Mukabwa v Ken-Knit (K) Limited (Employment and Labour Relations Appeal E009 of 2021) [2024] KEELRC 2746 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2746 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS APPEAL E009 OF 2021

MA ONYANGO, J

NOVEMBER 7, 2024

BETWEEN

LEONARD CHIMWANI MUKABWA ..... 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. 347 of 2019 delivered by Honourable B. K. Kiptoo, SRM on 27th July 2019)

JUDGMENT

1. The Appellant was the Claimant in Eldoret CMELR NO. 347 of 2019 in which he had sued the Respondent vide a Memorandum of Claim dated 5th December 2019 alleging that he was wrongfully, unprocedurally and unlawfully terminated from employment. He sought for the following reliefs:
    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. 393,337.71/=
    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.
2. The Respondent filed a Reply to the Memorandum of Claim dated 30th January 2020 denying the averments in the Claim.

3. Upon hearing the parties, the Trial Magistrate Hon. B.K. Kiptoo, Senior Resident Magistrate in his judgment delivered on 27th July 2021 dismissed the Claim with costs to the Respondent.

4. The Appellant (Claimant in the lower court) was aggrieved by the said judgment and filed a Memorandum of Appeal on 20th August 2021 on the following grounds:

   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 for forgery and/or absconding duty;

      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 any 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;

   That the judgment of the learned magistrate is in the circumstances unfair and unjust.

5. Consequently, the Appellant seeks the following orders:

   i. The appeal be allowed;

   ii. The Judgment of the lower court delivered on 27th July 2021 be set aside and be substituted with a proper finding by this court;

   iii. The Respondent to pay costs in the lower court and in this appeal;

iv. This Honourable Court makes such and further orders as it deems fit and just to meet the ends of justice.

6. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions on 10th July 2023 while the Respondent's submissions were filed on 3rd October 2023.

Analysis

7. 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 Vs Associated Motor Boat Company Ltd & Others [1968] EA 123.

8. Vide his Memorandum of Claim dated 5th December 2019, the Appellant averred that he was permanently employed by the Respondent as a machine operator in the Spinning Department from 24th January 2007 where he worked until 1st March 2018. He avers that at the time his employment was terminated he was earning Kshs. 14,179 and a house allowance of Kshs 2,045.

9. The Appellant averred that on the 1st March 2018, he was issued with an incomplete show cause letter indicating the reason for termination as forging the Respondent's letter head and all the signatures of the directors to terminate his services with the Respondent so as to benefit from NSSF money. He maintained that he did not engage in the allegations levelled against him.

10. The Appellant contended that he was not accorded a fair and proper hearing and as such, the termination of his employment was unlawful and procedurally defective.

11. The Appellant sought payment of his terminal benefits which he particularized as hereunder:

    i. One month pay in lieu of notice.....Kshs. 16,305

    ii. Compensation for unfair termination.....Kshs. 195,660

    iii. Underpayment of wages..... Kshs. 179,718.50

    iv. Leave pro-rate.....Kshs. 1,654.21

12. The Respondent, in its Reply to Memorandum of Claim dated 30th January 2020, averred that on 1st March 2018, it served the Claimant with a complete show cause letter requiring him to explain why he had forged authorized signatories' signatures so as to withdraw his NSSF benefits while still in employment with the Respondent but after receiving the letter, the Claimant left and never reported back to work.

13. The Respondent further stated that it accorded the Claimant an opportunity to be heard before its disciplinary committee and in the presence of his union representatives on 29th March 2018 but the Claimant failed to turn up for the hearing.

14. It was the Respondent's contention that the Claimant was not entitled to payment of underpayment, one month pay in lieu of notice nor leave allowance.

15. The Respondent prayed for the Claimant's claim be dismissed with costs.

The Evidence adduced

16. At trial the Appellant testified as CW1 and stated that he was dismissed on false allegations of forging signatures of directors. It was his evidence that he was not taken through a disciplinary hearing and neither was he paid any benefits.

17. On being cross examined, the Claimant stated that he was issued with a show cause letter which he responded to and that on 28th March 2018, he was called by a Mr. Enock Wamwanga, the union representative, notifying him of the disciplinary hearing meeting scheduled for the 29th March 2018. The Claimant stated that he attended several meetings for disciplinary hearings.

