



**Board of Management Friends School Senende v Abwala (Employment and Labour Relations Appeal E047 of 2022) [2024] KEELRC 1432 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1432 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E047 OF 2022**

**MA ONYANGO, J**

**JUNE 13, 2024**

**BETWEEN**

**THE BOARD OF MANAGEMENT FRIENDS SCHOOL SENENDE APPELLANT**

**AND**

**PATRICK LUVAYO ABWALA ..... RESPONDENT**

*(Being an appeal from the whole Judgment of the Honourable Senior Resident Magistrate C. Menya delivered on 9th September 2022 in Eldoret CMEL No. 205 of 2019)*

**JUDGMENT**

1. The Appellant herein was sued by the Respondent in the trial court vide a Memorandum of Claim dated 24<sup>th</sup> July 2019 where the Respondent was seeking for his terminal dues for alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 9<sup>th</sup> September 2022 and entered judgment in favour of the Respondent.
3. The Appellant being dissatisfied with the said Judgement filed the instant appeal vide the Memorandum of Appeal dated 12<sup>th</sup> October 2022 and filed in court on 10<sup>th</sup> November 2022. It sets out the following grounds of appeal:
  - i. That the Trial Magistrate erred in law and in fact by holding that the Respondent had been unlawfully dismissed in the face of clear evidence of summary dismissal upon lawful cause.
  - ii. The Trial Magistrate erred in law by ignoring the evidence that the Respondent was duly summoned to a disciplinary hearing and thereafter summarily dismissed after he had been given a fair hearing following a show cause letter.



- iii. The Trial Magistrate erred in failing to make a finding that the Respondent was lawfully suspended.
  - iv. The decision to award the Respondent money for leave allegedly due was not supported by concrete evidence especially in the absence of any evidence that Respondent expressly applied for such leave and the same was denied during the alleged period of entitlement to leave.
  - v. The computation of alleged terminal benefits by the lower court is not justified in law and in fact.
4. The Appellant prays that this appeal be allowed and the decision of the lower court be quashed and the prayers sought in the Appellant's Statement of Response to the Respondent's claim be allowed with costs both in the court below and this appeal.
  5. The appeal was disposed of by way of written submissions. The Appellant filed its submissions on 9<sup>th</sup> September 2023 while the Respondent filed submissions on 4<sup>th</sup> October 2023.

### **Analysis and Determination**

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123.
7. Vide his Memorandum of Claim dated July 24, 2019, the Respondent herein sued the Appellant seeking the following reliefs:
  - i. A declaration that the Claimant's letter dated 14<sup>th</sup> March 2019 and the subsequent inaction of failing to render to the Respondent the decision(s) reached after the hearing of the Disciplinary Committee held on 5<sup>th</sup> June 2019 in a language he understands amount by inference to a constructive termination of the Claimant's employment with the Respondent.
  - ii. That upon prayer (a) being granted, a further declaration that the Respondent did not comply with the mandatory provisions of sections 28, 35, 41 and 51 of the [Employment Act](#) hence making the termination of the Claimant's employment unfair, illegal and unlawful termination and that the Claimant is entitled to compensation for the unlawful, unfair and illegal termination.
  - iii. An award for unlawful termination of Kshs. 1,237,080.65 as pleaded in paragraph 13 hereinabove.
  - iv. An order compelling the Respondent to issue the Claimant a Certificate of Service under section 51 of the [Employment Act](#).
  - v. Costs of this suit and interest on (b) above at court rates from the date of filing this suit until payment in full and also interest on costs from the date of judgment until payment in full.
  - vi. Any other relief(s) this Honourable Court may deem fit and just to grant.
8. In that Memorandum of Claim, the Respondent avers that he was employed by the Appellant as a Grounds man with effect from 1<sup>st</sup> January 2012 until March 14, 2019 when he was suspended from duty without lawful reason.



