



**Kaisha v Elgon View College (Employment and Labour Relations Cause
12 of 2022) [2023] KEELRC 1524 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1524 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 12 OF 2022
MA ONYANGO, J
JUNE 15, 2023**

BETWEEN

DORCAS KAISHA APPELLANT

AND

ELGON VIEW COLLEGE RESPONDENT

*(Being an appeal from the Judgment of Honourable L. Kassan delivered
on 28th February 2022 in Eldoret CMC E&LR Case No. 6 of 2018))*

JUDGMENT

Being an appeal from the Judgment of Honourable L. Kassan delivered on 28th February 2022 in Eldoret CMC E&LR Case No. 6 of 2018)

1. The Appellant herein was the Claimant in Eldoret CMC E&LR Cause No. 6 of 2018 wherein she sued the Respondent seeking payment of terminal dues, general damages, costs and interest, a declaration that the termination of her employment was unfair and unlawful and an order compelling the Respondent to issue to her a certificate of service.
2. After hearing the parties the trial court found in favour of and awarded the claimant one month's pay in lieu of notice, salary for the month of February and March 2018, certificate of service, interest to accrue from the date of judgment. The Court further ordered the claimant to pay half of costs of the suit to the Respondent. It is the said judgment that is the subject of the instant appeal.
3. The appeal is premised on the following grounds:
 - i. The Learned Magistrate erred in finding that the Claimant is liable to pay half cost of the suit to the Respondent.
 - ii. The Learned Magistrate erred in law and in fact in finding that the Claimant was only entitled to interests from the date of judgment



- iii. The Learned Magistrate erred in law and in fact in failing to appreciate that the Claimant was not afforded her constitutional right to be heard on the allegations against her to qualify her dismissal.
- iv. The Learned Magistrate erred in failing to appreciate the fact that the disciplinary process purportedly constituted by the Respondent was not only improperly constituted (if at all) but offended the principal of fairness and non-discrimination as set by law.
- v. The Learned magistrate erred in failing to appreciate the fact that the Respondent did not file resolutions on authority to defend suit.
- vi. The learned magistrate erred in fact and in law in finding that the Claimant had not filed her submissions and therefore ignoring the same despite the appellant filing and serving the submissions in good time receipt of which was acknowledged.
- vii. The learned magistrate erred in finding that the Claimant was only entitled to reliefs admitted by the Respondents.
- viii. By finding that the Claimant was entitled to one month's pay in lieu of notice, and that the Claimant had not been given sufficient notice, the learned magistrate contradicted himself and erred in failing to find that the Claimant was unlawfully terminated.
- ix. The learned magistrate misdirected himself in failing to appreciate the fact that the Claimant had not been granted leave and had not been paid for leave not taken.
- x. The learned magistrate misdirected erred in fact and in law in finding that the Respondent never paid/submitted the Appellant's NSSF and NHIF payments as required by law.
- xi. The learned magistrate erred in law and in fact in failing to properly analyse and address himself on evidence before him and in the face of express testimonial admissions on the part of the respondent, misdirected himself in arriving at erroneous conclusions not ably supported by evidence before him and utterly ignoring the respondent's admissions in evidence.
- xii. The learned magistrate erred in law and in fact in failing to analyse and totally failing to address himself on pertinent legal and factual issues contained in the Appellant's final submissions thereby arriving at erroneous findings.
- xiii. The learned magistrate erred in law to properly appreciate and apply established principles in a claim for unfair and unlawful suspension and termination in the factual and legal circumstances presented before him for determination.
- xiv. The learned magistrate erred in law and in fact in finding that the Respondents had proved the allegations of misconduct against the Claimant to warrant dismissal
- xv. The learned magistrate erred in law in failing to properly appreciate and establish that there was no notice of termination of employment.
- xvi. The learned magistrate misdirected himself in finding that the Respondents were not responsible for unlawfully suspending the Appellant.
- xvii. The learned magistrate erred in law and in fact in failing to establish that the appellant suffered psychological and mental anguish that she has been subjected to as a result of the Respondent's action.



