



**Osoro v Elgon View College & 2 others (Civil Appeal E023 of 2022)
[2023] KEELRC 1525 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1525 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CIVIL APPEAL E023 OF 2022
MA ONYANGO, J
JUNE 15, 2023**

BETWEEN

BETHUEL ATINDA OSORO APPELLANT

AND

ELGON VIEW COLLEGE 1ST RESPONDENT

PETER ANASSI 2ND RESPONDENT

PRISCA MORAA 3RD RESPONDENT

*(Being an appeal from the judgment of Hon. L. Kassan delivered
on 24th March 2022 in Eldoret CMC E&LR case no. 6 of 2018)*

JUDGMENT

1. The Appellant herein sued the Respondents at the lower court seeking the following remedies:
 - i. A declaration that the respondent action towards the Appellant amounted to unfair and /or unlawful dismissal;
 - ii. Payment of Kshs 1,979,200 being a remedy for unlawful termination,
 - iii. general damages;
 - iv. Costs;
 - v. interest at courts rates;
 - vi. an order directing and/or compelling the respondent to issue certificate of service to the Appellant and costs of the suit.



2. The Respondent filed a Memorandum of Defence denying the averments in the claim. Upon hearing the parties the Trial Magistrate Hon. L. Kassam, Chief Magistrate found that the Appellant's dismissal was not procedural and proceeded to make the following awards in favour of the Appellant:
 - a. Kshs 6,896 as one month's salary in lieu of notice
 - b. Kshs 20,000 as 2 months gross salary as compensation
 - c. Kshs 30,000 as compensation for unfair termination
 - d. Costs of the suit
 - e. Interest on (a) and (b) from the date of the judgment until payment in full.
3. The Appellant (Claimant in the lower court) was aggrieved by the said judgment and filed a Memorandum of Appeal on the 28th April 2022 on the grounds that:
 - i. The learned magistrate erred in law in failing to appreciate that the 3rd Defendant /Respondent was not called to testify and that her evidence was unchallenged and/ or uncontroverted;
 - ii. The learned magistrate erred in law and in fact in finding that the Appellant was only entitled to interests from the date of judgment;
 - iii. The learned magistrate erred in fact and in law in failing to appreciate that the Appellant was not afforded his constitutional right to be heard on allegations against him to qualify his dismissal;
 - iv. The learned magistrate erred in failing to appreciate the fact that the disciplinary process purportedly constituted (if at all), but offended the principal of fairness and non-discrimination as set by law;
 - v. The learned magistrate erred in fact and in law in finding that the Appellant had not filed his submissions and therefore ignoring the same despite the Appellant filing and serving the submissions in good time receipt of which was acknowledged;
 - vi. The learned magistrate erred in finding that the Appellant was only entitled to reliefs admitted to by the Respondents;
 - vii. By finding that the Appellant's dismissal was not in keeping with the dictates of the law, the learned magistrate erred in failing to award the Appellant the reliefs sought in his claim;
 - viii. The learned magistrate misdirected himself in failing to appreciate the fact that the Appellant had not been granted leave and had not been paid for leave not taken;
 - ix. The learned magistrate erred in fact and in law in finding that the respondent never paid / submitted the appellant NSSF and NHIF payments as required by law;
 - x. 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 an erroneous conclusion not ably supported by evidence before him and utterly ignoring the respondent's admissions in evidence;
 - xi. The learned magistrate erred in, law and in fact in failing to address himself on pertinent legal and factual issues contained in the Appellant's final submissions thereby arriving at an erroneous finding;



- xii. 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;
 - xiii. The learned magistrate erred in law and in fact in finding that the Respondent had proved the allegations of misconduct against the Appellant to warrant dismissal;
 - xiv. The learned magistrate erred in law in failing to properly appreciate and establish that there was no notice of termination of employment;
 - xv. The learned magistrate misdirected himself in finding that the Respondents were not responsible for unlawfully suspending the appellant; and,
 - xvi. The learned magistrate erred in failing to find that the Appellant was entitled to the reliefs sought in the statement of claim.
4. Consequently, the Appellant seeks the following orders:
- i. The appeal be allowed;
 - ii. The Judgment/decreed of the Hon. Chief Magistrate court issued on 28th February 2022 be reviewed and/or set aside and the same be substituted with a proper finding/judgment;
 - iii. The Respondent to pay costs in the lower court and in this particular appeal.
5. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions on 23rd March 2023 while the Respondents filed their submissions on 12th April 2023.

