



Sieberi & another v Board of Management St Mary Academy (Employment and Labour Relations Appeal E007 of 2023) [2025] KEELRC 2094 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 2094 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2023**

DKN MARETE, J

JUNE 25, 2025

BETWEEN

JOSEPH NYAMISOA SIEBERI 1ST APPELLANT

DENIS KYUMWA KYAMA 2ND APPELLANT

AND

BOARD OF MANAGEMENT ST MARY ACADEMY RESPONDENT

JUDGMENT

1. This appeal challenges the decision of the learned magistrate delivered on 31st January 2023 dismissing the Appellants' claim for wrongful termination of employment. The Appellants, dissatisfied with this outcome, have filed the present appeal on seven grounds. These grounds can be condensed into three key issues for determination. These are as follows Whether the trial court erred in finding that the Appellants failed to prove wrongful termination. Whether it erred in not awarding terminal benefits such as notice pay and house allowance, and, Whether its decision was inconsistent with established law and evidence.
2. The Appellants seeks to overturn the lower court's judgment and obtain a declaration that their termination was unlawful, along with an award of Kshs.1,921,254.83 in terminal benefits, cost, and interest.
3. The genesis of this dispute lies in the conflicting narratives presented before the trial court by the parties. While the Appellants maintain they were summarily dismissed without due process, the Respondent contends that the Appellants voluntarily absconded duty. The trial magistrate, in a judgment delivered on 31st January 2023 found in favor of the Respondent holding that the Appellants had failed to discharge their burden of proving wrongful termination.
4. Aggrieved by this decision, the Appellants have lodged the present appeal raising seven grounds which essentially challenge the trial court's findings on three key aspects: the proof of termination, the award



of terminal benefits and the consistency of the judgment with established legal principles. This Court must now determine whether the trial magistrate erred in her application of employment law principles to the facts of this case.

5. The factual background of this case reveals a typical employment dispute with significant implications for both parties. According to the Respondent, the Appellants were engaged by the Respondent as drivers for the school's transportation needs or services. This engagement was on a temporary basis, renewable at the end of each school term. However, the Appellants contend they were permanent employees who had worked continuously for three years prior to their termination.
6. The crux of the dispute centers around events occurring in August 2018. The Appellants allege that upon reporting for work after the school holidays, they were verbally informed that their services were no longer required. This alleged termination was not preceded by any notice or disciplinary hearing. The Respondent, on the other hand, presents a starkly different version, maintaining that the Appellants simply failed to report back to work after the holidays, necessitating their replacement.
7. At trial, both parties presented documentary evidence to support their respective positions. The Appellants relied heavily on payslips and NSSF contribution records showing continuous employment while the Respondent produced what it claimed were temporary employment contracts. The trial magistrate, in evaluating this evidence, concluded that the Appellants had not sufficiently proved their cases for wrongful termination.
8. The Respondent's defense rests primarily, on two pillars, the alleged temporary nature of the Appellants' employment and their purported abscondment of duty. Counsel for the Respondent maintains that the Appellants were engaged on fixed-term contracts that required renewal at the end of each school term. They rely on authorities such as *Margaret A. Ochieng versus National Water Conservation and Pipeline Corporation* [2014] eKLR which recognizes fixed-term contracts as a legitimate form of employment.
9. Regarding the termination, the Respondent insists that no termination occurred because the Appellants voluntarily abandoned their positions. They seek to rely on authority of *Omar Ndaro Zuma v Modern Coast Express* [2019] eKLR for the proposition that an employee alleging termination must present concrete evidence to support this claim. The Respondent argues that the Appellants' mere assertion of verbal termination, without corroboration, is insufficient to discharge their burden of proof under Section 47(5) of the *Employment Act*, 2007.
10. On the issue of benefits, the Respondent contends that the Appellants' salaries were inclusive of all allowances, including house allowance. They further argue that the Appellants were not entitled to overtime as their working hours were clearly defined and included adequate rest periods during school hours. Regarding leave, they maintain that school holidays served as the Appellants' leave periods, as established in *Edward W. Obuya v M.M. Shah Academy* [2016] eKLR.
11. The issues for determination therefore are;
 1. Whether the trial court erred in finding that the Appellants failed to prove wrongful termination.
 2. Whether it erred in not awarding terminal benefits such as notice pay and house allowance, and,
 3. Whether its decision was inconsistent with established law and evidence.
12. The 1st issue for determination is whether the trial court erred in finding that the Appellants failed to prove wrongful termination. The Appellants' case is anchored on several key arguments that merit



