



**Wells Fargo Ltd v Dzuta (Appeal 25 of 2020)
[2023] KEELRC 1146 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 25 OF 2020**

**AK NZEI, J
MAY 11, 2023**

BETWEEN

WELLS FARGO LTD APPELLANT

AND

THOMAS LWAMBI DZUTA RESPONDENT

*(Appeal from the judgment of the Hon. M. L. Nabibya, Principal
Magistrate, delivered on the 24th July 2020 in Msa SRMCC No. 322 of 2018)*

JUDGMENT

1. The appellant was the respondent in Mombasa SRMC ELR Cause No 322 of 2018 whereby the respondent herein (who was the claimant in the aforesaid suit) sued the appellant and pleaded:-
 - a. that the respondent was employed by the appellant as a day guard on November 16, 2013, earning Kshs 25,762 at the time of termination.
 - b. that the respondent retained continuous and uninterrupted employment until August 10, 2018 when his employment was summarily terminated by the respondent on allegations of insubordination and willful disobedience of a proper superior order contrary to section 44(4) (e) of the *Employment Act*.
 - c. that at all material time, the respondent was willing to have a medical test conducted by a health facility of the appellant's choice and that on March 29, 2018 at 18:55:59, the respondent underwent a pathological lab test at Mantata Africa limited Healthcare facility whereby he tested positive for cocaine.
 - d. that the respondent requested to have the pathology redone, and a test done at Mombasa Hospital gave a negative result for cocaine.



- e. that dissatisfied with those results, the appellant insisted on the respondent taking a third test at a facility of the appellant's choice.
 - f. that the respondent did, on multiple occasions, inform the appellant of his grievance over the results from Medanta Afri-Care and the appellant's insistence that the respondent takes further tests. That the respondent became apprehensive of the appellant's insistence on a third examination by the appellant's chosen pathologist and the possibility of such pathologist being comprised, and that the respondent attended Mewa Drug Treatment Drop in Mombasa on April 17, 2018 for pathological test/examination, and later Kenyatta National Hospital, both of which returned negative results.
 - g. that the respondent's employment was unlawfully and unprocedurally summarily dismissed by the appellant *vide* a letter dated August 10, 2018 or thereabouts.
 - h. that the respondent was not given an opportunity to be heard before termination and was not given any sufficient notice and was not paid his rightful dues.
2. The respondent set out his claim against the appellant as follows:-
- a. one month salary *in lieu of* notice..... ..kshs 25,762
 - b. salary for July 218Kshs25,762
 - c. outstanding leave days (991x27x58/12)...Kshs 100,587
 - d. compensation for unfair termination of employment.....Kshs 309,144
 - e. unpaid dues for 10 working days in August 2018..Kshs 9,900
 - f. service pay (991x15x58/12).....Kshs 71,848
 - g. uniform refundKshs 4,000
- Total Kshs 494,902
- h. certificate of Service.
 - i. damages for employment related defamation by the appellant
 - j. damages for diminished employability of the respondent.
 - k. costs of the suit and interest.
3. Other documents field by the respondent along with his statement of claim included an affidavit in verification of the claim, the respondent's written witness statement dated October 11, 2018 and an evenly dated list of documents listing some twenty one documents. The listed documents included the respondent's contract of employment dated June 1, 2015, his payslips for June and August 2018, Work Identity Card, discharge certificate dated August 20, 2018, NSSF statement, the respondent's letters dated June 21, 2018, July 5, 2018 and July 24, 2018, the appellant's letter dated June 2, 2018, summary dismissal letter dated August 10, 2018, clinical pathology results dated March 29, 2018 and June 12, 2018 respectively, a certificate of analysis from Government Chemist dated June 12, 2018, a letter from Mewa Health and Harm Reduction Centre dated April 17, 2018, and a Toxicology/ Pathological Report from Mombasa Hospital dated May 4, 2018, among others.
4. The appellant defended the respondent's suit *vide* a statement of response dated November 16, 2018, whereby it denied the respondent's claim. The appellant further pleaded:-



