



**Mutoro v Ken-Knit (K) Limited (Employment and Labour Relations Appeal E004 of 2021) [2024] KEELRC 13212 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13212 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E004 OF 2021  
MA ONYANGO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**GILBERT WAMALWA MUTORO ..... APPELLANT**

**AND**

**KEN-KNIT (K) LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and decree arising from Eldoret Chief Magistrate's Court, ELRC Cause No. 353 of 2019 delivered by the Honourable S. Wewa SRM on 4th May 2021)*

**JUDGMENT**

1. The Appellant herein was the Claimant in the trial court in which he sued the Respondent vide a Memorandum of Claim dated 17<sup>th</sup> December 2019 alleging that he was wrongfully, unprocedurally and unlawfully terminated from employment.
2. In the Memorandum of Claim, the Appellant averred that he was employed by the Respondent as a machine operator in the Spinning Department on permanent terms from 7<sup>th</sup> January 2000 and worked until 1<sup>st</sup> March 2018 when his employment was wrongfully, unprocedurally and unlawfully terminated.
3. He averred that on 1<sup>st</sup> March 2018, he was summoned by the Human Resource Personnel and informed that his services had been terminated with immediate effect on grounds that he had forged the Respondent's letterhead and the signatures of all the directors in a letter indicating that he had retired so as to benefit from NSSF funds. The Appellant stated that he responded to the allegations made by the Respondent and explained that he did not forge the company's letterhead or signatures of directors but had only visited the NSSF offices to inquire if he was eligible to receive part of his pension having attained the age of 50 years. The Appellant stated that he made it clear that the officials at the NSSF offices informed him that it was possible for him to access his dues which funds were processed and released to him.



4. The Appellant disputed the termination of his employment on the alleged forgery. He also contended that he was not accorded a fair and proper hearing. The Appellant further averred that the Respondent terminated his services without a fair reason and without regard to the procedures set out in the [Employment Act](#).
5. The Appellant prayed for the following reliefs against the Respondent:
  - a. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues
  - b. The sum of Kshs. 524,143.21/= particularised as hereunder:
    - i. One month pay in lieu of notice.....Kshs. 16,305
    - ii. Compensation for unfair termination...Kshs. 195,660
    - iii. Service pay.....Kshs. 120,521.50
    - iv. Underpayment of wages.....Kshs. 190,028.50
    - v. Leave pro-rate.....Kshs. 1,654.21
  - c. Exemplary damages
  - d. Certificate of Service
  - e. Cost of this suit and Interests at court rates from time of filing the suit until payment in full and
  - f. Any other further and better relief the Honourable Court may deem just and fit to grant.
6. The Respondent filed a Response to the Memorandum of Claim on 22<sup>nd</sup> January 2020 denying the averments in the Claim and maintained that it never dismissed the Appellant nor terminated his employment. The Respondent contended that it did not violate any provision of the [Employment Act](#) as there was nothing in the circumstances to warrant application or adherence to sections 41(c), 43(1) and 45(2) of the Act.
7. After hearing the parties, the trial court delivered its judgment on 4<sup>th</sup> May 2021 dismissing the Appellant's claim.
8. The Appellant being dissatisfied with the trial court's judgment instituted the instant appeal vide the Memorandum of Appeal dated 2<sup>nd</sup> June 2021 filed in court on 3<sup>rd</sup> July 2021 on the following grounds of appeal:
  - i. That the learned magistrate erred in law and fact by applying wrong principles in dismissing the suit with costs to the Respondent.
  - ii. That the learned trial magistrate erred in law and in fact in finding that the Appellant had not been terminated from employment having not been issued with a termination letter, when in fact;
    - a. No show cause was issued to the Appellant to respond to the allegations placed against him;
    - b. The Respondent failed to prove fairness of the allegations placed against the Appellant;



