



**Arya Samaj Primary School & another v Muchonyi (Appeal E011 of 2023)
[2024] KEELRC 457 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 457 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E011 OF 2023
AK NZEI, J
FEBRUARY 29, 2024**

BETWEEN

THE ARYA SAMAJ PRIMARY SCHOOL 1ST APPELLANT

THE ARYA SAMAJ EDUCATIONAL BOARD 2ND APPELLANT

AND

JAMES CHARO MUCHONYI RESPONDENT

*(Being an Appeal from the Judgment of Hon. D.W. Mburu – SPM
delivered on 13th January 2023 in CM ELR Cause No. 398 of 2018))*

JUDGMENT

1. This is an appeal against the judgment of Hon. D.W. Mburu delivered on 13/1/2022 in Mombasa CMC ELR Case No. 398 of 2018. In the said suit, the Respondent had sued the Appellants herein vide a memorandum of claim dated 12/11/2018 and filed in Court on 14/11/2018, and pleaded that he had been employed by the Appellants as a teacher from 2/1/1992 to 3/3/2018 when his employment was unlawfully, wrongfully and unfairly terminated by the Appellants.
2. The Respondent had further pleaded that termination of his employment and failure by the Respondents to give him a fair chance and opportunity to be heard was in bad faith, without due process, was based on unjustifiable grounds, and was in breach of the claimant's terms and conditions of employment, the *Employment Act* and best labour practices.
3. The Respondent had further pleaded:-
 - a. that he had worked diligently without any warning letters or reprimand, earning a gross salary of kshs. 25,973.



- b. that on 3/3/2018, the respondent was issued with a summary dismissal letter without being given a chance to respond to the allegations that had been raised against him.
 - c. that the summary dismissal was unfair, wrongful, unlawful, irregular and unjustified.
4. The Respondent had sought the following reliefs:-
 - a. One month salary in lieu of notice.
 - b. Service pay at the rate of one(1) month's salary for each of the 26 years of service.....ksh. 675,298.
 - c. Damages for unfair termination of employment (kshs. 25,973x12 months' salary).....ksh. 311,676.
 - d. A declaration that the claimant's summary dismissal by the Respondent was irregular, unlawful, unfair and wrongful.
 - e. Certificate of service.
 - f. Costs of the claim and interest.
5. Documents filed by the Respondent alongside the memorandum of claim were his written witness statement dated 2/11/2018 and a list of documents dated 12/11/2018, listing 7 documents. The listed documents included a letter of offer of employment dated 20/12/1991; the claimant's payslip for February 2018, the summary dismissal letter dated 3/3/2018, a demand letter dated 2/4/2018, letter by the Appellant dated 4/4/2018, response to the demand dated 18/4/2018 and a letter to the Appellant dated 20/4/2018.
6. Out of the 7 documents listed by the Respondent, only the letter of offer dated 20/12/1991 and the demand letter dated 3/4/2018 were included in the record of appeal filed in this Court.
7. The Appellants are shown to have entered appearance on 18/12/2018, and to have filed Response to the Respondent's claim on 8/1/2019. The Appellants denied the Respondent's claim and pleaded:-
 - a. that the Respondent had been employed by the 1st Respondent on bi-annual contractual basis on the terms and conditions stated in the contracts entered into between the 1st Appellant and the Respondent, the latest of which was entered into on 1/1/2017 for a period of two years from the said date to 31/12/2018.
 - b. that it was an express/implied term of the claimant's contract of employment that he would abide by the direction/rules and regulations set by the Respondents and/or any person duly authorized to do so, and not to physically or psychologically abuse children.
 - c. that the 1st Appellant had issued several circulars forbidding corporal punishment, which in any event is forbidden under the provisions of Article 29 of *the Constitution* of Kenya 2010 and Sections 13 and 18 of the Children's Act; and warned all staff, including the Respondent herein, against engaging in such conduct.
 - d. that the Respondent persistently meted out corporal punishment to children on several occasions, and had been issued with several warnings on this, and regarding other misconduct instances.



- e. that on 1/3/2018, the respondent physically punished a standard 4R pupil by meting out corporal punishment on her, and that on 2/3/2018, the 1st Appellant wrote to him, with a copy to the 2nd Appellant, to show cause why he could not be summarily dismissed.
 - f. that in his response dated 2/3/2018, the respondent simply acknowledged his misconduct and offered no explanation, and was summarily terminated by the 1st Respondent.
 - g. that the Respondent accepted kshs. 8,432 in full and final settlement upon signing a discharge voucher on 4/3/2018.
8. The Appellant also filed a witness statement by one Mr. John B. Ochieng dated 2/3/2022 and a list of documents dated 11/3/2019, listing 25 documents, which included a bundle of warning letters, the Respondents' statement on corporal punishment dated 2/3/2009, notification on corporal punishment dated 27/2/2015, minutes of General Staff Meeting held on 28/12/2015, internal memos issued on 11/11/2015, 3/2/2016, 28/2/2017, and 6/2/2018 respectively, a letter dated 8/1/2018 from the Appellant to the Respondent, the Respondent's commitment/statement on corporal punishment dated 18/10/2017, a show cause letter dated 2/3/2018, the Respondent's letter dated 2/3/2018 in response to the show cause letter, a certificate of service dated 5/3/2018, a discharge letter dated 4/4/2018 and a summary dismissal letter dated 3/3/2018, among others.
 9. On 18/1/2021, the Appellants filed a further list of documents dated 18/1/2021, listing a bundle of documents on NSSF deductions (by the Appellants) for the period 15/2/2015 to 9/3/2018.
 10. At the trial, the respondent adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. The respondent further admitted to having beaten a pupil on the shoulder because she was making noise in class; and stated that he contributed to both NSSF and NHIF. He admitted having signed a discharge voucher and further testified that he was not given an opportunity to defend himself, that he had signed a two year contract commencing on 1/1/2017 and ending on 31/12/2018.
 11. The Appellants called one witness, John Baptist Ochieng (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the documents listed on the Appellant's list of documents and supplementary list of documents referred to in paragraphs 8 and 9 of this judgment. The witness (RW-1) further testified that the respondent administered corporal punishment on a pupil, which was against the school's policy, that the respondent had been given several warnings, and that the Respondent was not invited to a Board meeting with an employee of his choice.
 12. Written submissions are shown to have been filed on behalf of both parties, and the trial Court delivered its judgment on 13/1/2022, making a finding of unfair termination and awarding the respondent ksh. 233,757, made up as follows:-
 - a. one month pay in lieu of noticekshs. 25,973
 - b. eight months' pay as compensation for loss of employment.....ksh. 207,784.
 - c. costs of the suit.
 13. Aggrieved by the said judgment, the Appellants preferred the appeal herein and set forth the following 12 grounds of appeal.
 - a. that the learned trial magistrate erred in law and in fact in entering judgment in favour of the Claimant against the Respondent for a total sum of kshs.233,757.00 plus costs of the suit.



- b. that the learned trial magistrate erred in law and in fact in holding that the Claimant had been employed on a permanent basis without taking into account and consideration the Appellant's list of documents, its witnesses testimony, written submissions and the authorities, and thereby arriving at a wrong conclusion.
- c. that the learned trial magistrate wholly misapprehended the letter of employment dated 20th December 1991, holding that it governed the employment relationship between the parties, and on that basis further held that the Claimant had been employed on permanent basis when the letter itself categorically stated that the appointment carried no guarantee or permanent employment.
- d. that the learned trial magistrate wholly failed to appreciate that the Claimant was given fixed term contracts which were on a bi-annual contractual basis and that the latest one was that of 1st January 2017 for a period of 2 years running from 1st January 2018 to 21st December 2018, which is provided for in the *Employment Act* under Section 10(3) (c)
- e. that the learned trial magistrate failed to appreciate and/or wholly and completely ignored the principle on fixed term contracts as was held by the Court of Appeal in the case of Trocaire- vs- Catherine Wambui Karuno [2018] eKLR, consequence of which he arrived at a wrong decision and conclusion.
- f. that the learned trial magistrate wholly and completely ignored and/or failed to analyse the Appellant's case, only relying on the Claimant's consequence of which he arrived at the wrong decision and conclusion.
- g. that the learned trial magistrate erred in law and in fact in ignoring and completely disregarding the Defendant's evidence and written submissions, particularly on the issue of termination of the Claimant.
- h. that the learned trial magistrate erred in law and in fact in failing to appreciate the admission by the Claimant of his mistake in response to the notice to show cause why the Claimant ought not to be summarily dismissed, and further ignored the principles enunciated in the case of David Otieno Ogada -vs- Bidco Africa Limited [2020] eKLR on such admissions.
- i. that the learned trial magistrate wholly misinterpreted the provisions of Section 45 of the *Employment Act* and further failed to appreciate and/or ignored the binding decision in the case of Benson Muraguri Maina vs- Kassam & Bros Co. Ltd [2016] eKLR and wholly misapplied or misinterpreted the decisions in the case of James Chemweno Kiptui -vs- Kenya Pipeline Company Limited [2014] eKLR consequence of which he erred in the analysis of all the material evidence placed before him on the issue of termination.
- j. that the learned trial magistrate erred in law and in fact in ignoring and completely disregarding the Appellant's written submissions.
- k. that the learned trial magistrate considered extraneous matters in arriving at his decision to allowing the Claimant's claim against the Appellant.
- l. that the learned trial magistrate erred in law and in fact in failing to appreciate that the Claimant had failed to prove his claim or indeed that he had a cause of action in the first place against the appellants.

14. the Appellants are seeking the following reliefs on appeal:-



- a. that the appeal be allowed.
 - b. that the judgment made in favour of the Respondent herein in CM.ELR Cause No. 398 of 2018 on 13/1/2022 be set aside, and judgment be entered for the Appellants herein dismissing the suit with costs.
 - c. that costs of the appeal and of the suit in the subordinate Court be awarded to the Appellants herein.
15. This is a first appeal. A first Appellate Court is mandated to re-evaluate the evidence presented before the trial Court as well as the judgment, and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions on it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This mandate was stated in *Mursal & Another -vs- Munese* (suing as the Legal Administrators of Dalphine Kanini Manesa) CIVIL APPEAL NO. e20 OF 2021 eKLR, where the Court stated as follows:-
- “A first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law....
- A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust.”
16. I will handle the grounds of appeal together. Having considered the pleadings filed, and evidence presented before the trial Court, issues that present for determination, in my view, are as follows:-
- a. whether termination of the Respondent’s employment by the Appellants was unfair.
 - b. whether the Respondent is entitled to the reliefs sought in the trial Court.
17. On the first issue, the Appellants pleaded that on 1/3/2018, the Respondent, being a teacher in the 1st Appellant school, meted out corporal punishment on a standard 4 pupil, which act was against both the law and the school’s policy, as a result of which the Appellants summarily dismissed the respondent on 3/3/2018. The Appellants demonstrated by documentary evidence that it was, indeed, against the Appellants’ school’s policy to subject pupils to corporal punishment. The Appellants produced in evidence minutes of staff meetings held on 9/3/2015 and 28/12/2015 whereat the Appellants’ teachers were warned against administering corporal punishment on pupils. Further, the Respondent is shown to have made written personal undertakings on 2/3/2009 and 18/10/2017 respectively, acknowledging that he would personally take responsibility for any consequences arising from corporal punishment administered by himself.
18. In the show cause letter dated 2/3/2018, the Appellants accused the respondent of having administered corporal punishment on a named standard 4R pupil, which charge the Respondent admitted in his response to the show cause letter, also dated 2/3/2018. The Respondent attributed what he referred to as “an unfortunate incident” to indiscipline on the part of the pupil, and apologized.



19. For termination of an employee's employment to pass the fairness test, it must be demonstrated that there was both substantive and procedural fairness. It was held as follows in Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR:-

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

20. Section 45(2) (a) of the Employment Act provides that termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid. In the present case, the Appellant demonstrated that the reason for terminating the Respondent's employment was valid. To that extent, substantive fairness was demonstrated.

21. On procedural fairness, however, the Appellants failed the fairness test. Section 41 of the Employment Act sets out a mandatory procedure that must be adhered to by every employer intending to terminate an employee's employment on account of misconduct, poor performance or physical incapacity. The Appellant has accused the Respondent of gross misconduct. This is clear from the Respondent's letter of summary dismissal dated 3/3/3018 which states in part:-

“Please be advised that your explanation on corporal punishment inflicted on Std 4R pupil, Rania Bilal, is not satisfactory because you carried out such gross misconduct with full knowledge and in your senses....:

22. Section 41 of the Employment Act provides as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

23. Both parties testified that the Respondent was not taken through the foregoing procedure. This rendered the termination process unfair. I uphold the trial Court's finding in that regard.

24. On the second issue, it was demonstrated by the Appellants that on 4/4/2018, the Respondent was paid kshs. 8,432 by the Appellants, upon which he signed a discharge, discharging the Appellants. The discharge letter/voucher produced in evidence by the Appellants, and which the Respondent admitted in evidence to having signed, states as follows:-

“I, Mr. James Charo, of ID No. 9472030 have no objection to the above. I have no other claims whatsoever against Arya Primary School. I am completely satisfied with above amount received.



I state that I have no further claims.

Signed

Witness: signed.”

25. The wording of the foregoing discharge is all inclusive. It does not leave out any aspect of the Respondent’s claim against the Appellants, or any claim which the Respondent could or can pursue. Had the discharge simply referred to the Respondent’s dues, then the Respondent would be justified to challenge the legality and fairness of his termination, and would be justified to seek compensation thereon. The discharge, however, states that the Respondent “has no other claims whatsoever” and has “no further claims”. This covered all types of future claims.
26. A duly signed discharge forms a separate contract between the parties involved, and unless vitiated by factors that would ordinarily vitiate a contract, it is binding on them. In the present case, the Respondent admitted in evidence that he had signed the discharge. He, being a teacher, did not plead misrepresentation, fraud, undue influence, undue pressure, coercion or any other vitiating factor.
27. The Court of Appeal, while discussing the import of a discharge voucher in the case of *Trinity Prime Investment Ltd -vs- Lion Of Kenya Insurance Company Limited* [2015] eKLR observed as follows:-

“The execution of a Discharge Voucher, we agree with the learned judge, constituted a complete contract.

Even if payment by it was less than the total loss sum, the Appellant accepted it because he wanted payment quickly and execution of the Voucher was free of misrepresentation, fraud or other. The Appellant was thus fully discharged.”
28. I stated as follows in the case of *Ben Otieno Aketch -vs- Macharia Mwangi & Njeru Advocates* [2021] eKLR:-

“The Claimant, who is an Advocate of the High Court of Kenya, did not demonstrate the existence of any vitiating factors like fraud, undue influence, undue pressure, ignorance, misrepresentation, coercion, threats, or illegality. The allegations of a flight cancellation are not a vitiating factor, and were not proved.

The Discharge and Clearance Certificate executed by the claimant on 8th June 2015 is binding on him, and the Respondent is fully discharged.”
29. In the absence of any vitiating factor, the discharge signed by the Respondent on 4/4/2018 to the effect that he had no other or further claims whatsoever against the Appellants (Arya Primary School) is legally and contractually binding on him. In their first ground of appeal, the Appellants stated that the learned trial magistrate erred in law and in fact in entering judgment in favour of the Respondent (who was the claimant in the primary suit) against the Appellants for a total sum of kshs. 233,757 plus costs of the suit. I agree with them, in view of the foregoing. The trial Court fell into error by failing to consider all the evidence presented by the parties before it, and in particular the legal and contractual import of the aforesaid discharge to which the Appellants had pleaded and testified on. The validity of that discharge was never disputed by the Respondent.
30. The appeal succeeds. The trial Court’s judgment is hereby set aside, and is substituted with an order dismissing the Respondent’s suit, being Mombasa Chief Magistrate’s Court Employment Cause No. 398 of 2018.



31. Each party will bear its own costs of the appeal and of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