- a. that the respondent's salary at the time of dismissal was Kshs 17,414. The appellant admitted having employed the respondent as pleaded by him.
- b. that on March 27, 2018, the appellant requested the respondent and his colleagues assigned at Citi Bank, Mombasa, to undergo a voluntary drug test, which had been requested by the appellant's client as part of their corporate governance.
- c. that on March 29, 2018, the respondent underwent a drug test at Medanta Africare and tested positive for cocaine.
- d. that the respondent was called to a meeting on April 14, 2018 whereat he was issued with a letter April 14, 2018, whose contents were explained to him, and was requested to show cause why disciplinary action could not be taken against him, in view of the fact that he had tested positive for cocaine.
- e. that by a letter dated April 18, 2018, the respondent disputed the drug test results carried out at Medanta Africare and requested to be tested again in a government hospital.
- f. that on April 24, 2018, a disciplinary hearing was conducted where the respondent denied having taken cocaine and requested to be tested again at a government hospital. That the respondent was accompanied to the disciplinary hearing by a witness, and that the appellant granted the respondent's request.
- g. that the respondent underwent a drug test at Mombasa Hospital on May 4, 2018 and tested negative for cocaine.
- h. that by a letter dated May 10, 2018, the appellant informed the respondent that since he had tested positive for cocaine in the first instance, the appellant reserved the right to have the respondent tested within three months, and that his disciplinary process would remain open for the next three months; that the respondent agreed to this by signing the said letter dated May 10, 2018.
- i. that via a telephone call on June 22, 2018, the appellant's Human Resource Director requested the respondent to undergo a drug test in line with his consent of May 16, 2016, but the respondent declined to take the drug test *vide* a letter dated June 21, 2018.
- j. that by a letter dated June 2, 2018 (inadvertently dated June 2, 2018), the appellant requested the respondent to undertake a drug test whose cost it would cover, but the respondent again declined, *vide* his letter dated July 5, 2018.
- k. that by a letter dated July 23, 2018, the respondent was invited by the appellant to discuss the allegations made against him, and was informed of the right to be accompanied by a witness.
- l. that by a letter dated July 24, 2018, the respondent was requested to show cause why disciplinary action could not be taken against him for insubordination and was again informed of his right to be accompanied by a colleague.
- m. that the respondent responded to the letter on July 24, 2018 and failed to show cause and failed to explain why he had defied lawful instructions from his superior and breached the consent he voluntarily signed on October 16, 2018.
- n. that the appellant convened a disciplinary hearing on July 30, 2018 which the respondent attended accompanied by a colleague, and upon deliberations, the respondent's employment



- third test, but only requested to go to a government hospital. It was the Respondent's evidence that he had never used cocaine, cigarettes or even alcohol.
9. The appellant called one witness, Stepehn Kangethe (RW-1), who adopted his filed witness statement dated January 30, 2019 and produced in evidence the documents referred to in paragraph 5 of this judgment. The witness testified that the respondent was dismissed for failing to obey lawful instructions by the employer. That the respondent was to present himself for a drug test, which he refused to do. That the appellant wanted a random test done to clarify the variance.
 10. RW-1 further testified under cross examination that he attended the disciplinary hearing on July 30, 2018, that he was taking the minutes and he captured all that transpired. That the respondent was given a chance but he chose not to present his case.
 11. Cross-examined, RW-1 testified that the third drug test was meant to clear the variance in the first two. That there was a discussion on the third test but there was no agreement on the same. That the respondent was accused of using cocaine, and that the appellant refused to accept the government report because the respondent refused to follow lawful and proper instructions which amounted to gross misconduct.
 12. After considering the case presented before it by the parties herein, the trial court delivered its judgment on July 24, 2020 and awarded the respondent Kshs 25,772 being one month salary in lieu of notice and the equivalent of twelve months' salary being compensation for unfair termination of employment (Kshs 25,772X12) = Kshs 309,144. The other claims were disallowed, the claims for uniform refund and payment for days worked in August 2018 having been abandoned by the respondent at the trial. The respondent was also awarded costs and interest.
 13. Aggrieved by the said judgment, the appellant preferred the present appeal, and raised the following grounds of appeal:-
 - a. the learned magistrate erred in law and fact by failing to find that the respondent's refusal to undergo a third drug test, which he had agreed to, amounted to insubordination and was a valid ground for dismissal.
 - b. the learned magistrate erred in holding that the appellant had given unilateral, unfair and unreasonable instructions to the respondent to undergo a third drug test when in fact the decision was made with the respondent's concurrence and arising from a previous disciplinary process.
 - c. the learned magistrate erred in law and fact in holding that the respondent's dismissal was unreasonable, unfair and wrongful when the appellant had valid grounds for termination and (had) complied with the requisite procedure.
 - d. the learned magistrate erred in awarding the respondent 12 months' pay as compensation and further erred by failing to give reasons for making the said award as required under the provisions of section 49 of the *Employment Act*.
 - e. the learned magistrate erred in awarding the respondent costs of the suit and interest.
 - f. the learned magistrate misdirected herself by failing to fully appreciate and correctly analyse the pleadings and evidence filed in the trial court.
 14. I will address the grounds of appeal together. This is a first appeal, and a first appeal is by way of a retrial. The duty of a first appellate court is to re-evaluate, reanalyze and to reconsider the evidence adduced in the trial court; and to draw its own conclusion, bearing in mind that it did not see or hear the witnesses



testify, and therefore giving allowance for that. It was stated as follows in *Musral & another v Manese* [2022] eKLR:-

