



REPUBLIC OF KENYA



**Ndarugu Tea Factory Company Limited v Olouch (Appeal
E058 of 2022) [2023] KEELRC 457 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 457 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E058 OF 2022
MN NDUMA, J
FEBRUARY 23, 2023**

BETWEEN

NDARUGU TEA FACTORY COMPANY LIMITED APPELLANT

AND

CALISTO AKELLO OLOUCH RESPONDENT

*(Being an appeal against the entire judgment of Honourable H M. Ng'ang'a
the Principal Magistrate Gatundu Law Courts dated April 20, 2022)*

RULING

1. The appeal is against the judgment of honourable H M Ng'ang'a the Principal Magistrate at Gatundu Law Courts delivered on April 20, 2022.
2. The grounds of appeal are set out in the Memorandum of Appeal dated May 18, 2022 as follows:-
 1. That the trial Court erred in fact and in law by misapprehending the facts, applying the wrong legal principles and arriving at the wrong decision to the prejudice of the Appellant.
 2. That the trial Court erred in fact and in law by making a finding that the respondent's termination was unprocedural and substantively unfair.
 3. That the trial Court erred in failing to appreciate the evidence and the Respondent's own admission during cross-examination that he indeed attended the disciplinary meeting held on July 2, 2019 accompanied by a shop floor union representative Mr Julius Ngugi.
 4. That the trial court erred in fact and in law by failing to appreciate the fact that the appeal was lodged at the Kenya Plantations and Agricultural Workers Union challenging the resolution of the disciplinary meeting held on July 2, 2019 to dismiss the respondent which found out that the procedure adopted by the appellant in dismissing the claimant to have been satisfactory.



5. That trial court erred in fact and in law by finding that the boiler report dated May 9, 2019 was never produced as evidence yet the same was produced as the respondent's exhibit number 13 therefore failing to take into account its evidentiary value in determination of the case.
6. That the trial court erred in fact and in law by awarding compensation equivalent of 12 months' pay without laying any legal basis for the same.
7. That the trial Court erred in fact and in law in failing to take into account the principles of making an award of compensation as set out under section 49 and 50 of the *Employment Act*.
3. The brief facts of the case before the trial court are that the claimant was employed by the respondent on September 21, 2009 as a Boiler Technician. That he served the respondent continuously for a period of ten (10) years until July 2, 2019 when the contract of employment was terminated by the appellant on allegation of gross misconduct and violation of company rules.
4. The claimant/respondent filed suit claiming that the dismissal was unlawful and unfair for there was no valid reason to dismiss the claimant from service.
5. The trial court in its judgment found that the claimant/ respondent had no valid reason to dismiss the claimant/respondent from employment in that the claimant/respondent did not discharge the burden of prove placed on it. The court awarded the claimant/respondent the equivalent of twelve months' salary in compensation for the unlawful and unfair dismissal in the sum of kshs 695,820.
6. In terms of the Court of Appeal decision in *Selles vs Motor Boat Company Limited*, this court is obliged to evaluate the evidence on record afresh and reach its own conclusion minded that it had no opportunity to see and listen to witnesses directly. The court is also minded that it need not interfere with the decision of the trial court merely because it would have arrived at a different decision but may do so if it finds that the trial court did not consider relevant facts and or considered extraneous facts or that it materially misdirected itself on matters of law as to lead to an injustice.
7. The claimant (P W 1) testified that he was wrongly accused of not reporting that the boiler was faulty when in fact he had reported; organised for an inspection of the boiler and the boiler was found faulty and had advised the production manager that the boiler should not be used until it was repaired otherwise it would knock. That his advice was ignored. The Production Manager, gave the claimant notice to show cause why he did not stop the machine and the claimant was suspended from duty. The claimant responded to the show cause letter. The claimant was called to a disciplinary meeting. The claimant stated that the documents he wished to rely on at the disciplinary hearing were taken away and were not produced. The claimant testified that he was victimised for no fault all. The claimant said he was not advised to bring a co-worker on representative at the meeting. The claimant stated that the termination was unlawful and unfair since he was not to blame for the boiler failure as he had reported all the failures of the machine upon an inspection being conducted but his advice for the machine not to be used until it was repaired was ignored by the production manager.
8. D W 1 Peter Khabuti testified that he was the factory unit manager. He testified that he gave the claimant two notices to show cause. That the first one was for poor work performance. That D W 1 had called him to prepare the boiler and he did not do so. The second notice to show cause was for loss of a transmitter. That the explanation the claimant gave was not satisfactory in his response to notice to show cause and at the disciplinary hearing.
9. D W 1 stated the company had two boilers for different roles. That on May 9, 2019, a government inspector came to inspect the boiler. The inspector gave the boiler a clean bill of health. On May 11, 2019, D W 1 asked the claimant to operationalize the boiler that had been inspected (JTA boiler). That



up to May 20, 2019, the boiler was not ready for use. That is why he issued the claimant with Notice to show cause why the boiler was not operational. That the claimant stated in his defence that the boiler was faulty and so was the transmitter. That the boiler could not work. D W 1 stated that, this information by the claimant was shocking since the boiler had been inspected and found to be okay. That D W 1 demanded the faulty transmitter to be brought to him. That the claimant brought an old transmitter ball that D W 1 claims was put in the store long time ago. D W 1 demanded for the transmitter that was working when the boiler was installed. That the claimant was unable to produce it or give an explanation. That D W 1 gave the claimant Notice To Show Cause for the loss of the transmitter.

