



**Odhiambo v Janeiro Junior Academy (Appeal E062 of 2024)
[2025] KEELRC 926 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 926 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E062 OF 2024
JK GAKERI, J
MARCH 25, 2025**

BETWEEN

BONFACE OTIENO ODHIAMBO APPELLANT

AND

JANEIRO JUNIOR ACADEMY RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of C.A.S Mutai, Chief Magistrate in Homa Bay CMELRC No. E011 of 2023, Bonface Otieno Odhiambo V Janeiro Junior Academy delivered on 20th September, 2024.
2. By way of background, the appellant sued the respondent vide a Memorandum of Claim dated 23rd November, 2023 alleging unfair summary dismissal.
3. The appellant's case was that he joined the respondent as a teacher in December 2018 and by the time he was dismissed from employment his salary was Kshs.20,550.00
4. It is the appellant's case that he served diligently and competently though evidence revealed that there were many complaints against him as a teacher.
5. The appellant alleged that he was dismissed by the Head Teacher, Mr. Phillip Aduda by word of mouth on 31st July, 2023.
6. The respondent admitted that the appellant was its employee and averred that he had been involved in many incidences of gross misconduct ranging from insubordination, dereliction of duty, absence without leave, child molestation, corporal punishment of pupils, receiving monies from parents under false pretence, theft of students pocket money among many others and dismissal was fair.



7. During the hearing, the appellant admitted that he made a written promise to remit monies after a demand was made by Mr. Steve Ogweno, and knew a pupil named Louis Fernando whom he allegedly assaulted and some Kshs.5,000 mentioned related to the issue.
8. He denied having received a notice to show cause dated 7th February, 2019. He asserted that he had a proper TSC Number 789944 under his identity card number.
9. He maintained that he had a clean record as he had neither been disciplined nor summoned by the police.
10. Mr. Philip Aduda, testifying for the respondent confirmed that on 31st July, 2023, there was swimming for Grade IV in school and the appellant attended the activity as a teacher. He also admitted having communicated the dismissal to the appellant on the same day in his office, as the employer had made a decision to terminate the appellant's services. He confirmed that the Board sat on 1st August, 2023 to make the decision on the dismissal and no letter of termination of employment was issued.
11. The witness could neither confirm whether the appellant received the notice to show cause nor when he allegedly absconded duty.
12. However, he testified that the appellant had 5 allegations against him.
13. After considering the evidence before the court, the learned trial Magistrate found that the appellant was guilty of misconduct which justified summary dismissal from service the absence of a hearing notwithstanding.
14. The court awarded one (1) month salary in lieu of notice.
15. This is the judgment appealed against.
16. The trial Magistrate is faulted on the grounds that he erred in law and fact:
 1. In finding that the appellant engaged in misconduct which justified summary dismissal.
 2. Failing to grant the prayers sought despite finding that the appellant was not accorded a fair hearing.
17. Counsel urged the court to aside the impugned judgment of the trial and allow the appeal with costs.

Appellants submissions

18. On the finding that the appellant engaged in misconduct counsel relied on the provisions of Section 44(3), 43(1) and 45(2) of the *Employment Act* and Sections 101 to 110 of the *Evidence Act* to submit that the respondent did not prove substantive fairness in the dismissal of the appellant from employment as the minutes on record dated 1st August, 2023 had only one ground namely; insubordination and silent on the other charges and no particulars were provided.
19. That the old notices to show cause had been overtaken by events such as alleged assault of a pupil on 2019 and the complaint was thereafter withdrawn.
20. Counsel urged that no valid reason for the summary dismissal was given.
21. On procedural fairness counsel submitted that the provisions of Section 45(2)(c) of the *Employment Act* were not complied with.
22. Reliance was also made on the sentiments of the Court in *National Bank of Kenya V Samuel Nguru Mutonya* [2019] eKLR to urge that the respondent did not issue a notice to show cause, conduct a



hearing and did not issue a dismissal letter and the appellant was thus not accorded procedural fairness in the dismissal from employment.