Analysis

- 6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
- 7. Vide his Statement of Claim dated 7th August 2018, the Appellant accused the Respondents of unfair dismissal. The Appellant averred that he was employed by the 1st Respondent as a cook in 2010 and worked in the said institution until the year 2017 when he was removed from the institution and taken to work at the home of the 2nd and 3rd Respondents who are the proprietors of the 1st Respondent.
- 8. According to the Appellant, in August 2017, the 2nd and 3rd Respondents travelled to their village and locked the main house. The Appellant who resided at the Respondents' servants quarters was left behind together with the Respondents' house help.
- 9. It was the Appellant's contention that upon return the 2nd and 3rd Respondents alleged that the Appellant had stolen Kshs 400,000 from the main house. As a result, the Appellant was arrested and confined overnight at the police station.
- 10. The Appellant stated that after he was released from the police station the following day, he went back to his work place at the 2nd and 3rd Respondents home following which he was dismissed verbally without compliance with the law.
- 11. The Respondents on their part filed a Memorandum of Defence dated 4th September 2018 denying the averments in the claim. It was their contention that the Appellant was dismissed for gross misconduct after he accessed the 2nd and 3rd Respondent's main house and stole 3000USD.



The Evidence adduced

12. At trial the Appellant testified as CW1. He stated that he was dismissed from work without notice. That prior to the incident which led to the dismissal, he had never been involved in any misconduct. He stated that he started working at a salary of Kshs 8,000 which was later increased to Kshs. 10,000. He further stated that he worked from 5am to 10pm without being paid overtime. He maintained that he was innocent of the allegations of gross misconduct which led to the termination of his employment.
13. The Respondents called 3 witnesses in furtherance of their case. RW1, Dennis Nyaoga introduced himself as the 2nd respondent's nephew. He confirmed that the Appellant was an employee of the Respondents and that during the month of August 2017, the 2nd and 3rd Respondents travelled to their rural village leaving behind the Appellant and the house help. He stated that the Appellant and the house help had access to the main house as he found them there on several occasions watching TV.
14. He stated that when he was summoned by the police, he was asked if the main house had been accessed during the period the 2nd and 3rd Respondents were away and he informed the authorities that the Appellant and the house help accessed the said house.
15. On cross examination, RW1 stated that he did not witness the money being stolen and that he did not record a statement at the police station following the incident.
16. RW2 one Samuel Mageto stated that he was staying at the servant's quarters with RW1 when the incident occurred. He testified that the Appellant and the house help had access to the main house and that he would find them watching tv in the evening in the said house.
17. He testified that he did not know if there was money in the house and neither did he record a statement at the police station.
18. The 2nd Respondent testified as RW3. He stated that the Appellant was his casual employee and was never issued with a contract of employment. He stated that the Appellant worked for him from 2010 to April 2011 when he left until October 2012. That he did not remit NSSF during the period when the Appellant was away.
19. He testified that the Appellant was working for him in July 2017 and was accommodated in the Servants Quarters. RW1 stated that they locked the main house and left for the village with RW3, his spouse. That when they came back, 3000 USD which he had kept in a locked suitcase in his bedroom was missing.
20. According to RW1, there was no break in of the main doors and the door to the bedroom, and the suitcase was torn but the lock was intact.
21. RW1 testified that he called DW1 and DW2 and it was then that he was told that the Appellant and the househelp used to access the main door when the 2nd and 3rd Respondent were away.
22. It was his evidence that he reported the matter to Langas Police Station and as a result the Appellant was apprehended but released the next day and that's when RW1 dismissed the Appellant verbally from employment.
23. Judgment was delivered by the trial court on 28th February 2022 which judgment is now the subject of this appeal.



The Appeal

The Appellant's Submissions

24. Counsel for the Appellant, Mr. Oyaro in his submissions dated 22nd March 2023 framed the issues for determination to be;
 - i. Terms of employment of appellant
 - ii. Whether the appellant was unfairly dismissed/terminated
 - iii. The implications on the 3rd defendant failure to testify
 - iv. Whether the appellant is entitled to the prayers sought.
25. On that the first issue, it was submitted that the Appellant had served the Respondents for over 8 years and was earning a monthly salary through the bank and as such it cannot be said that he was a casual labourer. Counsel submitted that the Appellant was not a casual employee therefore he is entitled to such terms and conditions of service as envisaged by section 37(2) of the [Employment Act](#).
26. On the second issue as to whether the Appellant was unfairly dismissed/terminated, counsel for the appellant submitted that the Appellant was dismissed unjustly and unfairly as there was no valid reason to warrant his termination.
27. It was further submitted that although the Appellant was dismissed on allegations of theft emanating from the 2nd and 3rd Respondents, no evidence was found to charge him. It was submitted that the onus of proof of the alleged misconduct was on the Respondents by dint of Section 43 and 45 of the [Employment Act](#). To buttress this position, the case of Gibson D. Mwanjala Vs Kenya Revenue Authority was cited.
28. With regard to the third issue framed by the Appellant's counsel, it was submitted that the failure of the Respondents to call the 3rd Respondent to testify meant that the evidence of the Appellant against the 3rd Respondent remained uncontroverted and therefore unchallenged.
29. In the end, this court was urged to find merit in the appeal and grant the prayers sought.

