



**Kaharu v Ark Limited (Employment and Labour Relations Appeal
E005 of 2021) [2024] KEELRC 124 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 124 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2021
ON MAKAU, J
JANUARY 30, 2024**

BETWEEN

DAVID GACHURU KAHARU APPELLANT

AND

THE ARK LIMITED RESPONDENT

*(Being an Appeal against the Judgment of Hon.Wendy Kagendo
delivered on 15th March, 2021 in Nyeri CMELRC No.18 of 2019)*

JUDGMENT

1. By a Memorandum of Appeal dated 1st April, 2021, the appellant seeks to reverse the judgment of the trial court (Hon.W.Kagendo-CM) rendered on 15th March 2021 on the following grounds:-
 - a. That the learned Trial Magistrate erred in law and in fact in failing to find that the Appellant was unlawfully suspended from work.
 - b. The learned Trial Magistrate erred in law and in fact in failing to consider the evidence of the appellant contained in the supplementary list of Documents that showed that, the appellant was not keen to continue working with the Respondent and did not reach its judgment based on all the evidence before the court.
 - c. The learned Trial Magistrate erred in law and in fact in failing to find that the appellant having worked for the Respondent was entitled to terminal benefits.
 - d. that the learned Trial Magistrate erred in law and in fact in finding that the appellant had absconded from work which was as per the evidence before court was not the position.



Factual background

2. The appeal arises from an employment contract. The appellant was employed by the respondent as an Artisan Painter from 1st January 2012. He undertook his duties diligently until 14th October 2017 when he was suspended from work without pay for loss of employer's property. He was charged with the offence of stealing by servant in Nyeri Criminal case No.966 of 2017 which ended with his acquittal on 23rd August, 2018.
3. By a letter dated 11th September 2018, he notified the respondent's General Manager that he was not keen on returning to work and sought for payment of his outstanding salary and terminal dues. The General Manager never responded to the letter until 9th October 2018 when he wrote to the appellant requiring him to resume on 11th October 2018. The appellant responded by the letter dated 16th October 2018 restating his demands as per the letter dated 11th September 2018.
4. The dispute finally landed in court and after considering the evidence presented, the trial found no merits in the suit and dismissed it with no orders as to costs.

The appeal

5. The appeal was canvassed by written submissions. The appellant submitted on three issues: -
 - a. Whether the appellant was unlawfully suspended.
 - b. Whether the appellant was constructively dismissed.
 - c. Whether the appellant should be awarded the reliefs sought in the trial court.
6. On the 1st issue, he submitted that the respondent suspended him based on clause 10 of the Collective Bargaining Agreement (CBA), but the employer violated that clause. He contended that the suspension ought to have been 14 days pending the investigations into the lost items and then upon being charged in court, the suspension to be extended until the completion of the court process. In his view the employer acted unlawfully by giving him an indefinite suspension without indication on when it would end.
7. As regards the 2nd issue, he contended that the unlawful suspension amounted to constructive dismissal. He fortified the above submission by citing the case of *Milton M Isanya v Aga Khan Hospital Kisumu* (2017) eKLR, *Coca Cola East Africa Ltd v Maria Kagai Ligaga* (2015) eKLR and *Humphrey Sitati v Board of Management Lenana School* (2020) eKLR.
8. In view of the foregoing submissions, the appellant urged the court to find that he is entitled to the reliefs sought in the appeal.
9. The respondent, on the other hand submitted on the following issues:
 - a. Whether the appellant resigned or he was unfairly dismissed.
 - b. Whether the prayers sought should issue.
10. On the 1st issue, it submitted that the evidence on record is clear that the appellant never reported back to work after acquittal from the criminal charges. By a letter dated 9th October, he was instructed to report back to work but he absconded without good cause or permission.
11. It submitted that the obligation was on the appellant to report back to work upon his acquittal and not the employer to look for him. Consequently, it submitted that the appellant was not dismissed but



rather absconded from work after his acquittal. He failed to report back even after being required to do so by the employer.

12. In view of the foregoing, the respondent submitted that the appellant is not entitled to any relief since he never worked since 14th October 2017. Consequently, the court was urged to dismiss the claim by the appellant.

Issues for determination

13. This being a first appeal, the mandate of this court is to re-evaluate the evidence and make my own independent conclusions as was held by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 1 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.”

14. Having perused the record of appeal, and the submissions by both sides the following issues fall for determination: -
 - a. Whether the suspension of the claimant was unlawful.
 - b. Whether the claimant was constructively dismissed or he absconded work.
 - c. Whether the appellant merits the relief sought in the court below.

Suspension

15. There is no dispute that the appellant was suspended by the letter dated 14th October 2017. The letter stated that: -

“Mr.David Gachuru

Painter

The Ark Ltd.

Dear David,

Re: Suspension From Work

This letter is to inform you that the Ark Ltd Management has suspended you from work without pay wef 14th October, 2017.

This is following the incident of loss of items in transit from Aberdare Country Club to Ark Lodge, while you were the painter on duty.

The case is under the police investigations as per the CBA and once through you will be notified.



Yours,
Richard Hodgson
General Manager
Aberdare Country Club
Cc.
-Union Chairman
-FC -The Ark Ltd
-Personal file.”

16. Clause 10 of the CBA provides as follows: -
- a. “The employer reserves the right to suspend with full pay an employee from employment up to a maximum of 14 days pending investigations into alleged gross misconduct or other offences.
 - b. Should the employee be found to have committed gross misconduct or other offences, then he/she shall be summarily dismissed or terminated with effect from the date of the employer’s decision upon completion of the investigations. Should the employee be found innocent of gross misconduct or other offences, then he/she shall be reinstated forthwith.
 - c. Where the employee’s case is under investigation by the police or is pending before a court of law the employee’s suspension shall be extended without pay until the result of the police investigation or the court action is known.”
17. The above clause provides that the employer has the right to suspend an employee for 14 days with full pay pending investigations into alleged misconduct or other offences. However, where the employee’s case is being investigated by police or is pending before court for trial, the suspension shall be extended without pay until the result of the police investigation or the court decision is rendered.
18. In this case, the appellant was suspended after report was made by the respondent’s Security Manager to Mweiga police station. Consequently, the suspension fell within the meaning of clause 10 paragraph 3 of the CBA, that is, to remain in force until the completion of the police investigation or outcome of the court process. It is a fact that the police investigated the offence of stealing by servant and eventually charged the appellant in court. He then remained under suspension until the court acquitted him.
19. Having considered the evidence on record, I am satisfied that the suspension of the appellant was in accordance with clause 10 of the CBA and for that reason, it was lawful. Consequently, I find that the trial court was right in her conclusion that the suspension was lawful.

Constructive dismissal

20. Having considered the pleadings filed in the trial court, and the Memorandum of Appeal herein, there is no mention of constructive dismissal. The record is clear that the dispute presented by the parties to the trial court and this court is about unlawful suspension, salary during the suspension and terminal benefits. In fact, the appellant admitted under oath that he resigned from employment and demanded his unpaid salary and terminal dues.
21. It follows that the issue of constructive dismissal was not among the matters presented for determination by the trial court. It is an after thought introduced too late by the appellant in his submission before this court and the respondent never responded to the same.



Reliefs sought

22. The appellant sought to recover his salary during suspension until the date of filing suit. Clause 10 paragraph 2 of the CBA provides:

“Should the employee be found innocent of gross misconduct or other offences, then he/she shall be reinstated forthwith.”
23. In my view, the above reinstatement means that all rights and benefits of the employee under his contract of service are restored. He becomes entitled to get his job back together with all the withheld salary because he was prevented to work by the employer. The employer cannot be allowed to institute frivolous charges against an employee, suspend him without pay, and after acquittal purport to deny him the withheld salary.
24. Having said that, I find that the trial court erred by dismissing the claim for salary withheld during the suspension. The appellant remained in employment of the respondent through the period of suspension. He could not seek for alternative job. Consequently, I hold that he is entitled to salary for eleven months being the period between 14th October 2017 and 9th September, 2018 when he wrote a resignation letter through his counsel and demanded his dues.
25. Another claim is for general damages for unlawful suspension. I have already held that the suspension was lawful and therefore no general damages are payable to the appellant.
26. The last prayer was for terminal dues but no particulars were pleaded. However, the clause 27 (b) of the CBA provides for payment of gratuity to an employee who terminates his employment or who is terminated. Consequently, I find and hold that he is entitled to gratuity payment under clause 27(b) of the CBA.

Conclusion

27. I have found that the trial court was right in dismissing the claim for unlawful suspension. I have however faulted the trial court for failing to find that the appellant was entitled to all his salary withheld during the suspension period and terminal dues under the CBA after he resigned. Consequently, I allow the appeal, set aside the impugned judgment, and substitute it with an order awarding the appellant the following: -
 - a. Salary for the eleven (11) months suspension period.
 - b. Gratuity under clause 27 (b) of the CBA.
 - c. The employer to assess and pay within 45 days of this judgment.
 - d. The award is subject to statutory deductions.
 - e. The appellant is awarded costs of the appeal and the court below.

DATED, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY, 2024.

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