- careful consideration. First and foremost, they contend that the Respondent failed to comply with the mandatory procedural requirements for termination as set out in Section 41 of the *Employment Act*, 2007. This section mandates that an employer must explain the reasons for termination to the employee in a language they understand and allow the employee to have a representative present during this explanation.
13. Counsel for the Appellants emphasized that there was no evidence whatsoever that these procedural safeguards were observed. No show-cause notice was issued, no disciplinary hearing was conducted, and no termination letter was provided. This complete disregard for due process, they argue, renders the termination procedurally unfair regardless of the substantive reasons that might have existed.
 14. The Appellants further rely on the principle established in *Boniface Francis Mwangi v B.O.M Iyego Secondary School* [2019] eKLR which imposes an obligation on employers to make reasonable attempts to contact employees who are alleged to have absconded duty. In the present case, the Respondent admitted that no such attempts were made, which significantly undermines their defense.
 15. Regarding the nature of their employment, the Appellants presented compelling documentary evidence in the form of payslips and NSSF records showing continuous deductions and payments over three years. This evidence directly contradicts the Respondent's claim that the Appellants were temporary employees whose contracts needed renewal every term. The purported temporary contracts produced by the Respondent were undated, unsigned, and lacked essential terms, making them legally deficient under Section 10(7) of the *Employment Act*, 2007.
 16. On the issue of terminal benefits, the Appellants highlight the Respondent's admission that house allowance was never paid, in clear violation of Section 31 of the *Employment Act*. They also point to the complete absence of any notice or payment in lieu of notice, contrary to Section 35(1)(c). The trial court's failure to address these clear statutory violations, they argue, constitutes a material error in law.
 17. The Respondent on the other hand seeks to rely on alleged temporary contracts is unavailing. The documents produced (pages 45-46 of the Record) are so fundamentally deficient - lacking dates, signatures, and essential terms - that they cannot be considered valid contracts under Section 10(7) of the *Employment Act*, 2007. This provision requires written contracts to contain specific information, including the date of commencement, job description, and terms of remuneration. This is so far for the validity of the fixed term contract adduced in evidence by the Respondent.
 18. The learned magistrate concludes her determination by finding that the testimony of PW1 – the Claimants' witness that their employment was terminated verbally but the co-claimant has not proof of such termination of employment. This confusing scenario led her to conclude a finding of no proof of wrongful termination. The allegations of wrongful termination of employment was therefore not proven on a balance of probability as against the Respondent and therefore dismissed the claim.
 19. All this time, the Appellant had a duty of proving unlawful termination of employment on the part of the Respondent. On the basis of their prima facie case of unlawful termination of employment, the burden would then shift to the Respondent to justify the termination. This, they did not do to a standard of balance or probabilities so as to enable a shift of the rebuttal burden of proof of lawful termination to the Respondent.
 20. The Respondent sought to rely on a case of absconding duty and failure to report back to work at the opening of the school term and therefore their replacement. In as much as we may not wish to rely on the credibility of the substance and form of the evidence of fixed term contracts for the Appellant, the Respondent's case comes out finer than that of the Appellants on a balance of probabilities. This is because, like it is observed by the trial court, the Appellants did not get out their way to establish a prime



facie case to which the Respondent would have been called to answer. The issue of the Respondent having had to seek out the Appellants from wherever they were hiding is no longer good law or precedent. The employer is no longer required to look for recalcitrant employees to ready and avail them for the due process of law as provided for under section 41 and 42 of the *Employment Act*, 2007.

21. I am therefore decline to dismiss the appeal with orders that each party bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 25TH DAY OF JUNE 2025.

D. K. NJAGI MARETE

JUDGE

Appearances:

Achila instructed by Omongo Gatune & Company Advocates for the Appellant.

Miss Matasi instructed by Simba & Simba Advocates for the Respondent.

