



REPUBLIC OF KENYA



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**Kwambai v Board of Management, Moi Kapsowar Girls Secondary School
(Appeal 13 of 2020) [2025] KEELRC 1632 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1632 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL 13 OF 2020
MA ONYANGO, J
MAY 29, 2025**

BETWEEN

WILSON KWAMBAI APPELLANT

AND

**BOARD OF MANAGEMENT, MOI KAPSOWAR GIRLS SECONDARY
SCHOOL RESPONDENT**

*(Being an appeal from the Judgment of Hon. C.R.T. Ateya
delivered on 19th October 2020 in ITEN ELRC NO. 4 of 2019)*

JUDGMENT

1. The Appellant herein was the Claimant in Iten ELRC No. 4 of 2019 wherein he sued the Respondent vide a Memorandum of Claim dated 15th July 2019 seeking compensation for alleged unfair termination of his employment and for payment of his terminal dues.
2. After hearing the parties, the trial court delivered its judgment on 19th October 2020 and dismissed the Appellant's suit with costs on the basis that the Appellant did not prove his case on a balance of probabilities.
3. The Appellant being dissatisfied with the said Judgment instituted the instant appeal vide the Memorandum of Appeal dated 23rd October 2020 on the following grounds of appeal:
 - i. The learned magistrate erred in fact and law by failing to direct her mind properly on the principles of employment law.
 - ii. The learned magistrate erred in both fact and in law by ignoring the pleadings of the parties and creating new facts.
 - iii. The learned magistrate erred in law and fact by raising the standard of proof for the claimant.



- iv. The learned magistrate erred in fact and in law in holding that the claimant was summarily dismissed against pleadings of the parties therein.
 - v. The learned magistrate erred in fact and law in reciting the provision of the *Employment Act* and failing to apply them to the evidence pleadings and the facts.
 - vi. The learned magistrate erred in fact and in law in holding that the claimant Absconded duty against the evidence offered in the pleadings and were not controverted by the respondent.
 - vii. The learned magistrate erred in fact and law holding that the claimant did not show cause against the evidence and the pleadings that he attended disciplinary hearings as required and that the disciplinary hearing did not result in a termination but an indefinite suspension, which he sought to challenge
 - viii. The learned magistrate misdirected her mind in fact in holding that the claimant did not bother to find out why his suspension took too long against the evidence pleadings of both parties.
 - ix. The learned magistrate erred in fact and law in holding that the claimant was paid during his suspension in absence of and evidence of the same.
 - x. The learned magistrate erred in fact and in law in holding that the claimant failed to prove his case in a balance of probabilities.
 - xi. The learned magistrate erred in law and fact raising the standard of proof required from the Claimant
 - xii. The learned magistrate erred in fact and in law holding that the claimant was not entitled to terminal benefits against the pleadings and the evidence availed.
 - xiii. The learned magistrate erred in law stretching her discretion and ignored binding decisions relied upon by the claimant and the respondent in their pleadings
 - xiv. The learned magistrate failed to appreciate the binding decisions of the employment and labour relation on payment of dues and suspension.
 - xv. The learned magistrate erred in law in ignoring the protections offered to an employee while on suspension and the entitlements under the *employment act*.
 - xvi. The learned magistrate erred in law in holding that the claimant ought to have proven he did not receive payments while on suspension.
 - xvii. The learned magistrate misdirected her mind to the law in holding that the claimant was fairly and procedurally terminated against the pleadings and the evidence advised without evaluating the procedure adopted by the respondent.
 - xviii. The learned magistrate erred in fact in agreeing with the respondent's action to lock out the respondent from its premises and argue desertion of duty.
 - xix. The learned magistrate in law and fact in refusing to find that the evidence on record supported the appellant's case.
 - xx. The judgement of the learned magistrate in the circumstance is unfair and unjust.
4. Consequently, the Appellant prayed for the following orders:
- a. The appeal be allowed entirely.



- b. The appellant claim be allowed as drawn in the memorandum of claim.
- c. The judgement of the subordinate court be set aside with all consequential orders.
- d. Costs of the appeal be awarded to the appellant.
- e. Any other relief that this honorable court deems fit and just to grant.

