



REPUBLIC OF KENYA



KENYA LAW
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**Kimanzi v Mwangangi (Civil Appeal 187 of 2017)
[2023] KECA 86 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 86 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 187 OF 2017
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

ALEX KIMANZI APPELLANT

AND

EVANS MUMO MWANGANGI RESPONDENT

(Being an appeal against the ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (Linnet Ndolo, J.) delivered on 14th November 2016 in Employment and Labour Relations Court Case No. 18 of 2016)

JUDGMENT

1. This appeal arises from a ruling dated November 14, 2016 of learned judge, Linnet Ndolo of the Employment and Labour Relations Court. The learned judge cited the appellant for contempt and consequently ordered him to pay a fine of Kshs 1,000,000/= (Kenya shillings one million) or in default be committed to civil jail for a period of 30 days. The trial court further ordered that the penalty was to take effect immediately.
2. By way of background, the appellant at the material time, was the acting county secretary of Kitui county public service board. The respondent, Dr. Evans Mumo Mwangangi was at the material time, the deputy director county ministry of health and sanitation. On May 26, 2015, the respondent was interdicted and sent on compulsory leave for alleged gross misconduct. Aggrieved by the decision to interdict him, the respondent filed Cause No 18 of 2016, in the Employment and Labour Relations Court at Nairobi. Upon hearing the parties, the learned judge issued orders on May 31, 2016 as follows:
 - “16. Moreover, the Claimant was not only kept away from work but his emoluments were reduced. Unlike suspension which is a neutral action taken to allow unfettered investigation, interdiction is a disciplinary action that must be taken in the context of due process as set out in Section 41 of the



Employment Act, 2007. This is more so in situations where an interdiction is so prolonged that it acquires the character of a final disciplinary action. I have examined the steps taken towards the Claimant's interdiction and find that they fall short of the procedural fairness requirements set out in law.

For the foregoing reasons I make the following orders:

- a. The Claimant's interdiction is hereby quashed;
 - b. The Claimant is reinstated to his position without any loss of pay or benefits;
 - c. The Respondents will pay the costs of this application.”
3. On July 22, 2016, the respondent applied to cite the appellant and two others for contempt and for an appropriate sentence to be imposed by the Court. The orders sought were as follows:
- “2. That the Court issues summons to the following persons to show cause why they should not be punished by this Court for contempt of Court:
 - a. Alex kimanzi
 - b. Rose kavata Masya; and
 - c. Fredrick Muli
 3. That, Mr. Alex Kimanzi, the acting county secretary, Kitui county, Ms. Rose Kavata Masya, the Kitui county public service board chairperson and Fredrick Muli, the acting chief officer & deputy director of health services, the above named contemnors be cited for contempt of this Honourable Court for willfully disobeying the orders issued by Lady Justice Ndolo on May 31, 2016.
 4. That Mr. Alex Kimanzi, the acting county secretary, Kitui county, Ms. Rose Kavata Masya, the Kitui county public service board chairperson and Fredrick Muli, the acting chief officer & deputy director of health & sanitation, the above named contemnors herein be detained in prison for a period of six(6) months or for such period as this Honourable Court shall deem necessary for being in disobedience of the orders of this Honourable Court issued by Lady Justice Ndolo on May 31, 2016.
 5. That in addition to or in lieu of such committal, the Honourable Court be pleased to order the sequestration of the properties of Mr. Alex Kimanzi, Ms. Rose Kavata Masya and Fredrick Muli, the contemnors herein respectively for disobedience and/or non- observance of the orders of this Honourable Court given on May 31, 2016.
 6. That Mr. Alex Kimanzi, Ms. Rose Kavata Masya and Fredrick Muli, the contemnors herein bear the costs of this application.”
4. In support for the application for contempt, the respondent swore an affidavit dated July 22, 2016 stating as follows: that he had not received the letter for reinstatement; that he had not received his outstanding salary and allowances; that he had not been reinstated to the former office of acting chief officer and deputy director; that the appellant had issued him with a letter dated July 20, 2016 instructing him to proceed on a 45 days annual leave without any reasonable grounds; and that being sent on annual leave amounted to forced compulsory leave.



5. In reply to the application for contempt, the appellant swore an affidavit on August 15, 2016 stating as follows: that on July 15, 2016 the respondent was issued with a letter terminating his interdiction and which letter confirmed his reinstatement as an employee of the county; that the respondent reported back to work on July 20, 2016 and was advised that his salary and allowances were being processed for payment.
6. He further deposed, that the respondent had accumulated 45 leave days which he was requested to take; that the respondent was reinstated to his former position of deputy director health services; and therefore there was no violation or disobedience of the court orders as alleged.
7. Upon hearing the parties, the learned judge held as follows:

“ 31. Extensive arguments were made on the Claimant’s leave balance position but I think the important question is not whether the Claimant had leave days to his credit but rather whether the action of sending him on leave in the wake of his reinstatement was a violation of the orders granted by this Court on May 31, 2016.