9. He avers that he was subjected to an illegally constituted Disciplinary Committee hearing held on 5<sup>th</sup> June 2019 which had to date of filing suit not communicated the outcome reached with regard to his case.
10. The Respondent contends that the decision by the Appellant to suspend him from service vide the letter dated March 14, 2019, the failure to constitute a proper disciplinary committee as provided for in section 41(1) of the Employment Act and the failure to give an explanation for the decision made by the illegally constituted Disciplinary Hearing Committee held on 5<sup>th</sup> June 2019 in a language that the Claimant understood amounted to constructive termination of his employment.
11. The Respondent further contended that his constructive termination was unfair because the Respondent did not act in accordance with the principles and tenets of justice, equity and fair procedure and was tainted with illegality and in breach of the mandatory provisions of the Employment Act.
12. In response, the Appellant filed a Reply to the Memorandum of Claim on 9<sup>th</sup> September 2019 denying that the Respondent's services were suspended without lawful reasons.
13. The Appellant contended that the procedure leading to the suspension of the Claimant was proper, procedural and lawful and was based on the Claimant's persistent deviant behavior. According to the Appellant, the Respondent was subjected to a lawful disciplinary process that was fair and was given an opportunity to defend himself in observance of rules of natural justice.

#### **The Evidence Adduced**

14. At trial the Respondent testified as CW1. He adopted his witness statement recorded on 24<sup>th</sup> July 2019 as his evidence in chief. CW1 told the court that he was suspended on 14<sup>th</sup> March 2019 after he asked for some hours off to attend a funeral.
15. In his testimony, the Respondent maintained that during his engagement with the Appellant, he worked throughout the week (7 days) between 6am to 6pm and that he never went on leave save for year 2014.
16. On cross examination by counsel Amasakha, the Respondent admitted that he had previously been issued with warnings and he always apologized for the wrongdoings. He denied filing the claim prematurely.
17. The Appellant called its principal, Mr Albert Masiolo who testified as RW1. He adopted his witness statement dated 9<sup>th</sup> September 2019 as his evidence in chief. In his evidence, RW1 maintained that due process was followed in the suspension of the Respondent by the Appellant.
18. On cross examination, RW1 stated that the Respondent was a diligent worker and that he received several awards. When asked whether the Respondent was issued with a notice to show cause letter, he answered in the affirmative. The same was however not produced in court.

#### **The Appeal**

##### **The Appellant's Submissions**

19. In its submissions filed in court on September 19, 2023, the Appellant has crystalized the issues for determination to be:
  - i. Whether the court held it right in finding that the Respondent had been unlawfully dismissed.



- ii. Whether the trial court held it right in finding that the rebuttal by the Appellant that the suit was premature was not convincing.
  - iii. Whether the trial court took into consideration the evidence of the Appellant in making a determination of the case.
  - iv. Whether the court erred in awarding prayers not expressly sought in the pleadings.
  - v. Whether the computation of the alleged terminal benefits by the lower court is justified in law and fact
20. On the first issue, the Appellant submitted that the trial court erred by failing to take into account the number of warnings the Respondent had been given prior to his suspension. According to the Appellant, the Respondent was suspended from employment after he left his work station to attend a funeral without permission. It is alleged that the Respondent had on several occasions been issued with warnings and notices to show cause following his misconduct and that the reasons relied on in suspending the Respondent were genuinely believed to exist. The Appellant stated the Respondent in his testimony admitted that he had received several warnings.
  21. It is the Appellant's submission that the trial court failed to take into consideration the conduct of the employee prior to the suspension.
  22. The Appellant also faulted the trial court for holding that the Appellant had failed to demonstrate that the provisions of section 41 of the *Employment Act* were adhered to. According to the Appellant, during the Respondent's cross examination, he testified that he was not a member of a union and further, that he did not necessarily need a steward. The Appellant urged the court to make a finding that the Respondent failed to avail another employee at the hearing out of his own volition and that such failure on his part should not be visited on the Appellant.
  23. On the second issue, the Appellant submitted that the Respondent was suspended on 14<sup>th</sup> March 2019 and appeared before the disciplinary committee on 5<sup>th</sup> June 2019. It is submitted that the minutes of the disciplinary committee were handed to the Respondent and a copy forwarded to the Board of Management whose tenure had expired. That the Respondent had to wait for reconstitution of the Board to deliberate on his reinstatement or otherwise. It is submitted that the Respondent ought to have awaited the reconstitution of the Board of Management to give a verdict of his case before filing the claim at the trial court.
  24. With regard to the third issue, it is the Appellant's submission that the trial court disregarded the evidence of the Appellant, particularly the bundle of documents in support of the Appellant's case.
  25. On the issue whether the court erred in awarding prayers not expressly sought in pleadings, it is the Appellant's submission that the award for unlawful termination of Kshs 1,237,080.65 was not pleaded. The Appellant submitted that the trial court erred in basing its decision on the said computation which was not in the pleadings therein.
  26. Lastly, on the issue whether the computation of the alleged terminal benefits by the lower court is justified in law and fact, the Appellant submitted that the trial court erred in fact and in law by computing the underpayment on basic pay basing on legal notice 112 of 2017 and making a computation of 86 months when indeed the same notice came into force on 1<sup>st</sup> May 2017 and can only be applied for 25 months or so.
  27. Consequently, the court was urged to find the decision of the trial court unsustainable with regard to the substantive claim and that this Honourable court allows this appeal with costs to the Appellant.



## Respondent's Submissions

28. The Respondent on its part identified the issues for determination in this appeal to be:
- i. Whether the trial court erred in finding that the Respondent's dismissal was unlawful;
  - ii. Whether the trial court took into account the Appellant's case in its judgment;
  - iii. Whether the trial court erred in the computation of terminal dues;
  - iv. Whether the instant appeal is meritorious.
29. According to the Respondent, the disciplinary hearing conducted on 5<sup>th</sup> June 2019 breached the mandatory provisions of the Employment Act as the committee was illegally constituted. The Respondent submitted that he was never informed of his right to have a colleague or union representative present during the said hearing. The Respondent submitted that the Appellant intentionally breached the mandatory provisions of sections 41(1) and (2) of the Employment Act with regard to disciplinary hearings.
30. The Respondent further submitted that the Appellant's lack of communication of the findings from the disciplinary hearing. It is the Respondent's position that after the disciplinary hearing, there has never been any official communication of the decision to the Respondent in the language he understands as per the request made in the Respondent's letter dated 10<sup>th</sup> June 2019.
31. On the second issue whether the trial court took into account the Appellant's case in its judgment, the Respondent submitted that the judgment addressed all matters as raised by the parties and the evidence adduced.
32. With regard to the award of Kshs 1,237,080.65, it is submitted that the prayer as awarded by the trial court was pleaded by the Respondent and that it is within the ambit of the trial court to make any orders and reliefs in the interest of justice.
33. On the third issue whether the trial court erred in the computation of terminal dues, the Respondent submitted that the findings of the court so far as terminal dues are concerned are valid and legitimate. The Respondent submits that on the issue of leave dues, it was well proved that the Respondent was the Appellant's employee since the year 2012 and as such, he was entitled to receive leave dues from the Appellant.
34. On the computation of underpayment, the Respondent submits that the trial court rightfully relied on legal Notice No. 112 of 2017 in making a computation of the dues.
35. Lastly, on whether the instant appeal is meritorious, it is submitted that this appeal is an afterthought and an abuse of the court process as the same discloses no valid grounds for a variation or discharge of the judgment. The Respondent has submitted that the Respondent's case at the trial court was coached in law and well substantiated with fact, for which reason the trial court made a finding in his favour.
36. The Respondent prayed that the appeal be dismissed with costs.

## Determination

37. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that fall for determination are whether the trial court erred in holding that the Respondent had proved that he had been constructively dismissed.



38. In his Memorandum of Claim, the Respondent averred that he was constructively dismissed from employment as he was placed on unpaid suspension without communication of the decision of the disciplinary committee.
39. On the other hand, the Appellant has in its submissions stated that the Respondent instituted the suit at the trial court prematurely before a decision was made by the Board of Management. It contends that the disciplinary committee submitted its verdict to the Board of Management whose term was coming to an end and that the Respondent was to await the constitution of a new board for his case to be handled.
40. The Black's Law Dictionary (Tenth Edition) defines constructive dismissal or discharge as:
- “An employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”
41. Based on the above definition, the question that this court ought to answer is whether the circumstances under which the Respondent left employment would constitute constructive dismissal.
42. From the evidence on record, the Respondent was suspended from employment vide a suspension letter dated 14<sup>th</sup> March 2019. He was thereafter invited for a disciplinary hearing to be held on 5<sup>th</sup> June 2019 which he attended. From the minutes of the said disciplinary hearing, at page 51 of the Record of Appeal, after the Respondent was heard, he was told to go home and wait for communication of the decision of the disciplinary committee.
43. From the record, the Respondent filed the suit at the trial court barely 6 weeks after appearing before the disciplinary committee.
44. The Appellant at paragraph 11 of its Response to the Memorandum of Claim raised the issue that the suit had been filed prematurely. It was contended that the disciplinary process set in motion against the Respondent was ongoing at the time of filing the suit.
45. From an analysis of the above, it is evident that the Respondent filed the suit prematurely as he had not been informed of the decision of the disciplinary committee. His employment had thus not been terminated at the time filed the suit alleging constructive termination and neither were the circumstances such as he would assume constructive dismissal. He cannot therefore be heard to say that he was constructively dismissed by the Appellant. The trial court thus erred in holding that the Respondent was constructively dismissed by the Appellant.
46. The next issue is whether the trial court erred in awarding the remedies sought in the Claim by the Respondent. I will consider each prayer under the specific head.
- a. A declaration to issue in terms of paragraphs (a) & (b) of the prayers sought in the Memorandum of Claim consequently making the termination of the Claimant’s employment unlawful.
- As already found, the Respondent did not prove that he was constructively dismissed. He prematurely filed the claim before a verdict was made on his disciplinary case. He was therefore not unlawfully terminated and as such this prayer cannot issue.
- b.



- i. Compensation for unfair termination Kshs 82,753.80  
This prayer cannot issue as the Respondent's employment was not unfairly terminated.
- ii. One month pay in lieu of notice Kshs 7,930.60  
Having not been unfairly terminated and having filed the suit against the Appellant prematurely, the Respondent is not entitled to pay in lieu of notice. The award of the trial court under this head is accordingly set aside.
- ii. Underpayments on the basic pay
- iii. The trial court in its judgment awarded the Respondent Kshs 92,118.90 based on the 2017 Legal Notice. It was the Respondent's uncontroverted evidence that he started working for the Appellant on 1<sup>st</sup> January 2012 at a salary of Kshs 5000. The salary was subsequently reviewed to Kshs 6,400 in February 2014.
- iv. I have looked at the Minimum Wages Orders for the relevant period that is between 2012 and 2019. The Wage order applicable for the period 1<sup>st</sup> May 2011 to 1<sup>st</sup> May 2012 was Kshs 4047, 2012 to 2013 was Kshs 4577.20, 2013 to 2014 Kshs 5218, 2014 to 2014, it was not reviewed, so the applicable was for 2013-2014 which provided for Kshs 5218, 2015 to 2016 was Kshs 5844.20. Again this was not reviewed in 2016 and the minimum wage remained at Kshs 5844.20. 2017 to 2018 was Kshs 6896.16 while the minimum wage applicable between 1<sup>st</sup> May 2018 to 1<sup>st</sup> May 2019 was Kshs 7240.95.
- v. In total, the underpayment amounts to Kshs 17,789.20. The award by the trial court is hereby set aside, and substituted therewith an award in the sum of Kshs. 17,789.20 on account of salary underpayment.
- vi. Off days not given  
The Respondent was awarded Kshs 21,696.80. There is no basis for this award and as such, it is set aside.
- ii. Leave days  
The Respondent stated in his evidence that he never went on leave during the entire period he was employed by the Appellant save for the year 2014. The Appellant did not deny this averment. I however noted that the pay in lieu of leave is based on one months' salary for each year yet the Respondent's leave entitlement was 21 days per year according to the Terms and Conditions of Service for Board of Management (BOM) Employees. The leave should therefore be  $(6896.15 \times 26 / 30 \times 5) = 27,850$ . The award of Kshs. 34,480.75 by the trial court is set aside and in place thereof an award of Kshs. 27,850 is substituted and awarded to the Respondent.

47. Accordingly, the appeal partially succeeds and judgment in Eldoret CMELRC No. 205 of 2019 is set aside and substituted with the following:

- i. The Respondent did not prove that he was constructively terminated from employment
- ii. The award for underpayments is set aside and substituted with an award of Kshs. 17,789.20
- iii. The award for leave is set aside and in place thereof an award of Kshs. 27,850 awarded.



- iv. The award for compensation for unfair termination, one month pay in lieu of notice and off days not given are set aside
  - v. The award for leave days is set aside and substituted with an award of Kshs. 27,850.
48. The appeal having succeeded partially, each party shall bear its costs of the appeal and in the lower court.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13<sup>TH</sup> DAY OF JUNE, 2024**

**MAUREEN ONYANGO**

**JUDGE**

