



**National Transport & Safety Authority v Nthiga (Appeal E243 of 2022)
[2024] KEELRC 2830 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2830 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E243 OF 2022
NJ ABUODHA, J
NOVEMBER 14, 2024**

**BETWEEN
NATIONAL TRANSPORT & SAFETY AUTHORITY APPELLANT
AND
DENNIS MUTHIRI NTHIGA RESPONDENT**

*(Being an appeal against the decision of the Court in Chief Magistrate
Employment and Labour Relations Court in CMEL NO. E1314 of
2020 delivered by the Honourable D. M Kivuti (PM) on 4th July 2022)*

JUDGMENT

1. Through the Memorandum of Appeal dated 23rd November, 2023, the Appellant appeals against the Judgment of Honourable Peter Mutholi(PM) delivered on 12/8/2020.
2. The Appeal was based on the grounds that:
 - i. The Honourable Magistrate erred in Law and Fact in failing to appreciate the proper effect and purport of the pleadings and evidence before thereby arriving at a decision which is not supported by or is manifestly against the weight of the evidence.
 - ii. The Honourable Magistrate erred in law and fact by disregarding the totality of the Appellant’s pleadings, documents and cited authorities and as a result arrived at a decision materially unsupported by the Law quite contrary to established jurisprudence.
 - iii. The Honourable Magistrate erred in law and fact in failing to find that the Respondent submitted a forged degree Certificate from Makerere University despite the Respondent expressly admitting the same.



- iv. The Honourable Magistrate erred in law and fact in failing to find that the minimum qualification for the Graduate Clerk position was a degree from any recognized University thereby arriving at decision unsupported by the evidence on record.
 - v. The Honourable Magistrate erred in law and fact in failing to find that the Appellant had a substantive reason to terminate the Respondent's employment and therefore the Respondent was fairly and justifiably terminated from employment.
 - vi. The Honourable Magistrate erred in law and fact in failing find that the Appellant followed due process in the termination of the Respondent's employment thereby arriving at a decision materially unsupported by the evidence on record.
 - vii. The Honourable Magistrate erred in law and fact in finding in favour of the Respondent and directing the Appellant herein to reinstate the Respondent and to pay unpaid salaries from the date of dismissal to the date of reinstatement.
3. The Appellant prayed that: -
- i. The appeal be allowed and the Judgment delivered by Honourable D.M Kivuti (PM) on 4th July, 2022 against the Appellant be set aside, with orders substituted thereof, dismissing the Respondent's suit with costs.
 - ii. That the Honourable Court be pleased to issue an order for reimbursement of the sum of Kshs.3,593,324/- paid to the Respondent as back pay for unpaid salaries from the date of dismissal to 19th October 2022.
 - iii. That the Honourable Court be pleased to issue an order for reimbursement of the sum of Kshs 4,335,996 and Kshs 497,000,000/= being the salaries and medical premium respectively paid to the Respondent from the date of employment to the date of dismissal.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's advocates C & K Advocates, LLP filed written submissions dated 5th July, 2024. On the issue of whether the dismissal was founded on a valid and fair reason; Counsel relied on Section 43(2) and 45(2) of the Act on the reason(s) for termination of employment contract to be matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
6. Counsel submitted that the Claimant was dismissed based on a Show Cause letter dated January 14, 2020, which indicated that the Bachelor of Information Technology Degree Certificate (serial number MCT0123978) submitted during their hiring was confirmed as a forgery, according to a report from Makerere University.
7. Counsel submitted that the Respondent's act was classified as gross misconduct, violating various provisions within the Human Resource and Procedure Manual, the Public Service Discipline Manual, the Public Service Code of Conduct and Ethics, as well as sections of the Penal Code.
8. It was the Counsel's submission that the Respondent was engaged by the Appellant as a Graduate Trainee. That the Staff Bio Data Form which provided that the Respondent was engaged as graduate Trainee was never disputed by the Respondent, who failed to provide any documentation to challenge its authenticity. Instead, the Respondent claimed that his Curriculum Vitae was the sole document containing his qualifications.



