



**Kamotho v Njuca Consolidaed Ltd (Employment and Labour Relations
Appeal E005 of 2022) [2023] KEELRC 541 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 541 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2022
ON MAKAU, J
MARCH 6, 2023**

BETWEEN

STEPHEN KAMANDE KAMOTHO APPELLANT

AND

NJUCA CONSOLIDAED LTD RESPONDENT

JUDGMENT

1. The appellant sued the respondent seeking damages for unfair termination of his employment on January 31, 2018. The total claim was for Kshs 87,510.00 and it was based on the ground that the termination was for no valid reason and no prior fair hearing was afforded to him. The respondent denied liability and averred that the claimant was arrested and charged with a criminal offence after which he never reported back to work. Having considered the matter, the trial court (Hon E M Nyagah) found that the claimant absconded work after he was arrested and arraigned in court for the criminal offence. Consequently, the court dismissed the suit.
2. The appellant was aggrieved and brought this appeal citing the following grounds:
 1. That the honourable magistrate erred in law and fact in dismissing the claimant/appellant's claim against the weight of the evidence adduced.
 2. That the honourable magistrate erred in law and fact in failing to consider the evidence adduced by the plaintiff and holding that the claimant had absconded duty.
 3. That the honourable magistrate erred in law and fact in failing to consider the plaintiff's submissions and imposing a high burden of proof.
 4. That the honourable magistrate erred in law and fact in finding that the respondent was entitled to summarily dismiss the claimant.



5. That the honourable magistrate erred in law and fact in failing to assess the award the appellant would have been entitled to had he proved his case.

Submissions

3. The appellant submitted on three grounds. First, it was submitted that the trial court erred in dismissing the suit against the weight of the evidence. It was submitted that the appellant's evidence that upon acquittal, he was denied entry past the respondent's gate and therefore his effort to report back to work was thwarted. It was further submitted that DW1 confirmed during cross-examination that he was not aware whether the appellant was turned away at his work place.
4. As regards the alleged absconding, the appellant submitted that no evidence has been tendered by the respondent to show that effort was made to reach out to the appellant either via phone or otherwise. Again there is no evidence to show that the respondent reported the alleged absconding to the Labour office. It was argued that DW1 gave contradictory evidence regarding the alleged attempt to reach the appellant via mobile phone. The case of *David Gituma Kirera v Majani Gardens Limited (2021) eKLR* was cited to fortify the submission that alleged absconding must be supported by evidence that the employer made effort to reach out to the employee but in vain.
5. Secondly the appellant submitted that the respondent was not entitled to dismiss him summarily since there was no valid reason to justify the dismissal and fair procedure was not followed before the dismissal. Therefore it was contended that the termination was unfair under section 45 of the *Employment Act*.
6. For emphasis, reliance was placed on the case of *Daniel Marua Chacha v Santram Hardware (2022) eKLR*, *Paul Mwakio v Freight Services Ltd (2022) eKLR* and *Richard Kiplimo Koech v Yuko Supermarket Ltd (2015) eKLR*.
7. Finally the appellant submitted that the trial court failed in its duty to assess compensation of damages for unlawful termination. For emphasis, he relied on the case of *Gladys Wanjiku Njaramba v Globe Pharmacy (2014) eKLR* where the court held that the trial court erred by failing to assess the damages he would have awarded had the suit been successful.
8. In the end the appellant urged the court to allow the appeal, set aside the impugned judgment and in its place, enter judgment in his favour as prayed in the memorandum of claim. He further prayed for costs of the appeal and the suit in the lower court.
9. The respondent submitted on two grounds. Firstly, it was submitted that the trial court did not err in holding that the employer was entitled to dismiss the appellant summarily. It was submitted that the appellant failed to report back to work and therefore the employer was entitled to invoke section 44 (4) (a) and (b) of the *act* which entitled an employer to summarily dismiss his employee for absenting himself from work without leave or for willful neglect to perform his work or carelessly perform his work.
10. For emphasis, reliance was placed on the case of *Joseph Njoroge Kiama v Summer Ltd (2014) eKLR* where the court held that absenting himself from work for ten days without permission amounted to absconding and the employer was entitled to dismiss him summarily under section 44 (4) of the *Employment Act*.
11. It was further submitted that the appellant repudiated his contract by absconding because that meant that he was no longer going to perform the contract of employment. It was contended that the respondent's witness testified that efforts were made to reach the appellant but it was futile. For



emphasis, reliance was placed on the case of [Leonard Kipkorir Mutai v Lichi Security Systems Ltd \(2020\)eKLR](#) where Nzioki J held that refusal to go to work can be construed as repudiation of contract and the employer need to deploy resources to trace the employee or to require him to show cause why his services should not be terminated.

