



**Oduor v Ahero Girls Secondary (Appeal E023 of 2024)  
[2024] KEELRC 2861 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2861 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E023 OF 2024  
NZIOKI WA MAKAU, J  
NOVEMBER 20, 2024**

**BETWEEN**

**GEORGE OCHIENG ODUOR ..... APPELLANT**

**AND**

**AHERO GIRLS SECONDARY ..... RESPONDENT**

*((Being an appeal against the judgment and decree of Hon. J.  
Wambiliyangah SPM in Kisumu Law Courts Chief Magistrates  
Court – MCELRC E042 of 2020 given on 28<sup>th</sup> September 2023))*

**JUDGMENT**

1. Dissatisfied with the outcome in the Chief Magistrates Court, the Appellant lodged a memorandum of appeal with this court on 25<sup>th</sup> June 2024 contending that: -
  - i. The Learned Magistrate erred in law and fact by failing to find that the Appellant was wrongfully and unlawfully terminated by the Respondent without reasonable cause or justification.
  - ii. The report made by the Appellant clearly shows that he was under threat from the Respondent's Principal.
  - iii. The Magistrate did not appreciate the overwhelming evidence given by the Appellant at trial.
  - iv. The Magistrate did not carefully evaluate and consider the provision of section 41(2) of the Employment Act which had been breached by the Respondent in the matter.
  - v. The decision was against the weight of evidence.
  - vi. The Magistrate erred in law and in fact in failing to find that the procedure for summary dismissal under section 44 of the Employment Act was not followed and was grossly breached.



- vii. The Magistrate erred in law and in fact in failing to find that the audit report clearly showed that there was financial impropriety and that the Appellant reported the same.
- viii. The unprocedural act of the Respondent violated Article 47 of *the Constitution* by not providing the Appellant with the opportunity to defend this case.
- ix. The Magistrate erred in law and in fact in finding that the right of the Appellant under Article 50 of *the Constitution* was breached.
- x. The Magistrate was completely biased against the Appellant.

The Appellant thus prays that the appeal be allowed and the Magistrate's decision be set aside.

2. By way of brief background, the Appellant impleaded the Respondent before the Kisumu Magistrates' court alleging unfair dismissal. He sought terminal benefits, salary for the remainder of the years until retirement, reinstatement and damages for unlawful dismissal. In response to the claim, the Respondent contended that the Appellant was summarily dismissed for insubordination, gross misconduct and lack of accountability. After considering the evidence, the Magistrate delivered a judgment on 28<sup>th</sup> September 2023 wherein the Learned Magistrate found the Appellant's case unmerited and dismissed it with costs awarded to the Respondent. Through directions issued on 2<sup>nd</sup> October 2024 parties agreed to dispose of the appeal by way of written submissions as provided for under the 2024 Rules of the Court.

### **Appellant's submissions**

3. The Appellant urges the court to re-examine the pleadings and evidence tendered and reach a conclusion that he had proven his case before the magistrate's court. He calls upon the court to be guided by its duty as a first appellate court to carry out a fresh exhaustive scrutiny of both the law and fact having in mind that it did not hear the witnesses firsthand. The Appellant cites the cases of Peter M Kariuki v Attorney General [2014] eKLR, Fr. Narsensio Begumisa & 3 others v Eric Kibebaga SCCA No. 17 of 2002 (unreported) and Gitobu Imanyara & 2 others v Attorney General [2016] eKLR which reiterated a first appellate court's duty to re-appraise the facts and the law and draw its own conclusion.
4. The Appellant submits that the Learned Magistrate did not adhere to the principles outlined in section 41 of the *Employment Act*. He argues that the letter dated 10<sup>th</sup> March 2020, which invited him to appear before the Board of Management (BOM), did not constitute a valid invitation to a disciplinary hearing. He cites the letter's language, which specifically requests him to attend for "further clarification and deliberations," and submitted that the Blacks Law dictionary's definition of clarification as the art and process of discovering and expounding. He reiterates that the letter was merely an invitation to discuss the alleged on the attempts on his life and the theft of school funds by the principal. Additionally, the Appellant submits that the transformation of the Board of Management meeting into a disciplinary hearing was procedurally incorrect. He relies on the case of Council of Civil Servants Union v Minister of Civil Service (1985) AC 2 where it was stated as follows: -

'Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the rules expressly laid down in statute or legislative instrument by which such authority exercises jurisdiction to make a decision.'



5. He also cites the dicta of Odunga J. (as he then was) in *Paul Kuria Kiore v Kenyatta University* [2016] eKLR where the Learned Judge stated:

“As the law required that the Complainant be availed for cross-examination, there is no way the manner in which the Respondent conducted its proceedings can be said to have met the threshold under Article 47 of *the Constitution* pursuant to which the *Fair Administrative Action Act* was enacted. It is not contended by the Respondent that its disciplinary rules or procedure provided for a different mode of conducting proceedings from that provided under the Act. Even if there existed such a procedure it had to comply with the letter and spirit of Article 47 of *the Constitution*.”

