Mutero v Secretary , BOM Kamacharia Girls Secondary School (Employment and Labour Relations Appeal E003 of 2024) [2025] KEELRC 250 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 250 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2024

ON MAKAU, J

FEBRUARY 4, 2025

BETWEEN

STEPHEN RINA MUTERO ..... APPELLANT

AND

THE SECRETARY , BOM KAMACHARIA GIRLS SECONDARY SCHOOL ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable Mr.Martin Kinyua Mutegi (PM) delivered on 8th March , 2024 in Kangema CMELRC Cause NO. E001 of 2022)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 18th March 2024, the appellant seeks for the following orders: -

    a. That the Judgment and decree of the Principal Magistrate dated 8th March, 2024 in Kangema Principal Magistrate's ELRC Cause Number E001 of 2022 be set aside and be submitted with an order allowing the claimant's claim.

    b. That the costs here and below be borne by the Respondent.

2. The appeal stands on the following grounds: -

    1. The Learned trial Magistrate erred in law in holding that the claimant failed to prove his claim. A miscarriage of justice was thereby occasioned.

    2. The Learned trial Magistrate erred in law and in fact in not holding that the claimant was not given a chance to appear and defend himself before the board thereby arriving at an erroneous decision that the claimant's termination was fair and just, when there was no evidence that the

claimant was summoned and appeared before any disciplinary board. A miscarriage of justice was thereby occasioned.

3. The Learned trial Magistrate erred in law and in fact in holding that the Respondent had clearly demonstrated that the process leading to the claimant's termination was lawful whereas the claimant was never served with any notice to show cause. A miscarriage of justice was thereby occasioned.

4. The Learned trial Magistrate erred in law and in fact in making a finding of fact without any proper regard to the evidence adduced by the claimant. A miscarriage of justice was thereby occasioned.

5. The Learned trial Magistrate erred in law and in fact by holding that the respondent failed to attend the disciplinary hearing, without due regard to the provisions of Section 41 and 44 of the *Employment Act*, 2007. A miscarriage of justice was thereby occasioned.

6. The Learned trial Magistrate erred in law and in fact in failing to take account that there was nothing to prove or show that the claimant was served with a letter dated 30th September, 2019 that purportedly summoned the claimant to appear before the board for the disciplinary hearing. A miscarriage of justice was thereby occasioned.

7. The Learned trial Magistrate erred in law and in fact in failing to hold that the claimant was not given an opportunity to present his case and defend himself at the disciplinary hearing. A miscarriage of justice was thereby occasioned.

8. The Learned trial Magistrate's judgment is not based on the evidence on record and relies on extraneous facts and issues. A miscarriage of justice was thereby occasioned.

Background

3. The appellant was employed by the respondent as an Accounts Clerk on 19th January 1995 to 3rd February 2020 when he was dismissed for gross professional misconduct. His salary was Kshs.26,491 as at the time of his exit.

4. On 18th October 2022, the appellant sued the respondent in the lower court alleging that his employment had been unfairly terminated and prayed for the following orders: -

    a. Kshs.317,748/= being one year's salary as compensation for unfair and unlawful termination.

    b. Kshs.327,748/= being service pay at Kshs.13,239.50/= for each completed year of service for 24 years (from 1995 to 2020)

    c. Kshs.26,479/= being annual leave for 23 days of 2019.

    d. Any other or better relief that this court may deem meet and just to grant.

    e. Costs of this suit plus interest at court rates.

5. The respondent filed a Response denying the alleged unfair termination and averred that the appellant was not entitled to the reliefs sought. It then prayed for the suit to be dismissed with costs.

6. The suit went to full hearing whereby both sides gave evidence. The appellant testified as PW1 and adopted his written statement as his evidence in chief. In brief, his evidence was that he was employed from 9th January 1995 to 3rd February 2020. He served for 24 years before the termination by the respondent. He maintained that he was dismissed without being accorded any disciplinary hearing or

being served with a show cause letter. He denied ever being served with the letter dated 30th September 2019 inviting him to a disciplinary hearing. However, he admitted that the was given one month notice of termination vide letter dated 2nd January 2020.

7. He denied ever facing challenges in executing his mandate. However, he admitted that he wrote a letter dated 9th October 2019 requesting for redeployment to lighter duties of a storekeeper. He contended that apart from his duties as Accounts Clerk/Bursar, he also supervised the other non-teaching staff. His request for lighter duties was not granted. He maintained that having gaps in his reports did not mean that he had failed in his duties.