Analysis

5. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for that.
6. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

7. Vide his Memorandum of Claim dated 15th July 2019, the Claimant (now the Appellant) stated that he was permanently employed by the Respondent as a grounds man with effect from 1st January 2008. He averred that he served in the same position until 1st December 2011 when he was orally promoted to a cook and that on 7th July 2014, he was confirmed orally as a permanent cook.
8. The Claimant contended that he served the Respondent dedicatedly until on 10th October 2016 when he was suspended from service on allegation of theft. The Claimant avers that he was orally invited to appear before the Board where he did and after the hearing, the board was satisfied with his explanation and informed him to report to work on 13th January 2017. The Claimant stated that on 13th January 2017, he received a SMS from the secretary of the Respondent informing him not to report to work. It was the Claimant’s contention that he went to seek clarifications on the contents of the SMS only to be told that the security was given express instructions not to let him within the school premises
9. The Claimant stated that his dismissal was illegal, unfair, unlawful and that it violated the provisions of sections 41(1),44(4),45(2) and 43 of the Employment.
10. The Appellant therefore contended that he was unfairly terminated from employment without being paid his terminal dues which he particularized as hereunder:
 - i. One month’s pay in lieu of notice.....Kshs 10,223
 - ii. Compensation for unfair termination....Kshs 122,676
 - iii. Leave Dues.....Kshs 78,717.10
 - iv. Salary during suspension.....Kshs 316,913
 - v. Salary until retirement.....Kshs 1,349,436
 - vi. Service pay.....Kshs 56,226.50
 - vii. Overtime dues.....Kshs 1,233,103.50
 - Total.....Kshs 3,167,295.10



11. The Appellant prayed for the following reliefs:
 - i. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstances the Claimant is entitled to compensation of his terminal dues as outlined above
 - ii. Reinstatement with full salary, benefits and continuity of service without victimization
 - iii. The court be pleased to lift the suspension and substitute it with an appropriate order of the court
 - iv. A declaration that the Claimant is entitled to a salary during suspension
 - v. In the alternative, the sum of Kshs. 3,167,295.10
 - vi. Exemplary damages
 - vii. Certificate of Service
 - viii. Costs of this suit and interests at court rates
 - ix. Any other relief the court may deem just and fit to grant
12. In response, the Respondent filed a Response to Memorandum of Claim dated 5th September 2019 denying the averments made by the Appellant in his claim. The Respondent contended that the Claimant was suspended from work on 10th October 2016 after he was found with stolen items belonging to the institution. The Respondent stated that the Claimant's salary was not stopped during the suspension period and that the claimant never reported back to school despite several summons issued to him. The Respondent averred that a notice to show cause was issued to the Claimant but he willfully refused to respond to the same. The Respondent therefore stated that the claimant was not terminated from employment but that he deserted duty.
13. The Respondent further stated that the Claimant having deserted duty without leave and even refusing to report to work when summoned by the respondent having been found with stolen property belonging to the institution, the Respondent was entitled to its right to summarily dismiss the Claimant pursuant to section 44(3) and 44(4)(a),(e) and (g) of the Employment Act.
14. The Respondent thus urged the court to dismiss the claimant's claim with costs.

The Evidence adduced

15. At trial the Appellant testified as CW1 and adopted his witness statements recorded on 15th July 2019 as his evidence in chief.
16. On cross examination, the Appellant stated that he was accused by the Respondent that he had stolen tea leaves, sugar and maize flour. He denied to selling milk from outside to student. He stated that he was issued with a suspension letter but denied ever receiving a termination letter. It was his testimony that he has never gone back to school since the suspension.
17. On re-examination, the Claimant averred that he has not been charged in a criminal court for the alleged theft and that he had been on suspension without pay for three years.
18. The Respondent called Hellen Mabose Luhangala, who testified as RW1. She introduced herself as the principal of Moi Kapsowar High School and the Respondent's secretary. RW1 adopted her witness statement recorded on 18th November 2019 as her evidence in chief.



19. RW1 told the court that the Claimant was suspended from employment after he was found with tea leaves, sugar and maize flour. She also stated that the Claimant gave the students food that was not permitted and that he gave the students his phone.
20. The Respondent's witness stated that the Claimant appeared before the Board of Management on 20th December 2016 and averred that the Claimant was not dismissed. It was her testimony that the Claimant was issued with the letter dated 15th February 2018 as a reminder for him to respond to the allegations of gross misconduct. RW1 stated that when the Claimant was issued with the letter dated 15th February 2018, he walked out of school and never reported to work.
21. On cross examination, RW1 stated that the Claimant was not on suspension when he deserted duty.
22. After hearing the parties, the trial court delivered its judgment on 19th October 2020 dismissing the Claimant's suit.
23. It is the said judgment that is now the subject of this appeal.

