by the said decision, the appellant invoked this Court's jurisdiction by filing a notice of appeal dated 18<sup>th</sup> March, 2019. The appellant seeks that we allow this appeal, that the orders and judgment of the ELRC be set aside, that the balance of Kshs.180,202/- be paid to him inclusive of interest from the date of judgment, costs of the appeal and that of the ELRC and that this Court orders a retrial or any other order that it may deem fit.
14. In asking us to consider the above prayers, the appellant preferred 10 grounds of appeal which we hereby summarise them as follows: -
  - a. The learned Judge erred by failing to peruse the previous records available in Wang'uru Court and any other available supporting documents before delivering his judgement;
  - b. That learned Judge erred by failing to consider that the Union and the Management agreed on the payments but the Management failed to pay the balance;
  - c. The learned Judge erred by failing to consider that the appellant was sick and he did not absent himself without permission and failing to consider the medical report;
  - d. The learned Judge erred in law and in fact by failing to consider the respondent were only entitled to pay only what had been agreed upon as the appellant's payment which was not fulfilled.
  - e. That the learned Judge considered extraneous matters thereby arriving a wrong conclusion.

### **Submissions**

15. We heard the parties virtually. The appellant appeared in person while there was no representation for the respondent. The appellant was acting in person and had filed written submissions, which he opted to rely on. The respondent did not file any written submissions.
16. The appellant submitted inter alia that the respondent did not produce any evidence to show that the appellant had a criminal case and was incarcerated resulting in his failure to report to work. The appellant asserted that the termination was unlawful, as he was never issued with a notice to show cause to explain his absence from duty. That the respondent's manager was aware that the appellant was unwell, as he had taken him to the hospital. The appellant further submitted that he was able to produce a letter showing that he was sick and had undergone a minor surgery. The appellant further asserted that he produced letters from the Labour Office clearly stipulating that the total amount payable to the appellant was Kshs.216,00/- and not Kshs.80,802/- which the respondent paid.
17. The appellant urged this Court to find that the ELRC erred in its judgment and thereby set it aside and allow the appeal with costs. Determination
18. We have considered the record of appeal, the appellant's written submissions, the authorities cited and the law. This being the first appellate court, this appeal is by way of retrial in line with Rule 31(1) of this Court's Rules, 2022 which provides that we have the powers to re - appraise the evidence and draw inferences of fact. A duty which was further expounded in the case of *Selle vs Association of Motorboat Co. Kenya & Others* [1968] EA 123.



19. Even as we do so, we must consider that:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding; and an appellate court is not bound to accept a trial judge’s finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.” See *Peters vs Sunday Post Limited* (1958) EA 424.

20. As we had stated in the opening paragraph of this judgment, the main issue for determination is whether the appellant’s employment was unlawfully terminated; or whether his alleged desertion of duty led to his termination as found by the ELRC.

21. The *Employment Act* places a huge legal obligation on the employer prior to dismissal of an employee. For any claim anchored on unlawful dismissal from employment, the burden of proving that unfairness or wrongful dismissal from employment has occurred, rests with the employee while the burden of justifying the grounds of dismissal lies with employer. The employer is under a duty to prove the reasons for termination/dismissal (Section 43); to prove that the reasons are valid and fair (Section 45) and prove that the grounds are justified (Section 47(5)). Further to the foregoing, the employer is placed under a mandatory duty to follow an elaborate process under Section 41 requiring a notification and hearing before termination.

22. We have carefully examined the record before us. The appellant conceded that at one point he was absent from work. The appellant submitted before this Court that he was sick having undergone a minor surgery at the Embu Hospital. Indeed, there is a medical report from the Embu Level 5 Hospital dated 26<sup>th</sup> August, 2016. In the medical report, it is stated that the appellant was treated at the facility on 31<sup>st</sup> May 2016 where he underwent a minor surgery. On behalf of the respondent, Lawrence testified that the last time the appellant was in the office was on 9<sup>th</sup> May 2016 and that he never returned to work. The respondent found out a month later that the appellant was involved in a land dispute at Wang’uru.

23. On these allegations, the appellant confirmed in cross-examination, that he was at Wang’uru Law Court for a case concerning a land dispute. Even in this appeal, the appellant raised the ground that the ELRC erred by not calling for and considering the records from the Wang’uru Law Courts. We pause to ask rhetorically how the ELRC was supposed to have called for the records from Wang’uru Law Courts when the appellant deliberately hid this fact from the court?

24. Much as the appellant put up a pontificated argument that he was at the hospital, he did not call the doctor who wrote his medical report to come and authenticate its contents. It is not enough that a medical report was written. The extent of the surgery, warranted for more medical documents to be produced. Furthermore, it is highly unlikely that an employee can be taken ill and an employer will not be concerned about his/her employee’s wellbeing. One wonders why the appellant’s wife and children did not alert the respondent of their kin’s illness. We do not think that the appellant is being forthright with his claim that he was hospitalized.

25. The appellant certainly did make his bed and must lie on it. The deliberate desertion dented the appellant’s reputation and image in his employer’s eyes. On a balance of probabilities, we find and concur with the findings of the ELRC that the appellant failed to lead evidence to demonstrate that he



was unfairly terminated. On a balance of probabilities, the respondent discharged its burden of proof under Section 47 (5) of the *Employment Act* and the claim for unfair termination fails.

26. As to whether the appellant is entitled to payment, it is not in contention that the respondent settled all the former dues to the appellant by issuing a cheque of Kshs.80,802/- which was duly acknowledged and accepted by the appellant.
27. In the premise, the fate of this appeal lies in its dismissal. The appeal is accordingly dismissed with no orders as to costs since the respondent did not participate in this appeal.

**DATED AND DELIVERED AT NYERI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2024.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

