



**Cherono v Valley Hospital Limited (Employment and Labour Relations
Appeal E007 of 2022) [2023] KEELRC 1950 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2022**

**HS WASILWA, J
JULY 31, 2023**

BETWEEN

EVERLYNE CHERONO APPELLANT

AND

VALLEY HOSPITAL LIMITED RESPONDENT

*(Arising from from the Judgement and Decree of the Honourable JB Kalo(CM), delivered on
March 15, 2022 in Chief Magistrates Court at Nakuru, Case Number CMELRC No 74 of 2019.)*

JUDGMENT

1. This appeal arose from the Judgement and Decree of the Honourable JB Kalo(CM), delivered on March 15, 2022 in Chief Magistrates Court at Nakuru, Case Number CMELRC No 74 of 2019. The grounds of the Appeal are as follows; -
 1. That the Honourable Magistrate JB Kalo, erred in law and in fact by failing to consider the evidence of the claimant and the critically analyze the same and accord it due weight to the extent that the claimant was able to prove her case.
 2. That the learned Magistrate JB Kalo erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence, exhibits and Submissions of parties.
 3. That the learned Magistrate JB Kalo erred in law and in fact by applying his own theory in assessing the pleadings, evidence and exhibits which made him fall into error of speculation and inserted his facts and findings which was not supported by the pleadings, evidence and exhibits.



4. That the learned Magistrate JB Kalo erred in law and in fact in holding that the Appellant has established a prima facie case based on the pleadings on the record and evidence but failed to award as per the prayers sought.
 5. That the learned magistrate JB Kalo erred in law and in fact by failing to contextualize the provisions of sections 41(2), 44(3) & (4), 45 and 49 of the [Employment Act, 2007](#) and thereby arrived at unlawful decision.
2. The Appellant sought for the following orders:-:
- a. That the appeal be allowed.
 - b. That the Judgment delivered on March 15, 2022 in the Chief Magistrates Court CMELRC No 74 of 2019, be reviewed and the judgement entered in favour of the Appellant against the Respondent in terms of prayer (a), (b), (c), (d), (e), (f) and (g) of the Memorandum of claim.
 - c. That the Respondent do bear the costs of this Appeal.

Brief facts.

3. The Appellant was employed by the Respondent with effect from September 1, 1997 as a receptionist, earning a Gross salary of Kshs 3,500. That she later rose through the ranks to the position of Records clerk. That she served the Respondent diligently throughout her employment for 21 years without receiving any warning letter until her termination on 2March 7, 2019. At the time of termination, the Appellant was earning Kshs 29,999.20.
4. It is stated that the Appellant was subjected through a sham disciplinary process that did not accord her fair hearing or grant her Appeal mechanism. She maintained that the termination was unfair and prayed to be reinstated and or compensation for the remainder of her employment period till retirement.
5. She also stated that on termination, she was not issued with a certificate of service, an issue that has made it impossible for her to secure any other employment, especially now that she is 44 years.
6. She also stated that the termination was gender discriminative and that she was terminated while on a 7 days leave and a day before reporting back to work.
7. In response to the claim, the Respondent stated that following computerization of the Respondent's operations, the Appellant was deployed to Records office and made in charge of the entire department including documentation of patients details, billing and finalization of the Bills for Credit Control Department to be delivered to clients.
8. Sometimes in 2018, an audit was carried out and it was discovered that not all bills were finalized and closed, which caused the Respondent huge losses. Within the same year in February, 2018, the Respondent's cash was embezzled by officer under the watch of the Appellant. In August, 2018 officers under the Appellant's watch were caught in a fraud case and arrested. In 2019 another Audit was carried out that revealed that Kshs 2,987,351 had been lost due to unclosed bills which in effect were not claimed and paid.
9. From that revelation, the Respondent discovered that the Appellant was deleting bill from the system, mishandling patient and subjecting them to prolonged pain by failing to act on the interest of the patients, changing doctors for patients without authority, thereby putting the Respondent into conflicts with consultants, failing to escalate issues that needed management intervention thereby



compromising service delivery and unprocedurally instructing other employees to provide service to patients already referred to other institutions and failing to charge consultations fees.