18. On re-examination, the Claimant denied being called for a disciplinary hearing.

19. The Respondent called two witnesses. RW1 was Rebecca Cheluget, the Respondent's Human Resource Manager. She adopted her witness statement recorded on 30th January 2020 as her evidence in chief. RW1 maintained that the Claimant was issued with a show cause letter after an officer from NSSF sought for a staff who had been paid prematurely before retirement. It was contended that the Claimant responded to the show case letter and was subsequently invited for a disciplinary hearing on 29th March 2018 vide a letter dated 28th March 2018 but he did not turn up for the hearing. RW1 maintained that the Claimant never went back to work after the incident.

20. On cross examination, the Respondent's witness conceded that nobody from NSSF offices was called to testify that the Claimant forged the signatures and got the money fraudulently.

21. RW1, Enock Wawire Wamwanda introduced himself as the staff steward at the Respondent's company. He stated he called the Claimant inviting him for the disciplinary hearing and that the Claimant informed him that he would attend the meeting but on the hearing day, the Claimant never showed up.

The Appeal

The Appellant's Submissions

22. Counsel for the Appellant, Mr. Kibii in his submissions dated 7th July 2023 framed the issues for determination to be;

    i. Whether termination of the Appellant's employment was unfair.

    ii. Whether the appellant was entitled to the reliefs and remedies sought.

    iii. Who should bear the costs of the claim.

23. On the first issue, it was submitted that the Respondent herein did not, in terminating the Appellant's employment, comply with the mandatory procedure requirements of Section 41 and 43 of the *Employment Act* on procedural fairness and fair reason.

24. On procedural fairness, the Appellant submitted that he was called at 6:15pm to attend a disciplinary hearing the next day at 9am. According to the Appellant, he could not have prepared himself and his witness for a hearing to be conducted the following day in the morning. The Appellant therefore submitted that the failure to summon the Appellant on time for Disciplinary hearing was prejudicial to the Appellant since he was not subjected to oral hearing as is by law required. It is submitted that the Appellant was not given an opportunity to defend himself orally and call a witness in his defence hence his termination was unfair. In support of this position, the Appellant cited the cases of case 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 Nyeri Case No. 31 Of 2019 James Mungai Muhia v Kenya National Union of Teachers & 2 others [2020] eKLR

25. As regards whether the Appellant was terminated from employment on fair reason, the appellant submitted that he was terminated from employment on allegations of forgery of the company's

letter head and signatories' signatures. It is the Appellant's submission that although RW1 in her evidence in court alluded that they had received letters from NSSF informing them of the forgery, no witness from NSSF was called to authenticate the same neither did RW1 produce before the purported forged document. The Appellant maintained that the Respondent reason for terminating him from employment was not fair as no investigation was done. The Appellant cited the case in *Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited (Employment and Labour Relations Cause 22 of 2019*) [2022] to buttress this position.

26. In his submission, the Appellant denied the allegation by the Respondent that he absconded duty after being issued with a show cause letter. According to the Appellant, he was not allowed to work from 1st March,2018 and that he sought Audience with the Respondent severally but none was given to him.

27. With regard to the second issue framed by the Appellant's counsel, the Appellant has 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. The Appellant therefore sought to be awarded Kshs. 393,337.71 as his terminal benefits.

28. Lastly, the court was urged to allow the appeal with costs both at the trial court and on appeal.

The Respondents' Submissions

29. Counsel for the Respondent, Mr. Kitiwa in his submissions dated 3rd October 2023 framed the issues for determination to be:

    i. Whether the termination of the Appellant's Employment was unfair and unprocedural.

    ii. Whether the Appeal is Merited.

    iii. Whether the Appellant is entitled to the Reliefs Sought.

    iv. Who should bear the Costs of this Appeal.

30. On the first issue, it was submitted that The Respondent attempted to accord the Claimant a fair hearing vide the notice to show cause letter and even invite him for a disciplinary hearing but the claimant himself elected to disregard the invite which would have allowed him to rebut the claims of forgery labelled against him. It is the Respondent's submission that the court cannot punish for the Claimant's own arrogance and willful disregard of due procedure. Reliance was placed in the cases of BIFU *v Barclays Bank of Kenya Cause 1660 of 2013*(unreported) and Gideon Akwera v Board of Governors Church on the Rock Academy [2015] eKLR

31. On the issue raised by the Appellant that the notice for the disciplinary hearing was too short, the Respondent submitted that the Appellant did not produce any evidence that he either received the notice of hearing under protest, or that he caused a letter to be written or any other form of communication to be made to the management of the Respondent company on the shortage of time.

32. It is the Respondent's submission that upon receipt of the information by NSSF officials of the Appellant's intention to pre-maturely and unlawfully access his retirement funds, the Appellant was served with a notice to show cause letter to which he responded, and was then invited to a hearing to which he refused to attend and deserted his employment ever since. On this basis, the Respondent maintained that due process was therefore followed.

