



**Benvar Estates Limited v Tabo (Appeal E122 of 2021)
[2023] KEELRC 1310 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E122 OF 2021
NZIOKI WA MAKAU, J
MAY 3, 2023**

BETWEEN

BENVAR ESTATES LIMITED APPELLANT

AND

MOHAMED ALI TABO RESPONDENT

(Being an appeal from the Judgment of Magistrate's Court at Ruiru delivered by Honourable J. A. Agonda Principal Magistrate on 25th February 2021 in Chief Magistrate's Court ELRC Case No. 25 of 2019)

JUDGMENT

1. This appeal emanated from the Judgment dated and delivered on 25th February 2021 by Hon. J. A. Agonda PM in Ruiru ELRC No. 25 of 2019. The Appellant filed a Memorandum of Appeal dated 13th October 2021 pursuant to Order 42 of the Civil Procedure Rules, 2010 with the following Grounds of Appeal:
 - i. That the Learned Magistrate erred in Law and facts in arriving at findings that were against the weight of evidence.
 - ii. That the Learned Trial Magistrate erred in Law and fact in failing to find that the Respondent was terminated by the Appellant on grounds of gross misconduct.
 - iii. That the Learned Trial Magistrate erred in Law and fact in finding that the Respondent was unfairly terminated.
 - iv. That the Learned Trial Magistrate erred in Law and fact in failing to consider the Appellant's submissions.



- v. That the Learned Trial Magistrate erred in Law and fact and misdirected herself by finding that the Appellant was entitled to the reliefs sought.
 - vi. That the Learned Trial Magistrate erred in Law and fact and misdirected herself by allowing the Respondent's claim.
 - vii. That the Seamed Trial Magistrate erred in law and fact by entering a judgment against the Appellant.
2. The Appellant thus seeks for orders that: the Appeal be allowed; the Judgment dated 25th February 2021 be set aside; this Honourable Court does quash the said decision and, in its place, proceed to declare that the Respondent was rightly dismissed from employment; the cost of this Appeal be awarded to the Appellant; and for any other or further order this Court may deem fit and just in the circumstances.
 3. The Appeal herein was disposed by way of written submissions.
 4. Appellant's Submissions

The Appellant submits that the issues for determination are whether the termination of the Claimant's employment was unfair or unlawful; whether the Claimant is entitled to the reliefs sought; and the cost of the Appeal. On the first issue, the Appellant joins grounds 2, 3 and 4 of the Memorandum of Appeal. It submits that the letter produced by the Respondent at page 27 of the Record of Appeal, to prove that he had officially retired from his employment, was a forgery as the letter head and signature do not belong to the Appellant company. That the Trial Court totally ignored this fact that was also clearly captured in the Appellant/Respondent's submissions produced at page 91 of the Record and the Appellant thus asks this Honourable Court to consider the issue. It further submits that it issued a Suspension Notice produced at page 73 of the record citing the Respondent for misconduct in his line of duty resulting from a breach of the Appellant's rules of conduct. That from the Muster Roll produced at page 74 to 77 for the period between 1st March 2018 and 10th April 2018, it is evident that the Respondent was sent on compulsory leave and was expected back to work at the end of the leave period. However, at the end of the leave period, while investigations of gross misconduct against him were underway, the Respondent failed to report back to work resulting in desertion from duty, which formed the basis for his dismissal by the Appellant. That notably, the Respondent never wrote or communicated to it of his intention to terminate his duties hence the dismissal on the ground of desertion of duty.

5. The Appellant asserts that desertion is tantamount to gross misconduct warranting summary dismissal and is defined under section 44(4)(a) of the *Employment Act* as follows: "Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work". The Appellant submits that this position was reiterated in the case of *David Rono Rotich v National Cement Company Ltd* [2018] eKLR in which the Court stated that desertion is by its nature more serious than a mere absence because it rotates around an employee's intention to never return to work and considering the fundamental obligation to report to work, desertion is tantamount to gross misconduct warranting summary dismissal. It is the Appellant's submission that its witness, as seen from the proceedings, had tried reaching out to the Respondent but he never answered the phone calls and further, gross misconduct was raised in the testimony of RW2, RW3 and in the statement of RW3 during the hearing before the Trial Court (pages 106 to 112 of the Record of Appeal). That therefore the termination of the Respondent's employment was neither unfair nor unlawful and this Court ought to allow the Appeal in terms of grounds 2, 3 and 4 of the Memorandum of Appeal.