10. The claimant responded to the notice to show cause and was called to a disciplinary hearing attended by a shop steward Mr Njagi who represents workers. D W 1 produced the inspection report which indicated that the boiler was satisfactory and the valve opened at the time of inspection. D W 1 stated that the claimant knew the inspector and was versed with the procedure of inspection. That the inspector having given the boiler a clean bill of health, D W 1 was surprised that the claimant who is the technician in charge was unable to prepare the boiler for use from May 11, 2019 up to May 20, 2019. It was a valid demand to the claimant to explain why the boiler could not work.
11. That the claimant was dismissed for a valid reason having been unable to account for this transmitter. He was paid his terminal benefits according to the collective bargaining agreement and signed for it.
12. That the claimant was paid half pay during the suspension as per the collective bargaining agreement. That the claimant was paid kshs 691,690 which was subjected to Pay As You Earn (PAYE) and he was given a certificate of service. D W 1 said he was not aware of the checklist. He was posted to the factory in 2019, April. D W 1 said he produced documents to prove that there was a missing transmission float ball. That a replacement was bought for kshs 139,000. That the claimant fitted the new float ball on May 29, 2019. D W 1 denied he had bad blood against the claimant. D W 1 prays the suit be dismissed with costs.
13. Under cross-examination, D W 1 said he was a Manager of Kenya Tea Development Authority (KTDA) for 35 years. That he was posted to Ndarugu Factory in August, 2019.
14. D W 1 stated that a boiler can operate without a float ball. That the float ball is only used to regulate the water intake. That the boiler also has another safety measure.
15. D W 1 stated that he did not make any report of the missing float ball. That the people who saw the claimant take the float ball were not called to testify before Court. D W 1 stated he charged the claimant for poor work performance and delay in operationalizing the JTA boiler. D W 1 stated the float ball was removed after the inspection was done.
16. The learned magistrate had framed the following issues for determination:-
 - (a) Whether the termination of the claimant was unfair.
 - (b) Whether the claimant is entitled to general damages for unlawful termination.
 - (c) Whether the claimant was negligent resulting in the loss of the boiler transmitter float ball.
 - (d) Who should pay the costs of the claim and Counter claim.
17. The learned trial Magistrate upon careful consideration of the evidence adduced by the parties arrived at the conclusion that the letter of termination dated July 4, 2019 stated that on May 29, 2019, the JTA boiler could not operate due to a missing transmitter float ball. The respondent blamed the claimant



for having stolen the transmitter float ball and filed a counter claim against the claim before Court for recovery of the purchase price of the new transmitter float ball.

18. The respondent did not call any witness to testify to the allegation that some unnamed workers saw the claimant move the transmitter float ball from the boiler and replaced it with an old one.
19. The court found that the counter-claim was not proved by the respondent. That this having been the basis for the dismissal, the respondent had failed to prove that it had a valid reason to dismiss the claimant from employment. The learned magistrate also faulted the respondent for having denied the claimant opportunity to produce the relevant documentation before the disciplinary committee to prove his innocence. The court found that the procedure followed by the respondent in the hearing was unfair. The court found the claimant successfully rebutted the allegation by the respondent by producing a check list which showed that the JTA boiler was faulty as far back as September 20, 2017 as it was indicated in that checklist that the boiler steam main stop valve was faulty. The inspection report apparently done in May, 2019, and which D W 1 stated had given the JTA boiler a clean bill of health was not produced before court and at the disciplinary hearing.
20. The claimant testified that the inspector had not tested the boiler and when he released the steam, he noted that the boiler was faulty.
21. The court concluded, which conclusion we found to be the only reasonable conclusion from the evidence adduced before court that:-

“ Even without considering the technicality and merits of the decision, it is manifestly clear that the decision to terminate the claimant’s employment was rushed and did not consider the claimant’s defence.”.
22. It is the finding by this court that the respondent/Appellant had no valid reason to dismiss the claimant from employment. Furthermore, the procedure followed by the respondent/appellant did not provide the claimant with reasonable opportunity to proffer his defence which makes more sense in the circumstances of this case.
23. The court finds that the respondent/appellant having failed to satisfy the requirements of sections 41, 43 and 45 of the *Employment Act*, 2007, the dismissal of the claimant was unlawful and unfair. Accordingly, the appeal before Court lacks any merit.
24. The conclusion we have arrived at is supported by the decision of the court in *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR upon considering the entire testimony placed before the trial Court afresh.
25. However, the trial court did not consider the provisions of section 49(1) (4) before awarding the claimant the maxim compensation of the equivalent of 12 months’ salary.
26. The trial court misdirected itself in this regard. From the record, the claimant had diligently served the respondent for a period of 9 years. The claimant was paid terminal benefits upon dismissal and was given a certificate of service. The court finds that the claimant was wrongly victimized and did not contribute to the dismissal. The claimant was not compensated for the unlawful and unfair loss of his employment. The claimant suffered loss of career progression and therefore suffered loss and damages. The claimant clearly desired to continue in his employment till retirement date.
27. The court substitutes the award of the equivalent of twelve months salary in compensation with the equivalent of 9 months’ salary in compensation in the sum of 521,055.



28. In the final analysis, the appeal on the issue of liability is dismissed. The appeal partly succeeds on the issue of quantum. The court enters judgment in favour of the claimant/respondent for a sum of kshs 521,055. The award is payable with interest at court rates from the date of the judgment of the lower court till payment in full.

29. The appellant to meet the costs of the suit before the trial court and this court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23RD DAY OF FEBRUARY, 2023.

MATHEWS NDERI NDUMA

JUDGE

Appearances

Mr Juma for appellant

Mr Gitari for respondent

Ekale: Court assistant