12. The second issue submitted on was whether a higher burden of proof was imposed by the trial court. It was submitted that under section 107 of the [Evidence Act](#), the burden of proof is on the person who desires any court to give judgment as to legal right as liability. The court was urged to find that the appellant failed to adduce any evidence to prove that he reported back or made to report back to work after his acquittal. Therefore the court was asked to dismiss the appeal with costs because the issue of absconding was proved at the lower court and evidence to the contrary was presented.

Determination

13. Having considered the record of the appeal and the rival submissions filed, the issues for determination are:
 - a. Whether the appellant was dismissed by the respondent or he absconded work.
 - b. If he was dismissed, whether the reason was valid and the procedure followed was fair.
 - c. Whether the appellant is entitled to the relief sought in the primary suit.
14. This being a first appeal, the court is obliged to re-evaluate the evidence and come up with its own conclusions while warning itself that it did not have the advantage of hearing the testimonies from the witnesses like the trial court. The court should also not interfere with the findings of fact unless the findings of facts are based on no evidence or on misapprehension of evidence or where it is shown that a trial court has acted on wrong principles in arriving at the finding in issue ([Ndima Samburi Soti v Elvis Kimtai Chepkeses \(2010\)eKLR](#)).

Absconding or dismissal

15. The appellant pleaded in paragraph 3 of his memorandum of claim that his employment was unfairly terminated verbally by the respondent on January 31, 2018 without stating any valid reason. The respondent, however, pleaded in paragraph 5 and 6 of its defence that after the appellant absconded work after he was arrested and subsequently released. Consequently it denied the alleged termination and maintained that the appellant absconded work.
16. The burden of proving unfair termination lies with the employee (see section 47 (5) of the [Employment Act](#)). The appellant was therefore required under section 107 of the [Evidence Act](#) to adduce evidence during the trial to prove the alleged termination.
17. It is common ground that the appellant was arrested on January 31, 2018 from his place of work and on February 1, 2018 he was charged with a criminal offence. The proceedings of the Criminal Case No 135 of 2018 (page 34 of the record of appeal) indicate the appellant pleaded not guilty and he was given cash bail of Kshs 20,000.00 or bond of Kshs 50,000.00. The appellant did not raise either and he remained in custody until February 21, 2018 when he was released on bond after a surety was approved by the court.
18. The appellant never reported back to work after being released on bond. He waited until March 20, 2019 when he was discharged from the criminal case and then, allegedly went to see his employer. There is however, no evidence that he indeed reported back to work after the discharge from the criminal proceeding as alleged. He has not called any witness or produced any documentary evidence



to corroborate his allegation that he went to the respondents offices but was barred entry at the gate. Consequently the magistrate was right in his finding that the appellant never reported back after acquittal.

19. Even if he did reported back, which is not the case, his absence for more than one year without permission or order by the employer to stay away pending trial of the criminal offence sealed his fate. I say so because section 44 (4) (f) of the *Employment Act* provides that an employer is entitled to summarily dismiss his employee who has failed to secure his liberty within 14 days after being arrested for a cognizable offence which is punishable by imprisonment.
20. In this case there is evidence that the appellant failed to secure bail within 14 days of his arrest, and even upon his release after 21 days in custody, he stayed away for over one year. He terminated his employment through absconding. To that extent, I find that the respondent never dismissed the appellant. The latter deserted his employment voluntarily and without notice.

Unfair dismissal

21. Having found that the appellant absconded, the issue of unfair termination does not arise. He deserted his employment without notice to the employer.

Reliefs

22. In view of the finding that the appellant absconded work, it is my conclusion that he cannot benefit from his own fault. The trial court was right in failing to award him damages under section 49 of the *Employment Act*, namely salary in lieu of notice and compensation for unfair termination.
23. The claim for January 2018 salary, welfare deductions, annual leave and public holidays were not substantiated by evidence. The written statement that was adopted as the appellant's testimony did not support the said claims. Therefore I hold that the said claims were not proved by evidence.
24. In conclusion, I agree with the respondent that the impugned judgment was grounded on the law and the evidence adduced. The appellant has failed to convince me that the decision resulted from misapprehension of evidence or that the trial court acted on wrong principles. Consequently, the appeal is bereft of merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF MARCH, 2023.

ONESMUS N MAKAU

JUDGE

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 April 15, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