8. The respondent (Wanjiku Chege aka Mrs.Mwai) testified as DW1 and adopted her written statement dated 21st November 2022 as her evidence and produced a bundle of documents as exhibits. She was posted to Kamacharia Secondary School on 1st January 2016 and found the appellant there working as Accounts Clerk. She encountered many challenges in relation to the appellant's work. Complaints came from parents about handling of parents' monies and in 2017 and 2019, the auditors noted glaring financial impropriety.

9. She further testified that the appellant was summoned before the Board but failed to appear. He was then found to be unqualified for the job and his request for deployment to the stores was declined by the Board. He also requested for light duties but all the positions were filled. Hence, she gave him a termination letter.

10. She further testified that the appellant was given many chances since 2016 to improve but he failed to do so. He had even sat for KATC and failed. She clarified that the termination was a decision by the Board.

11. After considering the evidence and the submissions, the trial court (Hon.Mutegi PM) concluded that the appellant did not prove a case of unfair termination of his employment by the respondent, and dismissed the suit with costs. In reaching the said conclusion, the trial court observed that the appellant was made aware of his misconduct in writing and he was afforded a chance to appear before the Board for hearing but he declined.

12. The trial court sought guidance from Dominic Matangwa Manyasa v Chairman, Secretary Board of Management of Our Lady of Mercy Tins Secondary School-Busia (2018) eKLR and Rahab Sheila Nyangau v Murang'a County Government (2019) eKLR where the court held that the employee had been accorded a hearing but declined.

Submissions in the appeal

13. It was submitted for the appellant that he was never served with a show cause or accorded any disciplinary hearing before termination of his employment. It was argued that the appellant was only served with a letter dated 2nd January 2020 captioned 'NOTICE TO TERMINATE SERVICES' by which he was notified of the decision of the Board to terminate his employment for gross misconduct. The notice was for a period of 30 days. The letter did not mention any show cause letter or failure to attend disciplinary hearing.

14. Accordingly, it was argued that the termination of the appellant's services was not in accordance with the procedure under section 41 of the *Employment Act*. For emphasis, reliance was placed on Joseph Otieno v Riley Services Ltd (2022) eKLR where the court held that the right to be heard under section 41 of the *Employment Act* was mandatory even if the alleged misconduct is apparent.

15. It was further submitted that the appellant was never served with any letter inviting him to appear before the Board for hearing. He was also not served with a show cause letter indicating specific charges against him. The letter dated 30th September 2019 produced by the respondent was an afterthought made after the appellant filed suit. Reliance was placed on the case of Naomi Wangui Kung'u v Board of Governors S.C.L.A Samaj School (2022) eKLR where it was held that the employer lost the opportunity to establish a valid cause to dismiss the employee when it denied her a hearing and simply dismissed her summarily.

16. In view of the foregoing matters, the trial court was faulted for finding that the appellant declined an invitation to attend disciplinary hearing before the school board. Accordingly, this court was urged to allow the appeal as prayed with costs and award the appellant the reliefs sought in the lower court suit.

17. On the other hand, it was submitted for the respondent that the appellant was served with a letter dated 30th September 2019 inviting him to defend himself before the school Board on 11th October 2019. The letter listed down the allegations which he was expected to respond to. As such, it was assumed that the letter was both a show cause and summons. It was further submitted that the time given to him to prepare defence to the allegations was ample.

18. As regards the disputed service of the letter dated 30th September 2019, it was submitted that there was establishment of communication. It was argued that the appellant was still in employment then, and therefore he was served while on duty at the school. It was further observed that minute 6/10/2019 in the minutes of the Board meeting held on 11th October 2019, the principal reported that the appellant had been issued with summons but he chose not to honour the same.

19. Accordingly, it was submitted that the appellant was indeed summoned to respond to a multiple complaints and gaps in his work as an Accounts Clerk and he failed to attend the hearing. As such the Board resolved to terminate his services after a notice of one month. The notice was issued on 2nd January 2020 and the termination letter was dated 3rd February 2020.

20. In view of the foregoing, it was submitted that the trial court was right in concluding that the termination of the appellant's employment was lawful as he was accorded an opportunity to defend himself but declined. Reliance was placed on the case of Dominic Matangwa Manyasa v Chairman, Secretary Board of Management of Our Lady of Mercy Tins Secondary School-Busia (2018) eKLR and Rahab Sheila Nyangau v Murang'a County Government (2019) eKLR.

21. In the end, the court was urged not to disturb the impugned decision and instead disallow the appeal.

Determination

22. The mandate of the court in this first appeal is to re-evaluate the evidence adduced in the lower court and arrive at my own conclusion. In Selle v Associated Motor Boat Company Ltd (1968) EA 123 the court held thus: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate 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, the 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."