10. Due to the foregoing, the Respondent served the Appellant with a show cause letter dated 13th March, 2019 detailing the charges against her and informing her of her rights. The Appellant responded to the Show cause letter and was invited for disciplinary hearing, which she attended with a representative of her choice one Victor Ochieng. However, that her explanation on the issues raised was not satisfactory leading to her dismissal.
11. The Respondent stated that the loss of Kshs 2,987,351 was to be shared by the three employs, with the Appellant shouldering Kshs 995,783,67, where her March salary was used to partly offset that debt leaving a balance of Kshs 950,489.65 which the Respondent claimed in its counterclaim.
12. The Appellant denied the roles stated by the Respondent and averred that at the material time, she was serving at the customer care office, serving clients, patients and visitors who have queries and direct them to the relevant offices. Also that she was tasked with sorting out finalized invoices and dispatching them to the various insurances for payment. She stated that invoices are prepared and closed by the records clerk, which office she did not work at between April, 2019 and February, 2019 because she was stationed at the Customer care desk. She denied causing any loss to the Respondent or neglecting her duties and thus the termination was unfair.
13. The parties agreed during trial to adopt all the the witness statement and all documents as evidence for the parties, which the trial court relied upon in rendering his decision.
14. Directions were taken for the appeal to be canvassed by written submissions with the Appellant filing on the 23rd June, 2023 and the Respondent on 26th June, 2023.

Appellant's Submissions.

15. The Appellant submitted from the onset that this being a first appeal, this Court is tasked with evaluations and consideration afresh of all the facts and the law, while considering the principles laid down under Section 78 of the *Civil Procedure Act* and reiterated in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, where the Court held that :-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

16. This view was also observed in the case of *Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR where the Court 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. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that



the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

17. Accordingly, it was submitted that the learned magistrate failed to consider the overwhelming evidence on the fact that the Appellant was not trained on the area of record keeping to be able to discharge her duties better. Further that the trial court did not consider the fact that the implementation of the template system was to be carried out by the ICT department and not the Appellant herein.
18. The Appellant submitted that the trial court erred in law and in fact in applying its own facts and material and not considering the evidence that was on record in favour of the Appellant. He argued that by finding of the Court on her role vis a vis the role of the ICT in managing the Template system was erroneous and cited the case of *Kenya Commercial Bank Limited V Mwanzau Mbaluka & Anor* [1998] eKLR where the Court stated that by raising and determining the suit on an issue that was neither pleaded nor evidence adduced on thereby introduced a new cause of action against the Appellant. Therefore, that such judgment cannot be left to stand.
19. The Appellant submitted that the it established a prima facie case in its preliminary stage, which the Court ought to have considered against the evidence tendered and find in her favour. On that basis, the Appellant urged this Court to re-evaluate the evidence tendered and makes its own independent conclusion in her favour.
20. It was submitted also that the trial court failed to contextualize the provisions of section 41, 44, 45 and 49 of the *Employment Act*, arriving at a wrong conclusion of finding that the termination was justified and due procedure followed. It was argued that the Appellant was terminated for unsubstantiated reason and following a sham disciplinary process with a pre-determined decision to terminate her services, therefore the termination was unfair.
21. In conclusion, the Appellant submitted that the Respondent flouted the rules and unfairly terminated her from employment and therefore that she ought to be compensated for the unfair termination. He urged this Court to allow the Appeal as prayed with costs.

Respondent’s Submissions.