The Respondents' Submissions

30. Counsel for the Respondents, Mr. Ngigi , in his submissions dated 6th April 2023 framed the issues for determination to be;
 - i. Whether the learned trial magistrate erred in law and in fact in arriving at the reliefs it declared.
 - ii. Whether the learned trial magistrate erred in law and in fact in finding that the Appellant's termination was unlawful and unfair.
31. On the first issue, it was submitted that from the evidence tendered before the trial court, the appellant had engaged in gross misconduct which could only attract summary dismissal as envisaged under Section 44(4) of the [Employment Act](#).
32. It was submitted that the conduct of the Appellant led a reasonable mind to believe that he either caused loss of a colossal sum of money from the 2nd and 3rd Respondents residence by illegally gaining access or that he is the one who indeed stole from his employers. The case of Thomas Sila Nzivo vs Bamburi Cement Limited 2014 eKLR



33. Counsel for the Respondents further submitted that the termination of the Appellant's employment was fair and just in terms of Section 45 of the *Employment Act* and as such the Appellant does not have a valid ground for this appeal as he has failed to satisfy his burden of proof as envisaged under Section 47(5) of the *Employment Act*.
34. Consequently, the court was urged to dismiss the appeal with costs

Determination

35. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issue that falls for my determination is whether the findings and the award of the Trial Court are in conformity with the pleadings and evidence adduced before the Trial Court. I will address the grounds of appeal in the order in which they have been set out in the Memorandum of Appeal.
36. In ground 1 of Appeal the Appellant raises the issue whether the failure of the 3rd Respondent to testify implied that the evidence against her was unchallenged.
37. I have perused the pleadings and note that the Appellant did not plead for judgement against the Respondents jointly or severally. In his testimony he did not adduce any evidence directly implicating the 3rd Respondent.
38. My understanding of the evidence is that the appellant employed by the 1st, Respondent but accuses the 2nd and 3rd Respondents for having been the agents of the 1st Respondent through whom he was dismissed. This would imply that the person against whom he expected compensation is the 1st Respondent.
39. In any event, where parties are jointly or severally sued, not all of them can must give evidence. Indeed, a witness other than the parties sued can give evidence on their behalf.
40. Further, the Respondents filed a joint defence and all the evidence adduced did not single out any of them. It is therefore only logical to conclude that all the evidence adduced by the defence was for all the Respondents.
41. I find no reason to support the Appellant's contention that the evidence against the 3rd Respondent was uncontested. In my view the evidence point to the contrary. This ground of appeal therefore fails.
42. The 2nd ground of appeal is whether the finding of the Trial Court that the Appellant was entitled to interest from date of judgment was an error in law and fact. The Appellant did not make any submissions thereon. Indeed, this ground is not listed as one of the grounds for determination in the Appellant's submissions. The only logical conclusion is therefore that this ground was abandoned. I will say no more on the issue.
43. Grounds no. 3, 4, 6, 7, 10, 11, 12, 13, 14 and 15 all relate to whether the findings of the Trial Court is supported by the evidence adduced.
44. The Trial court found that there was no proof that the Appellant was guilty of theft of the money that was lost, that he was terminated abruptly without notice, that he was not heard and consequently, that the termination of the Appellant's employment was unfair and unlawful.
45. From the evidence on record, it is not denied that money that was left in the house by the 2nd and 3rd Respondent when they travelled to their village home was lost. It was also common ground that there was no break-in at the house. DW1 and DW2 testified that on several occasions they found the



Appellant and the house help watching TV in the main house which according to the 2nd and 3rd Respondents, they locked and did not leave the key behind while they were away.