- xviii. The learned magistrate erred in failing to find that the Claimant was entitled to the reliefs sought in her statement of Claim.
4. The Appellant prays for the following reliefs:
- a. That the appeal be allowed;
 - b. The Judgement/decreed of the Hon. Chief Magistrate issued on 28/2/2022 be reviewed and/or set aside and the same be substituted with a proper finding/judgment;
 - c. The Respondent to pay the costs in the lower court and in this appeal.
5. On 19th December 2022, the court gave directions that the appeal be disposed of by way of written submissions. The Appellant filed her submissions on 13th March 2023 whereas the Respondent's submissions were filed on 12th April 2023.

Appellant's submissions

6. In her submissions the Appellant has crystalized the issues for determination in the appeal as follows:
- i. Whether the award by the trial magistrate was fair and just
 - ii. Whether the Claimant was unfairly dismissed/ terminated
 - iii. Whether the Respondent should pay costs.
7. On the first issue, it was submitted that the Respondent's averment that the Appellant was dismissed on account of gross misconduct was not proved. That the finding by the court that the Appellant was entitled to payment in lieu of notice and the award of two months' salary is a confirmation that the Appellant was unfairly dismissed hence she is entitled to the prayers she sought in her Statement of Claim.
8. The Appellant contended that the award by the trial court was unjust and unfair under the circumstances and the court was urged to re-evaluate the trial court's award in view of the circumstances surrounding the termination of the Appellant.
9. It was submitted that the termination of the Appellant was unfair, unjust and unlawful as she was not given notice prior to her termination, was not heard and was not afforded pay in lieu of notice.
10. It was further submitted that there was no valid reason to warrant the termination as required by Section 44(4) of the *Employment Act*.
11. The Appellant prayed that the appeal be allowed with costs.

Respondent's submissions

12. The Respondent on its part submitted that the issues for determination were:
- i. Whether the trial court erred in law and in fact by finding that the Appellant's conduct was unbecoming and of gross misconduct;
 - ii. Whether the trial court erred in law and in fact in finding that the Appellant was lawfully, procedurally and fairly dismissed from work;
 - iii. Whether the trial court erred in law and in fact by issuing out the reliefs it declared.



13. In addressing the first issue, counsel for the Respondent submitted that through investigations and inquiries, it was revealed that the Appellant received money from students on diverse dates in order to alter fee balances to read a smaller amount and sometimes, zero.
14. It was the respondent's case that these assertions were not controverted during trial and that the trial court arrived at a right decision.
15. As to whether the trial court erred in law and in fact by finding that the Appellant was lawfully, procedurally and fairly dismissed from work, it was the Respondent's submission that Section 44(3) of the Employment Act gives the employer the right to summarily dismiss an employee when the employee has fundamentally breached his/her obligations arising under the contract of service.
16. It was submitted that the Respondent had reasonable cause to effectively terminate the Appellant's employment.
17. On the issue of procedural fairness, counsel submitted that the Appellant was accorded sittings for disciplinary hearings between the period of 28th February 2018 and 14th March 2018 before she was eventually summarily dismissed from employment vide a letter dated 20th March 2018.
18. It was thus submitted that the Appellant had knowledge of the reasons for her dismissal in accordance with Section 41(1) and (2) of the Employment Act.
19. It was the Respondent's contention that the termination of the Appellant's employment was fair and just in tandem with the provisions of Section 45 of the Employment Act with respect to notice, hearing and reasons adduced for termination.
20. On the last issue whether the trial court erred in law and in fact by awarding the reliefs it did, the Respondent submitted that the trial court was indeed right in issuing the orders as the Appellant's case was a nonstarter. According to the Respondent, the Appellant had engaged in activities that were gross and against the terms of her employment.
21. The Court was urged to dismiss the appeal with costs as it is not merited.
22. This being a first appeal, this Court has a duty to re-evaluate all the evidence adduced before the lower court with a view of drawing its own conclusions thereon while giving due allowance for the fact that it did not have the benefit of seeing or hearing the witnesses as was elucidated in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
23. I have carefully considered the evidence that was presented before the lower court. The Appellant testified as CW1 and stated that she entered into a 3-year contract of employment with the Respondent which contract was to end in 2020. She stated that she was assigned duties which did not include dealing with finance.
24. In her testimony, CW1 denied receiving any monies from students.
25. On cross examination, CW1 stated that she did not clear a student by the name Marion Cheronno as her certificate from KNEC had not been delivered.
26. When asked whether she ever appeared before a disciplinary committee on 12/3/2018, she stated that she never attended such a meeting. She however admitted appearing before a meeting on 5/3/2018 chaired by Mr Anassi. CW1 maintained that she was not given a chance to defend herself.
27. The Respondent called Peter Anassi who testified as RW1. He introduced himself as the chair of the board of management of the Respondent. RW1 in his testimony stated that the claimant was



summarily dismissed from employment on account of gross misconduct. He stated that the dismissal was effected after investigations were conducted following complaints from students that the officers in the exam office were soliciting money from students to issue them with certificates and that there was dishonesty in the examination office.

28. According to RW1, the Appellant took Kshs.1500 from one student namely Sammy Chepkwony and issued him with a certificate despite the said student being on suspension. That the Appellant later remitted Kshs 2,500 to the bank in a bid to conceal that she had taken the Kshs 1500 from the student.
29. He testified that the said student was intercepted and admitted paying the Appellant cash to be issued his certificate. RW1 stated that the said student was taken through a disciplinary hearing wherein he admitted in writing that he had paid the Appellant the money.
30. With regard to the allegation that the Appellant had cleared and issued a certificate to another student by the name Marion Cheronno who had a school fee balance of Kshs 16,500, RW1 testified that the Appellant was found guilty after the investigations were done.
31. Mugusi Momanyi testified as RW2. He stated that in 2018, he was working for the Respondent at the time material to this suit. RW2 testified that the Appellant attended all the disciplinary meetings save for the one of 12th March 2018 and that she admitted liability. He stated that the student by the name Sammy Chepkwony went for his certificate at the Respondent's institution but did not follow the protocols.
32. According to RW2, the Appellant also issued a student by the name Marion Cheronno her certificate against the institution's policy that required students to clear their school fees first. The said Marion Cheronno is said to have had a balance of Kshs 16,500.
33. RW3 one Christabel, reiterated what RW2 had stated. According to RW3, the Appellant was dismissed from employment after it was established that she had issued some students with certificates without following procedure.

Determination

34. I have considered the Record of Appeal and the submissions by both parties. Although the memorandum of appeal has 18 grounds, the Appellant has distilled the issues for determination in the submissions to only 3. These are:
 - i. Whether the award by the trial magistrate was fair and just
 - ii. Whether the Claimant was unfairly dismissed/terminated
 - iii. Whether the Respondent should pay costs.

I will therefore consider only these grounds in the determination of the appeal. I will start with issue no. 2, then issue no. 1 and finally issue no. 3.

35. The Appellant submitted that the Trial Court having found that the Appellant was entitled to pay in lieu of notice and salary for the months of February and March 2018, it was contradictory for the Court to hold that the Appellant was not unfairly dismissed.
36. From the evidence that was tabled before the Trial Court, there were 3 charges levelled against the Appellant by the Respondent: receiving cash from a student Sammy Chepkwony against the college regulations; giving a student a certificate without clearance from the finance office; and, misusing her authority by closing the exam office without any good reason or authority from the management.



