



**Sitienei v Nandi Tea Estates Company Limited (Civil Appeal  
101 of 2017) [2021] KECA 103 (KLR) (22 October 2021) (Judgment)**

Neutral citation: [2021] KECA 103 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 101 OF 2017  
AK MURGOR, J MOHAMMED & HA OMONDI, JJA  
OCTOBER 22, 2021**

**BETWEEN**

**PHILIP KIBITOK SITIENEI ..... APPELLANT**

**AND**

**NANDI TEA ESTATES COMPANY LIMITED ..... RESPONDENT**

*(An Appeal against the Judgment and Decree of the Employment  
and Labour Relations Court of Kenya at Kericho (D.K. Njagi  
Marete, J) dated 8th December 2016 in ELR Cause No. 144 of 2016)*

**JUDGMENT**

1. Philip Kibitok Sitienei (the appellant) has preferred this appeal against the Judgment and Decree of the Employment and Labour Relations Court (ELRC) (Marete J.) dismissing his claim for unlawful and unfair termination on account of unauthorized absenteeism, and compensation for injuries sustained in the course of employment.
2. The appellant filed suit in the High Court at Kericho for a claim of compensation for unlawful and unfair termination as well as compensation for injuries sustained in the course of employment vide a statement of claim dated 27<sup>th</sup> September, 2016.

It was the appellant's case that he was engaged by Nandi Tea Estates Company Limited (the respondent) as a tea picker in January, 2016, where he served until his termination on 1<sup>st</sup> June, 2016, by way of dismissal. It was his contention that his termination was unfair and unlawful for the following reasons;

- (i) No opportunity to be heard was accorded.
- (ii) No notice of misconduct was given prior to dismissal.
- (iii) No misconduct existed.



- (iv) No opportunity to attend a hearing in the presence of a fellow employee, nor his union officials was accorded.
  - (v) No warning over misconduct was given.
  - (vi) The union was not informed of the intended termination.
  - (vii) The labor office was not notified of the termination.
  - (viii) The termination was motivated by reason of injuries sustained in the course of employment which is not a fair reason.
3. He sought a declaration that his termination was unfair and unlawful and prayed for 1 month's salary in lieu of notice and 12 months' salary as compensation for unfair and unlawful dismissal.
  4. The appellant claimed damages because of injuries he sustained after a dog bit him while in the course of his duties and that the respondent owed him a duty of care to;
    - (i) Provide a safe work environment.
    - (ii) Provide protective gear to the Claimant.
    - (iii) Clear the surrounding environment in order to avoid hedges that could conceal dangerous animals from attacking the Claimant or any other employee.
  5. The appellant maintained that as result of this breach of duty of care he was bitten by a wild dog on 18<sup>th</sup> March, 2016, while on duty and sustained two bite wounds on the lateral aspect of the right leg and as a result is unable to effectively use his right lower limbs.
  6. He also claimed to have suffered loss and damage because of the injuries and that he would require further medical treatment of the septic/necrotic wound which will involve surgical debridement, soft tissue and skin grafting, as well as completing the rabies vaccine, all these were calculated at Kshs.150,000/= and special damages of Kshs.6,000/= for the medical report.
  7. The respondent's defence was that the appellant was not dismissed, sacked and/or terminated on 31<sup>st</sup> July, 2016, but he deserted duty and left employment on his own volition after being bitten by a wild dog and failed to report to work on 1<sup>st</sup> August, 2016. That this desertion was in violation of the Collective Bargain Agreement between the union and the company.
  8. The respondent contested the claim for salary in lieu, compensation, or the claim for future medical expenses and special damages.
  9. At the hearing, the appellant reiterated the contents in his statement of claim that the dog belonged to the respondent, but we note in his pleadings that he stated that it was a wild dog that bit him.
  10. Vide a judgment dated 8<sup>th</sup> December, 2016, the Employment and Labour Relations Court having considered the parties' pleadings, testimony, and evidence of record, found that the appellant had not on a balance of probabilities proven his claim.

