



**Rakuomi v Ritz Enterprises Limited (Appeal E099 of 2021)
[2023] KEELRC 94 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 94 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E099 OF 2021
SC RUTTO, J
JANUARY 20, 2023**

BETWEEN

JOSHUA OUMA RAKUOMI APPELLANT

AND

RITZ ENTERPRISES LIMITED RESPONDENT

(Being an appeal from the Judgement and Orders of Honourable Kivuti, Senior Principal Magistrate, delivered on August 16, 2021 at Nairobi in MC ELRC No 1689 of 2019)

JUDGMENT

1. The appellant filed a Memorandum of Claim dated September 11, 2019 at the Chief Magistrate's Court at Milimani being ELRC No 1689 of 2019, through which he averred that he was employed by the respondent as a casual labourer with effect from September, 2014. That he served with loyalty, devotion and diligence until July 1, 2018, when he was irregularly terminated.
2. It was the appellant's case that he was summarily terminated without due process being followed and without exhausting alternative disciplinary measures. That there was no hearing prior to his dismissal and the respondent refused and or neglected to pay his terminal benefits. The appellant termed his termination as capricious, malicious and unlawful. It is for this reason that he sought against the respondent the sum of Kshs 233,600.00 being one month's salary in lieu of notice pay, unpaid leave and compensatory damages.
3. The respondent filed a statement of defence and averred that the appellant was summarily terminated after the carton he was carrying, had three shirts missing. That the appellant was taken through a disciplinary meeting and he signed for his dues as provided by the law. Consequently, the respondent asked the Court to dismiss the claim with costs.



4. The matter was canvassed through oral evidence and production of exhibits and subsequently, written submissions. Following close of the hearing, the trial Court evaluated and analyzed the record and delivered its Judgment, thereby dismissing the suit with costs.

The Appeal

5. The appellant was aggrieved by the Judgment of the trial Court hence instituted the instant Appeal through which he raises the following six grounds: -
 1. That the learned magistrate erred in law and in fact in failing to find that the Appellant's termination was wrongful and unfair.
 2. That the learned magistrate erred in law and in fact in failing to find that the Appellant was not afforded the due process of notification and hearing as codified in section 41 of the *Employment Act*.
 3. That the learned magistrate erred in law and in fact in finding that the claimant (sic) was subjected to a disciplinary process whereas no evidence was adduced by the respondent to evidence that the respondent complied with the dictates of section 41 of the *Employment Act*, 2007.
 4. That the learned magistrate erred in law and in fact in finding that the respondent had proved that there existed genuine reasons for the claimant's (sic) termination.
 5. That the learned magistrate erred in law and in fact in failing to properly analyse the evidence laid before him by the Appellant.
 6. That the Learned Magistrate erred in law and in fact in totally disregarding the Appellant's pleadings and submissions.
6. On July 21, 2022, the Court allowed the respondent's advocate's Application to cease acting for it. On the same day, the Court issued directions for the Appeal to proceed by way of written submissions.

The Submissions

7. It was the appellant's submission that there was no valid reason for his termination from employment. That there was no evidence that he was engaged in theft and that his termination did not strictly comply with sections 41, 43 and 45 of the *Employment Act*. In support of his submissions, the appellant placed reliance on the cases of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR, *Paul Makau Mututu vs Nasib Industrial Products* (2016) eKLR.
8. It was the appellant's further submission that the process of notification and hearing provided for under section 41 of the *Employment Act* was utterly ignored. That attempting to engage the union officials after termination did not sanitize the respondent's actions. To this end, reliance was placed on the case of *Mary Chemweno Kitui vs Kenya Pipeline Company Limited* (2014) eKLR.
9. The appellant urged the Court to allow his Appeal with costs.
10. The respondent did not file submissions as none were on the Court's physical record and could not be traced on the online portal.



