



**Odie v Jims Fresh Vegetables Growers and Exporters Limited (Employment and Labour Relations Appeal E221 of 2022) [2024] KEELRC 2544 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2544 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E221 OF 2022**

**SC RUTTO, J  
OCTOBER 18, 2024**

**BETWEEN**

**VITALIS ASUGO ODIE ..... APPELLANT**

**AND**

**JIMS FRESH VEGETABLES GROWERS AND EXPORTERS  
LIMITED ..... RESPONDENT**

*(Being an appeal against the Judgment and decree of the Chief Magistrate's Court at Kajiado by Honourable V. Kachuodho delivered on the 30th day of November 2022 in Kajiado Chief Magistrate's Court Employment Cause No. E072 of 2021)*

**JUDGMENT**

1. The Appellant commenced a suit against the Respondent at the Chief Magistrate's Court at Kajiado being ELRC No. E072 of 2021. It was the Appellant's case at the trial Court that he was employed by the Respondent in the position of Livestock Responsible with effect from 3<sup>rd</sup> October 2017. The Appellant averred that he worked for the Respondent without any record of indiscipline until he was unlawfully and unfairly dismissed from employment. According to him, he was diligent and dutiful in the discharge of his duty.
2. The Appellant further averred that on or about 4<sup>th</sup> July 2021, while at work, he was informed by the Respondent's manager Mr. Sammy Muthomi that the Respondent's director Mr. Sudhir Kent, had instructed that he (Appellant) should not report to work the following day. He was not given any reason for the directive. He was further informed that he would be called back in the event his services were required.
3. According to the Appellant, he was dismissed unlawfully and unfairly as he was not informed of any reason for his dismissal and was not granted an opportunity to be heard. Consequently, the Appellant sought a number of reliefs against the Respondent being notice pay, salary underpayment, payment



for public holidays, payment in lieu of leave, payment in lieu of rest days, service pay, compensatory damages and issuance of a certificate of service. He further sought to be awarded the costs of the suit plus interest.

4. The Respondent opposed the Claim through a Response which was subsequently amended on 13<sup>th</sup> May 2022. The Appellant was summoned and questioned over a theft incident that occurred on 31<sup>st</sup> July 2021 and was consequently suspended effective 5<sup>th</sup> July 2021 pending further disciplinary action and outcome of police investigations. The incident was further reported at Isinya police station. The Respondent was categorical that it did not terminate the Appellant from employment but merely suspended him.
5. Alongside its Amended Response, the Respondent lodged a Counterclaim against the Appellant in the sum of Kshs 87,000/=. In this regard, the Respondent alleged that on or about 3<sup>rd</sup> July 2021, its Managing Director was informed that one of the livestock kept at the farm owned by one Mr. Joseph Kikaya was being transported out of the farm without the farm manager's and owner's consent and/or knowledge. That upon enquiring from the men who were transporting the livestock out of the farm as to who had given them consent to do so, they indicated that the Appellant had sold the cow to one Mr. Kennedy Kemboi. The Appellant gave no explanation of the said incident. It was the Respondent's further assertion that it was exposed to legal proceedings. Accordingly, the Respondent asked the Court to enter judgment against the Appellant for the sum of Kshs 87,000/=.
6. At the trial Court, both parties were heard orally and their evidence was tested in cross-examination. Further, they filed written submissions after close of the hearing. The trial Court evaluated and analyzed the evidence on record, and in the end, dismissed the Claim. The trial Court found that the Respondent had proved that the reason for termination of the Appellant's employment was valid and that fair disciplinary procedure initiated by the Respondent was frustrated by the Appellant. Be that as it may, the trial Court proceeded to award the Appellant one month's salary in lieu of notice, terminal dues and a certificate of service. Notably, the trial Court did not make a finding with respect to the Respondent's Counterclaim.

## **The Appeal**

7. The Appellant being aggrieved by the findings and orders of the trial Court has sought to challenge them on the following seven grounds listed in its Memorandum of Appeal:
  1. That the Learned Magistrate erred in law and fact and or misdirected herself in finding and holding that the Respondent had a valid reason for dismissing the Appellant from employment.
  2. That the Learned Magistrate erred in law and fact and or misdirected herself in finding and holding that the Appellant frustrated a fair disciplinary procedure initiated by the Respondent.
  3. That the Learned Magistrate erred in law and fact and or misdirected herself in finding and holding that the Appellant deserted duty without evidence of such desertion being placed before the Court by the Respondent.
  4. That the Learned Magistrate erred in law and fact and or misdirected herself in finding and holding that the Appellant had not proved his case as provided under section 47(5) of the [Employment Act](#).
  5. That the Learned Magistrate erred in law and fact and or misdirected herself in finding and holding that the Appellant's termination was not unfair and unlawful.