32. Annual leave is an entitlement for every employee as provided under international and municipal law. Specifically, Article 3 of the Holidays with Pay (Revised) Convention, 1970 (No 132) secures a minimum of three working weeks for every year as annual leave. In similar vein, Section 28(1) of the [Employment Act, 2007](#) provides for a minimum of 21 days’ leave with full pay after every twelve consecutive months of service.

36. The Contemnors argue that the order of reinstatement without loss of pay and benefits included accrued leave hence the decision to send the Claimant on leave. This argument begs the question as to why the Claimant was not consulted in the scheduling of his leave. In my view, letter dated July 20, 2016 is a terse instruction to the Claimant to proceed on leave. I do not think this is the way ordinary annual leave is taken.

37. This Court has therefore arrived at the conclusion that by issuing the letter dated July 20, 2016, the 1st Contemnor, Alex Kimanzi violated the orders granted on May 31, 2016. To this extent I am persuaded by the holding by Rika J in Catherine Mwihaki Ngambi v Maths Trading Company Limited [2014] EKLR that reinstatement does not mean mere payroll reinstatement.

38. The Claimant in this case is a Medical Doctor holding a senior position in the County Government of Kitui and it cannot be that by merely restoring him to the payroll and then sending him on leave, he has been reinstated. Employment is more than money and for professionals such as the Claimant, the opportunity to practice in the workplace plays a crucial role in their career progression.

39. More importantly, given the history of this case which is littered with multiple allegations of contempt, and the patience exercised by the Court, there ought to have been more caution on the part of the Contemnors. Specifically, for Alex Kimanzi, who was right at the centre of the controversies in this case, a letter sending the Claimant on leave soon after reinstatement ought to have been anathema.



43. I have carefully considered the letter dated July 20, 2016 issued to the Claimant by Alex Kimanzi and have arrived at the conclusion that the said Alex Kimanzi knowingly and willfully violated the orders of the Court granted on May 31, 2016 and hereby cite the said Alex Kimanzi for contempt of court.
 44. Consequently, I direct that Alex Kimanzi shall pay a fine of Kshs 1,000,000 (read One Million Kenya Shillings) and in default the said Alex Kimanzi shall be committed to civil jail for a period of thirty (30) days. This penalty takes effect immediately.
 45. I further direct that the contempt herein be purged forthwith.”
8. Dissatisfied with ruling and orders of the Employment and Labour Relations Court, the appellant moved this Court on 9 grounds as set out in the memorandum of appeal dated June 16, 2017 and which we take the liberty to summarize and reframe as follows: that the learned judge erred in law by entertaining the letter dated July 20, 2016 as evidence for contempt, yet it was issued by a person who was not party to the proceedings; that the appellant had violated the court order dated May 31, 2016.
 9. Further grounds were that the learned judge erred by holding that there was a clear disobedience of the court order; that the act of sending the respondent on annual leave amounted to contempt; that imposing a fine and a sentence in default was unjustified in the circumstances of this case; and ordering purging of the contempt was wrong as the court orders had been complied with.
 10. The appellant submits that sending the respondent on leave was not an act of contempt because the order of May 31, 2016 only required the contemnors, the appellant included, to quash the interdiction directive and to reinstate the respondent to his position without any loss of pay or benefits; that furthermore, an employee serving interdiction would not be available to proceed on leave; that the suit as commenced against the office of the county secretary could not be a suit as against the county government of Kitui; that it is doubtful whether an order against an office which is not established in law as corporate entity could be enforced against the office; that the county government of Kitui was not a party to the proceedings in the superior court and hence the appellant should not have been condemned for actions he undertook on behalf of that government; that the county government of Kitui had the discretion to agree with him on how to utilize the 45 leave days and it was not mandatory to consult the respondent.
 11. The respondent submits that the compulsory annual leave was calculated to defeat the orders reinstating the respondent to his position and was in express violation of the law; that all the elements were satisfied to warrant a finding by the trial court that the conduct of the appellant was in contempt of its’ orders and that contempt proceedings could not only be instituted against holders of a state office but also against previous state officers who committed contempt while in office; and that failure by the court to allow the appellant to mitigate was not fatal and does not invalidate the finding of contempt.
 12. The appellant in the grounds and written submissions prays that this Court sets aside the orders issued on November 14, 2016 as there had been compliance with the court orders that had been issued, and therefore the conviction for the alleged contempt was not justified.
 13. This being a first appeal, it is our duty in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This approach was adopted in *Arthi Highway Developers Limited v West*