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & Another v Associated Motor Boat Co Ltd & another* [1968] EA 123 and in *Peters v Sunday Post Ltd* [1958] EA page 424.”

15. Having considered the pleadings filed and evidence adduced in the trial court, issues that arise for determination, in my view, are as follows:-
 - a. whether termination of the respondent’s employment was unfair.
 - b. whether the respondent is entitled to the reliefs sought in the trial court.
16. Before delving into the aforesaid issues for determination, it is important to establish the respondent’s gross monthly salary as at the time of termination. The respondent pleaded that he earned Kshs 25,762 per month, while the appellant pleaded that the respondent earned Kshs 17,414 per month. Among the documents produced in evidence by the respondent was his payslip for August 2018, which shows that he earned Kshs 15,142 basic salary and Kshs 2,272 house allowance. The respondent therefore earned a gross salary of Kshs 17,414 as at the time of his termination.
17. On the first issue and from the evidence on record, the appellant, *vide* a show cause letter dated April 14, 2018, called upon the respondent to show cause why disciplinary action could not be taken against him for having tested positive for cocaine pursuant to a drug test conducted on him and his colleagues on March 27, 2018 whereupon a report was received (by the appellant) on March 29, 2018. The show cause letter required the respondent to submit a written response to the respondent’s Human Resource Director on or before April 19, 2018, and to attend a hearing at Fargo House Nairobi on April 23, 2018 at 10.am and to bring a witness at the hearing, who could be a work colleague or a shop steward.
18. The respondent responded to the show cause letter *vide* a letter dated April 18, 2018 and stated in part:-

“I am surprised that I, Thomas Lwambi, tested positive for cocaine. Since I was born upto date I have never used any drugs.

Furthermore, I request to be tested again in a government institution to compare the results of the test.”
19. No disciplinary proceedings were shown to have been taken on April 23, 2018; and no letter was produced by either party rescheduling the proceedings. At the trial, the appellant produced the disciplinary hearing proceedings/minutes for April 24, 2018 in which the respondent is shown to have attended a hearing in the company of a fellow employee as a witness. The respondent testified to having attended a disciplinary hearing on April 24, 2018.
20. At the disciplinary hearing on April 24, 2018, the respondent denied having taken cocaine, and stated that he felt that the lab test may not have been accurate, and requested for a repeat test at a government hospital. The respondent’s witness made a similar request.



21. The disciplinary panel granted the respondent's request, but directed that the test be done at the Agakhan or Mombasa Hospitals, to which the respondent agreed. The respondent was directed to go back to work and the meeting was closed at 08:31 am on the aforesaid date.
22. Both parties testified that a repeat test, facilitated by the appellant, was done at Mombasa Hospital and that the same returned a negative result for cocaine. This, in my view, closed the disciplinary process that had been commenced *vide* the appellant's show cause letter dated April 14, 2018.
23. Although the appellant (RW-1) testified to the respondent having signed a consent on May 16, 2018 to take a third drug test, no such consent was included in the record of appeal filed in this court by the appellant as having been produced in evidence in the trial court. I have noted some three illegible/plain pages (at pages 58,59 and 60) in the record of appeal filed in this court by the appellant on August 24, 2020. One of the pages (page 58) has the respondent's name written at the bottom by hand, a signature besides the had written name and the date May 16, 2018 written besides the signature by hand. Even if it were to be assumed, and the court cannot make assumptions, that this is the consent for a third cocaine test that the appellant referred to, the question as to where and under what circumstances the same was "signed" by the respondent would arise. The minutes of the April 24, 2018 disciplinary hearing did not refer to any resolution and/or decision on a third test, and the court was not referred to any disciplinary proceedings said or alleged to have been conducted on May 16, 2018. Indeed, the alleged consent was not said to have been signed by the respondent in the presence of a witness. On his part, the respondent testified to having been forced to sign the alleged consent.
24. On July 2, 2018, the respondent wrote to the appellant referring to a conversation on June 22, 2018 and enclosing the respondent's "consent" to have his blood tested, and "strongly recommending" that the respondent agrees to the test, which the appellant had booked at Lancet Laboratory in Mombasa, at its cost. The letter is shown to have been received by the respondent on July 5, 2018.
25. On the same date (July 5, 2018), the respondent wrote to the appellant as stated:-