The Appeal

24. The appeal was disposed of by way of written submissions. Both parties filed the submissions. The Appellant's submissions are dated 9th February 2024 while the Respondent's submissions are dated 11th April 2024

Appellant's submissions

25. The Appellant submitted on the following issues:
 - i. Whether the claimant is on suspension or the services were terminated
 - ii. Whether the claimant was paid during suspension
 - iii. Whether the parties satisfied their required standard of proof
 - iv. Whether the claimant is entitled to the prayers in this appeal
 - v. Who should bear the costs of this appeal
26. On the first issue, the Appellant submitted that in his pleadings and evidence tendered before the trial court, he proved that he is still on suspension. The Appellant submitted that the trial court in holding that the Claimant was summarily dismissed is neither supported by the evidence nor the proceedings. The Appellant contended that the Respondent in its pleadings admitted that he is still on suspension.
27. The Appellant therefore maintained that his services were suspended for a very long period unfairly and that he ought to be on pay during suspension.
28. On the issue whether the Claimant was paid during suspension, the Appellant reiterated that since he was suspended by the Respondent he has never received any payments for salaries or otherwise. It was submitted that the Respondent did not produce any document detailing the payments and being a public institution, the Respondent was obligated to keep records of all payments made to its employees as stipulated by section 74 of the *Employment Act*.
29. The Appellant therefore submitted that based on the evidence on record, there was no basis for the trial court to hold that the Claimant was paid while on suspension.



30. On the third issue, the Appellant submitted that he established before the trial court that he was in the employment of the Respondent up to the time he was suspended. He stated that once he was issued with the notice to show cause he appeared before the board and the board being satisfied with his explanation directed him to report back to work only to receive an SMS from the secretary of the Respondent informing him not to report to work. The Appellant submitted that he was locked out of the school premises prompting him to write a letter which is part of his documents produced.
31. The Appellant thus submitted that he discharged his evidentiary mandate to the standard required by law, and the holding by trial magistrate therefore had the effect of raising the standard of proof beyond the legally established threshold. It is the Appellant's submission that the Respondent did not demonstrate that the process was fair and justified.
32. The Appellant urged the court to set aside the trial court's judgement and to allow the instant appeal with costs.

The Respondent's submissions

33. In its submissions, the Respondent reiterated that during the suspension, the Claimant continued to receive his salary and despite being summoned, he never responded to the complaints raised against him, and instead, he resorted to constant absenteeism.
34. The Respondent submitted that when the Appellant finally appeared before the disciplinary committee, the explanation he gave was not satisfactory given the fact that he was found in possession of stolen maize and beans. The Respondent maintained that the Appellant was fairly and procedurally terminated from employment after the Respondent found that the Appellant had stolen the Respondent's maize and beans and further, that he had engaged in gross misconduct of giving the students unauthorized milk.
35. The Respondent stated that the Claimant was invited to a termination was explained to him.

disciplinary meeting on allegation of theft where he attended in the company of his supervisor , Mr. David Bowen, the Bursar and the Respondent being dissatisfied with the explanation given by the Appellant, issued a suspension notice to him which notice he did not respond to and instead he chose to desert work completely which led to him being summarily dismissed pursuant to section 44(3) and 44(4) (a), (e) , and (g) of the *Employment Act* 2007 and that the reasons for the
36. It is therefore the Respondent's submission that the termination of the Appellant's employment was based on a valid and fair reason solely founded on his conduct and that fair procedure was followed in the termination of the Appellant.
37. The Respondent thus submitted that the trial court in its findings considered the evidence of RW1 in rebutting the claim and after analyzing all the evidence before her and applying the law to the facts, the learned magistrate reached a just conclusion finding that the Claimant had failed to prove his claim.
38. The Respondent maintained that the Appellant is undeserving of the reliefs sought in his Memorandum of claim. The court was urged to find this appeal to be unmerited and to dismiss it with costs to the Respondent.