6. That the Learned Magistrate erred in law and fact and or misdirected herself in failing to make a determination on the claims for underpayment despite being admitted by the Respondent's witness, payment in lieu of public holidays, payment in lieu of leave, payment in lieu of rest days, service pay and NHIF penalty which were not in any way predicated on the fairness and or lawfulness of the Appellant's dismissal from employment.
7. That the Honourable Court erred in law and fact and or misdirected herself in failing to award costs of the case to the Appellant.

### **The Submissions**

8. The Appeal was canvassed by way of written submissions. On his part, the Appellant submitted that he was dismissed from employment and that the allegation that he was issued with a suspension notice and that he deserted duty are mere afterthoughts and are not supported by evidence.
9. It was the Appellant's further submission that the Respondent did not demonstrate that it had a fair and valid reason to dismiss him from employment. That further, he was not informed of the reason for his dismissal if at all any existed. In his view, even if the sale of Mr. Kikaya's cow were to be considered as being the reason for dismissal, it would still be invalid and unfair.
10. To this end, the Appellant urged the Court to find that he was dismissed pursuant to an invalid, non-existent and unfair reason.
11. With respect to procedural fairness, the Appellant argued that he was not granted an opportunity to be heard as provided by law. He further submitted that no material was placed before the trial Court whatsoever to demonstrate any engagements in the nature of the disciplinary hearing. It was the Appellant's further contention that his dismissal was unlawful, wrongful and unfair within the meaning of Section 45 for offending the provisions of Sections 41 and 42 of the *Employment Act*.
12. In support of the Appellant's submissions, reliance was placed on a number of authorities including *Walter Anuro v Teachers Service Commission* [2013] eKLR, *David Gichana Omuya v Mombasa Maize Millers Limited* [2014] eKLR, *Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Ltd* [2014] eKLR, *Peter Apolo Ochieng v Amido Centre Kenya* [2016] eKLR and *David Njoroge Muiru v Elsa Limited* [2014] eKLR.
13. The Respondent's submissions despite being uploaded on the online portal, were not paid for. To that end, they were not duly filed.

### **Analysis and Determination**

14. Being a first appeal, this Court has a duty to reconsider the evidence, evaluate it and draw its own conclusion but making allowance for the fact that it has not seen or heard the witnesses. Such was the determination by the Court of Appeal in *J. S. M. v E. N. B.* [2015] eKLR, thus: -

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”



15. In view of the above duty, I am enjoined to revisit the evidence presented before the trial Court afresh and analyze it in order to arrive at my own independent conclusion but bearing in mind that I did not see or hear the witnesses as they testified.
16. Having reviewed the record before me, the Appellant's submissions, as well as the law applicable, the following issues stand out for determination: -
  - a. Whether the Respondent had a valid and fair reason to terminate the employment of the Appellant;
  - b. Whether the Respondent terminated the Appellant's employment in line with fair procedure;
  - c. Whether the remedies sought by the Appellant lie in law.