9. Counsel submitted that the Trial Court made an error by concluding that the Appellant did not adequately demonstrate the Respondent's qualifications, as the definition of a Graduate Trainee provides that the individual possesses a degree.
10. Counsel submitted that the Employment Act, section 44(4) outlines that certain actions may be considered gross misconduct, justifying the summary dismissal of an employee and if an employee commits or is reasonably suspected of committing a criminal offense that harms the employer or their property, this can be grounds for dismissal.
11. Counsel submitted that the Appellant learnt through a Committee visit to Makerere University that the Respondent's degree certificate was indeed forged, as confirmed by an official letter from the university dated February 6, 2018. The forged certificate, along with the Respondent's personal biodata form submitted during the hiring process, provides clear evidence of his employment based on this fraudulent document.
12. Counsel relied on among others the Court of Appeal case of Civil Appeal No. 13 of 2017 Abdi Mohammed Daib vs Kenya Ports Authority while submitting that the issue of forged certificates went to the core of the parties' relationship and resulted in breach of trust and the Respondent's termination was fair. That the Appellant was entitled to hold such genuine belief that the Respondent had provided false information pertaining to his academic qualification after Makerere University confirmed that the degree certificate provided by the Respondent at the time of his employment was a forged document.
13. On the issue of whether the procedure followed in terminating the Respondent's employment was fair, Counsel submitted that in considering an issue of wrongful or unfair dismissal the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness and relied on Section 41 of the Act on procedural requirements and also relied on among others the case of Anthony Mkala Chitavi-Vs- Malindi Water & Sewerage Co. Ltd Mombasa Industrial Cause No. 64 of 2012 (2013) eKLR.
14. Counsel submitted that the Appellant began verifying the academic certificates of all its employees in 2018, which is understandable given its large size and the extensive efforts required, including physical visits to universities and the process took a significant amount of time. Counsel submitted that in 2020, the Appellant initiated disciplinary actions against employees found to have submitted false academic documents.
15. Counsel relied on the case of Abdi Mohammed Daib vs Kenya Ports Authority Mombasa and submitted that the procedure the Authority adopted in dismissing the Respondent from employment just like in this case was found by the learned court to be fair just and valid in line with the Employment Act.
16. Counsel submitted that at the hearing on 18th June, 2020 the Respondent admitted to having indicated that he was a holder of a degree certificate obtained from Makerere University in his staff Bio data form. That he claimed that information on his staff Bio data form may have been inadvertently filled and that he was currently (2020) pursuing a Bachelor of Commerce Degree in Purchasing and Logistics at Daystar University.
17. Counsel further submitted that the Disciplinary committee found that the Respondent had issued a staff biodata form duly filled and signed indicating that he was in possession of degree certificate from Makerere University hence his claims that he did not submit the degree certificate which had been confirmed as fake was not plausible.



18. Counsel submitted that the Appellant proceeded to dismiss the Respondent as per above recommendations on 6th July,2020. He appealed to the Appeals Committee who maintained the verdict of dismissal.
19. On the issue of whether the reliefs sought should be granted, Counsel submitted that the Appellant justifiably, fairly and lawfully terminated the Respondent's employment. Counsel submitted that this Court issues an order for the reimbursement of Kshs. 3,593,324/- that was paid to the Respondent as back pay for unpaid salaries from the time of dismissal until 19th October 2022.
20. Counsel submitted that the Appellant's Counterclaim be granted, directing that the salaries and medical premiums amounting to Kshs. 4,335,996/- and Kshs. 497,000.00/- respectively, which were paid to the Respondent from the start of employment until dismissal, be reimbursed to the Appellant.

Respondent's Submissions

21. The Respondent's advocates GNK & Associates LLP filed written submissions dated 26th July 2024 and submitted on the grounds of Appeal. Counsel submitted on the role of first appellate court while relying on the case of Stanwel Holdings Limited & Another v Racheal Haluku Emanuel & Another (2020) eKLR.
22. On the first two grounds of appeal counsel relied on the case of Mohammed Mahmoud Jabane V Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; VOL. 1 KAR 982; [1986-1989] EA 183 and submitted that an appellate court will not overturn a judge's findings of fact unless it can be demonstrated that the judge considered inappropriate facts, overlooked necessary factors, misunderstood the evidence's impact, or applied incorrect principles.
23. Counsel submitted that the Respondent was employed by the Appellant as an Enforcement Officer and was never in the role of a Graduate Clerk, contrary to the Appellant's claims. Counsel relied on Section 107(1) of the *Evidence Act* on burden of proof of facts a party alleges. That the letter of confirmation failed to mention the position of Graduate clerk which Collins Kipruto corroborated during cross examination in the trial court.
24. Counsel submitted that the Respondent never admitted to submitting a forged degree or any degree certificate. According to the Judgment of Hon. D.M. Kivuti, the Respondent denied having knowledge of or possessing a Makerere University degree. The Respondent only acknowledged having certifications for CCNA and Oracle at the time of his application and was at the time of the trial still pursuing a Bachelor of Commerce Degree in Purchasing and Logistics at Daystar University.
25. Counsel submitted that the claim that this certificate was found in the Respondent's employment file was dubious, particularly since the Appellant could not produce the Respondent's CV and related documents, raising doubts about the certificate's origin. That the Appellant could not prove if the Respondent was the one who supplied it with the Degree certificate.
26. Counsel further submitted that the only document the Respondent used during application at the Appellant's office was his CV which the Appellant refused to give to him when he requested for it during disciplinary proceedings and it was also not submitted in court. That the CV outlined the Respondent's academic qualifications.
27. On grounds 3 and 4 of the Appeal counsel relied on Section 41 on procedural fairness and section 45(2) on the reasons for termination. Counsel also relied on the case of Janet Nyandiko V- Kenya Commercial Bank Limited [2017] eKLR on both substantive and procedural fairness which the Appellant did not adhere to in this case