Determination

39. I have considered the Record of Appeal and the submissions by both parties. The many grounds of Appeal raised by the Appellant relate to the substantive and procedural fairness of the termination of his employment by the Respondent.
40. The Appellant accused the trial court of failing to consider all the evidence submitted and thereby erroneously holding that the Appellant failed to prove his case on a balance of probabilities.
41. The burden of proof in termination of employment claims is on the employer who is required to prove that the reasons for the termination are valid and the procedure fair.
42. Section 45(1) of the *Employment Act* provides that:

“No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -

- a) That the reason or reasons for the termination is valid.
- b) That the reason for the termination is a fair reason.
- (i) Related to the employee’s conduct, capacity or compatibility or
- (ii) Based on the operational requirements of the employer was that the Employment was terminated in accordance with fair procedure”.
43. From the evidence on record, the Appellant was suspended from employment by the Respondent on account of gross misconduct. The Respondent contended that the Appellant was found to have stolen maize and beans belonging to the Respondent and also that he was found with milk which he was selling to students contrary to the Respondent’s guidelines.
44. The Respondent asserted that the Appellant was invited to a Board meeting where he was required to show cause and was thereafter suspended. It is the Respondent’s submission that after being suspended, the Appellant absconded duty.
45. The Appellant on the other hand stated that he was suspended on account of false allegations that beans and maize were found in his locker on 7th October 2016 while he was off duty.
46. The reasons for the Appellant’s suspension were set out in the suspension letter dated 10th October 2016 issued to the Appellant. It reads:

Wilson Kwambai

Cook

RE: Suspension from duty

The above subject refers, you have been suspended from duty on the following counts:

1. Theft case- found with stolen items on 7/10/2016

Your suspension starts on 10/10/2016 until you are called to appear before the executive board meeting.

Yours faithfully



Signed

Mrs. Dinah Cheruiyot(HSC)

Principal/Secretary BOM

47. From the record, the executive board sat on 20th December 2016 as evidenced by the minutes of the said meeting filed by the Respondent in its bundle of documents. From the said minutes, the recommendation was for termination of the Appellant and his other colleagues who were found to be culpable of the allegations levelled against them.
48. At page 39 of the Record of Appeal, is a letter dated 15th February 2018 filed by the Respondent. It is reproduced hereunder:-

15th February 2018

Wilson Kwambai

Dear sir,

RE: GROSS MISCONDUCT AND NEGLIGENCE In reference to your personal registry file in school, it has been noted that your performance was not on par with the acceptable level. You have fallen behind majorly in the tasks that you were assigned.

Despite the several verbal warnings, you did not show any signs of improvement.

This acts amounted to gross misconduct which indicated;

- i. Gross absenteeism and desertion from duty
- ii. Slowed work progress,
- iii. Inability to keep yourself tidy
- iv. Giving students phones to use

Habitual negligence which is repeated neglect of duty willfully and misconduct intentionally, knowingly and deliberately affects the schools performance.

Even after prior verbal warnings, discussions and reprimand that you disregarded you still failed to perform your duties.

Accordingly you are hereby required to show cause why you should not have been dismissed or otherwise punished.

We will be out of choices should you fail to submit your explanation as required as it will be presumed that you admit the charges and have no explanation to offer and the issue will be disposed off without any other reference to you.

Yours faithfully

Signed

Hellen Luhangala

BOM Secretary

49. During trial the Appellant denied that he was served with the said letter which the Respondent referred to as the termination letter. The question for this court then becomes whether these are valid and fair



reasons for an employer to terminate an employee and whether the letter dated 15th February 2018 can be deemed a letter of termination.

50. Section 43 of the *Employment Act* provides that an employer shall prove the reasons for termination of employment. The section provides:
- (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.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
51. In this case the offence that the Appellant was accused of occurred in 2016 and he was invited to appear before the Respondent's board meeting in December, 2016. He was thereafter issued with a letter of termination dated 15th February 2018, more than a year later. The letter is framed as a show cause. The Appellant denied that he received the letter. He states that after he appeared before the board on 20th December, 2016 his suspension was never lifted and he was never allowed to go back to work.
52. There is no evidence that the Appellant was subjected to a further hearing before a decision was made to terminate his employment. There is further no letter of termination of employment. The contents of the letter dated 15th February 2018 do not relate to the hearing of 20th December, 2016. There is a disconnect between the evidence on record and the testimony of RW1.
53. The finding of the trial court that the Appellant did not bother to find out why his suspension took so long was a shift of the burden of proof from the Respondent to the Appellant. The finding that the Appellant was on pay during suspension until he deserted duty when the salary was stopped is not supported by the evidence on record. Neither is the finding at paragraph 14 of the Judgment that the Appellant absconded duty.
54. I find that the Respondent did not prove that the Appellant was recalled from suspension by letter dated 10th October, 2016. I further find that the Respondent did not prove that the Appellant absconded duty. This court has severally held that where an employer alleges that an employee absconded duty it must demonstrate what action it took to contact the employee to report back to work. There is a disconnect between the decision in the hearing of 20th December, 2016, the letter dated 15th February, 2018 and the termination of the Appellants employment which is not documented. It is inconceivable that the Respondent would send the Appellant on suspension by letter and fail to send him a letter of termination for alleged failure to respond to the letter dated 15th February, 2018.
55. It is for the foregoing reasons that I find that the Appellant proved on a balance of probabilities that he was never recalled from suspension and that there was no proof that he received the letter dated 15th February, 2018, which as I have observed, does not fit into the story the Respondent submitted to the court.
56. The Appellant having been unfairly and unlawfully terminated from employment he is entitled to compensation and payment of his terminal dues. In his Memorandum of Claim, the Appellant prayed for several remedies which I will address in separate heads.
- a. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair in the circumstances