The court held that the appellant failed to tender evidence in support of his case on unfair and unlawful termination. That he had set out a case for treatment after a dog bite but was unable to show the nexus between the dog bite, treatment, and his claim, thus accordingly dismissed the claim. The appellant challenges the judgment of the Employment and Labour Relations Court on 8 grounds of appeal which we condense to the following:



- (i) Unfair and unlawful termination of employment: It is the appellant's contention that his engagement with the respondent was a term of employment for more than one month and that he was entitled to the protection against unfair and unlawful termination. He submits that based on the respondent's contention that the employment relationship had terminated by effluxion of time, that the respondent failed to produce a contract evidencing that the employment relationship was one of a fixed term contract. Further, that the respondent did not carry out a hearing to establish the gross misconduct on desertion of duty as alleged by the respondent, in contravention of Section 41 of the *Employment Act*.
- (ii) Unfair labour practices and discrimination: It is the appellant's submission that the established reason for termination was due to him having been bitten by a dog, and the same amounted to an unfair labor practice contrary to Article 41 of the *Constitution* and discriminatory contrary to Article 27 of the *Constitution*. It is the appellant's case that the respondent did not discharge its duty to refute this testimony. The appellant contends that the respondent failed to accord him treatment, and that the injury having happened in the course of his duties an award of damages was appropriate.
- (iii) Liability and Damages for injury sustained at work: The appellant's case is that he sustained injuries while at work, as the respondent confirms the injuries. He referred to the medical report by Dr. Sokobe which confirmed the injury and even as at 26<sup>th</sup> July, 2016, the appellant was still unwell. The appellant was unable to effectively use the right lower limb as the wound bled easily and had become septic with some necrosis which would require further treatment. That further the respondent is liable for the damages as it breached duty of care by failing to provide a safe working environment.
- (iv) Failure to quantify the award-ground: The appellant submits that the learned trial judge erred in failing to award the relief sought as prayed for under the following heads:
  - unfair and unlawful termination of employment,
  - 1 months' notice Kshs.10,052/=
  - & twelve months' salary as compensation being Kshs.120,624/=
  - Special Damages Kshs.6,000/=
  - General Damages Kshs.800,000/=
  - Cost of future medical treatment Kshs.150,000

- 11. The respondent admitted that the appellant was summarily dismissed on 1<sup>st</sup> August, 2016, for gross misconduct involving unauthorized absenteeism from the workplace, which was in accordance with Section 44(4) of the *Employment Act*.
- 12. In justifying the dismissal, the respondent called 3 witnesses. The appellant's supervisor (Tarus), in laying down the events leading to the dismissal stated that he reported the appellant's absence to the Human Resource Manager in an email dated 10<sup>th</sup> July, 2016. That on 16<sup>th</sup> July, 2016, the appellant resurfaced seeking to apply for leave. The respondent's General Manager (Fred Wasike) testified that the Security Manager and the Human Resources Manager plus the appellant appeared before him, whereupon the appellant was given a chance to offer an explanation. Instead he produced documents which allegedly precluded him from undergoing disciplinary action. Consequently, the appellant refused to participate in the process, without the presence of his Advocate.