- c. No evidence of the Appellant's misconduct, if at all was tendered against the Appellant;
  - d. No fair hearing was accorded to the Appellant;
  - e. The Appellant was not issued with a termination letter;
- iii. The learned magistrate erred in law and fact in failing to appreciate the evidence by the Appellant thereby leading to miscarriage of justice.
  - iv. That the learned trial magistrate erred in law and fact in not considering the Appellant's submissions and authorities in support of the claim in its entirety;
  - v. That the learned trial magistrate erred in Law and fact in failing to consider the validity of the reason for termination of the appellant from employment;
  - vi. That the learned trial magistrate erred in law and in fact in holding without basis that the Appellant's dismissal on a preponderance of evidence tilted to the respondent, when in fact the respondent did not discharge the burden of proof of justification of termination of the Appellant as per section 10 and 47(5) the Employment Act 2007
  - vii. The learned trial magistrate erred in fact and law by failing to rely on evidence on record, decided case laws, statutes, international conventions and equity in her decision to dismiss the appellant's suit;
  - viii. The learned trial magistrate erred in fact and law by failing to address the issue of certificate of service;
  - ix. That the judgment of the learned magistrate is in the circumstances unfair and unjust.
9. The Appellant prays for the following reliefs:
- a. This appeal be allowed
  - b. The judgment of the lower court delivered on 4<sup>th</sup> day of May 2021 be set aside and be substituted with a proper finding by this Honourable court.
  - c. The Respondent to pay costs in the lower court and in this appeal.
  - d. This Honourable court makes such and further orders as it deems fit and just to meet the ends of justice.
10. The appeal was disposed of by way of written submissions. The Appellant filed his submissions on 30<sup>th</sup> October 2023. The Respondent did not file any submissions.

### **Appellant's Submissions**

- 11. The Appellant submitted that this being an appellate court, it is mandated to evaluate and re-examine the evidence adduced in the trial court in order to reach its own conclusion. The Appellant relied on the of *Selle & Another vs Associated Motor Boat Co. Limited & Others* (1968) EA 123.
- 12. Regarding the issue whether the termination of the Appellant's employment was fair, the Appellant submitted that the Respondent did not comply with the mandatory procedural and substantive fairness in terminating his employment. The Appellant submitted that he was not summoned for any disciplinary hearing since he did not receive any notice inviting him for any disciplinary hearing. The Appellant further submitted that although the Respondent's witness, RW2, while giving his evidence



- stated that the Appellant was summoned for a disciplinary hearing through a phone call, no evidence was produced before the trial court to demonstrate that the Respondent indeed reached the Appellant.
13. The Appellant further submitted that the alleged invite to the disciplinary hearing dated 28<sup>th</sup> March 2018, although not served on him, was issued to the shop steward for onward transmission to the Appellant to attend a disciplinary hearing to be held on 29<sup>th</sup> March 2018. According to the Appellant, the said notice even if it was to be authentic, was too short and fell short of procedural fairness as he could not attend the disciplinary hearing on such short notice. In support of this position, the Appellant cited the cases of *Geothermal Development Company Limited v Attorney General & 3 others*; *Godfrey Barasa Ochieng v Security Guards Services Limited (2022) eKLR*; *Republic v University of Nairobi ex-parte Lazarus Wakoli Kunani & 2 others (2017) eKLR*; and *James Mungai Muhia v Kenya National Union of Teachers & 2 others (2020) eKLR*.
  14. The Appellant submitted that the failure to summon him for disciplinary hearing was prejudicial to him since he was not afforded an opportunity to defend himself.
  15. On whether the Respondent terminated the Appellant's employment for valid reason, the Appellant contended that his employment was terminated on allegations of forgery of the company's letterhead and signatories' signatures. The Appellant stated that RW1, in her evidence before the trial court alluded that the Respondent had received letters from NSSF informing it of the forgery, but did not call anyone from NSSF or produce a report from the Directorate of Criminal investigations to authenticate the said forgery. It is therefore the Appellant's submission that the failure by the Respondent to produce evidence to demonstrate the alleged forgery shows that the Respondent was not certain about the said accusations and neither had it completed its investigations before terminating the Appellant's employment.
  16. While citing the case of *Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited (Employment and Labour Relations Cause 22 of 2019) (2022)*, the Appellant submitted that the Respondent did not demonstrate the fairness of the reasons for terminating his employment.
  17. Consequently, the Appellant submitted that the trial court erred in law and in fact in failing to award him the reliefs sought and a certificate of service, as he had demonstrated that he was unfairly and unprocedurally terminated from employment. He urged the court to overturn the trial court's judgment with a holding that he was indeed unfairly and unprocedurally terminated from employment. He also prayed to be awarded Kshs. 524,143.21 as terminal benefits, a certificate of service and costs both at the trial court and in the appeal.

