



**Bollore Transport & Logistics Limited v Kidaha (Appeal E060 of 2022)
[2024] KEELRC 1650 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1650 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E060 OF 2022
NZIOKI WA MAKAU, J
JUNE 24, 2024**

BETWEEN

BOLLORE TRANSPORT & LOGISTICS LIMITED APPELLANT

AND

WYCLIFF ISASIDA KIDHAHA RESPONDENT

(Being an Appeal arising from the Judgment and Decree of the Honourable A. N. Makau (Mrs.) Principal Magistrate delivered on the 28th April 2022 in Chief Magistrates Court at Milimani Chief Magistrates Employment and Labour Case No. 466 of 2019)

JUDGMENT

1. Aggrieved by the Judgment and Decree of Hon. A. N. Makau (Mrs.) Principal Magistrate delivered on 28th April 2022 in Chief Magistrates Employment and Labour Case No. 466 of 2019, the Appellant Company filed a Memorandum of Appeal dated 19th May 2022 appealing against the said Judgment on the following grounds:
 - a. That the Honourable Learned Magistrate in arriving at the conclusion that the Court was not told of what offence the Claimant had been charged with or what his defence was, and that the Claimant did not participate in the disciplinary hearing erred in law and in fact in failing to take into account the evidence of the parties tendered both in the witness statements and orally, the Claimant's memorandum of claim and the supporting documents, particularly the notice to show cause contained in the bundle of documents adopted as evidence which expressly detailed the charges brought against the Claimant, as well as the evidence of both witnesses confirming that the Claimant was taken through a disciplinary hearing.
 - b. That the Honourable Learned Magistrate in arriving at the conclusion that there were no minutes of the disciplinary hearing to demonstrate compliance with the disciplinary procedure erred in law and in fact in failing to take into account the minutes contained in the list of



documents dated 4th September 2020 and filed on 29th September 2020 which minutes were served upon the Claimant's advocates and duly received on the 5th October 2020.

- c. That the Honourable Magistrate additionally erred in law and in fact in failing to take into account the fact that the disciplinary process is not only limited to the minutes but is a culmination of various procedures including the issuance of notice to show cause, response, if any filed, invitation to attend the hearing, notification of the right to be accompanied, conducting the hearing and lastly issuance of the verdict, all which were contained in the evidence produced by the Parties.
 - d. That the Honourable Magistrate in arriving at the finding that the Claimant was not given a chance to be accompanied by a representative erred in law and in fact in failing to take into account the contents of the disciplinary hearing invite which expressly notified the claimant of the said right, the witness nomination form which was filled by the claimant nominating one James Biore, and the minutes of the hearing which show the attendance of the said Mr. James Biore, and in the circumstances arriving at a decision not supported by the evidence on record.
 - e. That the Honourable Magistrate in arriving at the conclusion that the Appellant not having issued the Claimant with a one month's notice failed to follow the required process erred in law and in fact in failing to appreciate the fact that this was a disciplinary process which having arrived at the decision to terminate, the letter of termination notified the Claimant of the payment of one month's pay in lieu of notice and this was principally because under the circumstances, a notice could not be issued.
 - f. That the Honourable Magistrate consequently erred in law and in fact in failing to take into consideration the totality of the evidence tendered and consequently arriving at a decision not supported by the facts and evidence on record.
2. The Appellant prays the Court Orders that the Appeal be allowed and that the Judgment and Decree delivered on 28th April 2022 be set aside and be substituted with an order dismissing the Claim as against the Appellant with costs, and entering judgment on the Counterclaim in favour of the Appellant. It further prays that costs of the Appeal and of the Claim be borne by the Respondent.
 3. The matter was disposed by way of written submissions.
 4. Appellant's Submissions
The Appellant sought for this Court to determine the following issues:
 - a. Whether the Appellant unprocedurally terminated the Respondent's employment.
 - b. Whether the Respondent was entitled to the reliefs awarded.
 5. The Appellant's case is that the learned trial Magistrate failed to appreciate the facts and evidence tendered by the Appellant in support of its Defence, in arriving at her findings in the impugned Judgment delivered on 28th April 2022. That the trial Court failed to thoroughly examine the evidence on record. The Appellant submitted that the trial Magistrate found in the impugned Judgment that the Respondent had valid reasons to terminate the Claimant's employment but concluded that the Respondent had not followed laid out procedure in its disciplinary process. The Appellant contended that the finding of the trial Court that the procedure had not been followed was incorrect and that this Court ought to re-evaluate the evidence tendered in respect of the procedure it employed in dismissing the Respondent. That since this is a first appeal, this Court's role as expressed in *Selle & another v Associated Motor Boat Company Limited Co. Ltd & others* [1968] EA 123 that the Court is not