33. As to whether there was a valid reason for the Respondent to issue the Appellant with the show cause letter, the Respondent submitted that during hearing, RWI confirmed that the Respondent received information from NSSF that some of its employees attempted to withdraw retirement funds illegally. It

is further submitted that the Appellant's own letter marked REXH3, in response to the notice to show cause letter is a demonstration that the Appellant committed the offence. Accordingly, the Respondent submitted that it was well within its rights as an employer to issue the notice to show cause letter to the Appellant.

34. On whether the Appellant is entitled to the reliefs sought, the Respondent maintained that the Appellant was never terminated from employment as he elected to desert his work upon issuance of the notice to show cause letter. The Appellant has therefore contended that unfair termination has not been proven.

35. In the end, the Respondent urged the court to dismiss the Appellant's appeal with costs to the Respondent.

Determination

36. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issue that falls for my determination is whether the findings and the award of the Trial Court are in conformity with the pleadings and evidence adduced before the Trial Court. The grounds of appeal are summarized as follows:

    i. That the learned magistrate erred in failing to consider the validity of the reason for termination of the Appellant from employment

    ii. That the learned 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) of the *Employment Act*.

37. Before delve into determination of the grounds of appeal now falling for determination before the court, it is important that I address the issue raised by the Respondent that the Appellant absconded duty immediately upon being issued with the notice to show cause on 1st March 2018. It is now trite that when an employer pleads that an employee absconded duty, the employer must give evidence showing that reasonable attempt was made to contact the employee concerned and find out the reason for the employee's failure to present himself for work. In the case 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."

38. Flowing from the above, the Respondent's allegation that the Appellant absconded duty upon being issued with the notice to show cause letter does not hold water in the absence of evidence that efforts were made to trace him. This line of defence by the Respondent is therefore declined.

39. On ground 1 which relates to the question of whether or not the Respondent had valid reasons to initiate disciplinary action against the Appellant, Section 45 of the *Employment Act*, requires that an employer proves that the reasons for termination are valid and fair. Further, Section 43(2) specifically states that the reason or reasons for termination of a contract are the 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.

40. This position was affirmed by the Court of Appeal in the case of Reuben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR by citing with approval the following excerpt from the Halsbury's Laws of England, 4th Edition, Vol.16(1B) para 642:-

> " In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable response to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair. In assessing an employer's action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer's decision".

41. In the present case, the show cause letter dated 1st March 2018 cited the reasons for the intended disciplinary action against the Appellant as, "forging letter head of the company with all the signatures of the directors to terminate your services so as to benefit from the NSSF money." The show cause letter reads:

> Ken-Knit (K) LTD
>
> Human Resource Department
>
> Ref: Show Cause Letter
>
> Date: 1.3.2018
>
> To
>
> Leonard Mukabwa P.No. 13 Dept. Spinning
>
> Following the allegations made against you that on..... at .....(Section) during..... (Shift)at.....m/pm you contravene normal discipline by- FORCING LETTER
>
> Head of the Company With all the Signature of the Directors to Terminate Your Services so as to Benefit From the NSSF Money.
>
> Kindly write to show cause as to why disciplinary action should not be taken against you within the next 48 hours after receiving this letter.
>
> Failure of which severe disciplinary action will be taken against you including even termination of your services without further notice.
>
> Kindly acknowledge receipt.
>
> Signed Signed
>
> H.R Department Head of Department

Received on 1.3.2018 at 5pm am/pm by me

Leonard Mukabwa

Signature: Signed

42. The Appellant admitted to the charge of forging the signatures of the directors. In the Appellant's response to the show cause letter dated 6th March 2018 the Appellant wrote:

> 6th March 2018
>
> Dear Madam Personnel,
>
> RE: Attempting taking NSSF payments
>
> Due to unavoidable circumstances, I attempted to take my NSSF payments which was to enable me pay fees for my children. Two in universities and two in high school. I took fingerprints, taken ID and NSSF statements copies and account number photo copy. I did not take this money.
>
> So far I was not given any retirement letter from the company management
>
> Yours faithfully
>
> SP.12
>
> Signed
>
> Mukabwa Leonard Chimwani

43. From the above, it is clear that the Respondent had a valid reason to subject the Appellant to disciplinary action owing to his own admission that he indeed committed the act of misconduct that he was charged with.

44. Ground no. 2 relate to whether the findings of the Trial Court is supported by the evidence adduced. The Appellant faulted the trial court for holding that based on the evidence of on record, he was the architect of his misfortunes. In its judgment, the trial court made a finding that based on the evidence on record, the Appellant was given a fair hearing.

