



**Ariri v Watchdog Limited (Appeal E076 of 2022)
[2024] KEELRC 1077 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1077 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E076 OF 2022
NZIOKI WA MAKAU, J
MARCH 11, 2024**

BETWEEN

SAMUEL MOGAKA ARIRI APPELLANT

AND

THE WATCHDOG LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable M. W. Murage Senior Resident Magistrate made on 2nd June 2022 in Nairobi CMELRC No. 2290 of 2019)

JUDGMENT

1. Aggrieved with the Judgment of Hon. M. W. Murage Senior Resident Magistrate delivered on 2nd June 2022 in Nairobi Cmel No. 2290 of 2019: Samuel Mogaka Ariri v The Watchdog Limited, the Appellant filed against the said Judgment on the following grounds:
 - i. That the learned Magistrate erred in fact and in law by delivering a judgment that was at gross variance with the proceedings.
 - ii. That the learned Magistrate erred in fact and in law in finding that the Appellant had not proved his case against the Respondent for wrongful termination whereas there was overwhelming evidence to the contrary.
 - iii. That the learned Magistrate erred in fact and in law in failing to make a finding and or award salary for notice pay, days worked, annual leave items which had been admitted by the Respondent in her submissions.
 - iv. That the trial Magistrate erred in law and in fact by issuing a Judgment that is contrary to established case law and precedent which had been cited before him.
 - v. That the trial Magistrate erred in fact and in law by disregarding the Appellant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.



- vi. That the learned Magistrate erred in law and in fact in wholly dismissing the Appellant's claim despite the same being supported by evidence.
 - vii. That the learned Magistrate erred in law and in fact by delivering a Judgment inconsistent with the proceedings.
 - viii. That the learned Magistrate erred in law and in fact in delivering a Judgment that is contrary to the provisions of the law and settled authorities.
2. The Appellant prayed that the Appeal to be allowed and the said Judgment of the Subordinate Court of 2nd June 2022 be set aside. He further asked this Court to enter judgment against the Respondent for:
- i. A declaration that the Appellant's termination from employment was wrongful, unfair and unlawful.
 - ii. The Appellant be paid his terminal benefits as set out in paragraph 9 of the Statement of Claim amounting to Kshs. 390,740/-
 - iii. Costs of the appeal.
 - iv. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of section 51 of the Employment Act, 2007.
 - v. Interests on (ii) and (iii) above.
3. The matter was disposed by way of written submissions.
4. Appellant's Submissions
- The Appellant argued the grounds of appeal in three groups as hereunder:
- i. Grounds 1, 4, 6 and 7 as; the learned Magistrate erred in fact and in law in delivering a Judgement which was at gross variance with proceedings, disregarding evidence before her and contrary to established case law and precedent.
 - ii. Grounds 2, 5 and 8 as; the trial Magistrate erred in fact and in law in finding that the Appellant had not proved his case against the Respondent whereas there was overwhelming evidence to the contrary, disregarding the Claimant's submissions and delivering a Judgment that is contrary to provisions of the law.
 - iii. That the learned Magistrate erred in fact and in law by failing to make a finding and or award one-month salary, underpayment, prorated leave, overtime, off days and compensation.
5. It was the Appellant's submission that a look at pages 69-74 of the Record of Appeal indicates that the trial Court did not analyse the evidence placed before it and equally did not capture the oral evidence and cross-examination of the witnesses. He noted that he had told the trial Court that his services were orally dispensed with on 7th October 2019 when the supervisor asked him to hand over company uniform and that he was later summoned on 9th October 2019 to collect the termination letter. That on cross-examination, RW1 stated that he did not see the Claimant/Appellant on 4th October 2019 and had invited him to show cause even though he had no letter calling him to show cause. That the evidence of RW2 who was his supervisor, was that the Claimant reported at work on 4th October in the morning and was drunk but upon cross-examination, stated that he does not have the occurrence book showing the attendances of the Claimant. That lastly, RW3 asserted that he knew the Claimant when he found him outside the head office gate. It was the Appellant's submission that no explanation was given for this obvious contradiction which was also not captured in the Judgement



of the trial Court and that it was not feasible to terminate in absentia an employee who was absent on 3rd and 4th October 2019. He submitted that his version that the termination occurred on 7th October 2019 and was then formalized on 9th October 2019 when the employer issued him with the termination letter is more credible. According to the Appellant, this flies in the face of section 45 of the [Employment Act](#) 2007.