"I, Thomas Lwambi was tested at Mewa Hospital and results were positive. Again, I went for another test at Mombasa Hospital and the results were negative. My family decided to take me to a government chemist in Kenyatta National Hospital Nairobi. The results were negative. This issue is stressing me, wasting my time and money, and it has spoil (sic) my name. therefore, I am not ready to be tested unless by court orders to do so."
26. It was the appellant's evidence that this amounted to disobedience of lawful instructions. In my view, if the employer (the appellant) felt that the respondent's refusal to take a third drug test which, according to the appellant he had consented to, then that possibly constituted a ground for a fresh charge against the respondent under section 44(4) (e) of the *Employment Act*, which charge is distinct and different from the drug use charge which had been dealt with and concluded pursuant to the April 24, 2018 disciplinary proceedings and subsequent drug test at Mombasa Hospital which returned negative results.
27. Instead of initiating a fresh disciplinary process, the appellant, according to documentary evidence adduced by it, held proceedings on July 30, 2018 which are indicated to be a continuation of the proceedings of April 24, 2018, and which the respondent is indicated to have attended. The respondent is not shown to have been given an opportunity to say anything. It is simply indicated that the respondent had nothing to add. No evidence was given on how the alleged meeting of July 30, 2018 was convened. Further, the alleged minutes of July 30, 2018 are not shown to have been signed by the respondent.



28. The respondent was summarily dismissed *vide* a letter dated August 10, 2018. The letter makes reference to the show cause letter dated April 14, 2018, the appellant's letter dated May 10, 2018 and to a subsequent disciplinary hearing on July 30, 2018 and states in part:-

“

“1. Having accepted to undergo follow up toxicology tests at the time and place of our choosing and having signed our letter to you dated May 10, 2018 to signify such acceptance, you have refused to take the test, and instead, you have proceeded to take your own test without our approval. You are therefore found to be grossly insubordinate in that you have refused a proper, legitimate and lawful management instruction.

Consequently, in accordance with the provisions of section 44(4) (e) of the *Employment Act*, 2007, you have been summarily dismissed.”

29. As already stated elsewhere in this judgment, the allegation/charge on the basis of which the respondent was dismissed was different from the charge/allegation of wrong doing which was the subject of the disciplinary hearing/proceedings held on April 24, 2018. The latter charge of failure to obey lawful instructions ought to have been the subject of separate disciplinary proceedings, regarding which the appellant ought to have complied with section 41 of the *Employment Act*.

30. The respondent was summarily dismissed for reasons other than those stated in the show cause letter dated April 14, 2018, and on which he had been subjected to disciplinary proceedings. The dismissal was, therefore, unfair within the meaning of section 45(1) of the *Employment Act*. The appellant did not act in accordance with justice and equity in terminating the respondent's employment. I find and hold that termination of the respondent's employment by the appellant was unfair. I uphold the trial court's finding in that regard, though for different reasons as contained in this judgment.

31. On the second issue, I uphold the trial court's award of twelve months' salary for unfair termination of employment, taking into account the circumstances in which the termination took place. The award shall, however, be calculated based on the respondent's gross salary as at the time of termination which was Kshs 17,414, hence $Kshs\ 17,414 \times 12 = 208,968$.

32. I further, uphold the trial court's award of one month salary *in lieu of* notice pursuant to section 35(1) (c) of the *Employment Act*. The notice pay shall, however, be Kshs 17,414, as this was the respondent's gross salary at the time of termination.

33. The respondent abandoned the claims for leave pay, the claim for days worked in August 2018 and the claim for uniform refund. The respondent was a member of NSSF and the trial court's refusal to allow the claim for service pay is upheld pursuant to section 35(6) (d). The claim for July 2018 salary was not pleaded and was not proved. The claims for damages were not specifically pleaded, and were not proved on a balance of probability. I uphold the trial court's findings regarding the same.

34. Regarding the award of costs by the trial court, I find and hold that the trial court did not fall into any form of error by awarding costs of the suit to the respondent. Costs follow the event, and are in the discretion of the court.

35. In sum, I uphold the trial court's findings, save for variation in calculating the award made as contained in this judgment. I find no merit in the appellant's appeal and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH MAY 2023



AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Appellant

..... for Respondent

