



**Mayfair Holdings Ltd v Okutoto (Appeal E016 of 2021)
[2023] KEELRC 562 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 562 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E016 OF 2021
CN BAARI, J
MARCH 2, 2023**

BETWEEN

MAYFAIR HOLDINGS LTD APPELLANT

AND

DANIEL LUBANGA OKUTOTO RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. R. K. Ondieki
(SPM) delivered on 6th April, 2021 in Kisumu CMEELRC NO. 412 OF 2019)*

JUDGMENT

1. This appeal arises from a Judgment rendered on 6th April, 2021, where the Trial Court found in favour of the Respondent herein. The Trial Court made a declaration that the termination of the Respondent was unfair for want of valid reasons and fair procedure, and further proceeded to award one month's salary in lieu of notice, accrued leave, payment of 124 days worked without off, payment for public holidays worked, compensation for unlawful termination, issuance of a certificate of service, costs and interest.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 5th May, 2021.
3. The appeal is premised on the grounds that:
 - i. The Learned Magistrate misinterpreted the evidence before him hence arriving at a wrong conclusion.
 - ii. The Learned Magistrate failed to consider the Appellant's evidence hence arriving at a wrong conclusion.
 - iii. The Learned Magistrate failed to appreciate that the Respondent deserted duty and it was therefore not possible to carry out disciplinary proceedings against him.



- iv. The Learned Magistrate failed to consider the Appellant's submission and exhibits presented in court.
4. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

5. It is the Appellant's submission that the Learned Magistrate misinterpreted the evidence on record and also did not consider the evidence tendered by the Appellant, hence arriving at the wrong conclusion.
6. The Appellant submits that from the proceedings and the documents filed, it was a live issue that the Claimant was absent from duty from 2/10/2019 to 17/10/2019, and the Claimant did not attempt to explain his absence yet the court finds that the Claimant was unfairly terminated.
7. It is the Respondent's submission that the Trial Court misinterpreted the evidence as a whole, and further failed to consider the evidence of the Appellant, hence arriving at the wrong conclusion in his judgment.
8. The Appellant's further submission is that he concedes that disciplinary proceedings were never carried out against the Claimant/Respondent but submits that it was not possible to carry out disciplinary proceedings for a person who is absent from duty.
9. The Appellant submits that it did not terminated the Respondent and hence there was no need to conduct disciplinary proceedings against him.
10. It is the Appellant's submission that the Respondent never gave it an opportunity to conduct disciplinary proceedings against him as he went away never to return to the Appellants company.
11. The Appellant submits that the Trial Magistrate failed to consider its submission and exhibits it presented before it. The Appellant further submits that no evidence was led by the Claimant on the leave days and the public holidays that he had allegedly worked, and even the days worked without off, and the court still went ahead to award everything claimed by the Claimant/Respondent without interrogating the same and without evidence having been led by the Claimant.
12. The Appellant finally submits that the judgment of the Trial Court is without basis and urge the court to allow the appeal with costs to the Appellant.

The Respondent's Submissions

13. The Respondent submits that from the record, and the evidence tendered before the Trial Court, the Appellant did not tender evidence to rebut the evidence tendered by the Respondent. It is the Respondent's further submission that his evidence was not challenged and neither was it rebutted.
14. The Respondent submits that the Appellant never produced any evidence and/or called any witness to justify the compliance with Section 41 of the *Employment Act*, or the reasons for terminating the Respondent's employment, hence the termination was wrongful, unfair, unlawful and unprocedural.
15. It is the Respondent's submission that the Appellant's allegations that the Respondent absconded and/or deserted duty and which made it impossible to carry out disciplinary proceeding against him, is not true and no evidence was led in support of this allegations.
16. The Respondent further submits that there is no evidence of the attempts, if any, made to reach the Respondent. The Respondent sought to rely in the cases of *William Gituma v RAA Limited* [2020] eKLR and *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, for the holding that



it is not enough for an employer to say an employee has deserted duty and do nothing about it. The employer must demonstrate attempts made to reach out to an employee to establish their whereabouts. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee. It is therefore not enough for an employer to simply state that an employee has deserted duty.

Analysis and Determination

17. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into the following two grounds: -

- a. That the Learned Magistrate erred in failing to consider the Appellant's evidence before him hence arriving at a wrong decision.
- b. That the Learned Magistrate erred in failing to appreciate that the Respondent absconded duty and therefore it was not possible to subject him to disciplinary proceedings.

18. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, Madan J.A had this to say on appeals:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

19. Again, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, while handling a first appeal from the High Court, the Court of Appeal held that:

“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”

20. The role of this Court as a first Appellate Court in this matter, is to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the learned Trial Court are to stand.

21. The Trial Court found the termination of the Respondent herein unfair, on account of failure of the employer/Appellant to accord the Respondent fair procedure and valid reasons for his termination.

22. The Appellant's position is that the Respondent absconded duty and was thus not possible for him to be subjected to disciplinary action. The Court record however, bears email exchanges between the Group General Manager of the Appellant and one of their supervisors named Mr. Mwanzi, informing the General Manager, that the Respondent was not flexible and that he had sent him away. In his response, the General Manager told Mr. Mwanzi not to let the Respondent return to work. This email exchange happened on the morning of 4th October, 2019, the time around which the Respondent was said to have absconded duty.