Analysis and determination

11. This being the first appellate court, it has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In doing this, the Court is cognizant that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was reaffirmed in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, as follows:

“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”
12. Similarly, in *Peters vs Sunday Post Ltd* [1958] EA 424, the Court held that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
13. Bearing in mind the role of the Court at this juncture and upon considering the entire Record of Appeal as well as the appellant’s submissions and the law, three issues stand out for determination, thus: -
 - a. Whether the summary dismissal of the appellant was substantively justified.
 - b. Whether the dismissal of the appellant was in line with fair procedure.
 - c. Whether the appellant is entitled to the remedies sought.

Substantive justification?

14. With regards to this issue, the respondent was required under section 43 (1) and 45(2) (a) and (b) of the *Employment Act* to prove the reason for which the appellant was dismissed. Such reasons have to be fair and valid.
15. In the instant case, the reasons leading to the appellant’s dismissal can be discerned from his letter of summary dismissal which reads in part:

“You were found in possession of company 3 shirts with intent to steal the same. This is a habit the management cannot tolerate at all costs....”
16. In essence, the appellant was accused of stealing his employer’s property. Basically, he was being accused of committing an act against the respondent to its substantial detriment. No doubt, this is a ground for summary dismissal under section 44(4) (g) of the *Employment Act*.
17. It was the appellant’s case at the trial Court that together with other workers, he was transporting clothes from the respondent’s sister company to the respondent company. That the clothes were in 24 sealed cartons. That they offloaded and took the sealed cartons to the counting area. That their supervisor duly inspected the cartons and confirmed that they were duly sealed. That upon counting the pieces inside the cartons, it was found that there were three shirts missing. That since he and another



employee known as Dennis had carried the last two cartons, they were unfairly accused of stealing the shirts, locked in a room and police called. That they told the police that they could not have stolen the shirts since the boxes were sealed and had been so confirmed before counting commenced. That they further requested that the CCTV footage in the respondent's premises be checked to confirm whether they opened the boxes. That they were beaten and forced to sign a letter saying they were suspects in the theft. That upon signing the letter, they were released and issued with letters of termination.

18. RW1 testified that on July 10, 2016, he went to the store with Dennis Wabomba Kisiangani, Joshua (appellant) and other workers. That Dennis was supposed to take care of the goods and deliver them together with the driver. That they counted the goods in the boxes at the store, sealed and took them to the office awaiting issuance of delivery note and invoice. That upon reaching the office, it was found that one of the boxes was opened and shirts taken therefrom. That he found out that out of 34 pieces, 3 were missing. That Dennis was responsible for the safety of the goods taken from the store to the office. That Joshua (appellant) and Dennis delivered the goods upon being sealed from the store to the respondent's office. That upon arrival, none of them accepted responsibility for the lost shirts. That in the absence of an explanation, the two were held responsible for the loss.
19. What presents from the foregoing is that it is not in doubt that three shirts were lost and that the loss was discovered upon delivery to the respondent's premises. The question is whether the shirts were lost while on transit to the respondent's office and in the hands of the appellant and his colleague Dennis.
20. Whereas the appellant stated that they delivered the cartons while sealed, RW1 maintained that one of the cartons had been opened upon arrival at the respondent's premises. What was before the trial Court was therefore a credibility contest. Is there a possibility that the shirts were less in number upon dispatch? Yes. Is there a possibility that less shirts were packed inside the cartons and sealed? Yes. Indeed, there was no mention by the respondent that the shirts inside the sealed boxes were counted and confirmed to be complete before dispatch. There was also no documentation indicating whether the shirts inside each of the boxes had been counted and confirmed as accurate prior to dispatch.
21. It is also notable that the appellant's letter of dismissal indicates that he was found in possession of the lost shirts while, RW1 testified that the shirts were missing when the carton was opened. It was his testimony that the appellant and the said Dennis denied liability for the missing shirts. He did not mention, let alone suggest in his testimony that the appellant was found in possession of the stolen shirts. It is therefore not clear what the true position is. If indeed, the appellant was found with the shirts, then the issue of liability between him and his colleague Denis would not have arisen in the first place. As a matter of fact, I find the reasons proffered in the appellant's letter of summary dismissal to be at variance with the testimony of RW1 at the trial court. This was an inconsistency from the respondent's end.
22. In light of sections 43(1) and 45(2) (a) and (b) of the *Employment Act*, the respondent bore the responsibility of proving that indeed, the shirts went missing while in the hands of the appellant and his colleague or rather, that he was found in possession of the same. As was held by the Court of Appeal in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR:

