



Ngoci v Broadview Security Limited (Employment and Labour Relations Appeal E038 of 2022) [2024] KEELRC 544 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 544 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E038 OF 2022
ON MAKAU, J
MARCH 8, 2024**

BETWEEN

DENNIS WAITHAKA NGOCI APPELLANT

AND

BROADVIEW SECURITY LIMITED RESPONDENT

*(Being an Appeal against the Judgment of the Principal Magistrate at Meru,
Hon.E.Mbicha delivered on 5th October, 2022 in MELRC No. 7 of 2022)*

JUDGMENT

1. The appellant was employed by the respondent as an Accountant on 12th June 2018. His monthly gross salary was Kshs.21,500.00 and he was entitled to annual leave of 21 days. His working time was 7.30am to 5.30pm from Monday to Saturday. The contract was terminable by either party giving a notice of one month.
2. On 2nd March 2020, the appellant sued the respondent for unfair and unlawful termination of his employment contract contrary to section 45 of the *Employment Act*. He sought to recover Kshs.363,200.00 being salary for October and November 2019, one-month salary in lieu of notice, 12 months salary as compensation for unfair termination, one month salary being annual leave, refund of cash guarantee of 17 months, Sacco deductions for 17 months and Sacco dividends.
3. The respondent was served with the appellant's pleadings and summons and entered appearance through F.J.Mugambi & Co Advocates. However, no defence was filed and the suit proceeded by formal proof. After considering the material before it, the trial court (E.Mbicha PM) rendered the impugned judgment in which he dismissed the claim for unlawful termination but allowed the claims for unpaid salary and reimbursement of deductions towards cash guarantee and Sacco. A certificate of service was also awarded.



4. The appellant was dissatisfied with the said judgment and brought this appeal seeking to set aside the said judgment on the following grounds: -
 - a. That the learned Magistrate erred in law and in fact by raising the degree and bar of proof of civil matter beyond balance of probabilities.
 - b. That the learned Magistrate erred in both law and facts by completely ignoring the claimant's pleadings together with his submissions.
 - c. That the learned Magistrate erred in both law and fact in disallowing the plaintiff's claim for unfair termination when there was overwhelming evidence to prove that indeed the claimant was unfairly terminated from the contract by the respondent.
 - d. That the learned Magistrate erred in law and in fact in failing to find the text message from the respondent's Human Resource Manager instructing the appellant herein to handover all the company (respondent's) items under his possession amounted to constructive dismissal and the appellant had no much to do than handover as instructed.
 - e. That the learned Magistrate erred both in law and in fact in failing to find that to the extent that the respondent herein did not accord the appellant a hearing, issue the appellant with notice of termination of his contract nor pay the appellant in lieu of notice, the respondent's actions were illegal and amounted to unfair termination.
 - f. That the learned Magistrate erred in law and fact in failing to find that the Kshs.1000 deductions made from appellant's salary by the respondents which deductions were disguised as Sacco savings deductions all which totaled to Kshs.17,000.00 were illegal as no Sacco that indeed existed and said deductions never benefited the appellant but the respondent.
 - g. That the learned chief Magistrate erred in both law and fact by failing to find and hold that the Kshs.500 deductions made from the appellant's salary by the respondent all totaling to Kshs.8,500.00 were illegal should be paid to the appellant.
 - h. That the learned Magistrate erred in law and fact in failing to appreciate the circumstances surrounding the appellant's dismissal and failing to appreciate the law governing unfair termination to find that the respondent was in violation of the said laws so as to find the appellant termination was unfair.

Background

5. During the trial the appellant testified as PW1 and basically adopted his written statement and bundle of 6 documents as his evidence. In brief he reiterated the facts in the claim that he was employed by the respondent as Accounts and Administration in charge on 14th February 2018 for a gross pay of Kshs.21,000.00 per month and worked until 14th November 2019 when he was dismissed.
6. He stated that on the said date at 10.30 hours he received a call from the respondent's HR Manager Madam Hawa Guyo telling him that his services were no longer needed. Upon enquiry as to the reason for the dismissal, madam Hawa Guyo hung the phone. Later in the afternoon of the same day, he received a text message from madam Hawa Guyo instructing him to handover the company's property. His effort to resolve the matter with her were futile prompting him to report the matter to his trade union. The trade union wrote a letter but no response was elicited.
7. The appellant contended that he rendered diligent service to the respondent for one year five months and received neither written nor verbal warning before the dismissal.



8. The appellant called the branch secretary of his trade union, Mr. Josphat Mati who also relied on his written statement dated 12th March 2020 as his evidence. In brief his evidence was that on 10th February 2020 the claimant visited the offices of the union and reported that the respondent sacked him in November 2019 and failed to pay his salary. He then wrote a letter to the respondent's CEO and personally delivered it to the respondent's sister company called Smart Connections (EA) Ltd. The receipt of the letter was then acknowledged by stamping.
9. After the hearing, the appellant filed written submissions and the court rendered the impugned judgment

Submissions on appeal

10. The appellant submitted that the trial court ignored his pleadings and submissions and relied on a document which was not produced as an exhibit to conclude that there was no unfair termination but voluntary resignation. He contended that the court misdirected itself by placing reliance on extraneous matters and cited the case of *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* (2015) eKLR where the Court of Appeal faulted the trial court for relying on a document marked for identification ('MFI') but never produced as an exhibit.
11. The appellant submitted that he had proved a case of unfair termination by evidence. The said evidence was never controverted since the respondent tendered no evidence to prove that it informed him the reason for the termination and accorded him fair hearing before the termination. For emphasis he cited section 43 and 45 of the *Employment Act* and Article 47 of *the Constitution* to buttress his case. He further relied on section 49 of the *Employment Act* to urge that he is entitled to remedy for unfair termination.
12. Finally, the appellant submitted that he is entitled to salary for October and November 2019 equaling to Kshs.42,000.00 as awarded by the court and the cash guarantee of Kshs.8,500.00. He also contended that he is entitled to Kshs.17,000.00 deducted from his salary disguised as Sacco contributions but no account number was ever given to him.

Issues for determination

13. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own independent conclusion. The said mandate was established by the Court of Appeal in the case of *Kenya Ports Authority v Kushton (Kenya) Limited* (2009) 2EA 212 that: -

“On first appeal from the High court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
14. Having considered the evidence on record and the submissions made before me, the following issues fall for determination: -
 - a. Whether the appellant voluntarily resigned or he was unfairly dismissed.
 - b. Whether the impugned judgment should stand.



Resignation versus Dismissal

15. The appellant's case is that he was unfairly dismissed from work via a phone call by the respondent's HR Manager Ms.Hawa Guyo on 14th November 2019 at 10.30 hours. On the same day, afternoon, the HR Manager directed him to handover compulsory property. He produced copy of the said text message.
16. The respondent was served with the pleadings and supporting evidence but failed to file defence and tender evidence to controvert the appellant's claim. Consequently, I find that on the basis of the evidence on record, the appellant has proved his case on a balance of probability that he did not resign from employment but he was dismissed by the respondent's HR Manager Ms.Hawa Guyo.
17. I must agree with the appellant's submissions that the trial court erred in law and facts by relying on a document that was not produced as an exhibit to conclude that the appellant resigned voluntarily from employment. The court placed reliance on a letter written by the trade union (appearing as number 6 on the claimant's list of documents) but which was never produced during the trial.
18. In Kenneth Nyaga Mwigie case, supra, the Court of Appeal held that: -

“In our view, the trial court erred in evaluating the evidence on record and basing his decision on ‘MFI 2’ which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification. The respondents did not tender any formal evidence to challenge the defamation claim lodged against them.”
19. I am bound by the above decision and reiterate the same herein. The trial court erred by placing reliance on a document that was formerly withdrawn by the appellant during the hearing.

Whether the impugned judgment should stand

20. I will accept the invitation to determine whether the termination was unfair and unlawful.
21. Section 45 (1) and (2) of the [Employment Act](#) provides that:
 - “(1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee's conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”



22. Section 41 of the *Employment Act* provides that: -

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

23. The appellant herein argued that he was summarily dismissed over the phone by the HR Manager followed by a text message directing him to handover company property. His request for reason for the decision was not given. He was not accorded any hearing before the termination. These facts have not been controverted and therefore I find and hold that the termination was unfair within the meaning of section 45 of the *Employment Act*.
24. Under section 49 of the *Employment Act*, the appellant is entitled to remedies which include monetary compensation or reinstatement or re-engagement. He only prayed for monetary compensation. He worked for less than two years with clean records before the employment was abruptly ended. I award him two months salary as compensation for unfair termination being Kshs.42,000.00.
25. The award of Kshs.42,000.00 salary from October and November 2019 and Kshs.7,500.00 cash guarantee by the trial court will not be disturbed because the appellant asked this Court to uphold the same.
26. The appellant claims for refund of Kshs.17,000.00 deducted as Sacco contributions for 17 months yet no account number was given to him. The respondent has not rebutted that evidence which is corroborated by the pay slips produced as exhibits. Consequently, I grant the said claim for reimbursement of Kshs.17,000.00.

Conclusion

27. I have found that the appellant was unfairly dismissed from employment by the respondent and as such he is entitled to remedy under section 49 of the *Employment Act*. I have also found that the claim for reimbursement of money deducted from salary as Sacco is merited. Consequently, I allow the appeal, set aside the impugned judgment and substitute it with the following awards in favour of the appellant:

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- a. Compensation for unfair terminationKshs.42,000.00
 - b. Salary for October and November, 2019.....Kshs.42,000.00
 - c. Cash guarantee refund.....Kshs.7,500.00
 - d. Refund of Sacco deductions.....Kshs.17,000.00
- Kshs.106,500.00



- e. The award is in addition to costs of the appeal and court below plus interest at court rate from the date of this judgment.
- f. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 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

