



**Mango v Spinknit Ltd (Civil Appeal 219 of 2018)
[2023] KECA 1108 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1108 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 219 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
SEPTEMBER 22, 2023**

BETWEEN

PETER JUMA MANGO APPELLANT

AND

SPINKNIT LTD RESPONDENT

(An appeal from the Judgment and decree of the employment and Labor Relations Court at Nakuru (M. Mbaru, J.) dated November 8th, 2018) in ELRC Cause No. 51 of 2015)

JUDGMENT

1. The Appellant, Peter Juma Mango, instituted a suit, Nakuru ELRC Cause No. 51 of 2015, in which he sued his former employer, Spin Knit Limited, seeking inter alia, a declaration that his termination was unfair, wrongful, unlawful, and illegal. He also sought payment under several different heads in view of the wrongful termination.
2. The Appellant's claim was that he was employed by the Respondent on May 1, 1999, as a machine attendant with an agreed monthly remuneration of Kshs 11,710/-, where he worked until October 27, 2014, when he was unfairly, wrongfully, and unlawfully terminated. During the period of his employment, his salary had gone up by 7% and at the time of his termination, he was earning Kshs 12,530/-.
3. The appellant claimed that he was victimized in the workplace on allegations of gross misconduct, violating his employment rights. He itemized his claim as follows:
 - a. 4 months in lieu of notice.....Kshs 50,120.00
 - b. Days worked and not paid Kshs10,859.00
 - c. Leave earned and not taken.....Kshs 9,189.00



- d. Leave traveling allowance.....Kshs 2,623.00
 - e. Severance pay.....Kshs 106,505.00
 - f. 12 months compensationKshs 105.360.00, and
 - g. Certificate of service
4. At the trial, the Appellant testified that the Respondent accused him of soliciting signatures at the workplace and summoned him to a disciplinary meeting vide a letter dated August 8th, 2014. He was later served with another letter postponing the meeting, but was suspended from work effective from 15th September 2014, vide a letter dated 13th September 2014. The appellant asserted that he attended the scheduled hearing on 7th October 2014, where he denied all the allegations leveled against him.
 5. The appellant claimed that he was subsequently invited for another meeting on 10th October 2014, but on that day his efforts to attend the meeting were frustrated at the behest of the Respondent. Thereafter, he was dismissed from work vide a letter dated 27th October 2014, without further due process. Additionally, the Appellant testified that the Union wrote a letter to the Respondent on 23rd January 2015, advocating for the Appellant’s reinstatement at work, which the Respondent ignored.
 6. The Respondent in turn objected to the Appellant’s claims, asserting that the Appellant engaged in conduct other than what he was employed to do. Specifically, that the Appellant was soliciting signatures from fellow employees and was subsequently served with a notice to show cause, which he responded to. The Appellant was invited to a disciplinary meeting, before which he appeared on 7th October 2014, but failed to appear for the follow-up meeting on 10th October 2014.
 7. The Respondent denied frustrating the Appellant’s attendance at the second meeting and alleged that a follow-up letter dated 16th October 2014 was sent to the Appellant, to show cause for his absenteeism and why he had absconded his duties. That the Appellant failed to respond to the letter or resume work, leading to his summary dismissal on 27th October 2014. In support of its case, the Respondent produced several correspondences addressed to the Appellant.
 8. The Respondent stated that they met the Appellant’s Union on 16th December 2014, but the process was also frustrated, when the Union failed to re-assemble for negotiations.
 9. On November 8, 2018, the ELRC (Mbaru J.) delivered a judgment stating that the Appellant’s dismissal was justified. The court held inter alia that the Appellant’s conduct in failing to attend work and the scheduled hearing, were grounds permitting the summary dismissal and therefore that it was justified. Regarding the remedies sought by the Appellant, the trial court held that the Appellant was not entitled to payment in lieu of notice, 12 months’ compensation, or severance pay, due to the summary dismissal. The court however, allowed the Appellant the prayers in relation to pay for the days worked and leave earned, as well as a certificate of service in accordance with Section 51 of the Employment Act, all available on condition that the Appellant cleared with the Respondent.
 10. Aggrieved by the judgement, the Appellant lodged a Memorandum of Appeal dated November 15, 2018, raising eleven (11) grounds of appeal. The Appellant alleged that the learned Judge erred in law and in fact on the following fronts:
 - “i. In upholding the summons for dismissal of the Appellant by the Respondent in terms of the contents of the letter dated 27th October 2014.