End Butchery Limited & 6 others [2015] eKLR where the court cited the case of *Selle v Associated Motor Boat Co.* [1968] EA 123:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

14. Having considered the record of appeal, the written and oral submissions of the learned counsels for the appellant and the respondent, we are of the considered opinion that this appeal will stand or fall on the following issues:
 - i. Did the appellant violate the court orders issued on May 31, 2016?
 - ii. What is the standard of proof that has to be discharged by a party, who alleges that there has been a violation or disobedience of court orders?
 - iii. Did the trial court err in law by failing to give the appellant a chance to mitigate before sentencing him for contempt?
15. Before we answer the above questions, it is important to state that obedience of court orders, is the bedrock of the rule of law. An organized society lives through an organized system of governance and therefore the obedience of court orders by all parties is not an option but a mandatory requirement. Any party who deliberately disobeys a court order, should not cry or scream when being crashed by the jaws of justice.
16. At the heart of the answer, to the grounds that we have identified for analysis is; what orders were made by the ELRC Court; were the orders served; and was there disobedience of those court orders? To answer these questions, it is necessary for us to re-analyze the proceedings leading to the application for contempt and the orders that were made. A summary of the facts is as follows:
 - i. On May 31, 2016, the ELRC Court gave orders to the effect that; respondent’s interdiction was quashed; reinstated him to his position without any loss of pay or benefits and costs for the application.
 - ii. In the affidavit in support of the application for contempt, the respondent depones as follows: he had not received the letter of reinstatement; the outstanding salary had not been paid; he went back to work through a letter sent by the applicant’s advocate; that he was advised to report to one Fredrick Muli who had taken over his position in his absence; the appellant wrote a letter instructing him to go on a 45 days leave without reasonable grounds; being advised to go on leave amounted to a forced compulsory leave and; there was blatant disobedience of the Court order.
 - iii. The appellant responded to the application for contempt vide a replying affidavit sworn on August 15, 2016, stating that: by letter dated July 15, 2016, the interdiction of the respondent was cancelled and respondent allowed to



resume duty; the letter was hand delivered through G4S courier services to the respondent; a meeting was held with the respondent's advocate on the issue of reinstatement and on July 19, 2016, the letter was produced in court and the contemnors were discharged by the court; the respondent reported to duty on July 20, 2016 and advised that his payments were being worked on; the respondent had accumulated 45 leave days and the request for him to proceed on the 45 days annual leave was done in accordance with the county public service human resource manual and; the applicant had not committed any contempt.

17. We note that the trial court was faced with those two conflicting sets of facts. Upon hearing the parties, the court proceeded to cite the applicant for contempt and fined him a sum of Kshs 1,000,000/= (Kenya shillings one million) or civil jail of 30 days and further ordered that the penalty was to take place immediately.
18. A perusal of the proceedings reveals that the learned judge in her ruling admitted, that there was compliance of the orders issued on July 19, 2016. At the risk of repetition, the learned judge held as follows:

“I have heard counsels for the parties in this matter and take notice of letter dated July 15, 2016 reinstating the claimant to his position without loss of payment or benefits thus drawing (sic) the letters of interdiction and dismissal. I also take notice of the personal attendance of the 2nd – 4th contemnors with the explanation of the absence of the 1st contemnor. While recognizing these gestures by the contemnors, the Court must reiterate the importance of obeying Court orders for the sake of rule of law which is essential in any democratic society. The Court has heard the apology offered by the contemnors through counsel Mr. Obura. Further the Court has heard arguments on the import of the orders of reinstatement made by the claimant, most particular reference to the allowances that the claimant claims were denied to him prior to interdiction. Taking all this into account, I have made the following orders:

- a. The apology offered by the contemnors through their counsel is hereby accepted and the contemnors are discharged.
 - b. The matter of the allowances that did not form part of the claimant's emoluments prior to interdictions was not determined at the interlocutory stage and will therefore be determined at the main hearing.
 - c. The contemnors will pay the costs of the application for contempt of Court.”
19. We also note that, the respondent was issued with a letter of reinstatement dated July 15, 2016 which states as follows:

“Dr. Evans Mumo Mwangangi Dear Dr Mumo,

Ref: Elrc Cause No 18 Of 2015(sic)

Yourslef – v- Kitui Public Service Board And Another

We refer to the above matter and to the Orders made by the honourable court on the May 31, 2016 reinstating you to your position without loss of payment or benefits.



We write to confirm full compliance with the said Orders by withdrawing our letters of interdiction and dismissal. You may report to your work station with immediate effect.

We are also working out your payments as you know this takes time and you shall be notified in due course.

Yours faithfully,

Alex Kimanzi

Ag. County Secretary.”