28. Counsel submitted that the due process had not been followed right from the moment the Respondent was issued with the notice to show cause. The notice to show cause revealed that a degree certificate in question was confirmed as a forgery by a Makerere University report which was requested by the Respondent. That a look at the report showed that it was dated 6th February, 2018 but the show cause letter to the Respondent is dated 14th January, 2020 2 years later which was inordinate delay. That during that period the Respondent continued working without any impediment and the offence was never reported to relevant authorities.
29. Counsel submitted that the delay went against the Appellant's administrative policies where forgery of documents was a serious offence which was against its Section 11.7 Human Resource Manual to cause them to act immediately. That the Appellant solely relied on a report from Makerere University that lacked official designation or signature, which raises doubts about its authenticity.
30. Counsel submitted that after the notice was issued, the Respondent requested several documents, including a copy of his CV and the degree certificate, but the Appellant failed to provide the CV used in the Respondent's job application. That failure to supply the Respondent with the right documents to prepare for the hearing meant he was disadvantaged to prepare for the same.
31. Counsel submitted that while the Respondent was issued with a notice to show cause accusing him of forgery while the reason for dismissal was entirely different stating falsifying information. That four months after filing his appeal over the disciplinary verdict the Appellant did not communicate its verdict. Counsel relied on section 47(5) on respective burden of proof by both employee and employer where the employer must justify the grounds of the termination.
32. Counsel further submitted that section 11.7 of the Appellant's Human Resource Manual provided that the decision must be based upon logical proof and evidentiary material. That the Appellant did not provide any logical proof or evidence that the Respondent supplied the forged degree to them.
33. Counsel submitted that the Appellant did not follow the due procedure in termination of the employment and did not have any substantive reason to dismiss the Respondent whatsoever rendering the summary dismissal unlawful, unjustifiable and without any valid grounds.
34. On the awards made by the trial court Counsel relied on section 49(1)(a) and 49(3) on awards of unpaid salaries and reinstatement. Counsel submitted that the Respondent was unlawfully dismissed hence entitled to unpaid salaries and reinstatement as per above sections. That the Appellant seeking an order for reimbursement of the sum of Kshs. 3,593,324/= paid to the Respondent as back pay for unpaid salaries from the date of dismissal to 19th October, 2022, was entirely unfounded. That the sum of Kshs. 3,593,324/= was incorrect, as the trial court actually ordered the payment of Kshs. 2,907,527.72/=.
35. Counsel submitted that the Appellant was claiming a reimbursement of Kshs. 4,333,996/= and Kshs. 497,000/= being salaries and medical premium paid to the Respondent from the date of employment to date of dismissal but did not in any manner state how the same is arrived at. That the same could not be litigated in the Appeal when the same was not specifically prayed at the trial court as the Appellant filed a replying affidavit not a memorandum of response and counterclaim. That pleadings were the bedrock which all the proceedings derive from where the Appellant could have particularized its counterclaim.
36. Counsel relied on the case of Independent Electoral and Boundaries Commission & Another V Mule & 3 Others (Civil Appeal 219 of 2013) (2014) KECA 890 (KLR) and submitted that parties must adhere to their pleadings. Any evidence that does not align with the pleadings is irrelevant and should



be disregarded. That new claims and evidence should not be introduced at the appeal stage without the necessary scrutiny at the trial court.

37. Counsel submitted that the Appellant's claim for reimbursement should not only be granted due to the absence of a clear and substantiated basis for the amounts sought but also because the Respondent followed the due process of application and was rightfully employed by the Appellant.

Determination

38. The court has considered the pleadings and submissions filed by the parties herein and reiterated that the principles which guide this court in an appeal from a trial court are now well settled. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