6. As regards the second issue, the Appellant joins grounds 5 and 6 of the Memorandum of Appeal. It submits that the Claimant is not entitled to the orders sought because firstly, the award for 12 months' pay as compensation for termination of employment provided for under section 49(1)(c) of the *Employment Act* is made in cases of wrongful dismissal and where the termination of employment is proven to have been unfair. That however in the instant case, the termination of the Respondent's employment was because of desertion from duty and was neither unfair nor unlawful, which means the Respondent was not entitled to the award. Furthermore, on 7th June 2018, the Appellant paid the Respondent all his terminal dues amounting to Kshs. 51,317.70 through his Equity Bank account (page 78 of the Record). That the dues extinguished by the presence of gross misconduct of desertion on his part and which were therefore not paid to him include one month's pay in lieu of notice and pay in lieu of untaken leave. That since the Respondent did not refund the paid amount to date, it could only be taken that he was satisfied with the amount of money paid to him by the Appellant. The Appellant thus asks this Court to find merit in grounds 5 and 6 of the Memorandum of Appeal.
7. It is the Appellant's submission that the Trial Court erred in finding that the Respondent proved on a balance of probabilities that his employment was unfairly and or unlawfully terminated by the Appellant and therefore awarding the Claim. On the prayer for costs, it submits that the same be guided by the outcome of the Appeal.
8. Respondent's Submissions
The Respondent submits that the Appellant's choice to summarily dismiss him after accepting his early retirement request was a tactful move intended to deny him gratuity provided under clause 5 of the Appellant's Regulations (produced in the Supplementary Record of Appeal dated 3rd April 2023). That the said clause 5 provides that, if an employee is retired, resigns on old or sickness or where service has been terminated other than for gross misconduct after serving the company continuously for a period of 5 years, he or she shall be entitled to gratuity at a rate of 16 days' pay for each year completed of service. The Respondent submits that he was constructively dismissed from employment because he decided to request for an early retirement after he was frustrated for not being paid his salary when it was due. Further, putting him on an indefinite suspension without a suspension notice amounted to constructive dismissal from employment. He relies on the case of *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR in which the Court defined constructive dismissal as occurring when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign and since the resignation was not voluntary, it is in effect a termination.
9. It is the Respondent's submission that no evidence was advanced to prove that the Appellant's Mr. Kimani did not author the letter they say was a forgery and neither did the Appellant raise the issue of disputing the letter in its pleadings. That the Appellant's claim that all its letters have the company's stamp does not hold water because in the lower court, it filed letters that did not have its stamp (promotion letter at page 48 of the record of appeal, the security supervisory promotion and salary adjustment letter at page 47). That evidently, Mr. Kimani, the Appellant's General Manager did accept his early retirement before he was served with a copy of the summary dismissal letter on 18th March 2019 citing the reason for termination from employment as desertion of duty. He denies that he deserted duty and that if he indeed did desert duty, the Appellant failed to show the efforts it made towards reaching out to him and putting him on notice that termination of employment on the ground of desertion was under consideration. He submits that section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies with the person who wishes the court to believe in its existence and it was therefore for the Appellant to first prove that he indeed deserted employment and it made efforts to reach out to him.



10. The Respondent submits that his dismissal was unfair because the Appellant did not follow the procedure provided for in section 41(1) and (2) of the Employment Act on notification and hearing before termination on grounds of misconduct, poor performance and incapacity, and in terms of considering any representations the employee may have on the same. Furthermore, the termination was without justification and neither was a notice of misconduct nor a certificate of service issued to him. It is the Respondent's position that considering there was no other ground advanced in the summary dismissal letter apart from that of desertion, the grounds mentioned in the Suspension Notice issued on 5th August 2019 were an afterthought as he was never subjected to any disciplinary hearing to answer to the allegations raised in the said Suspension Notice served on him a year after he had separated with the Appellant.
11. As to whether or not he is entitled to the reliefs he was awarded by the Trial Court, the Respondent submits that having been terminated without notice, he is statutorily entitled to one month's salary in lieu of notice. For gratuity, he had at the time of termination from employment served the Appellant for 14 years which entitles him to gratuity after the unfair termination from employment. That his prayer for salary was denied by the lower Court after it was established that he was paid Kshs. 51,000/-, being the salary for February, March and April. However, since he earned Kshs. 27,000/- per month, the amount he was paid only covered February and March 2018 and he is therefore entitled to salary for the months of April, May and June. That in awarding him 12 months' compensation for loss of earnings, the Trial Court considered his years of service, his conduct of having not contributed to the termination, his attempt to settle the matter out of court by subjecting it to conciliation, his untainted record of employment with several promotions, the indefinite suspension without a salary he was subjected to, the summary dismissal letter being served upon him a year after the fact, and being dismissed from employment after his letter of early retirement was accepted. He further submits that having established that he was unlawfully terminated from employment, he was entitled to costs of the suit and that since the Appeal herein is not merited, it should be dismissed with costs and awarded to the Respondent.
12. The Appellant challenges the decision of the Ruiru Chief Magistrate's Court in which the trial court found in favour of the Respondent herein. The Respondent was a former employee of the Appellant. From the record before me, the Learned Principal Magistrate awarded the Claimant an amount of Kshs. 552,600/- which included service gratuity and compensation as well a one month's salary in lieu of notice.
13. The Court has considered the facts of the case and the law and warns itself that it neither saw nor heard the witnesses who testified before the Learned Principal Magistrate and only relies on the record of the proceedings before the trial court. The Respondent denied absconding work. No cogent evidence was adduced to recant the letter by Mr. Kimani who was the Respondent's supervisor. The Appellant in an attempt to walk away from the letter asserted that all its letters bore a stamp. That was not the case as the Appellant produced in evidence letters that did not bear the company stamp. It was evident the Respondent was not given a hearing before the dismissal by the Appellant. The Appellant asserts desertion and despite this assertion did not issue a notice to show cause upon the Respondent.
14. The foregoing is ample to indicate that the Court does not see any error in weight attached to the evidence and the findings by the Learned Principal Magistrate. The Court therefore upholds the decision and dismisses the Appellant's appeal with costs to the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 3rd day of May 2023



Nzioki wa Makau

JUDGE

