



**Nyayo Tea Zones Development Corporation v Ogola (Civil Appeal  
99 of 2017) [2021] KECA 298 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 298 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 99 OF 2017  
S OLE KANTAI, AK MURGOR & HA OMONDI, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**NYAYO TEA ZONES DEVELOPMENT CORPORATION ..... APPELLANT**

**AND**

**ALICE MMBOGA OGOLA ..... RESPONDENT**

*(Being an appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu (Maureen Onyango, J.) dated 4th May, 2017 in ELRC Cause No. 363 of 2015)*

**JUDGMENT**

1. This is a first appeal from the Judgment of the Employment and Labour Relations Court (ELRC) at Kisumu (Maureen Onyango, J.). Our mandate under rule 29 of the *Court of Appeal Rules* is to re-appraise the evidence and to draw inferences of fact, to give the parties, another trial but without the benefit of seeing or hearing witnesses, an advantage that the trial court has – *Selle v Associated Motor Boat Company Limited [1968] EA 123; Kenya Ports Authority v Kuston (K) Limited [2009] 2 EA 212*.
2. In Memorandum of Claim filed in that court the respondent (Alice Mmboga Ogola) claimed that she was between 1992 to 2003 employed by the appellant (Nyayo Tea Zone Development Corporation); that her services were unlawfully terminated; that the process of termination was unlawful; that during her employment she was underpaid and she claimed 2 months' salary in lieu of notice; leave for 2 years; service gratuity and compensation for unfair termination. The Judge heard the case and found in favour of the respondent finding that the suspension of the respondent was unfair. The Judge awarded the respondent one-month salary in lieu of notice, service pay at 15 days' salary per year and awarded compensation for 12 months.
3. In the Memorandum of Appeal drawn for the appellant by its lawyers M/S Gumbo & Associates 6 grounds of appeal are taken to the effect that the Judge erred in law in holding that she had jurisdiction to entertain the claim; that the Judge erred in finding that there was an employment relationship



between the appellant and the respondent; that the Judge erred in shifting the burden of proof from the respondent to the appellant; that the Judge erred in law and fact in finding that the respondent had been unfairly terminated; that there was no evidence that the respondent had worked for the appellant for a period of 21 years and, finally, that there was no legal basis for awarding the decretal sum to the respondent.

4. The proceedings before the Judge were rather brief.
5. The respondent testified that she had suffered an injury while at work; she had filed suit against the appellant and was compensated. She said:

“... I was paid for my injury. I did not go back to work after the injury ... I blame my employer for terminating my employment without reason. ...”

6. The appellant called its Human Resource and Administration Manager, William Topom whose evidence was that there was no record to show that the respondent had been employed by the appellant. The issue whether there was an employment relationship between the appellant and the respondent is quickly resolved by the fact that in Kapsabet PMCC No. 176 of 2013 the respondent sued the appellant as a result of an injury she sustained while at the appellant’s place of work. That suit was settled by payment of money by the appellant to the respondent as evidenced by the letter dated 30th March, 2015 from the appellant’s lawyers making a payment to the respondent’s lawyers. The parties in that suit were the same as the parties before the ELRC. The complaint in Memorandum of Appeal about jurisdiction is also misplaced; ELRC had jurisdiction to entertain the suit where the dispute revolved around whether the respondent’s employment was terminated by the appellant.
7. The Judge considered Section 47(5) of the *Employment Act* which provides that where there is a complaint of unfair termination of employment or wrongful dismissal the burden of proving that termination of employment or wrongful dismissal rests with the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests with the employer.
8. The appeal came up for a virtual hearing before us on 6th of July, 2021. Learned counsel for the appellant was Mr. Mwangi Kangu while the respondent was represented by learned counsel Mr. Alfred Chepkwony. Both sides had filed written submissions and in a highlight of the same Mr. Kangu submitted that the Judge erred in holding that the respondent had worked for 21 years. According to counsel the respondent had absconded from work and was not entitled to compensation; she was a casual employee not entitled to notice of termination of employment. Counsel for the respondent wondered whether the law allowed any employer to engage an employee for 21 years on casual basis. According to counsel the respondent’s termination of employment was a result of the injury claim she had filed in Kapsabet.
9. We have considered the record of appeal, submissions made and note that we have already discussed some of the complaints raised in Memorandum of Appeal.
10. The Judge held that the respondent’s “suspension” of employment was unfair. That conclusion, with due respect, is not supported by the record.
11. The respondent testified that after she was injured at work she filed an injury claim at Kapsabet Magistrates court and that after the injury she did not go back to work. The respondent pursued her injury claim, was successful in that claim, was awarded damages which were paid and it was after payment of that claim that she filed the suit at ELRC claiming that she had been unfairly terminated. The allegations in the claim at ELRC were not supported by the evidence she gave. She absconded



work after she suffered the injury and there was no termination of employment at all as she is the one who did not go back to work after she suffered an injury. The Judge was wrong to find that the respondent's employment was unfairly terminated. There was no termination; the respondent constructively terminated her employment when she failed to report to work as required.

12. This appeal has merit and we allow it. We set aside the Judgment of ELRC and substitute thereof an order dismissing the claim. The appellant will have costs here and below.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

