



REPUBLIC OF KENYA



**Mutulile v Labchem Limited (Employment and Labour Relations Appeal
32 of 2019) [2023] KEELRC 417 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 417 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 32 OF 2019
MN NDUMA, J
FEBRUARY 9, 2023**

BETWEEN

JULIUS WEKULO MUTULILE CLAIMANT

AND

LABCHEM LIMITED RESPONDENT

(Being an appeal from the judgment and orders of Honourable Kituti, Principal Magistrate at Nairobi MC. ELRC No. 375 of 2018 delivered on 30th August, 2019)

JUDGMENT

1. The appeal is filed from the Judgment of Hon DM Kivuti, Senior Resident Magistrate delivered in August, 2019.
2. The Memorandum of Appeal dated September 20, 2019 sets out the grounds of Appeal as follows:-
 1. THAT the learned magistrate erred in law and in fact in failing to appreciate that the Appellant's termination was procedurally and substantively unfair for failure to comply with the relevant provisions of the Employment Act
 2. THAT the learned magistrate erred in law and in fact in failing to find that the Appellant was not afforded a fair hearing in the presence of an employee of choice as required under Section 45 of the Employment Act, 2007 nor issued with a Notice to Show Cause notifying him the reasons for which his termination was under consideration or allowed an opportunity to respond to the allegations levelled against him.
 3. THAT the learned magistrate erred in law and in fact in finding that there was a disciplinary hearing, that the Appellant was issued with a notice and that the local labour office was involved in the Appellant's termination.



4. THAT the learned magistrate erred in law and in fact in dismissing the Appellant's suit against the preponderance of evidence.
3. In terms of the Court of Appeal decision in *Selle & Another -vs- Associated Motor Boat Company Limited & Others (1986) EA 123*, the Court has considered the evidence adduced before the Court Aquo afresh and has made its own conclusion about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The Court is also minded that it need not impugn the findings of the lower Court merely because it would have arrived at a different decision but only if the lower Court misdirected itself on material facts and the law applicable resulting in miscarriage of justice.
4. The claimant vide a memorandum of Claim filed on October 23, 2018 sought a declaration that the termination of the employment of the respondent by the Appellant was unlawful and unfair and that the Court awards the respondent the equivalent of 12 months' salary in compensation thereof.
5. The claimant also sought payment of unpaid National Social Security Fund (NHIF) due for the period 2014 - 2018 in the sum of Kshs 20,800.
6. The suit was defended by the Appellant vide a memorandum of defence filed on December 19, 2018 in which the reliefs sought were said to be without merit. It was however not denied that the respondent was employed by the Appellant from January, 2014 until he was dismissed from employment on April 25, 2018.
7. The claimant testified that he was employed by the respondent to do general duties in the year 2014. That he was summarily dismissed from employment by the respondent on April 25, 2018. That on that date, RW1 was called by the respondent's accountant to his office and was paid Kshs 27,016 and was given a letter which upon reading the same realized that he had been dismissed from employment. That he was not given any notice or warning of the intended termination. That at the time of dismissal, he earned Kshs 12,927 per month. That no disciplinary hearing was conducted prior to the dismissal. That he was victimized by one Godfrey Opete who was exploiting him at the work place. PW1 stated that he was paid one month salary in lieu of notice and service pay. That he had no claim against the employer in respect of National Hospital Insurance Fund and National Social Security Fund.
8. Under cross-examination PW1 stated the following

' I was issued with a termination letter. I have not challenged the grounds stated in the termination letter. I do not oppose the grounds for termination.'
9. DW1 Godfrey Opete testified that he was a supervisor employed by the respondent. That he knew the claimant as he assisted him to get employment. That he had worked for the Appellant since 2007.
10. That the claimant stopped listening to him as a supervisor. That the claimant was on various occasions given verbal warning because of not performing his duties but he did not change. That on April 14, 2018, DW1 was in charge of the workers at the respondent's Godown in Mombasa road. That the claimant disobeyed Instructions to work and was on phone call instead of working. That DW1 asked the claimant to stop making calls but he refused in the presence of other workers. That DW1 reported the matter to the Director and a meeting was called for the respondent to explain the reason for insubordination. That the claimant did not give any explanation and instead said DW1 and the Director could not do anything to him. That the claimant was given a final warning. That the claimant continued insulting the director and the supervisor and declined to perform duties assigned. That he was a difficult employee hence the termination.



11. DW2 Kennedy Kanene testified that he was an Office Assistant. He stated that the claimant disregarded instructions and would absent himself from work. That the respondent had a warning letter. That a meeting was held before the claimant had his employment terminated. That the termination was fair.
12. The learned trial magistrate upon analyzing the evidence adduced by the PW1 and that adduced by DW1 and DW2 arrived at the considered conclusion that the respondent had discharged the onus placed on it under Section 43 of the *Employment Act* in that the employer had established that it had a valid reason to terminate the employment of the claimant. The trial magistrate also found that the employer had followed fair procedure in terminating the employment of the claimant.
13. Upon a careful analysis of the evidence adduced, this Court also arrives at the same conclusion as the learned magistrate did. That the claimant was a difficult employee and had failed to heed both verbal and written warnings issued to him by his supervisor.
14. The claimant had failed to discharge the onus placed on him under Section 47(5) of the *Employment Act*, 2007 to demonstrate that the termination was wrongful.
15. The Court finds that the appeal lacks merit in its entirety and dismiss the same with costs before this Court and the trial Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF FEBRUARY, 2023.

MATHEWS NDERI NDUMA

JUDGE

Appearances

Mr. Njeru for Appellant

*Mr. Baabu for Respondent

Ekale: Court Assistant