23. On reliefs, the trial court is faulted for not granting the same save for pay in lieu of notice.

Analysis and determination

24. Being a first appeal, the role of the appellate court is well settled and articulated in legions of decisions such as *Selle & Another V Associated Motor Boat Co.* [968] EA 123 where the Court of Appeal held as follows:

“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 consider 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 facts, if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities...”

25. The salient complaint against the learned trial court is the finding that the appellant engaged in some misconduct to justify the summary dismissal.
26. Put differently, the finding was not supported by evidence or was against the weight of the evidence before the court. Documents on record reveal that by letter dated 21st July, 2023, the claimant was summoned to appear before the respondent’s Board of Directors on 1st August, 2023 to answer to four charges of defiance to authority, indecent touching of female pupils during lessons, missing of lessons and corporal punishment.
27. The meeting was scheduled to take place at 3:00pm.
28. The claimant denied having received the letter and RWI provided no evidence to show that the appellant received the letter.
29. However, even if he had received it he was dismissed by word of mouth by Mr. Phillip Aduda a day earlier.
30. Strangely, the appellant appealed the decision on the day the Board was to sit to deliberate the issue stating that he had heard of the decision from Mr. Phillip Aduda.
31. There is no evidence on whether the appeal was ever considered or responded to.
32. The minutes of the meeting purportedly held on 1st August, 2023 lack authentication and are thus of no evidential value.
33. Documents on record further reveal that the appellant applied for a teaching position at the respondent’s institution vide letter dated 19th December, 2018 and was offered the position by word of mouth and served for over 4¹/₂ years.
34. However, the documents further reveal that his sojourn at the school was not without incidences some of which were of a criminal nature.
35. Within the 1st 3 months of his employment, the appellant was accused of assaulting a pupil named Louis Fernando, around March, 2019 and the matter was reported to the police, OB No.18/2/3/2019.



The matter does not appear to have been followed up and the complaint was later withdrawn by Louis mother one, Florence.

36. A medical Examination Report on record shows that the pupil was examined by a Dr. Okal on 2nd March, 2019 and it was evident that the pupil had been assaulted with a blunt object.
37. The claimant admitted on cross-examination that he agreed to remit the sum of Kshs.5,000 per month on account of the incident and committed himself in writing.
38. The promise to remit the cash was made on 4th March, 2019.
39. There is no evidence to show that he ever denied having assaulted the pupil.
40. It is unclear when the pupil's mother withdrew the complaint against the claimant.
41. No doubt this conduct adversely affected the respondent's perception of the appellant as a teacher.
42. During the month of February 2019, the appellant was accused of neglect of duty particularly the dormitories and was accorded 48 hours to make amends.
43. The alleged assault came later.
44. Equally, minutes of a Board meeting held on 9th January, 2022 reveal that the appellant's alleged misconduct was Agenda item Min 4/BOM/01/2022, under staff Discipline and the appellant was warned by word of mouth.
45. The board resolved that any other form of defiance would occasion summary dismissal.
46. Clearly, the appellant's record was not as clean as he purported and the allegations against him were grave.
47. Be that as it may, on the date of summary dismissal on 31st July, 2023, the Head Teacher, Mr. Phillip Aduda did not provide any reason for the action the respondent had taken.
48. During the hearing, RWI gave contradictory evidence on cross-examination. He stated that he informed the appellant that his services had been terminated on 31st July, 2023, in his office as the employer had made the decision to do so.
49. Later on, he testified that "He was sacked on the same day that the Board sat to dismiss Bonface".
50. By 1st August, 2023, the appellant was already aware of the dismissal as his appeal to the Board shows.
51. The principles that govern termination of employment and summary dismissal are well settled by the provisions of the *Employment Act* and case law.
52. In simple legal parlance for a termination of employment to pass the fairness test, it must be demonstrated that the employer had a valid and fair reason to terminate the employee's employment owing to his/her conduct, capacity or compatibility or the operational requirements of the employers and the termination was conducted in accordance with a fair procedure.
53. Put differently, there must have been not only substantive justification for the termination, but also procedural fairness.

See Walter Ogal Anuro V Teachers Service Commission [2013] eKLR, CMC Avition Ltd V Mohammed Noor [2013] eKLR and Naima Khamis V Oxford University Press (EA) Ltd ([2017] eKLR.

54. Relatedly, Section 43(1) of the *Employment Act* 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, termination shall be deemed to have been unfair within the meaning of Section 45.
55. Similarly, under Section 47(5) of the Act, in a complaint of unfair termination of employment, the employer shoulders the burden of justifying the grounds of termination of employment.
56. In *Galgalo Jarso Jillo V Agriculutral Finance Corporation* [2021] Eklr, B.O. Manani J. stated as follows:

" ...In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must in fact be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists even if it turns out that it in fact did not exist..."
57. Further, in *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR, the Court of Appeal expressed the view that:

"... The standard of proof is on a balance of probability not beyond reasonable doubt and all that the employer is required to prove are the reasons that it "genuinely believed to exist" causing it to terminate the employee's services.

That is a partly subjective test".
58. In the instant case, being a summary dismissal, it behooved the respondent to accord the appellant the reason(s) for the drastic action, which, the claimant, testified left him devastated.
59. A verbal explanation would have ameliorated the circumstances.
60. In the present scenario, the respondent cannot and did not specify any immediate or long term circumstance(s) that led to or culminated in the summary dismissal of the appellant.
16. Guided by the mantra that he who alleges must prove encapsulated by the provisions of Section 107, 108 and 109 of the *Evidence Act* and restated in countless decisions such as *Hahn V Singh* [1985] eKLR, *Ndiritu V Kapkoi & Another* [2005] IEA 334, *Mary Wamboi Kabugu V Kenya Bus Services Ltd* [1997] KECA and flowing from the foregoing, it is surmisable that the court is not persuaded that the respondent discharged its burden of proof under the provisions of Section 43 and 47(5) of the *Employment Act*.
62. To that extent, the court finds that the respondent has failed to prove that it had a substantive justification to terminate the appellant's employment.
63. On procedural fairness, it is patently clear that the prescribed procedural requirements were not complied with.
64. The appellant was neither accorded an opportunity to respond to the allegations the respondent had made against him nor a chance to be heard as he did not attend the meeting held on 1st August, 2023 and there is no evidence to show that his attendance was envisaged.
65. As held in *Pius Machafu Isindu V Lavington Security Board Ltd* [2017] eKLR, the procedural requirements provided under Section 41 of the *Employment Act* are mandatory and non-compliance renders that attendant termination of employment or dismissal procedurally flawed and irregular and ultimately unfair within the meaning of Section 45 of the *Employment Act*, as was the case in the instant case and as the learned trial Magistrate found and held.



66. Puzzlingly, the respondent did not consider or respond to the appellant's appeal dated 1st August, 2023 nor issue a Certificate of Service, although the appellant did not pray for one.
67. Under Section 45(5)(a) of the *Employment Act*, in determining whether the employer acted with justice, and equity, the court considers the procedure adopted by the employer in the dismissal, communication of that decision and handling of the appeal, if any, conduct of the employee, compliance with statutory provisions and any previous warning letters.
68. The respondent failed virtually on all requirements of this provision.
69. The summary dismissal could not muster the test of just and equitable.
70. On reliefs, having found that the summary dismissal of the appellant was procedurally defective, the trial court ought to have decreed the declaration sought, awarded salary in lieu of notice, (as it did), and some compensation. Costs are discretionally.
71. As to whether the court should interfere with the exercise of discretion by the trial court, the court is guided by the sentiments of Madan JA (as he then was) in *United India Insurance Co. Ltd East Africa Underwriters (Kenya) Ltd [1985] KLR 898* as follows:

"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".

See also *Mbogo V Shah & Another [1968] EA 93*.

72. Having found that the summary dismissal of the appellant was deficient both substantively and procedurally the court is satisfied that a case has been made for interference with the trial court's exercise of decision as follows:
 - a. Declaration that the summary dismissal of the appellant by the respondent was unfair.
 - b. Equivalent of three (3) months gross salary, Kshs.61,650 compensation.

The court has taken into consideration that the claimant had only served for 4 years and 7 months which is a short time, appealed the decision and contributed to the summary dismissal owing to his conduct.
 - c. Costs of this appeal to the appellant.

Other Orders of the trial court are affirmed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 25TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