6. As regards grounds 2, 5 and 8 of the appeal, the Appellant submitted that the trial Court disregarded all evidence placed before her including: the absence of summons, letters or even a text message calling the Claimant to show cause or inviting him to a disciplinary hearing; the contradictions in the Respondent's evidence as per page 83-86 of the Record, the omission of the Claimant's Submissions highlighting the validity of the reason to terminate, procedure followed and his entitlement to the reliefs sought. The Appellant asserted that had the learned Magistrate considered the evidence, submissions and the authorities as presented before her, the Court would have reached a very different conclusion.
7. On ground 3, it was the Appellant's submission that the learned Magistrate erred in fact and in law by failing to make a finding and/or award one-month salary, underpayment, prorated leave, overtime, off days and compensation. He argued that the trial Court had not justified why despite the clear admission that the Respondent did not follow procedure, the Court opted to dismiss the suit without advancing any reasons whatsoever. He further submitted that there was no evidence that the provisions of section 41 of the [Employment Act](#) were complied with and urged the Court to be persuaded that the termination was unfair for want of procedural propriety. That he was thus entitled to the discretionary remedy under section 49(1)(c) of the [Employment Act](#) at six (6) months' pay since he lost his source of income at a point when he was most vulnerable, having lost an immediate cousin. He further urged the Court to look at the pleadings, witness statements, written submissions by both parties and rectify the glaring errors made by the trial Court and ultimately enter judgement as prayed for in the Statement of Claim.
8. Respondent's Submissions
With regards to grounds 1, 4, 6 and 7 of the Appeal, the Respondent submitted that the trial Magistrate carefully considered all evidence presented before her, as outlined in the Respondent's final written submissions and that the allegations of gross variance and disregard of evidence are unfounded. That from the issues of determination, the lower Court saw through the lies and fabricated evidence being the Bus Ticket dated 3rd October 2019 and Burial Permit date 4th October 2019, both produced by the Claimant/Appellant. The Respondent referred to pages 72 and 73 of the Judgment wherein the trial Court found the said evidence produced by the Claimant/Appellant to be inconsistent in that the date of the death was 24th September 2019 while the date of the burial was 4th October 2019. Further, that the Claimant/Appellant had indicated that he was absent because he was attending a cousin's burial, yet when he was summoned to work on the said 4th October 2019 (the same date of the burial), he showed up while intoxicated.
9. Additionally, the Respondent noted that whereas the Claimant/Appellant alleged he was orally terminated, his termination was properly documented following reasons that he failed to report to duty and upon being called to explain, he was found to be drunk and proceeded to insult his superiors. That from the Proceedings, RW2 attested that the Claimant/Appellant was drunk when summoned to work and that RW3 also stated that the Appellant was drunk at the premises of work and had also insulted him. According to the Respondent, there were no inconsistencies in the statements provided by its witnesses and that the Claimant's argument does not hold water. It referred the Court to the Muster Roll at page 39 of the Record of Appeal, which shows that the Appellant was not at work



from 3rd October 2019 and that the Proceedings during his cross-examination before the trial Court indicate his admission of having been issued with a notice to show cause per page 81 of the Record of Appeal. That it was the evidence of all its witnesses that they saw the Claimant at the offices on 4th October 2019 while both RW2 and RW2 attested seeing him drunk on that day. The Respondent submitted that there was enough reason to terminate the Appellant/Claimant's employment for gross misconduct and proper procedure was followed.

10. It was the Respondent's submission that for grounds 2, 5 and 8 of the Appeal, its final Written Submissions clearly outlined the valid reasons for termination as per the terms of the employment contract and relevant legal provisions. That the trial Magistrate's decision was therefore well-founded and in accordance with the law considering the Appellant did not provide any evidence showing that he communicated his absence from work. Furthermore, RW2's evidence in chief was that he called the Appellant who told him he was tired and hung up the phone on him. The Respondent argued that the Appellant/Claimant having failed to prove that he was unfairly terminated, his claim failed and he therefore could not have been granted the prayers sought.
11. - Lastly on ground 3 of the Appeal, the Respondent submitted that the trial Magistrate's decision was comprehensive and addressed all relevant issues raised by both parties and that the Appellant's claim for additional compensation beyond what was stipulated in the employment contract is without merit. It reiterated that the Appellant/Claimant having failed to prove that he was unfairly terminated, his claim for inter alia notice pay, fails and it is also noteworthy that he had not accrued any leave days because he was still under probation. The Respondent further submitted that it adduced evidence of the Contract of Employment dated 28th June 2019 at pages 40-41 of the Record of Appeal showing that the Claimant was being paid in accordance with the current minimum wage and that the Claimant further admitted in his cross-examination that he was being paid a consolidated salary and was not entitled to any other claims. The Respondent noted that in adherence to the Judgement, it later issued the Claimant through his advocates a Cheque for Kshs. 14,000/- for the days worked and a Certificate of Service.
12. It was the Respondent's submission that the termination process it followed was fair and in compliance with procedural requirements and that the Appellant was given the opportunity to explain his actions but failed to do so. That the Appellant/Claimant's refusal to engage in the disciplinary process cannot now be grounds for challenging the fairness of the termination. The Respondent thus urged this Court to uphold the decision of the lower Court and dismiss the Appeal herein with costs to the Respondent.
13. The Court therefore has had to look at the testimony adduced before the Senior Resident Magistrate's Court warning itself it neither heard nor saw the witnesses and come to its own conclusion on the matter. The duty of the first appellate court is clearly stated in the case of *Okeno v Republic* [1972] EA 32 where the Court held thus:

“The duty of the appellate court in this appeal is to submit the evidence adduced in the trial to fresh analysis in order to reach its own independent conclusion. In doing so, the court must bear in mind that unlike the trial court, it has not heard the opportunity of seeing and hearing the witness testify. By this principle this court is enjoined to carefully examine and weigh the record of the trial court and subsequent judgment in order to come up with its own decision” [emphasis by me]
14. The issues that lend themselves for determination in the appeal are whether the Learned Magistrate misapprehended the evidence adduced and reached a wrong conclusion and whether there was a misapplication of the law leading to a result that ought to be interfered with. The Appellant herein



was employed by the Respondent as a guard. He served it until 4th October 2019 when he was stated to have failed to attend work. It was indicated that the Appellant had been found to have apparently been drunk when he reported to duty after his absence. Despite there being no medical record of the intoxication of the Appellant, the Respondent's witnesses Mr. Dudley Stannah, Mr. Silvanus Mosareno Mariko and Mr. Joseph Munene Wanjau all indicated the Appellant was drunk when they met him on the material day. The evidence adduced was that the Appellant was absent from work on account of bereavement which had occurred in late September 2019. He was accused of not notifying the employer of the demise that led to the aforesaid absence.

15. The provisions of section 44 of the Employment Act grant an employer the authority to terminate the services of an employee who absents himself or herself from work or one who presents themselves for work whilst intoxicated. Based on the provisions of the Appellant's contract of employment and the Employment Act, the Appellant was terminated for good cause as both intoxication while on duty and absenteeism are grounds for termination. The testimony before the Subordinate Court was that the Appellant was however not heard prior to his termination. This in my view cast his dismissal in the realm of unfairness in terms of section 41 of the Employment Act. In the judgment before the Court below, the Court found that the Appellant had not been accorded an opportunity to give his side of the story. In my view, this was a failure on the part of the Respondent as a hearing is required where it contemplates the termination of the services of an employee. The Appellant is on this score, entitled to remedy. In my considered view, the Appellant wholly contributed to the termination by being absent from work and making it worse by reporting to duty while intoxicated. In my view, one month's salary would more than suffice as compensation. The Learned Magistrate granted the Appellant all the dues the Appellant was entitled to being – pay for days worked in the months of September and October 2019 as well as the certificate of service which, from all accounts, have been complied with.
16. The Appellant has been partly successful in the appeal and as such I have to consider what orders may arise on account of costs. In considering whether to award costs, it must be borne out that costs in such a scenario as this are at the discretion of the Court. In determining the issue, I am entitled to look at among other considerations, the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the relationship between the parties and the result in both the subordinate court and here. The only issue that the Court is found to have erred on, is the issue of the disciplinary procedure undertaken. The Appellant was not given a hearing thus placing his termination as unfair within the meaning of the law. For this he was successful in obtaining the sum of Kshs. 13,500/-. What would be an appropriate order for costs? Granted he engaged counsel to prosecute the appeal, the Court is minded to grant him an award of Kshs. 25,000/- as costs taking into account the relative ease with which the appeal was disposed of. The Court therefore in its final orders grants the following reliefs:-
 - i. The Judgment and decree of the Hon. M. W. Murage Senior Resident Magistrate dated 2nd June 2022 is affirmed save that the Appellant is awarded one month's salary as compensation being Kshs. 13,500/- for the unfair dismissal.
 - ii. The Appellant be paid Kshs. 25,000/- by the Respondent as costs for this appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2024

NZIOKI WA MAKAU

JUDGE