- ii. In failing to note that the reasons for the dismissal espoused in the letter dated 27th October 2014, were not based on the outcome of the disciplinary process.
- iii. In failing to note that the reasons for dismissal of the Appellant by the respondent were new allegations that needed hearing and consequent finding and as such, the said dismissal was tantamount to condemning the Appellant unheard and was a miscarriage of justice.
- iv. In failing to note that there was no definite finding or ruling of the disciplinary process that was indicated by the Respondent in a bid to prove the allegations leveled against the claimant.
- v. In placing a heavy burden on the Appellant in terms of him having genuine access to the disciplinary hearing process when the respondent through the guard did not allow the appellant to gain entry.
- vi. In holding the allegations that the Appellant had not attended the hearing willfully when it was clear from the evidence that the respondent had on three occasions frustrated the Appellant's attendance at the hearing.
- vii. In failing to note that there was no evidence of intentional sabotage of the disciplinary process and also the possibility of any sabotage of the disciplinary process by the Appellant.
- viii. In failing to note that the Respondent had breached the pre- disciplinary hearing process by violating various clauses in the collective bargain agreement as entered between the Appellant and the Respondent.
- ix. In failing to note that by the violation of the disciplinary hearing process, the consequent summary dismissal was unlawful, unjustified, and void ab initio.
- x. In failing to note that the Respondent had not prosecuted its case hence the Appellant's case was largely unchallenged by way of non-cross-examination and/or statement of oath to court on behalf of the Respondent.
- xi. In failing to properly analyze the pleadings and evidence tendered and the submissions filed on behalf of the Appellant hence arriving at a wrong decision."

The Appellant, therefore, seeks orders that the appeal be allowed and the judgment of the ELRC delivered on 8th November 2018, and the attendant decree be set aside, and costs be awarded to the Appellant.

- 11. At the virtual hearing of the appeal on 28th February 2023, learned counsel Mr. Maragia, appeared for the Appellant and highlighted his written submissions dated 24th August 2020. The gist of Mr. Maragia's submissions was that the trial court improperly castigated the Appellant without considering the Respondent's failure to appear before it to testify about denying the Appellant entrance into its facility. Counsel further submitted that the court erroneously disregarded the recommendation of the Appellant's Union for his reinstatement and instead blamed the Appellant for not liaising with the Union.



12. Additionally, counsel contended that the trial court was biased because it unjustifiably placed undue weight upon the Appellant's evidence, disregarding the Respondent's failure to address key issues in its claim. He urged that the appeal be allowed in its entirety.
13. On behalf of the Respondent, Masese Mabeya Advocates urged through submissions dated December 8, 2022, that the trial Judge rightfully considered the facts and evidence presented by the parties in reaching her decision. He asserted that the Appellant was represented by a Trade Union official during the disciplinary proceedings and therefore knew the importance of attendance, yet he chose not to attend.
14. Citing Sections 107 and 108 of the *Evidence Act*, Mr. Mabeya submitted that the Respondent's failure to attend court did not absolve the Appellant from discharging his obligation to prove his case. He contended that the Appellant did not discharge this burden causing the trial court to find for the Respondent. He therefore urged this court to dismiss the appeal with costs.
15. We have considered the record of appeal, the rival submissions by the parties and the law. This being a first appeal, the duty of this Court, as set out in the decision of *Selle & another vs Associated Motor Boats Co. Ltd & others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusions of facts and the law. We may only depart from the findings by the trial Court if they were not based on the evidence on record, or where the said Court is shown to have acted on wrong principles of law as was held in *Jabane vs Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) EA 93.
16. The above principles were reiterated in the case of *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
17. While the Appellant raised 11 grounds of appeal in his memorandum of appeal, we have considered them carefully and in our view, they can all be compressed into the following two issues for determination;
 - i. whether the Appellant's termination was justifiable and
 - ii. whether the trial judge erred in awarding the appellant only the payment for the days worked, leave earned, and a certificate of service upon clearance with the Respondent.
18. We begin by addressing the question whether the Appellant's termination was justified. It is not disputed that there was an employment relationship between the appellant and the respondent in the period running from 1st May 1999, to 27th October 2014. The final correspondence from the Respondent to the Appellant indicates that the Appellant was summarily dismissed from work.



19. Section 44 of the *Employment Act* (the Act), in relation to summary dismissal, provides as follows:
1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
 2. Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
 3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.
 4. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—
 - a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work:
 - b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly:
 - c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly:
 - d. an employee uses insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer:
 - e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer:
 - f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty: or
 - g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
20. Concerning the appellant's allegation that he was denied entry on the day of the meeting, the superior court held as follows:
- “The events taking place after 7th October 2014 come into perspective. The claimant attended before the disciplinary committee following serious allegations with regard to him collecting signatures from employees and causing tension at the workplace. He was directed to return on 10th October 2014. His evidence that he was stopped at the gate by the guards on the



grounds that Mr. Wabwire's case was being heard and thus he decided to go home is absurd in the least.

The claimant as all along aware that he was still in the employment of the respondent as had been suspended to allow for his case to be addressed. He arrived at the gate and opted to rely on the directions given to him by a guard. He decided to go away and wait for communication. Such communication arrived and it was his summary dismissal for failing to attend the disciplinary hearing as directed."