20. Having been served with a letter of reinstatement, a fact that the learned judge appreciated in her ruling, the allegation that the appellant violated the court order issued on May 31, 2016 is left hanging in the air and has no factual or legal basis. In view of the foregoing, the allegation that the appellant violated the court order collapses in view of these clear and uncontroverted facts.
21. We note that what weighed heavily in the mind of the trial court, was the sending of the respondent on annual leave. We also note that in the ruling the learned judge states as follows:

“... Extensive arguments were made on the claimant’s leave balance position but I think the important question is not whether the claimant had leave days to his credit but rather whether the action of sending him on leave in the wake of his reinstatement was a violation of the orders granted by this Court on May 31, 2016.”

The Judge proceeded to hold as follows:

“... This Court has therefore arrived at the conclusion that by issuing the letter dated July 20, 2016, the 1st Contemnor, Alex Kimanzi violated the orders granted on May 31, 2016 Specifically, for Alex Kimanzi, who was right at the centre of the controversies in this case, a letter sending the Claimant on leave soon after reinstatement ought to have been anathema.”

22. We quote with approval, the following authorities that have been quoted by the appellant as follows:
- i. [*Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others*](#) [2015] eKLR.
 - ii. [*Duncan Manuel Murigi v Kenya Railways Corporation*](#) (2008) eKLR.
 - iii. [*Kasembeli Sanane v Martin Muli Alias Fredrick Sanane & 4 others*](#) [2013] eKLR.
23. As already stated, disobedience of a court order is a serious transgression that attracts punitive measures. However, before a person can be condemned for being in violation of a court order, there must be evidence to show deliberate disobedience of the code by that person and, being quasi-criminal, the standard of proof in contempt of court matters is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See [*Mutitika v Baharini Farm*](#) (1985) eKLR.
24. In the case at hand, a reading of the orders issued on May 31, 2016 never dealt with the issue of annual leave. Once the respondent was reinstated, he was governed by all the human resource manuals and policies that governed all the other employees. The respondent was not elevated to any special status but was bound by the regulations and policies that governed all the employees. The respondent could not, and had no right to use the court order issued on May 31, 2016 as a license for intimidation or as a license for self-entitlement.



25. It is our holding that, the act of sending the respondent on annual leave could not lay a foundation for an application for contempt of court, given the terms of the order of 13th may 2016 and the finding of the trial court that the respondent had been reinstated. If the respondent considered being sent on leave as a violation of his rights, that should have been a matter for a different claim. We have said enough on these issues and it is now obvious, that the cornerstone of the application for contempt has collapsed.
26. Having held that there was no breach of the court order dated May 31, 2016, it is not necessary to interrogate the other grounds raised by the appellant as the backbone for the application for contempt has collapsed.
27. However, it is important that we address one more issue; what is the procedure to be followed when a court finds that a party is guilty of contempt. This Court has pronounced itself in the following decisions as follows:
- i. *Joseph Wanambisi & 3 others v Trans-Nzoia Investment Company Limited* [2012] eKLR:
“On the punishment, I have already indicated my concern that the learned Judge spelt out the fine of Kshs 5,000/= in his ruling without first receiving the mitigating factors and thereafter meting out the sentence. This Court has in several judgments in criminal cases stated that even where sentence is by law stated to be mandatory, the trial court should not sentence an offender before receiving and considering mitigating factors. Contempt proceedings, though Civil as is here, are in nature akin to criminal proceedings and the principles guiding the courts as regards sentencing need to be adopted.”
 - ii. *Francis Karioko Muruatetu & another v The Republic of Kenya* [2017] eKLR:
“(47) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

(48) Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”
28. In this appeal, we note that the appellant was convicted and fined without being given a chance to mitigate. The learned judge ought to have given the appellant a chance to mitigate before conviction and sentence. Courts must deal firmly with disobedience of court orders. Conversely, it is important to respect the rights of the parties before imposing a custodial sentence or fine by giving such a party a chance to mitigate.
29. We should also add that it was remiss for the trial court to keep referring to the appellant as “contemnor”, even before it had found him guilty contempt of court. Before finding the appellant guilty of contempt, he was merely an “alleged contemnor”. This sad choice of nomenclature gave an unfortunate impression that from the beginning, the trial court had formed the view that the appellant was indeed guilty of contempt of court.



30. In conclusion, we find that this appeal has merit and it succeeds. Therefore, we order and direct that:
- i. The appellant's appeal be and is hereby allowed;
 - ii. The ruling and the order of the Employment and Labour Relations Court at Nairobi (Linnet Ndolo, J.) and November 14, 2016 be and is hereby set aside and;
 - iii. If the appellant had already paid the fine, the money should be refunded.
 - (iv) The costs of this appeal and in the trial Court be borne by the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