46. The only inference that can be made from the evidence is that the appellant and the househelp who had access entered the house and stole the money or that they were negligent and/or reckless in the manner they took care of their employer's property leading to the loss of the money.
47. According to the Witness Statement of the 2nd Respondent which he adopted during the hearing, the reason for dismissing the Appellant was that he gained access into their house without their knowledge and as a result caused the loss of USD 3000 belonging to the 3rd Respondent. At the hearing he stated that no reasonable person would continue living with such a person after such an incident.
48. It is also on record that upon realizing that the money was lost the 2nd Respondent called the Appellant and his co- worker and questioned them about the same. They denied either accessing the house or stealing the money. The other two persons who had access to the compound were also called and questioned in the presence of the Appellant and his co-worker and disclosed that the Appellant and the worker had access to the house.
49. Although I would not have held that the Appellant was not given a hearing in view of the foregoing, I would not fault the trial Court for holding that there was no formal hearing.
50. I however find that the trial court misdirected itself on the law by holding that there was no valid reason for terminating the employment of the Appellant. Section 44(4) of the *Employment Act* which the trial court relied on permits an employer to summarily dismiss an employee for any of the following reasons:
 4. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if
 - a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
 - b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
 - c. an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
 - d. an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
 - e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
 - f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or



- g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.
51. From the evidence adduced, there were reasonable grounds to suspect that the Appellant and his co-worker either stole the money or recklessly handled the employer's property thereby causing the loss of the money. There were thus reasonable grounds for the Respondents to terminate the Appellant's employment.
52. In ground 5 of the Appeal the Appellant contests the holding in the judgment of the trial court that it did not file submissions. The Record of Appeal has a copy of the submissions duly received and stamped by the Court on 9th September 2021. The same were served and received by counsel on record for the Respondents on the same date as is evident from the stamp on the face of the said document. I find that this was an error on the face of the record. I however do not find any prejudice suffered by the Appellant due to the said error and do not think that the decision would have been different had the trial court considered the said submissions as all the issues therein are captured in the judgement. In any event this would not be a valid ground for overturning a decision of the court in a case where witnesses were presented and heard by the court.
53. The remaining grounds of appeal, that is 8 and 9, relate to remedies awarded by the trial court. The Appellant avers that the trial court erred in not making any finding on annual leave, service pay and unremitted NSSF.
54. I agree with the Appellant that no award was made in respect of the prayer for annual leave. From the evidence on record, apart from praying for leave for the entire period worked, no evidence was adduced in support thereof. This being a special damage claim, the Appellant had an obligation to prove the same. There is no proof of the number of years worked or the years when he did not take leave. The two letters relied upon by the Appellant dated 12th June 2017 and 8th December 2017 variously state the date of employment as November 2014 and January 2010 respectively. The variance was not explained.
55. I find that the Appellant did not prove this head of claim to warrant the grant of the order sought.
56. On the prayer for NSSF, as the trial court rightfully held, NSSF is a statutory body with mandate and machinery to supervise and make recovery of unremitted NSSF dues. It also has powers to charge both interest and penalize employers for non-compliance. This is therefore an issue for resolution by NSSF.
57. In its judgment, the trial court made the following awards; Kshs 6,896 as one month's salary in lieu of notice, Kshs 20,000 as 2 months gross salary as compensation, Kshs 30,000 as compensation for unfair termination, Costs of the suit, interest on (a) and (b) from the date of the judgment until payment in full.
58. The general principles on when an Appellate court may interfere with a discretionary power of a trial well captured in the case of *Mbogo & Another vs Shah*, [1968] EA, as follows:
- “An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
- “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person



who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

59. The Court of Appeal addressed the issue of awards in the case of *OI Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No. 42 of 2015, where the court held:

“remedies for unfair termination is provided for in section 49 of the Act. They include, payment equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the conduct of the employee, which to any extent caused or contributed to the termination.”

60. The Appellant in his testimony stated that at the time of termination of his employment he was earning Kshs. 10,000. This was confirmed by the 2nd Respondent in his testimony. The trial court awarded him Kshs. 6,896 pay in lieu of notice. No reason was given as to why the court awarded this instead of Kshs. 10,000 which was the appellant’s monthly salary. I find this to be an error and set the same aside and in its place award the Appellant Kshs. 10,000 as pay in lieu of notice.

61. The Respondents did not contest the award of the other heads in the judgment of the trial court. I however note that the award of Kshs. 20,000 was for unpaid salary for June and July while Kshs. 30,000 was for compensation. Apart from this correction I find no reason to interfere with the award of the trial court on the two heads or on costs and interest.

62. Consequently, the judgment of the trial court is upheld with the exception of the prayer for pay in lieu of notice which is set aside and replaced with an award of Kshs. 10,000.

63. The final award shall therefore be as follows:

- i. The award of 1 months’ salary in lieu of notice of Kshs 6,896 is set aside and substituted with Kshs 10,000
- ii. The award of 2 months’ salary for June and July sustained
- iii. The award of 3 months’ salary in compensation is sustained
- iv. I will not disturb the award of costs and interest by the trial court.

64. As the appeal has only partially succeeded, each party shall bear its own costs of the appeal.

65. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 15TH DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