21. We have looked at the dismissal letter addressed to the appellant by the respondent, which letter reads:

"We had a hearing on 7.10.2014 where you we closed (Sic) the meeting with a note that you come back to work by the management in two days i.e. 10.10.2014, for a continuation hearing. Since then we have not heard back from you. You were. Further issued with a letter which to date you refused to answer. This is considered by management as intentional sabotage to the disciplinary process by you. The management is now considering separating with you on the counts of 1. no show and 2. The disciplinary process sabotage.

You are hereby summarily dismissed forthwith for gross misconduct. You will be required to clear with the company immediately."

22. From the letter set out above, the main reason for the Respondent summarily terminating the Appellant's contract was because he did not attend the disciplinary hearing scheduled for 10th October 2014 and was to that end considered to have sabotaged the disciplinary process. The Appellant gave evidence as to the reason why he was unable to attend the hearing and alleged that he was stopped by the guard from entering the premises. It is common sense that if the appellant stopped by a guard from accessing a premises, he could not force his way into the restricted premises. The appellant had so far, discharged the burden of proof placed on him under Section 47(5) of the *Employment Act* to prove that his termination was unfair and wrongful.

23. The Respondent denied this allegation and stated that the Appellant chose not to show up for the meeting. The burden was thus, upon the respondent to put forth evidence to justify the grounds they alleged formed the basis for the termination. Section 112 of the *Evidence Act* provides that:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

It is trite that he who asserts must prove. This is entrenched in sections 107 and 108 of the *Evidence Act*, thus:

" 107

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. 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."



In our view, the guard being an employee of the respondent, it was upon the Respondent to produce him in court to provide evidence to rebut the allegation that the Appellant was restricted from entering the premises, on the material date for his disciplinary hearing.

24. We are further guided by the majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR. The Court had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law....”

25. Also, this Court in *Mbutia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:

“(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.

(23) The Defendant was the one who supplied the documents to the Plaintiff representing payment to KRA. The Defendant therefore bore the evidential burden of proof to prove that that payment was indeed made to KRA. The Defendant failed to shift that burden of proof.”

26. There being no evidence in rebuttal from the Respondent, there is no challenge to the Appellant’s assertion that his failure to attend the hearing was due to the Respondent’s conduct through their security guard who barred his entry into the facility. Accordingly, we find that although there were charges laid against the appellant which might have ended up in his dismissal, the manner in which his services were terminated was unprocedural for the reason that he was denied a chance to be fully heard.



27. The next issue is to determine the damages owed to the Appellant. First, the Appellant sought four months' payment in lieu of notice. The Appellant's contract of employment is silent as to termination, the grounds for termination or the notice period. However, section 35 1(c) of the Act provides that:

“A contract of service not being a contract to perform specific work, without references to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of the notice in writing.”

In a letter dated 13th September 2014 termed as “Show Cause No.2”, the Respondent gave notice to the Appellant of the intention to terminate his employment. We find that the notice was adequate in the circumstances and accordingly, the Appellant is not entitled to four months pay in lieu of notice.

28. Secondly, the Appellant sought compensation for the days worked but not paid in the sum of Kshs 10,859/-. All work done under a contract of service should be compensated, therefore the Appellant is entitled to remuneration for the days worked and not paid. This also applies to remuneration earned for the days worked instead of leave. The court allowed the Appellant these prayers, as well as a certificate of service in accordance with Section 51 of the Employment Act, and the respondents did not challenge the awards in this appeal, hence we take the awards in relation to the days worked and not paid, the leave earned and the order for certificate of service to be conclusive.

29. Regarding the severance pay, the Employment Act contemplates payment of severance in the following situations: wrongful dismissal and unfair termination under Section 49 of the Act and termination on account of redundancy under Section 40 of the Act. As noted above, the Appellant was unfairly dismissed. He is therefore entitled to severance pay under the provisions of the law, and as provided by section 49 (1) (c) of the Act:

“..an 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.”

30. Having in mind the guidelines set out in section 49 (4) which guide the court in determining what remedy is appropriate in each case, we carefully considered the circumstances of the termination, the extent to which the appellant contributed to his dismissal and the practicability of reinstatement or re-engagement. We are of the view that six month's compensation would suffice.

31. On the question of the costs of appeal, we note that the respondent did not participate in this appeal although duly served. The appeal having succeeded the appellant is therefore, awarded the costs of the appeal against the respondent.

32. Ultimately, this appeal is allowed and the appellant is awarded as follows:

- I. Days worked and not paid.....Kshs 10,859.00
- II. Leave earned and not taken.....Kshs 9,189.00
- III. 6 months compensationKshs 75,180.00
- IV. Certificate of service.
- V. Costs of this suit.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023



F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