37. From the evidence adduced by the Respondent before the trial court the Appellant was called and questioned about the first ground on 28th February 2018, and denied the charge. Further investigations were carried out by the Respondent and on 14th March 2018 the Appellant appeared before the disciplinary committee on the second charge. She again denied the charge and insisted that the student be called to be questioned in her presence. The appellant subsequently attended a disciplinary committee meeting on 5th March 2018 where she admitted the first charge. The Appellant also admitted the third charge. She stated that she closed the exam office because she had been threatened by the security officer that she would be arrested over the 1st charge. At the disciplinary meeting evidence available pointed to the guilt of the Appellant on the second charge too.
38. Following the disciplinary hearing the Appellant was suspended by letter dated 7th March 2018 pending a decision on her fate by the Respondent. The letter of suspension is reproduced below:

7th March, 2018

Dorcas,

Re: Suspension

I refer to a meeting in exams office on the 5th March 2018 to discuss your conduct as exam assistant. Two charges were read to you as follow:-

1. Receiving cash from a student against regulations and issuing certificate without clearance from finance director and failing to declare the same to the administrative committee which called you to answer the charge on 28th March, 2018.
2. Misusing your authority to close exam office without any good reason or authority from management.

The administrative committee invited you to defend yourself against the charges and after all evidence that was adduced by witnesses and after listening to your defence the committee found you guilty of both offences.

The committee recommended your suspension from work pending a final decision by the management. It was observed that if need be you may be called upon to answer other charges later.

Yours Sincerely,

Elgon View College

Nanassi

Executive Director

Cc

Finance Director

Administrative Director

Chief Principal

Registrar

39. The Appellant was finally dismissed summarily by letter dated 20th March 2018.

40. Did the learned Trial Court err in making the orders in respect of the remedies?



41. The Trial Court found that the Appellant had not proved that she was entitled to pay in lieu of annual leave, refund of NHIF, house allowance and overtime.
42. On annual leave the Appellants contract provides:

You will be entitled to annual leave during school holidays of 14 days
43. The *Employment Act* provides for minimum annual leave of 21 days. The Act further provides that it is the employer to produce records to prove that the employee took the annual leave. (Refer to section 10(3)(a), (6) and (7) and 74 of the *Employment Act*).
44. In this case the burden was on the Respondent to prove that the Appellant took annual leave. In the absence of such records the court must make a presumption in favour of the Appellant. I therefore award the Appellant annual leave for the duration of her last contract from 1st February 2015 to the date of dismissal, a period of 37 months.
45. The Appellant's contract does not contain hours of work or provision for overtime. She further did not adduce any evidence to prove that she worked any overtime or if she did, how many hours she worked. I find no reason to disagree with the decision of the Trial court on this issue.
46. The Appellant alleged that some deductions of NSSF were made from her salary but not remitted. According to the Respondent payment was not remitted only for the months when no deductions were made from the salary of the Appellant.
47. The evidence on record, NSSF Statement for the Appellant shows that payments were made up to January 2018, which was the last month that the Appellant was paid a salary. I therefore find no evidence that any NSSF deductions were not remitted. In any event, even had I found that some remittances were not made, I would send the Appellant to NSSF for follow up of such payments as NSSF has the statutory mandate, authority and machinery to do so.
48. With respect to the prayer for house allowance of Kshs. 10,000 per month the Appellant did not adduce any evidence in support thereof. I agree with the trial court that the same was not proved.
49. The trial court awarded the Appellant one months' salary in lieu of notice. According to the Appellant's contract she was entitled to 3 months' notice or pay in lieu thereof. However, the Appellant having been summarily dismissed procedurally and for valid reason as found by the trial Court, she is not entitled to the same.
50. The trial Court directed that the Appellant pays half of the Respondents cost. The basis for this decision was not explained in the Judgment.
51. In the normal course of events, the successful party is entitled to costs. In this case, the Appellant having been partially successful, it would have been expected that she would have costs of the suit, unless there was some reason to deny her the same, which should have been stated by the trial court. Having not given any reason, it is my finding that the order that the appellant pays half of the Respondent's costs was made in error.
52. In the final analysis I make the following orders:
 - i. Award no. a) in the trial court's judgment is set aside;
 - ii. award no. b) is sustained;
 - iii. Award no. c) and d) are sustained.



- iv. Award no. e) is set aside and in place thereof this court awards the Appellant costs in both the lower court and in the Appeal.

53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET

ON THIS 15TH DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

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