### **Valid and fair reason?**

17. The Appellant has averred that on 4<sup>th</sup> July 2021, he was instructed by the Respondent's Manager, Mr. Sammy Muthomi not to report to work the following day. He further stated that Mr. Muthomi informed him that his services had been terminated. According to him, he was not given the reasons for his termination from employment.
18. This position was refuted by the Respondent, maintaining that the Appellant was directly implicated in a theft incident at its farm hence he was suspended on 5<sup>th</sup> July 2021 pending further disciplinary action and outcome of police investigations. The Respondent was categorical that the Appellant was not terminated from employment.
19. As it is, there was no letter of termination exhibited at the trial Court. Therefore, the reasons leading to the separation of the parties cannot be inferred therefrom. This being the case, the Court will have to revisit the events relevant to this case in the period leading up to the severance of the employment relationship.
20. The record bears that a report was made at Isinya Police Station by Mr. Kennedy Kemboi and booked under OB 31/17/7/2021 in which he stated that on 23<sup>rd</sup> March 2021, he sent Kshs 40,000/= to the Appellant who wanted to sell him a cow. He later sent Kshs 36,550/= and later Kshs 11,000/= which was inclusive of transportation costs. Mr. Kemboi further stated that he was stopped as he was transporting the cow and informed that the cow belonged to Mr. Joshua Kikaya. Upon enquiring from the Appellant about the true position, he (Appellant) informed him that he would refund him his money, and to this end, they entered into an agreement.
21. Exhibited at the trial Court was a copy of the Agreement executed by the Appellant and Mr. Kemboi in which he (Appellant) acknowledged owing Mr. Kemboi the sum of Kshs 87,000/=. He committed to pay the said money by 16<sup>th</sup> July 2021.
22. From the record, the Appellant admitted during the trial that he sold the cow in question to Mr. Kemboi and that he utilized part of the funds received to settle his mother's hospital bills.
23. It is common ground that the Appellant was working for the Respondent in the position of Livestock Responsible. It thus follows that he was responsible for all the livestock on the Respondent's farm. As it turned out, the Appellant sold one of the cows on the farm, belonging to Mr. Kikaya.
24. In as much as the Appellant maintained that the cow in question did not belong to the Respondent, the fact of the matter is that since the cow was on the Respondent's farm, it bore the ultimate responsibility and was liable in the event of any loss.



25. Further, despite the Appellant's assertions that Mr. Kikaya had authorized him to service the cow and source for a buyer, he did not prove as much at the trial Court. Indeed, one wonders why Mr. Kikaya would intercept the sale of the cow if at all he had authorized the Appellant to source for a buyer.
26. The bottom line is that there is no evidence on record to show that the sale of the cow by the Appellant was procedural seeing that there is no paper trail authorizing him to sell or move the cow from the farm.
27. The foregoing account does not portray the Appellant as an honest employee and I have no doubt in my mind that his actions cast doubt on his credibility, moreso taking into account his position as Livestock Responsible.
28. If I may say, the Appellant's conduct breached the trust the Respondent had in him. How would the Respondent trust him as Livestock Responsible moving forward?
29. Coupled with the foregoing, the Appellant admitted that he utilized the proceeds from the sale of the cow to settle his mother's hospital bill. This further leads me to conclude that it is more than probable that the incident had dented the employment relationship between the Appellant and the Respondent in a fundamental way.
30. With respect to dismissal of an employee on grounds of dishonesty, the Canadian Supreme Court had this to say in the case of *McKinley v BC Tel* [2001] 2 S.C.R 161:

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”

31. Applying the test set in the foregoing authority, it is apparent that upon the occurrence of the incident in question and considering the Appellant's level of participation, the Respondent genuinely believed he could not be trusted anymore to be responsible for the livestock on its farm.
32. Indeed, the trust issue had gone to the root of the employment relationship and as such, constituted fair and valid grounds to cause termination of the Appellant's employment.
33. All things considered, it is this Court's finding that the Appellant's conduct gave the Respondent a valid and fair reason to commence termination of his employment within the meaning of Section 45 (2)(a) and (b) of the *Employment Act*.
34. To this end, this Court is unable to fault the finding by the learned trial Magistrate.

### **Procedural fairness?**

35. Section 45(2) (c) of the *Employment Act* provides that for termination to be fair, it ought to be in line with a fair process. Section 41(1) of the Act spells out the requirements of a fair process. This generally entails notification and hearing. In this regard, an employer is required to notify an employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations. The employee is also entitled to be accompanied by a fellow employee or a shop floor union representative of own choice during such explanation.



36. As stated herein, the Respondent averred that the Appellant was suspended from duty on 5<sup>th</sup> July 2021 pending investigations and further disciplinary action but he refused to collect the letter of suspension.
37. Beyond the letter of suspension, the Respondent did not lead any evidence at the trial Court to prove that it took the Appellant through the process contemplated under Section 41 of the [Employment Act](#).
38. In its defense, the Respondent, stated that the Appellant deserted duty hence defeating any attempt to conduct a disciplinary hearing.
39. Notwithstanding the Respondent's assertion, it did not indicate, let alone suggest that upon noting that the Appellant had deserted duty, it attempted to establish his whereabouts.
40. As has been held by this Court on numerous occasions, it is expected that where an employee deserts duty, an employer would take reasonable steps to ascertain his or her whereabouts. Case in point is *Mary Mumbi Kariuki v Director, Pamoja Women Development Programme* [2015] eKLR, where the Court reckoned that in the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.
41. If the Respondent's version is true that the Appellant deserted duty, it is logical that it would have followed up to establish his whereabouts. In any event, absence from work without permission constitutes one of the grounds for summary dismissal under Section 44(4) (a) of the [Employment Act](#). Hence, if indeed the Appellant had deserted duty and refused to collect his letter of suspension, why didn't the Respondent put him on notice that his employment was bound to be terminated if he failed to show cause for deserting work?
42. Further, it is notable that during cross-examination at the trial Court, DW1 stated that after he called the Appellant, he went to the office, read the letter of suspension and declined to sign the same but continued to stay on the farm. It was DW1's further testimony that he could not recall the last time the Appellant was on the farm. The foregoing casts doubt on the Respondent's version that the Appellant deserted duty.
43. The total sum of my consideration is that the Respondent has failed to prove that the Appellant deserted duty thereby frustrating any attempts to conduct a disciplinary hearing. As such, I cannot help but find that the trial Magistrate fell into error in finding that the disciplinary process initiated by the Respondent was frustrated by the Appellant.
44. In the end, the Court finds that the Appellant was not granted an opportunity to be heard.
45. In total sum, I find that in as much as the Respondent had a valid and fair reason to terminate the employment of the Appellant, it did not apply the procedural requirements stipulated under Section 41(1) of the [Employment Act](#). Consequently, the Appellant's termination from employment was procedurally unfair.

### **Remedies?**

46. At the trial Court, the Appellant was awarded one month's salary in lieu of notice. I must say that this award is at odds with the trial Court's finding that the termination of the Appellant from employment was not unfair and unlawful.
47. That said, as this Court has found that the Respondent was justified in terminating the Appellant's employment but failed to apply the laid down procedure under the [Employment Act](#), the award of one month's salary in lieu of notice is sustained. The Appellant is further awarded nominal damages



equivalent to one month of his last salary. In awarding the said amount, the Court has taken into consideration the Appellant's contribution to his termination from employment.

48. The Appellant further claimed the sum of Kshs 117,923.10 on account that he was paid less salary in the month of April 2021, while in May, June and July 2021, he was not paid any salary. This position was not controverted by the Respondent. In any event, the Respondent admitted in its Response to the Memorandum of Claim that it could tabulate and pay the Appellant's salary arrears in due course.
49. Further to the foregoing, DW1 admitted at the trial Court during cross-examination that the Respondent did not pay the Appellant salary for the months of April, May and June 2021 and that the same was not deducted and remitted to Mr. Kemboi. This being the case, the Court returns that the Appellant is entitled to the sum of Kshs 117,923.10 being unpaid salary.
50. The claim with respect to unpaid leave also succeeds as the Respondent failed to exhibit the Appellant's leave records as required under Section 74(1) (f) of the *Employment Act*.
51. The Appellant further sought to be awarded payment in lieu of public holidays and rest days. In support of its case at the trial Court, the Respondent exhibited a copy of its Muster roll which indicates that the Appellant was paid overtime. Additionally, the Appellant admitted during cross-examination at the trial Court that he was paid for the extra days worked although not all. Taking into account the foregoing, the Court declines to award overtime pay.
52. The Appellant's claim for service pay fails as the record bears that he is a registered member of the National Social Security Fund (NSSF). This places him within the ambit of the exclusions under Section 35(6)(d) of the *Employment Act*.

#### Orders

53. The total sum of my consideration is that the judgment of the trial Court is set aside and the Appeal is allowed in the following terms: -
  - a. The award of one month's salary in lieu of notice is sustained.
  - b. The Appellant is awarded compensatory damages in the sum of Kshs 45,000.00 which is equivalent to one month of his last salary.
  - c. The Appellant is awarded the sum of Kshs 117,923.10 being salary underpaid in the month of April 2021 and unpaid salary in May, June and July 2021.
  - d. The Appellant is awarded pay in lieu of leave being the sum of Kshs 31,500.00.
  - e. The final award is Kshs 239,423.10.
  - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
  - g. Costs in this Court and at the trial Court shall be borne by the Respondent and shall be pegged on the final award.

**DATED, SIGNED and DELIVERED at NAIROBI this 18th day of October, 2024.**

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**STELLA RUTTO**

**JUDGE**

Appearance:



For the Appellant Ms. Abai

For the Respondent Mr. Aradi instructed by Mr. Eredi

Court Assistant Millicent Kibet

## **ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