6. The Appellant submitted that non-compliance with Section 41 of the *Employment Act* renders a summary dismissal unfair. He cites the Court of Appeal decision in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the court in noting the prodigious legal obligation placed on employers in instances of summary dismissal stated that the employer was obligated: to prove the reasons for termination as stipulated in section 43, prove that the reasons are valid and fair as per section 45, prove that the grounds are justified as per section 47(5) and ensure there is notification and a hearing as per section 41 of the *Employment Act*.
7. Additionally, the Appellant submits that the Magistrate’s failure to recognize discrepancies in the dates of the meetings constituted an error. He avows that given the centrality of a fair hearing the contradiction was material. He cites the Tanzanian Court of Appeal in *Dickson Elia Nsamba Shapwata & another v The Republic Cr App No. 92 of 2007* as reiterated in *Philip Nzaka Watu v Republic* [2016] eKLR in the following terms:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

8. In further impugning the ‘purported’ disciplinary process the Appellant avers that no charges were framed and no proper hearing was carried out. He quotes the case of *David Wanjau Muhoro v Ol Pajeta Ranching Limited* [2014] eKLR as referenced in *Ruth Adhiambo Apindi v Unilever Kenya Limited* [2020] eKLR where the court emphasised on the right to grant an employee sufficient time to prepare between service of notice to show cause and the date of the hearing. The court equally noted that charges like fraud, dishonesty and fraudulent activities were vague depriving an employee of the opportunity to intelligibly respond. Furthermore, the court stated that the employee must be furnished with the documents the employer intends to rely on at the hearing. The Appellant submits that the Respondent’s failure to consider his appeal amounted to unfair procedure. He cites the fact that the board never sat on 29<sup>th</sup> September 2020 when the appeal was slated for hearing as well as on the case of *Mr G Moore v Phoenix Product Development Ltd UKEAT/0070/20/OO* which found that failure to consider an employee’s appeal amounted to unfair procedure. Regarding the charges against him the Appellant submits that they were invalid unproven and false. He argues that had the Magistrate analysed them properly, she would have reached the same conclusion. Concerning the allegation of providing false information to the police, he asserts that the specifics of this alleged falsehood were never disclosed. On the accusation of stealing documents, he clarifies that he handed them over to the EACC and the Ministry of Education, in accordance with his duty to report theft of public funds in public interest. He cites the Report by the Ministry of Education which relied on the invoices, payment vouchers and delivery notes to deduce improper financial management contrary to ethics, the *Public*



Procurement and Asset Disposal Act 2015 and the Public Finance Management Act. In light of this evidence, the Appellant submits that his dismissal was a consequence of his role as a whistleblower and that the magistrate erred in disregarding the evidence of significant misappropriation of public resources by the Respondent's Principal.

9. The Appellant implores the court to exercise its authority to protect public resources being misappropriated at the Respondent school. He draws attention to sections 12(3)(viii) and 20 of the Employment and Labour Relations Act on the court's power to grant any other relief it deems fit and the general powers of the court respectively. The Appellant places additional reliance on the Supreme Court of Kenya's decision in *In the Matter of the Speaker of the Senate & another* [2013] eKLR where the court referenced Professor Archibald Cox's analysis of the Supreme Court's role in American governance, to the effect that government tends to be pragmatic rather than purely idealistic, and that when one branch fails to address pressing issues, others must intervene, emphasizing that constitutional adjudication requires considering decisions that best serve the nation, recognizing that it cannot remain neutral on social and political issues, Ultimately, asserting that its opinions both reflect and shape national ideals. He equally reiterates the court's duty to issue directions that protect public funds and the future of the nation's children on the basis of the Court of Appeal in *Diamond Hasham Lalji & Another v Attorney General & 4 others* [2018] eKLR which acknowledged the importance of balancing state and societal interests in the administration of justice. Consequently, the Appellant submits that the appeal is for allowing, with costs.

#### **Respondent's submissions** \_\_\_

10. On its part the Respondent identifies the following issues for determination.
- a. Who was the Appellant's employer
  - b. Whether the prayers are merited
  - c. Whether evidence not produced in the trial court and/or new evidence brought in without leave of court should be relied at the appeal herein.
  - d. Who should bear costs of the appeal
11. On the first issue the Respondent submits that the Appellant was employed by the Board of Management and not the Principal. They argue that personal differences with the Principal could not influence the Board, which consists of more than 16 members. The Respondent asserts that the Appellant had previous disciplinary issues with other headteachers for which he had been suspended. Furthermore, the Respondent submits that the termination was procedural despite the challenges posed by the Covid 19 Pandemic. They affirm that the Appellant was issued a show cause letter to which he responded, invited for a disciplinary hearing which he attended and informed of his right to appeal. Regarding the merits of the prayers sought the Respondent reiterates the lawfulness of the termination. They point out inconsistencies between the prayers made in the Magistrate's Court and those presented in this appeal. Moreover, they argue that the Appellant is not entitled to either gratuity or service pay as he was a contributor to NSSF. In addition, the Respondent asserts that the prayer for payment of salary for the remainder of the 8 years to retirement is unfounded and lacks basis. With respect to the third issue, the Respondent submits that the Appellant relies on an audit report that does not form part of the record of appeal and was not produced at the magistrate's court. They assert that no leave has been granted to file the document and emphasise that this court is confined to reevaluating the evidence as presented before the magistrate's court.