23. Having carefully perused the record of appeal, the submissions made herein and the relevant law, the following issues fall for determination: -

    a. Whether the termination of the appellant's employment was grounded on valid and fair reason(s).

    b. Whether the termination was done in accordance with a fair procedure.

    c. Whether the appellant is entitled to the reliefs sought in his Memorandum of Claim.

Reasons for the termination

24. The reasons for the termination was cited in the termination letter dated 3rd February 2020 as "Gross Professional Misconduct". Specifically, there were allegations of inefficiency and gaps in his work as Accounts clerk as noted by Auditors in 2017 and 2019 financial reports. The appellant admitted the gaps and pleaded for redeployment to another role but his request was not granted.

25. I do not need to belabour that point as the appellant acknowledged his own mistakes. Consequently, I find and hold that the respondent discharged its burden of proof under section 43 (1) of the *Employment Act* which provides that: -

> " 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

Procedure followed

26. The appellant's case was that he was never served with any show cause letter before the termination and he was also not accorded disciplinary hearing as required under section 41 of the *Employment Act*, 2007. However, the respondent contended that the appellant was served with the letter dated 30th September 2019 which invited him to hearing before the Board on 11th October 2019. The letter listed the allegations, which the appellant was expected to respond to at the hearing but the appellant failed to attend the hearing.

27. I have perused the letter dated 30th September 2019 and confirmed that, indeed it was a summons for the appellant to appear before the full Board meeting on Friday 11th October 2019 at 10:00am without fail to defend himself against eleven (11) allegations. He was also required to prepare written submissions and present it. However, two issues arise from the said letter; whether the letter was served upon the appellant; and whether the letter was compliant with section 41 of the *Employment Act*.

28. As regards the service of the letter, there is no evidence adduced to prove that the letter was served on the appellant. The appellant did not acknowledge receipt by signing on the letter or delivery book and no eye witness testified during the trial to confirm that he/she witnessed the respondent serving the letter to the appellant. Consequently, I find that the respondent never served the appellant with the letter dated 30th September 2019 to summon him to attend disciplinary hearing on 11th October 2019.

29. Besides the letter did not comply with section 41 of the *Employment Act* which provides: -

> "(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

30. The letter did not notify the appellant that the employer was considering to terminate his employment contract for the allegations he was expected to defend himself against. The letter also did not indicate whether he was to appear before the Board for disciplinary hearing. Finally, the letter did not accord the appellant his statutory right of being accompanied to the meeting by a fellow employee of his choice.

31. Consequently, I find and hold that even if the letter had been served on the appellant, which was not the case, the respondent would not succeed in its allegation that it summoned the appellant to disciplinary hearing and he declined to attend. As already observed, the letter was not an invitation to attend disciplinary hearing.

32. It follows that the respondent terminated the appellant's employment unfairly because he was not accorded a fair opportunity to defend himself before the decision to terminate by notice was reached. I gather support from Kenfreight EA Limited v Benson K. Nguti [2016] eKLR, the Court of Appeal held that:

> " Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken."

Reliefs

33. In view of the finding that the termination of appellant's employment was unfair, I proceed to hold that the appellant is entitled to compensation under section 49 of the *Employment Act*. Considering his long service of 24 years, that he contributed to the termination through misconduct, and finally that he has no good chances of securing another job due to his age, I award him six (6) months gross salary as compensation for the unfair termination being Kshs.26,491 x 6 =Kshs.158,946.

34. As regards the claim for service pay the respondent maintained that the employer contributed NSSF dues for appellant's retirement and as such he is disqualified from claiming service pay. The termination notice dated 2nd January 2020 and the termination letter dated 3rd February 2020 advised the appellant to pursue his terminal benefits from the NSSF as prescribed by the government regulations.

35. The appellant corroborated the foregoing evidence by producing a copy of his pay slip for August 2019 which indicated a deduction towards NSSF contributions. Consequently, the applicant is disqualified from claiming service pay by dint of section 35 (6) of the *Employment Act* which provides that: -

> "(6) This section shall not apply where an employee is a member of-
>
> a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;
>
> b. a gratuity or service pay scheme established under a collective agreement;
>
> c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
>
> d. the National Social Security Fund.

36. Finally, the claim for salary in lieu of notice is not merited because the employer served him with one months' notice dated 2nd January 2020 which lapsed on 3rd February 2020 as indicated in the termination letter dated 3rd February 2020.

Conclusion

37. I have found that the termination of the appellant's employment was unfair for want of due process of law. I have also found that he is entitled to compensation for the unfair termination. Consequently, I allow the appeal to the extent highlighted above and enter judgment as follows: -

a. Compensation for unfair termination.....Kshs.158,946.00

b. The award is subject to statutory deductions but in addition to interest at court rates from the date of the judgment.

c. Costs of the appeal and the court below plus interest at court rate.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF FEBRUARY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE