



**Fineline Industries Limited v Kanyima (Appeal E087 of 2021)
[2024] KEELRC 414 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 414 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E087 OF 2021
NZIOKI WA MAKAU, J
FEBRUARY 29, 2024**

BETWEEN

FINELINE INDUSTRIES LIMITED APPELLANT

AND

KENNEDY AMIMO KANYIMA RESPONDENT

(Being an appeal from the judgment and order of the Senior Principal Magistrate Hon. D. Mburu (Mr.) delivered on 23rd July 2021 in Nairobi Milimani Commercial Courts CMEL No 1245 of 2019: Kennedy Amimo Kanyima v Fineline Industries Limited)

JUDGMENT

1. Aggrieved by the whole Judgment and Decree of the Hon. Senior Principal Magistrate D. Mburu (Mr.) delivered on 23rd July 2021 in Nairobi Milimani Commercial Courts CMEL No 1245 of 2019: *Kennedy Amimo Kanyima v Fineline Industries Limited*, the Appellant filed an Appeal against the award that was later amended on 19th June 2023 on the grounds that:
 1. That the Learned Magistrate erred in law and fact in failing to find that the Claimant was unlawfully and unfairly terminated on the grounds that he was verbally terminated for pestering the Respondent to compensate him for injuries allegedly suffered in 2013 when no evidence at all was tendered by the Claimant.
 2. That the Learned Magistrate erred in law and fact by imposing the burden of proof upon the Respondent while the Claimant never proved on a balance of probability that he was terminated on the grounds as alleged in his Memorandum of Claim for seeking compensation for injuries allegedly suffered in 2013.
 3. That the Learned Magistrate, therefore, misapprehended the evidence and erred in law and fact by awarding the Claimant one-month gross salary in lieu of notice and further eight months



gross salary as damages while the Claimant did not prove at all that he was he was terminated on the grounds as alleged in his Memorandum of Claim for seeking compensation for injuries allegedly suffered in 2013.

4. That the Learned Magistrate erred in law and fact by failing to appreciate that the Claimant did not provide any evidence of the alleged injuries that he suffered in 2013 by way of filed pleadings, treatment notes, and medical payment receipts that formed the basis of his entire evidence in the trial court proceedings and therefore he failed to prove wrongful dismissal as prescribed in section 47(5) of the *Employment Act*.
5. That the Learned Magistrate erred in law and fact by disregarding the Claimant's own admission under oath and the Respondent's uncontroverted evidence that the Claimant reported the dispute to the Nairobi Sub-County Labour Office and the Sub-County Labour Officer determined the dispute and eventually issued a Certificate of Payment dated 8th August 2019, which the Respondent promptly complied with.
6. That the Learned Magistrate erred in law and fact by disregarding the findings of the Nairobi Sub County Labour Officer who determined the dispute between the parties in the first instance who ultimately determined that the Claimant was not unfairly and unlawfully terminated by the Respondent.
7. That the Learned Magistrate erred in law and fact by finding that the Respondent failed to prove that the Claimant absconded duty by providing evidence of the Respondent's following up on the whereabouts of the Claimant while disregarding the Respondent's uncontroverted evidence which included a complaint by the Nairobi Sub County Labour Office dated 26th June 2019, which was served a mere fifteen (15) days after the alleged termination of employment of the Claimant.
8. That the intervening period of fifteen (15) days could not be a reasonable period for the Respondent to do a follow-up on the Claimant's whereabouts having left the Respondent's employment on 10th June 2019.
9. That the Learned Magistrate exercised his discretion wrongly by awarding the Claimant one-month gross salary in lieu of notice and further eight months gross salary as damages for unlawful and unfair termination without taking into account the provisions of section 49 of the *Employment Act* by failing to consider the circumstances that led to the termination of the Claimant by the Respondent.
10. That the Learned Magistrate failed to appreciate the pleadings, oral and documentary evidence, and written submissions filed by the Respondent as it became clear that the Claimant did not wish to return to work for the Respondent upon service upon it of a complaint by the Nairobi Sub County Labour Office dated 26th June 2019 alleging unlawful termination.
11. That the Learned Magistrate erred in law and fact and further failed to consider the Respondent's evidence by entering judgment in favour of the Claimant instead of dismissing the Claimant's claim in its entirety.
12. That the Learned Magistrate erred in law by imposing the burden of proof as prescribed in section 47(5) of the *Employment Act* upon the Respondent rather than the Claimant and therefore the Claimant did not prove on a balance of probability his case in light of all of the evidence tendered by the parties during the hearing and therefore the Learned Magistrate erred in failing to dismiss the Claimant's claim in its entirety with costs to the Respondent.



2. The Appellant sought for the Appeal to be allowed in its entirety and that the Judgment/Award and/or decision of the Honourable Magistrate and the resultant Decree passed in favour of the Claimant as against the Respondent be set aside in the following terms:
 - a. That the Claimant is not entitled to one month's salary of Kshs. 20,000/- in lieu of notice;
 - b. That the Claimant is not entitled to eight months' compensation amounting to Kshs. 160,000/- as damages;
 - c. That the Claimant is not entitled to the costs of the Claim.
3. The Appellant further asked the Court to be at liberty to make such further or alternative orders as it deems proper in the circumstances and that the costs of the Appeal and the Lower Court proceedings be awarded to the Appellant together with interest at court rates, until payment in full.
4. The matter was disposed by way of written submissions.

5. **Appellant's Submissions**

The Appellant submitted that the issues for determination before this Court are:

- a. Whether the termination of the Respondent was unlawful;
 - b. Whether the termination of the Respondent was fair; and
 - c. Whether the trial Court was bound by the decision of the sub-county labour office.
6. It was the Appellant's submission that the Respondent's claim against it before the Lower Court was solely premised on the ground that he was terminated for pestering the Appellant to compensate him for injuries he suffered while at work in 2013. That there was however lack of evidence from the Respondent by way of pleadings, hospital admittance and discharge reports, treatment notes, a claim filed to the Director of Occupational Safety and Health Services (DOSHS), or a claim filed in a competent court for compensation for the injuries. The Appellant noted that the trial Court's determination on the issue of termination, as contained in paras 9 and 10 of the Judgment was that the Court was of the view that the Respondent's claim that he was terminated because he was pestering the Appellant for compensation was convincing. The trial Court further found that no warning letter was issued by the Appellant informing the Respondent that it was considering terminating the Respondent on the said ground. According to the Appellant, this was an error as the burden to prove termination always rested with the employee and not the employer as prescribed by section 47(5) of the *Employment Act* as held in *Jawadu Hamad Omar v East Africa Sea Food Limited* [2017] eKLR. That the mere averment by the Respondent that he suffered injuries in 2013 while at work without tendering any supporting evidence did not entitle the Respondent to an award of judgment.
7. The Appellant further submitted that on its part, it tendered evidence of the letter dated 27th June 2019 responding to the Sub-County Labour Office letter dated 26th June 2019, wherein it stated that the Respondent had not been terminated. That the version of events leading to the claim as filed by the Respondent was narrated by the Sub-County Labour Office, which issued a Certificate of Payment dated 8th August 2019 (page 63 of the Record of Appeal dated 19th June 2023) that settled the Respondent's claim as against the Appellant and with both parties' respective signatures affixed therein. The Appellant fronted that the trial Court disregarded this crucial evidence and only relied on the Respondent's version of events, who did not even rebut the said evidence. That the Appellant having rebutted the Respondent's reasons for termination by stating that he absconded work, the evidential burden shifted back to the Respondent who, at all times, had the burden of proof as prescribed by



section 47(5) of the *Employment Act* as held in the case of *Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers v Mary Immaculate Primary School* [2013] eKLR. The Appellant also asked the Court to dismiss the Respondent's assertions that he was verbally terminated and therefore entitled to damages for unlawful termination and to find that the Respondent failed to discharge the burden that he did not abscond duty.

8. The Appellant submitted that section 44(1) of the *Employment Act* as read with section 44(4)(a) of the Act, provide for summary dismissal, without notice or with less notice than that to which an employee is entitled to by statutory or contractual term, of an employee who absents themselves from work without leave or other lawful cause. It further submitted that while section 41 of the *Employment Act* provides that a hearing should be undertaken before a termination on grounds of gross misconduct, the exchange of correspondences or appearances before a labour officer in accordance with section 49 of the Act satisfies the requirement for a hearing. In this regard, the Appellant relied on the holding of the Court affirming the position in the cases of *Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital* [2019] eKLR and *Kenya Revenue Authority v Menginya Salim Murgani - Civil Appeal 108 of 2009*. The Appellant submitted that the Sub-County Labour Office is a decision-making body within the meaning of section 49 of the Act and with the parties herein having submitted themselves to the procedures of the Sub-County Labour Office, the Respondent cannot claim that there was unfairness in the process that led to his termination. It thus urged this Court to infer that the termination process was fair and within the meaning of section 41 of the Act, further considering that the process at the labour office resulted in payment in favour of the Respondent.
9. As to whether the trial Court was bound by the decision of the Sub-County Labour Office, the Appellant submitted that the decision of the Sub-County Labour Office should be binding upon the parties. That only in the rarest of circumstances can this Court set aside and/or disregard the said decision as prescribed under section 47(2) of the *Employment Act* as the labour officer made the decision after the complaint was presented and parties were afforded the chance to engage in alternative dispute resolution encouraged in Article 159(2) of *the Constitution* of Kenya. The Appellant cited the case of *Judith Aluoch Nyanje v Bharat Bhusan Thakrar* [2017] eKLR in which the Court considered the report findings of the County Labour Officer and found that the claim had no merit and thus dismissed it. That similarly in the case of *John Muthini Kithome v Ali Mohamed Noorani t/a Olympic Restaurant* [2019] eKLR, the Court upheld the decision of the labour officer who had issued issuance of a certificate of payment and held that the claimant closed his case when he collected the settlement cheque from the County Labour officer and that allowing him to reopen the case would be an abuse of the court process. It was the Appellant's submission that while the trial Court had the jurisdiction to determine any further dispute referred to it in accordance with section 47(3) of the *Employment Act*, it erred in failing to consider the outcome of the conciliation process the parties subjected themselves to and the certificate of payment issued by the Sub-County Labour Office. That the trial Court should not have interfered with the outcome of the conciliation process and should have dismissed the Respondent's claim. The Appellant thus prayed that this Court accordingly sets aside the Judgment rendered by the trial Court on 23rd July 2021.

10. **Respondent's Submissions**

The Respondent submitted that from the evidence given before the trial Court, his departure from the Appellant's premises was as a result of directives given to him by the company's director and that he therefore did not leave employment out of his own free will but was forced out verbally on 13th June 2019. That the Appellant cannot now turn around and allege that he had deserted employment yet he was pushed out and made to believe that he would be called back. That for an employer to enjoy a defence of desertion, the employer must demonstrate efforts made to establish the whereabouts of



the employee and further demonstrate and/or prove that the employee had no intention of resuming work per *Javan Kisoi Mulwa v S.A.A Interstate Traders (K) Ltd* (Mombasa ELRC Cause No. 743 of 2017). It was the Respondent's submission that he was unfairly terminated and that the Appellant did not prove that he absconded duty.

11. The Respondent further submitted that the reason he was removed from employment was because of an allegation that he had been captured by the CCTV cameras smoking within the Appellant's premises and also abetting theft. He argued that the burden of proof is always on the party that alleges but the Appellant failed to produce the said CCTV footage before the trial Court and its witness never connected the CCTV footage and/or the photographs produced by the Appellant to prove that he was the person in those photographs. He further argued that the Appellant had an absolute obligation to not only state the reasons for the termination but also follow the due process. That section 45(2) of the *Employment Act* is clear that an employer must not only prove that the reason given for termination is valid and fair but must also ensure the process used is fair. That the reason given was not valid because the CCTV footage was not produced and he was not identified in the photographs produced and further, the Appellant did not follow the right process in terminating his services.
12. The Respondent submitted that after the Appellant was served with a complaint from the Labour Ministry, it never asked him to report back to work but instead indicated that it was terminating his contract on grounds of absconding duties, abetting theft and smoking in the factory premises within proximity of a running machine. That the Appellant's response to the complaint by the labour office clearly indicates its intention to terminate his services at all costs. The Respondent asserted that the Sub-County Labour Officer went ahead to calculate his final dues and to issue a Certificate of Payment without involving him and that he refused to take out the dues as tabulated because he was dissatisfied with how the Officer had handled the matter. He concluded that the Appeal herein lacks merit and should be dismissed with costs.
13. The Appellant asserts the trial court placed a heavy burden on it to disprove the allegations raised by the Respondent herein. I have perused the record of appeal as well as the proceedings before the Learned Magistrate. I have not discerned any departure from the evidentiary threshold of proof on a balance of probabilities. The Learned Magistrate did not apply the standard of proof beyond reasonable doubt. As such, this ground collapses. Section 43(1) of the *Employment Act* makes provision as follows:-
 - (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. (Emphasis by me)
14. The fact the Appellant was required to dislodge the assertion by the Respondent of the unfairness of his termination did not mean the Appellant was placed under a greater burden or subjected to the wrong yardstick in as far as the evidence of the Respondent was concerned. The Learned Magistrate was entitled to hold the Appellant to the standard he held it. As this ground similarly collapses, the other line of attack against the judgment was the award. The Learned Magistrate did not grant an inordinately high award as to merit it being disturbed on appeal, or give an award that was not supported by evidence. The Appellant chose not to contact the Respondent instead opting to write to the Labour Office. This was not sufficient to dislodge any doubts regarding the motive for the failure to look for the Respondent when it noted he was absent from work. He was not served with any notice to show cause as one would expect in such a scenario.
15. The foregoing is sufficient to demonstrate that I do not find any merit in the Appellant's appeal and proceed to hereby dismiss the same with costs to the Respondent.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