13. The clinical officer (Obadiah Sang) testified that the appellant went to the dispensary with complaints about a dog bite where he was treated and discharged on 25<sup>th</sup> June, 2016, but failed to report to work on 1<sup>st</sup> August, 2016. It was this witnesses' testimony that the appellant was neither terminated nor dismissed.
14. The argument advanced by the respondent is that the appellant left his station for several days without explanation, cause or communication and that there was substantive reason to warrant summary dismissal of the appellant. That the appellant was well aware of the requirement under the respondent's code of conduct, to inform the respondent of any absence or illness and prays that the appeal is dismissed.
15. This being a first appeal it is this court's primary duty to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as provided under Rule 29 (1)(a) of the *Court of Appeal Rules*.
16. The main issues in my view in this appeal are:
  - (i) Was the appellant's termination unfair/unlawful? From the appellant's submissions he contends that he was summarily dismissed on 1<sup>st</sup> July, 2016 and that the proper procedure under the *Employment Act* was not followed. The respondent's submissions on the other hand denied that the appellant was unlawfully terminated, as there was no evidence of termination and alleged that the appellant deserted duty. The appellant's supervisor maintained that he reported the appellant's absence to the Human Resource Manager in an email dated 10<sup>th</sup> July, 2016. Although this email is not a part of the respondent's list of documents, we note that the fact of unauthorized absenteeism is not contested. The respondent maintains that the appellant appeared before the General Manager on 16<sup>th</sup> July, 2014 and upon being given a chance to explain himself refused to do so without his advocate being present, and as a result of lack of cooperation, was dismissed for absconding duty.
17. The respondent argues that the appellant did not have to be given an oral hearing before termination and relies on the English Court of Appeal case of *R v Immigration Appeal Tribunal ex-parte Jones [1988] 1wlr 477,481*:

“...the hearing does not have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing...whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made...”
18. The respondent also relies on the case of *Kenya Revenue Authority vs Menginya Salim Murgani*, Civil Appeal 108 of 2009, where the court held:

“However in our view the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters...”
19. In the case of *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR*, the court in restating holding the KRA case, went further to state that the holding therein was good law, but not in respect of a hearing before a termination as envisaged under Section 41 of the Act. The court went on further to state that Section 41 provides the minimum standards of a fair procedure that an employer ought



to comply with. The Section provides for notification and hearing before termination on grounds of misconduct.

20. Four elements must be discernable for the procedure to pass the test:
  - a) an explanation of the grounds of termination in a language understood by the employee,
  - b) the reason for which the employer is considering termination,
  - c) entitlement of an employee to the presence of another employer of his choice when the explanation of grounds of termination is made,
  - d) hearing and considering any representation by the employee and the person chosen by the employee.
21. From the submissions there is an indication that when the appellant appeared before the General Manager, the appellant was given a chance to explain his absenteeism, but the appellant refused to do so without his advocate being present.
22. This court in the case of *Pius Machafu Isindu v Lavington Security Guards Limited [2017] e KLR* had the following to say on the burden of proof:

“There can be no doubt that the Act 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, prove the reasons are valid and fair, prove that the grounds are justified. A mandatory and elaborate process under Section 41 requiring notification and hearing before determination. The appellant (employee) in this case had the burden to prove, not only were his services terminated but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon to prove the reason for termination, and where the employer fails to do so, the termination will be deemed to have been unfair.

*Halsbury's Laws of England* 4<sup>th</sup> Edition, Vol. 16 (1B) para 642,

“...in adjudicating the reasonableness of the employer's conduct...a wider inquiry must be made to determine whether a reasonable employer could have decided to dismiss on those facts. The function of a tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses to which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if it falls outside the band it is unfair.”

23. The employer in our view has shown that there were reasonable and sufficient grounds at that for dismissal and the disciplinary process did pass the test in the Postal Corporation case (supra) as the appellant absented himself from work, and declined to participate in the hearings availed. He was the author of his own fate.
24. We hold therefore that the appellant has failed to demonstrate that his services were indeed terminated by the respondent in a manner that was flawed and wrongful.
25. ii. Liability and damages for injuries sustained at work: It is not disputed that the appellant sustained injuries from a dog bite. In its judgment, the Employment and Labour Relations Court found that although the appellant had laid down the case for a dog bite, the appellant failed to show the nexus between the dog bite and the respondent.



26. As has been stated above, the appellant in the Employment and Labour Relations Court stated he had been bitten by a wild dog. He however changes up his story in his submissions in this appeal to state that the dog that bit him belonged to the respondent.
27. I agree with the learned judge. The appellant has failed to show any connection between the dog bite and the respondent, and the appeal on this ground fails.
28. Consequently, we hold that the appeal lacks merit and is dismissed with costs

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2021.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