45. Section 41 of the *Employment Act* provides that: -

> "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

46. As stated earlier in this judgment, the Appellant was served with a show cause letter dated 1st March 2018 stating the reason for the action. From a perusal of the Respondent's list of documents, the Appellant was invited to a disciplinary hearing on 29th March 2018 vide a notice to attend hearing dated 28th March 2018. RW2 in his testimony before the trial court stated that he called the Appellant on 28th March 2018 notifying him of the disciplinary hearing scheduled for the next day, the 29th March 2018.

47. The Appellant has contended that he was not taken through the due process as required by section 41 of the Employment. Specifically, the Appellant has faulted the notification period of the disciplinary hearing meeting alleging that the notice to attend the hearing was too short. In Postal Corporation

of Kenya v Andrew K Tanui [2019] eKLR, the Court of Appeal stated as follows in respect of fair hearing: -

> " Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for notification and hearing before termination on grounds of misconduct.
>
> Four elements must be discernable for the procedure to pass:
>
> a. an explanation of the grounds of termination in a language understood by the employee;
>
> b. the reason or which the employer is considering termination;
>
> c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
>
> d. hearing and considering any representation by the employee and the person chosen by the employee."

48. From the testimony of RW1 and RW2, it is clear that the Appellant was not served with the invitation letter to the disciplinary hearing but was called and notified of the scheduled disciplinary hearing by both of them on 28th March 2018. RW2 testified that the Appellant promised to attend the hearing but did not. I agree with the Appellant that the notice was unreasonably short. My understanding of section 41 of the *Employment Act* is that an employee who has been called upon to defend himself on the charges levelled against him must, in all situations, be given adequate time to prepare for the hearing.

49. I however note that the Appellant agreed to attend the hearing but did not turn up. The hearing was thus called off because of the Appellant's non-attendance as stated by both RW1 and RW2 and as is evident from Respondents Exhibit 4.

50. The Claimant did not complain about the short notice or ask for another date. He just failed to turn up for the hearing. There is no indication from him that he intended to attend any other meeting called by the Respondent over the same issue.

51. On its part the Respondent ought to have informed the Claimant in good time about the hearing date. Further, it ought to have proceeded with the hearing against the Claimant and made its decision or taken some other decisive action following the failure of the Claimant to attend the meeting after confirming attendance and communicating the decision to the Claimant or calling off the meeting and fixing the hearing for another date or even dismissing the Claimant for failing to attend the disciplinary hearing after confirming his attendance.

52. When there is an allegation of misconduct against an employee who fails to attend a disciplinary hearing after being informed of the same the employer must take decisive action. It cannot be heard to say it did not dismiss the Claimant when it did not communicate its position to the Claimant. An employer cannot be allowed to sit on the fence or to wait for an employee to decide what action to take in such a situation. An employer is in control of disciplinary proceedings and must bring the same to conclusion in one way or another, not leave the process incomplete as was the case herein. It must pursue the proceedings to a definite conclusion which must be communicated to the employee.

53. For the above reasons, I find fault with the disciplinary process and must conclude that the same was not in accordance with the provisions of section 41 and 45(4)(b) as read with 45(5) of the *Employment Act*. section 45(2) requires that both procedural and substantive fairness be achieved for a termination

to be fair. I thus find the termination of the Claimant's employment procedurally unfair. To this extent I find that the trial court erred in law and fact in dismissing the claim of unfair termination without considering whether the Respondent followed the due procedure stipulated under section 41 of the *Employment Act*.

Whether the Appellant was entitled to the reliefs Sought?

54. 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. 393,337.71/=

    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.

55. Having found that the Respondent had a valid reason to terminate the Appellant's employment but did not fully comply with due process as required by section 41 of the *Employment Act*, the termination of the Appellant's employment was unfair and I declare accordingly.

56. The sum of Kshs. 393, 337.71 claimed by the Appellant as terminal benefits, was particularized by the Appellant to include one month's pay in lieu of notice, compensation for unfair termination, underpayment of wages and prorata leave.

57. 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.

58. 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 notice pay. The Appellant attached a pay slip for August 2017 showing that he was earning a basic salary of Kshs 12,016 and a house allowance of Kshs 1,802. I therefore award him Kshs 13,818 as notice pay.

59. 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 over 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, invited the Claimant for a disciplinary hearing which he failed to attend without communicating reasons for the same, 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.

60. 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 that the termination of the Appellant's employment was unfair for want of procedural fairness;

    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*

61. 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.

62. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ONTHIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE