



**Arunga v Kisumu Water & Sewerage Co Ltd (Appeal E065 of 2023)
[2024] KEELRC 1013 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1013 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E065 OF 2023**

**S RADIDO, J
APRIL 17, 2024**

BETWEEN

GODWIN OJWANG ARUNGA CLAIMANT

AND

KISUMU WATER & SEWERAGE CO LTD RESPONDENT

*(n Appeal from the judgment and decree of Hon Nyigee, PM in
Kisumu ELRC No. E239 of 2021, Godwin Ojwang Arunga v Kisumu
Water & Sewerage Co Ltd delivered on 20th November 2023)*

JUDGMENT

1. Godwin Ojwang Arunga (the Appellant) sued Kisumu Water & Sewerage Co Ltd (the Respondent) before the Principal Magistrates Court alleging unfair termination of employment and breach of contract.
2. The Cause was defended and in a judgment delivered on 20 November 2023, the Principal Magistrate found that the Respondent had valid reasons to dismiss the Appellant and dismissed the Cause.
3. Aggrieved, the Appellant lodged a Memorandum of Appeal with the Court on 1 December 2023, contending that:
 - i. The Magistrate dwelt solely on the issue of attempted theft of the 25kg bags while forgetting that the Claimant was actually arrested on this allegation and after investigations, the Police found no merit in the Respondent's claim of stealing and duly released him uncharged.
 - ii. The Court failed to appreciate the fact that the Respondent had a predetermined position when the Appellant employee was tried and the judgment written and delivered the same evening yet it was during the Corona lock-down period when gatherings were restricted and



people working half day and peoples' movement was restricted and there was no time taken by the Panel to review the evidence and write a judgment.

- iii. The Learned Magistrate failed to appreciate and consider the current position of the Superior Courts on summary dismissal and the relevant case law on summary dismissal.
 - iv. The Learned Magistrate failed to warn herself that she never heard or saw the Appellant testify in the Court below and treated the Appellant's evidence casually while failing to appreciate that she was dealing with a case that touched the Appellant's livelihood.
 - v. The Learned Magistrate failed in evaluation and analysis of the pleadings and evidence adduced.
 - vi. The Learned Magistrate erred in failing to consider all the facts, documentary evidence, written submissions and the binding authorities made on behalf of the Appellant in arriving at his decision of dismissing the claim.
 - vii. The Learned Magistrate failed in fact and in law in awarding the Respondent costs of the suit.
4. The Record of Appeal was filed on 22 December 2023, and the Court gave directions. The Appellant filed his submissions on 7 March 2024, and the Respondent on 2 April 2024.
 5. The Court has considered the Record of Appeal and the submissions.

The role of the Court on first appeal

6. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court: -

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

7. This Court will keep the interdict in mind.

Unfair termination of employment

Procedural fairness

8. The Respondent issued a show-cause notice to the Appellant on 14 May 2020. The notice set out the allegations against the Appellant and called upon him to make a written response.
9. On 20 May 2020, the Respondent invited the Appellant to attend a disciplinary hearing set for 27 May 2020. The invitation was copied to the trade union of which the Appellant was a member. The Appellant attended the hearing.
10. The Appellant also challenged the procedural fairness of the disciplinary hearing on the ground that a trade union representative was not present and that his witnesses were not asked questions. He also asserted that the process was unfair because the dismissal letter was issued on the day of the disciplinary hearing.
11. The time taken to make a decision after a disciplinary hearing will depend on the circumstances of each case and a disciplinary hearing cannot be faulted just because the employer makes a decision on



the day of the hearing. The Appellant here did not show that the taking of the decision on the day of the hearing was unfair or prejudiced him.

12. The Court has looked at the record of the disciplinary hearing. It does not show that the Appellant had or informed the Respondent that he had witnesses to call.
13. Considering that the trade union was copied on the letter inviting the Appellant to the disciplinary hearing, and without any suggestion that the invitation was not delivered to the trade union, the Court cannot fault the procedural fairness of the process. The Respondent could not be expected to compel the trade union to send a representative to the hearing.

Substantive fairness

14. In reaching a conclusion that the reasons for the dismissal of the Appellant were valid, the Principal Magistrate noted that the Appellant had given inconsistent versions of what happened during the disciplinary hearing, in the filed witness statement adopted as part of the evidence and before the Court.
15. The Appellant had testified that after leaving the front gate, he rode towards the back gate but before reaching the back gate, he saw some items lying on the ground. He also testified that he had been requested by a named security guard to pick him up at the back gate. He had left the said guard at the front gate.
16. The named guard denied having any arrangement with the Appellant and he further testified that he was in-charge of the guards and could not leave early. The guard was an employee of a contracted security firm. He explained how they had noticed the items earlier and informed one of the Respondent's supervisors who directed that a trap be laid.
17. The Appellant fell into the trap. Apart from the security guard, the Appellant's supervisor testified that he was called when the Appellant was loading the items.
18. The Appellant was caught red-handed. If he had stumbled upon the items, he would have notified the security guards or called his supervisor.
19. The Appellant attempted to argue that since he was not charged with a criminal offence or prosecuted, the reasons for his dismissal remained unsubstantiated and therefore not valid or fair.
20. The purposes and objectives of a criminal process and a disciplinary process are different, and the mere fact that criminal charges have not been laid against an employee cannot stop an employer from taking disciplinary action on the same allegations. Even the thresholds to be met under the processes are distinct. An employer can take disciplinary action founded on reasonable grounds while a criminal process has a higher threshold.
21. The Court is satisfied that the Respondent proved valid and fair reasons to dismiss the Appellant. The Principal Magistrate did not fall into an error when she found as much.
22. Compensation and pay in lieu of notice are thus not available to the Appellant as remedies.

Breach of contract

Gratuity

23. The Appellant sought for the payment of gratuity. During cross-examination, he admitted that the contract of employment did not provide for the payment of gratuity.



24. Without any other evidential or legal foundation, the Appellant did not make a case for the payment of gratuity.

House allowance

25. The Appellant's contract provided for gross wage and he cannot claim house allowance.

Leave allowance

26. Despite pleading an entitlement to leave allowance of Kshs 104,943/-, the Appellant did not lay a contractual or legal basis for this head of the claim.

27. The *Employment Act*, 2007 does not prescribe for payment of a leave allowance, but rather provides for annual leave of at least 21 days on full pay.

Conclusion and Orders

28. The Court has re-evaluated the evidence placed before the Principal Magistrate and finds that she did not fall into an error of law or fact.

29. The Appeal is dismissed with costs.

Delivered virtually, dated and signed in Kisumu on this 17th day of April 2024.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Omayya & Co. Advocates

For Respondent Otieno & Amisi Advocates

Court Assistant Chemwolo