“[13.] There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”



23. Therefore, the responsibility of proving the reasons for the appellant's dismissal fell on the respondent. Besides the oral testimony of RW1, there was no evidence in whatever form or manner to corroborate the respondent's assertions that the appellant was found in possession of the missing shirts or that the same were lost while on transit and in his hands.
24. In light of the foregoing, I am not persuaded that the respondent discharged its burden at the trial Court by proving that it had a valid and fair reason to summarily dismiss the appellant from employment.
25. His termination was therefore unfair and the finding by the learned Magistrate was not supported by evidence.
26. With respect to the second issue on procedural fairness, it was the appellant's testimony at the trial Court that he was not issued with a notice to show cause or afforded any hearing prior to his dismissal.
27. On the other hand, the respondent stated that it undertook a disciplinary hearing prior to the appellant's dismissal.
28. Section 45(2) (c) of the *Employment Act*, provides that for termination to be fair, it ought to be in line with fair procedure. Section 41(1) of the *Employment Act* sets out the specific requirements of a fair hearing. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.
29. Despite the respondent's assertions that it subjected the appellant to a disciplinary hearing, there was no evidence to prove as much. Indeed, there was no evidence that it notified the appellant of the reasons why it was contemplating terminating his employment. There was further no evidence that the appellant was required to present his defence to the allegations being levelled against him. In absence of such evidence, I am led to conclude that the respondent did not undertake the process contemplated under section 41 of the *Employment Act*.
30. It is worth mentioning that section 41 is couched in mandatory terms and cannot be applied selectively. In terms of subsection (2), the requirement applies to instances of summary dismissal thus:

“(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.” Underlined for emphasis
31. In assessing the import of section 41, the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K Tanui* [2019] eKLR, had this to say;

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...Four elements must thus be discernible for the procedure to pass muster: -

 - (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;



- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee...”

- 32. My position accords with the above determination by the Court of Appeal and I find and hold that section 41 of the Act sets the minimum requirements an employer ought to comply with prior to dismissing an employee. There ought to be nothing short of the same.
- 33. The upshot of the foregoing is that the appellant’s dismissal was not in compliance with the requirements of fair procedure as demanded by section 41, hence fell outside the legal parameters and on that basis, the resultant dismissal was unlawful and unprocedural.
- 34. The finding by the learned trial Magistrate was therefore not in consonance with the evidence placed before him. His finding did not flow from the evidentiary material on record hence it is evident that he fell into error by holding that the appellant’s dismissal was lawful.
- 35. I am therefore convinced that the respondent did not prove to the requisite standard before the learned trial Magistrate, that the appellant’s dismissal was fair and lawful in terms of sections 41, 43 and 45 of the Employment Act.

Remedies

- 36. Having found that the appellant’s dismissal was unfair and unlawful, the Court finds that he is entitled to an award of compensatory damages equivalent to six months of his gross salary. This award takes into account the length of the employment relationship and the fact that the respondent did not prove that there was a justifiable cause to terminate the appellant’s employment and in so doing failed to apply fair procedure.
- 37. The appellant is further entitled to one month’s salary in lieu of notice as his dismissal was unlawful.

Orders

- 38. The totality of my consideration is that the Appeal is allowed as follows:
 - a. The trial Court’s order dismissing the appellant’s suit in its entirety is hereby set aside.
 - b. The appellant is awarded compensatory damages in the sum of Kshs 78,000.00 being equivalent to 6 months of his gross salary.
 - c. The appellant is awarded one month’s salary in lieu of notice being the sum of Kshs 13,000.00.
 - d. The total award is Kshs 91,000.00.
 - e. Interest on the amount in (d) at court rates from the date this Judgement until full payment.
 - f. Costs of this Appeal, and those for the lower Court suit, shall be in favour of the appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

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STELLA RUTTO
JUDGE



Appearance:

For the Appellant Mr Njuru

For the Respondent No appearance

Court Assistant Abdimalik Hussein

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