## **Determination**

18. I have considered the record of appeal, the grounds of appeal and the submissions on record. I have also taken into account the authorities relied upon by the parties. This being a first appeal, I am obliged to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another v Associated Motor Boat Co. Ltd (1968) EA 123*.
19. From the Memorandum of Appeal and the submissions on record, I deduce that the appeal before this court raises the following issues: -
  - i. Whether the Appellant's employment was unlawfully terminated by the Respondent or he absconded duty
  - ii. Whether the learned trial magistrate erred in dismissing the Appellant's claim



iii. Whether the Appellant is entitled to the reliefs he is seeking in this appeal

**Whether the Appellant's employment was unlawfully terminated by the Respondent or he absconded duty**

20. The Respondent maintained that it never terminated the Appellant's employment and insisted that the Appellant absconded duty from 1<sup>st</sup> March 2018 upon being summoned by the Respondent's Human Resource Manager to explain his involvement in the forgery claims raised by the NSSF officials. The Respondent's witnesses, RW1 and RW2 in their evidence reiterated in their testimony that the Appellant's employment was never terminated, that he willfully and deliberately absconded duty from 1<sup>st</sup> March 2018.
21. On his part, the Appellant in his evidence contended that his employment was terminated by the Respondent on allegation that he had received money from NSSF while he was still an employee.
22. At page 47 of the record of appeal is a notice of a case hearing dated 28<sup>th</sup> March 2018 inviting the Appellant for a disciplinary hearing on 29<sup>th</sup> March 2018. The Respondent's witness stated that the Appellant never appeared for the hearing and opted to abscond duty.
23. Section 47(5) of the *Employment Act*, 2007 provides that –
- For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
24. It is now trite that when an employer pleads that an employee absconded duty, the employer must give evidence showing that reasonable attempts were made to contact the employee concerned and to find out the reason for the employee's failure to present himself for work. In the case of *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, the court observed as follows:
- “An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
25. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that
- “Dismissal on account of absconding duty must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”
26. Applying the foregoing propositions to the present case, no evidence was presented in court to demonstrate that the Respondent reached out to the Appellant after he absconded duty. The Respondent has therefore not discharged its onus of establishing that the Appellant absconded duty and as such, termination was procedurally unfair even though the Respondent had valid reason to commence disciplinary proceedings against the Appellant as he admitted drawing his benefits from NSSF yet he was still in employment.



### **Whether the learned magistrate erred in dismissing the Appellant's claim**

27. Having found that the termination of the Appellant's employment was unfair, I find that the trial court erred in dismissing the Appellant's claim on grounds that the Respondent observed both substantive and procedural fairness in terminating his from employment.

### **Whether the Appellant is entitled to the reliefs he is seeking in this appeal**

28. The Appellant prayed for the following reliefs in his statement of Claim before the trial court: -
- i. A declaration that the Claimant's services were unprocedurally, unlawfully and unfairly terminated and in the circumstance the claimant is entitled to compensation of his terminal dues
  - ii. The sum of Kshs. 524,143.21/=
  - iii. Exemplary damages
  - iv. Certificate of Service
  - v. Cost of this suit and Interests at court rates from time of filing the suit until payment in full and
  - vi. Any other further and better relief the Honourable Court may deem just and fit to grant.
29. Having found that the Respondent did not prove that the Appellant absconded duty, the resultant termination of the Appellant's employment was unfair and I accordingly declare so.
30. The Appellant claimed the sum of Kshs. 524,143.21/= as terminal benefits particularized to include one month's pay in lieu of notice, compensation for unfair termination, service pay, underpayment of wages and pro-rata leave.
31. The Appellant in his testimony did not lead any evidence in respect of his claim for underpayments and pro-rata leave. These prayers are therefore declined.
32. On the prayer for one month's pay in lieu of notice, having found that the Appellant's employment was unfairly terminated, he is entitled to the same.
33. On the Appellant's claim for 12 months' compensation, section 49 (4) of the Employment Act outlines the factors to be considered by the court in exercising its discretion while making awards of compensation for unfair dismissal. The Appellant had worked for the Respondent for almost 10 years as at the time his employment was terminated. Having considered the factors set out in section 49(4) (e) of the Employment Act, and specifically the fact that the Respondent had valid reason to terminate the Appellant's employment and also having found that the Respondent only partially complied with procedural fairness, I award the Appellant 1 one months' salary as compensation for unfair termination.
34. On the prayer for service pay, the Appellant's pay slip attached to his bundle of documents shows that he was a registered member of the NSSF. He did not lead evidence to prove that his terms of employment entitled him to the same. The prayer for service pay is declined.
35. In the end, the judgment of the trial court dismissing the Appellant's claim is set aside and substituted with the following:
- a. A declaration be and is hereby made that the termination of the Appellant's employment was unfair



- b. The Appellant is awarded one-month salary in lieu of notice.
  - c. The Appellant is awarded 1 months' salary as compensation for unfair termination.
  - d. The Respondent is directed to issue the Appellant with a certificate of service pursuant to section 51 of the *Employment Act*
36. As the appeal has only partially succeeded, each party shall bear its own costs of the appeal. I also order that each party bears its own costs of the trial in the lower court.
37. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024.**

**M. ONYANGO**

**JUDGE**