39. In this case, the Judgment of the trial court was that judgment was entered in favour of the Respondent against the Appellant in terms of prayer (a) and (b) which was that the Appellant was to reinstate the Respondent and pay him his unpaid salary from the date of termination to the date of reinstatement. The Appellant was aggrieved by this judgment hence this appeal on seven grounds.
40. The court finds that the issues placed by the parties for determination in the appeal can be reduced to two. That is, whether the trial magistrate erred in finding that the Respondent was unfairly terminated and whether the learned Magistrate erred in ordering for reinstatement of the Respondent and awarding him unpaid salary from date of termination to the date of reinstatement.
41. The Appellant alleged that the Respondent who it employed in January 2014 had submitted a forged degree certificate from Makerere University. That he was engaged as graduate trainee which meant he should have attained a degree as a precondition. The Appellant produced the said degree and staff biodata form which showed that the Respondent was engaged as a graduate trainee and that he had in his possession a degree in Information Technology and certification CCNA, ORACLE from Makerere University.
42. The Respondent on other hand denied furnishing the Appellant with the said forged degree and stated that the staff biodata was inadvertently filled. That he was at the time of trial, pursuing his degree in Commerce and Purchasing at Daystar University. That the correct document which provided his academic qualifications was his CV which he used in applying for the Job. That he was engaged as enforcement officer and not graduate trainee.
43. The trial court on the other hand found that the Appellant did not prove the reasons for the dismissal and the procedure adopted was unfair. This court notes that the burden of justifying the grounds of termination lies with the employer under section 47(5) of the *Employment Act*.
44. It is now well settled that for termination to pass fairness test there should be both substantive and procedural fairness as was held in *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR among others. With regard to substantive fairness the employer must prove the reasons for termination are valid and fair under section 43 of the Act and must be reasons which an employer believed existed at the time of termination. Failure to discharge this burden would lead to the conclusion that the termination was unfair within the meaning section 45 of the Act. The main reason



for termination in this case was submission of a forged degree certificate. The court notes that the Respondent denied submitting the same to the Appellant.

45. The Court further notes that the Appellant alleged that the Respondent was engaged as a graduate trainee and relied on the staff biodata. The letter dated 29th October, 2014 confirming the Respondent to permanent and pensionable status did not specify his designation but stated;

Your designation will be determined by the duties you will be allocated upon your deployment.

46. The payslips attached by both parties refer to the Respondent as Enforcement Officer II. This clearly means that the Respondent was engaged as an Enforcement Officer and not a Graduate Trainee. The Respondent requested for his CV from the Appellant during the disciplinary proceedings which was never supplied nor filed in the trial court. The Respondent alleged that the CV stipulated his academic qualifications yet the Appellant as the custodian of employment records as per section 74 of the act refused to produce the same.

47. The court therefore agrees with the trial court that it was not clear who supplied the alleged forged degree certificate to the Appellant and if the degree was even a requirement for employment. The appellant further did not sufficiently demonstrate that the post for which the respondent was hired required him to be a graduate. The Appellant ought to have filed the job requirements for the graduate trainee as well as the enforcement officer and produce a contract showing that the Respondent was engaged as a graduate trainee for the court to believe it.

48. The court notes that the staff biodata could be altered but a CV may not since it attaches the academic documents like transcripts and certificates. It is also interesting that the Appellant decided to use such a ground to terminate the respondent after he had served them for 6 years. It is also curious that the letter confirming the degree to be a forgery was issued in February 2018 but the Appellant acted by issuing a show cause letter to the Respondent in January, 2020 some two years later.

49. The Court is in agreement with the trial court that the Appellant did not have valid and fair reasons to dismiss the Respondent as the reasons for termination were not fair within the meaning of sections 43 and 45 of the *Employment Act*. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the court held as follows: -

Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.

This ground of appeal therefore fails and is hereby dismissed.

50. The trial court also found that the Appellant did not follow the laid down procedure in dismissing the Respondent. The Appellant did not furnish the Respondent with the requested documents such as his CV submitted during application for employment, to enable him prepare for the hearing. In any event, so long as the reasons were never valid the hearing was done for formality to sanctify the appellant's invalid actions.

51. On the prayer for reinstatement, section 49(3)(a) as read with section 49(4) (c) provides for reinstatement of an employee. The claim for reinstatement is available three years after termination under section 12(3)(vii) of the *Employment and Labour Relations Court Act*. Besides from the facts considered above in this appeal and evidence before the trial court which clearly demonstrated that there were no valid reasons for terminating the respondent, reinstatement was an appropriate remedy in the circumstances. The Respondent was terminated in January, 2020 and judgment delivered in



2022 hence the trial court was justified in ordering for reinstatement. This ground of appeal therefore fails and is hereby dismissed.

52. On the issue of unpaid salary from the date of termination to the date of reinstatement the court notes that whenever the court orders for reinstatement the same follows that the employee is to be reinstated without loss of his/her benefits. There was nothing wrong with the trial court ordering the same in this case.
53. On the Appellant's counterclaim the court notes that the Appellant filed a replying Affidavit and Counterclaim instead of its response and counterclaim and in any case the counterclaim fails for the reasons that the Court has upheld the findings of the trial Court that ordered that the Respondent be reinstated with benefits.
54. In the upshot this Appeal is found without merit and the same is hereby dismissed with costs.
55. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