23. Further, the Appellant's witness told the Trial Court in cross-examination, that the Respondent was sent away by their supervisor and further confirmed that the Respondent was not given a hearing.
24. The Court record thus confirms that the Respondent was no doubt unfairly terminated, by the Appellants failure to adhere to the requirements of Sections 41, 43, 45 and 47(5) of the Employment Act, 2007. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR, the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
25. Further, in *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the Employment Act has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present
26. To this end, I find and hold that the Respondent was unfairly terminated, and the finding of the Trial court in this respect is upheld.
27. The Trial Court upon reaching a conclusion that the Respondent was unfairly terminated, went ahead to grant the Respondent's prayers as listed in his Statement of Claim.
28. The reliefs listed in the Respondent's claim were for payment of one month's salary in lieu of notice, accrued leave, payment of 124 days worked without off, payment for public holidays worked, compensation for unlawful termination, issuance of a certificate of service, costs and interest.
29. The claims are in my opinion the Respondent's wish list, and which were subject to prove. The fact that an employee is found to have been unfairly terminated/dismissed, is not prove that all the reliefs he sought are merited. Each of the claims must be specifically proved.
30. My finding in this respect is that the trial Court did not justify the basis for the awards granted. I will thus proceed to analyse each claim and arrive at my own conclusion.

One Month's Salary In lieu of Notice

31. The Respondent's letters of appointment did not provide for notice period. The Collective Bargaining Agreement between the parties was also not availed to the Trial Court. In this regard, the Court will be guided by the statutory capping in respect of notice, which is a one month's salary.
32. The Respondent was just told to leave the Appellant's premises one night while on duty. This is confirmation that no notice was issued.
33. I find the claim for one-month salary in lieu of notice merited. The Trial Court's award in respect of notice is upheld.

Accrued Leave, Payment of 124 Days Worked Without Off, Payment for Public Holidays Worked

34. The Respondent did not lead any evidence to show that he was owed by the Appellant on account of work done on off-days and work done during public holiday. No indication was given in respect of the holidays worked and proof that the Respondent did not take his leave.
35. The Respondent was the burden bearer and he in my view, failed to discharge the burden in respect of the claims under this heading.
36. The Court record however bears a demand letter by Respondent's union in respect of leave not taken for three years.



37. A letter was also produced in court on the Respondent's final dues of Kshs. 23,895.39 and which was accompanied by a copy of a cheque in the name of the Respondent for similar amount. In this letter the Respondent signed in acknowledgement of the amount as his overtime, off days worked and annual leave due in full settlement. The letter further proceeded to indicate that the Respondent had no further claims against the Appellant.
38. In *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR the Court of Appeal was categorical that:
- “... we agree with the Learned Judge that the execution of the discharge voucher, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation or fraud. The appellant was thus fully discharged ... We therefore find that the execution of the discharge voucher by the appellant and the receipt of the sums therein stated, no more liability by way of any balance of the loss remained with the respondent.”
39. The Court of Appeal however in *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR cited its holding in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] Eklr stated:
- “Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties. As such, we respectfully disagree with the submissions made on behalf of the respondent to the effect that this Court in the *Thomas De La Rue Case* found such agreements could not bar further claims. Our understanding of that decision is that the Court simply stated that the answer lay with the facts of each case. In its own words, this Court in the aforementioned case expressed: “We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
40. The record does not show that the discharge in the matter herein was challenged or in any way controverted by the Respondent. This leads me to the conclusion that by signing the discharge, the Appellant no longer owes the Respondent on account of off days worked and annual leave.
41. The Trial Court's award in respect of off days, public holidays worked and accrued leave is without merit. The award is set aside.

Compensation for unfair Termination

42. The Trial Court awarded the Respondent 12 months salary as compensation for unfair termination. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR the court held that the measures of compensation should be guided by the statutory capping at the time of termination.
43. The record shows that the Respondent had a number of show cause letters for various acts of misconduct, and which he responded to giving reasons/explanations for the misconduct. This in my view is confirmation that the Respondent did not have a good record of service. The Respondent's



termination, albeit unfair for failure by the Appellant to adhere to the requirements of the law, could largely have been contributed by the Respondent's frequent acts of misconduct.

44. Further, the Court of Appeal has now settled that courts must justify the awards they make by providing reasons for the award. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay, must be based on sound judicial principles, and that the trial Judge must justify or explain why a Claimant is entitled to the maximum award.
45. No justification whatsoever was given for the blanket awards granted to the Respondent. Taking into consideration the Respondents contribution to the termination, I deem an award of eight months' salary (8) sufficient compensation for the Respondent's unfair termination. Consequently, the Trial Court's award of twelve (12) months' salary in compensation is hereby set aside.
46. In whole, the Court makes orders as follows: -
 - i. That the Trial Court's finding that the Respondent was unfairly terminated is upheld.
 - ii. The award of one month's salary in lieu of termination notice is upheld.
 - iii. The Trial Court's award in respect of accrued Leave, Payment of 124 Days Worked Without Off, Payment for Public Holidays Worked is set aside.
 - iv. That the Trial Court's award of 12 months' salary as compensation for unfair termination is set aside, and substituted therewith Eight (8) months' salary as compensation for unfair termination at Kshs. 199,920/-
 - v. The appeal having partially succeeded, I order that each party bears their own costs of the appeal
 - vi. The award of costs and interest by the Trial Court is left undisturbed.
47. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Odhiambo h/b for Mr. Yogo for the Appellant

Ms. Onsongo present for the Respondent

MS. Christine Omolo - Court Assistant