12. The Respondent further submits that the Appellant is fixated on the Principal, who is not a party to the suit but merely a witness and an ex officio member of the Board. In conclusion, the Respondent asserts that by alleging he was a whistleblower, the Appellant is engaging in a fishing expedition, as none of his claims of financial impropriety against the Principal have been substantiated. It submits that moreover, no claims of financial impropriety have been made against the Board of Management, who are his actual employers. It submits that the appeal is for disallowing, with costs to the Respondent.
13. The court on first appeal must be cognisant of the limits in as far as seeing and hearing the witnesses. As the appellate court, it behoves this Court to re-evaluate the evidence tendered and come to a determination so as to properly render justice to the parties. As such, the Court will determine whether there was:
  - i. Sufficient evidence to prove the Claimant (Appellant's) case?
  - ii. If the answer is to the affirmative, what remedies can the Appellant avail?
  - iii. Who is to bear the costs of this appeal and the case before the Learned Magistrate?
14. The Appellant was an employee of the Respondent and through his claim asserts unfair dismissal. He sought inter alia his terminal benefits, salary for the remainder of the years he was entitled to serve until his retirement, reinstatement to employment and damages for the unlawful dismissal. By way of reply to the claim, the Respondent contended that the Appellant was summarily dismissed for insubordination, gross misconduct and lack of accountability. The Appellant testified on his own behalf and called a minor ME and the Respondent called its sole witness Joyce Omondi. The Respondent asserts in the appeal before me that by alleging he was a whistleblower, the Appellant is engaging in a fishing expedition, as none of his claims of financial impropriety against the Principal have been substantiated. The evidence before the trial Magistrate indicates that the School was run like a personal fiefdom with the Principal one Joyce Omondi being subject of myriad investigations by EACC, the Police and an audit by the Ministry. The audit by the Ministry of Education revealed the allegations of financial impropriety raised by the Appellant were established to be true. The 34 page report of the Sub County Director Nyando Sub-County is damning of the Principal. It makes findings time and time again that there was flouting of procurement procedures and financial impropriety on the part of the Principal. The Board of Management was also complicit in the coverup by facilitating the quick exit of the Appellant. The show cause letter was dated 10<sup>th</sup> March 2020 and he was to show cause on 20<sup>th</sup> March 2020. That was hardly sufficient time to respond.
15. The Appellant's fault was apparently blowing the lid on corrupt activities at the School by reporting to the DCIO and the Ethics and Anti-Corruption Commission. When corruption is faced with action, the corrupt use all manner of excuses. The Appellant was required, if the letter of the Principal dated 17<sup>th</sup> March 2020 is anything to go by, to obtain permission before sharing his concerns with the Police and the EACC. This is asinine to say the least. There was no way he would ask the corrupt officials at the School for permission before exposing them. As there was no tangible basis for a summary dismissal under section 44 of the *Employment Act*, the finding by the Learned Senior Principal Magistrate was therefore erroneous. The Appellant should have had the benefit of section 41 of the *Employment Act* before his abrupt dismissal. He therefore was entitled to a finding that his dismissal was unfair and unlawful within the meaning of the *Employment Act* sections 41, 43, 45 and 47. He therefore would have been entitled to relief which would comprise of only the following:-
  - a. A declaration that his dismissal was unfair and unlawful.
  - b. Compensation of 12 month's salary for the egregious dismissal.



- c. Costs of the suit before the Magistrate.
16. As seen from the foregoing, the Appellant would have been unable to secure the payment of his salary for the remainder of the 8 years he has to serve before retirement for the reason that he did not make out a case for the award of the sum claimed under this head. He also is not able to secure a reinstatement as the period of 3 years is long past and a reinstatement cannot be granted. He will have the costs of this appeal as well as the costs of the Court below.
17. In the final analysis appeal is allowed to the extent that the judgment and decree of the Hon. Senior Principal Magistrate is vacated and replaced with a judgment in favour of the Appellant as follows:-
- a. A declaration that the Appellant's dismissal by the Respondent was unfair and unlawful.
  - b. Compensation of 12 month's salary for the egregious dismissal = Kshs. 679,020/-.
  - c. Costs of this appeal plus the costs below.
  - d. Interest on the sum in (b) above at court rates from the date of this Judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF NOVEMBER 2024**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