Having found that the Appellant was terminated without a valid reason or fair procedure, I make a declaration that his termination was unfair and unlawful.

b. Terminal benefits

i. One month pay in lieu of notice

The Appellant's un rebutted evidence is that he was earning Kshs 10,223 per month. He is entitled to the same as notice pay as provided under section 35 of the Act.

ii. Compensation for unfair termination

Having found that the termination of the employment of the Appellant was unlawful and unfair, this court is clothed with jurisdiction to award compensation. Section 49 of the Employment Act provides for remedies for wrongful dismissal and unfair termination. The Claimant worked for the Respondent for eight years. Taking into account the length of the Appellant's service and relevant factors under section 49(4) of the Act, I award him compensation equivalent to 10 months' salary at a sum of Kshs 102,230

iii. Leave Dues

I decline to make awards under this head as the Appellant did not adduce evidence to show that he is entitled to this prayer.

SUBPARA iv.

Anticipated salary

This prayer is declined as the Employment Act does not make provision for such.

v. Salary during suspension

The Respondent did not tender any evidence to show that the Appellant was paid a salary during the long period he was on suspension. I award the Appellant salary from the time he was suspended, that is 10th October 2016 to 15th February 2018 when he was eventually deemed to have been summarily dismissed totaling to Kshs 153,345.

vi. Service pay/Gratuity

The Appellant's appointment letter at page 18 of the Record of Appeal provides for payment of gratuity to employees who retire or are retired. Having found that the Appellant was unlawfully terminated I award him gratuity at the rate of 1/12 of each completed month of service which the Respondent is required to compute and pay to the Appellant as the information on record is not sufficient for the court to tabulate the same since it does not have the salary paid to the Appellant every month during the period he was in employment from 1st May, 2010.

vii. Overtime dues

The Appellant did not tender any evidence in support of this claim. The same is declined.

c. The court be pleased to lift the suspension and substitute it with an appropriate order of the court

This prayer cannot issue as it has since been overtaken by events



- d. A declaration that the Claimant is entitled to a salary during suspension

The Appellant's appointment letter is silent on the issue of suspension. I find that the Appellant was entitled to his salary during the suspension period in view of the ambiguity in the circumstances that transpired after the disciplinary hearing. I declare it as such.

- e. Reinstatement with full salary, benefits and continuity of service without victimization

Section 49 (3) (a) of the Employment Act provides for reinstatement if the termination or summary dismissal is found to be unfair. However, section 12 (3) (vii) of the Employment and Labour Relations Court Act provides that an order for reinstatement is only permitted within 3 years of the separation. The Appellant left employment long time ago. This prayer is therefore not available to the Appellant.

- f. Certificate of service

Pursuant to section 51 of the Employment Act, the Appellant is entitled to a Certificate of service.

57. In conclusion, the judgment of the Trial Court dismissing the Appellant's suit is set aside and substituted with the following:-

- i. A declaration be and is hereby made that the termination of the Appellant was unfair and unlawful.
- ii. The Appellant is awarded:
- a. One month pay in lieu of notice.....Kshs. 10,223
- b. 10 months' compensation for unfair termination Kshs. 102,223
- c. Salary during suspension.....Kshs 153,345.
- d. The Claimant is awarded gratuity to be tabulated by the Respondent based on his salary per month for the entire period he was in employment.
- iii. The Respondent shall issue a Certificate of Service to the Appellant within thirty days of this judgment.
- iv. The Respondent shall meet the costs of the Appeal

58. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