bound to accept the findings of the lower Court and must simply reconsider the evidence, evaluate it itself and draw its own conclusions while considering it has neither seen nor heard the witnesses. Further, it was the Appellant's submission that section 41 of the *Employment Act*, 2007 provides the procedure for handling of employee disciplinary cases. That the evidence before the trial Court is clear that it issued the Claimant with a notice to show cause with enumerated charges, he was invited to a disciplinary meeting and informed of the right to be accompanied to the hearing by a fellow employee or witness of choice, was issued with a termination notice, and paid his final dues. It argued that despite having produced minutes of the disciplinary hearing held on 31st December 2018, which the Claimant also referred to during examination in Court, the learned Magistrate erroneously found there were no minutes to confirm that the disciplinary hearing complied with the law. That the trial Court also found that there was no evidence that the Claimant was given an opportunity to clear with the office whereas the Appellant produced a Clearance Form dated 17th January 2019 and the Claimant admitted he was instructed to clear.

6. The Appellant further argued that whereas it was entitled to dismiss the Claimant summarily, it chose to give him a month's salary in lieu of notice. It cited section 44(4)(e) of the *Employment Act* on summary dismissal being justifiable if an employee knowingly fails or refuses to obey a lawful and proper command issued by the employer or a person placed in authority over him by his employer, which it was within the scope of his duty to obey. That the Court in *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR amplified the import of section 44(4)(g) and observed that the employer was not required to have conclusive proof of the claimant's involvement and was only expected to have reasonable and sufficient grounds. That in this case, the Claimant confirmed that an accident occurred and that he failed to report the accident and gave all manner of excuses, including that he would have reported the incident had he noticed the damage. The Appellant noted that the implication of such excuse is that were it not that the incident was captured on CCTV and he being called and questioned on the same, the incident would not have been noticed and the Claimant thus failed to obey a lawful command. That in the end, it had adduced evidence at the trial Court showing it complied with the required procedure whereas the Claimant failed to prove the claim for unfair termination as required of him under section 47(5) of the *Employment Act*. It was the Appellant's submission that it was therefore unfair for the trial Court to condemn it despite the proper evidence tendered by parties.
7. As to whether the Claimant/Respondent was entitled to the reliefs awarded, the Appellant submitted that considering its foregoing submissions, he was not entitled to the reliefs granted to him. That it offered the Claimant one-month salary in lieu of notice notwithstanding the fact that it was summary dismissal but he has never bothered to collect the said dues and others. It maintained that it fairly and lawfully terminated the Claimant's employment and in so doing, disentitled him from making a claim for wrongful dismissal and for compensation. The Appellant further submitted that the Claimant was not entitled to leave pay as he did not present any evidence that he applied for leave and was denied, and simply sought leave pay for one year without mentioning the year. That without prejudice, Courts have held that in order to sustain the relief of payment for annual leave days not taken, the claimant has to demonstrate that there were leave applications made and the same were declined as held in *Justus Miwani v Jiangxi Water & Hydro Power Construction Kenya Limited* [2019] eKLR. The Appellant also posited that whereas it had issued the Claimant with a certificate of service dated 16th January 2019 that formed part of the documents produced in his list of documents, the trial Court made a finding that the Claimant had not been given a certificate of service. That therefore the order that it should issue the Claimant with a certificate of service was both redundant. It was the Appellant's submission that the trial Magistrate, in effect, failed to take into consideration the totality of the evidence tendered and consequently arrived at a decision not supported by the facts and evidence on record. It urged the Court to thus grant the Orders sought.



Respondent's Submissions

8. The Respondent submitted that the trial Court's Judgment delivered on 28th April 2022 is both fair and sound because it factored and considered all the evidence that was adduced by parties, the submissions and authorities in support thereof. That he wondered why the Appellant issued him with a letter of suspension on the same day it issued him with a notice to show cause, even before he received his explanation in response to the show cause letter. He asserted that the Appellant issued him with a one-month notice as set out in his letter of appointment and did not pay him in lieu of such notice. He also noted that when he filed an appeal against the decision to terminate his services, the Appellant neither considered the same nor responded to it and did not explain why. That in the absence of such evidence, the trial Court cannot be faulted for having correctly held that his appeal was not in fact considered. The Respondent further submitted that in as much as the Appellant may have had a ground (which is disputed) to terminate his services, due process ought to have been followed to the latter. That sections 41, 42 and 43 of the [Employment Act](#) provide for the mandatory procedures to be followed and adhered to for a lawful termination of employment. That in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR the Court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness for the termination.
9. It was the Respondent's submission that it is on record that the Appellant particularly sought for the production and review of the said CCTV footage for the night of 13th December 2018, which formed the basis of the termination but the Appellant refused and/or declined to produce the said footage per the Notice to Produce dated 27th May 2019 at page 103 of the record. The Respondent cited the case of *CMK v Chandarana Supermarket Limited (Cause 13 of 2018)* [2024] KEELRC 388 (KLR) in which the Court noted that no CCTV footage was availed to corroborate the allegation of theft and thus found in favour of the claimant on that score. He equally relied on the case of *Kenya National Private Security Workers Union v G4S Kenya Limited* [2021] eKLR where it was held that due to lack of the evidence of the CCTV footage that would have led to proof that the grievant was or was not within the premises, the validity of the reason remained limbo hence the decision that the termination was unfair and unjustified. The Respondent submitted that the Appellant having failed to rebut the claim by availing the footage for review to justify their claim, the Appellant cannot attack the trial Court for holding that they had failed to discharge their burden of proof. The Respondent maintained that the decision of the trial Court was thus sound to the extent that the termination was unfair and unprocedural. He prays that this Court dismisses the instant claim with costs to the Respondent.
10. This being the first appeal, the Court has to reconsider the evidence and come to its own determination as held in the case of *Selle & another v Associated Motor Boat Company Limited & others* (supra). In the case before the learned Principal Magistrate, the Respondent was dismissed after the Appellant herein held a disciplinary hearing. The Appellant had been asked to avail a record of the CCTV footage. From the record before me, the Respondent's request went unheeded. The Appellant stoically declined to avail the CCTV footage despite the provenance of the same. It could have proved the culpability of the Claimant (Respondent in the Appeal) or exonerated him. The case of *Kenya National Private Security Workers Union v G4S Kenya Limited* (supra) where the court held that due to lack of the evidence of the CCTV footage that would have led to proof that the grievant was or was not within the premises, the validity of the reason remained in limbo hence the decision that the termination was unfair and unjustified. Similarly, in the case handled by the Chief Magistrate's Court, there was an aspect left in limbo. That is why the learned Magistrate found in favour of the Claimant. I therefore do not find any fault in the determination by the Court below. I uphold the decision and accordingly dismiss the appeal before this Court. In light of the success of the Respondent, I award costs to him.



Decision of Hon. Principal Magistrate is upheld in its entirety and the Appeal accordingly stands dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