22. The Respondent submitted on one issue; whether the Appeal is merited.
23. It was submitted, in concurrence with the Appellant, that the duty of the Court in a first appeal is to re-evaluate and re-assess the evidence adduced before the trial, keeping in mind that it did not have the benefit of seeing the witnesses testify, but still arrive at its own conclusion as was held in *Kenya National Highways Authority V Paleha Stores Limited & 2 others* [2020] eKLR.
24. The Respondent submitted that the main ground of appeal in this case was for failure by the trial court to contextualize the provisions of section 41, 44, 45 and 49 of the *Employment Act*. He argued that section 44 of the *Employment Act* provides for summary dismissal of an employee on the basis of breaching his obligations under the contract of service. He went ahead and stated that for summary dismissal to be justified, there are four elements that must be justified as stated by the Court of Appeal in the case of *Michael Otieno Oyombe V Eco Bank Limited* [2022] eKLR that listed the four elements that must be justified to include;-
 - (a) An explanation of the grounds of termination in a language understood by the employee; b) The reason for which the employer is considering termination; c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made and d) Hearing and considering any representation made by the employee and the representative chosen by the employee.”



25. Similarly, that the Appellant herein was an employee of the Respondent and in 2015 she was deployed to records department where she was made in charge of the department to ensure all patients details are documented, Billing and finalizations of Bills is done for credit control department to deliver to clients. However, that in 2018, the Respondent discovered that that not all bills were finalized and closed, causing the Respondent to incur losses due to non-payment of bills. Further that in February, 2019, there was embezzlement of money in the claimant's department which after audit was done discovered that the Respondent had lost Kshs 2,987,351. It was argued that, it is the Appellant's action and inaction of failing to ensure all patients have paid for the services that cause the Respondent the huge losses.
26. The Respondent submitted that as soon as the said loss was brought to their attention, they issued a notice to show cause that details the charges levelled against the Appellant. The Appellant Responded to the Show cause letter and she was invited to disciplinary hearing, where she was heard, however her explanation did not exonerate her and she was dismissed. Thus, that the Respondent followed due procedure before terminating the Appellant as held in *Kenya Union of Commercial Food and Allied Workers V Meru North Farmers Sacco Limited*, Cause 74 of 2013 [2014] eKLR.
27. The Respondent submitted that the termination of the Appellant was done in accordance with the law and necessitated by the huge losses that the Respondent incur due to the Appellant breach of her contract, which qualifies as gross misconduct to justify summary dismissal. In this they relied on the case of *Postal Corporation of Kenya V Andrew K Tanui* [2019] eKLR where the Court relied on the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR where the this Court had the following to say on the burden of proof:-
- “There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
28. Accordingly, the Respondent submitted that the termination of the Appellant's services was justified in the circumstances and the decision of the trial court was valid and lawful. The Respondent in conclusion, urged this Court to dismiss the Appeal with costs to the Respondent.
29. I have examined all the submissions and averments of the parties herein and indeed this being a first appeal to this court, this court has a duty to re-evaluate the evidence afresh and arrive at a conclusion based on facts and law before it.
30. From the evidence on record, the appellant was indeed employed by the respondents on 1/3/97 as a Receptionist/Customer Care at a gross salary of Kshs3,500/= but later rose to the position of Records Clerk at a basic salary of 35,000/=.
31. On 13/3/2019 the claimant received a show cause letter requiring her to give reasons why disciplinary action should not be preferred against her.
32. According to the show cause letter reasons indicated requiring disciplinary action were as follows:-

“RE: Failure To Carry Out Job Responsibility As Mandated By The Hospital



Because of failure to carry out your duties as stipulated in your job description and implementation of the findings on the survey by the Kabarak Research students carried out on August 6, 2018, concerning unclosed bills, the hospital lost Kshs2,987,351/=.

During the survey by the Kabarak team, it was noted that the bills of previous year 2017 and part of early 2018 were not closed and as such not claimed. Consequently, you were invited in the meeting to explain how Valley Hospital is losing money and measures which should be taken to reduce such losses, unfortunately you have failed to implement the recommendations of the said meeting.

The Management advised the IT department to create a template to be used in records to note down reasons for unclosed bills, but this was never implemented. Despite all this, the hospital continued to lose money because the unclosed bills were never attended to even after the template was issued.

Apart from the above issue, it was also noted that you mishandle NHIF patients, as you failed to handle the following cases professionally,

- a. You delayed admission for Nadya Korir, you did not inform Dr. Podho on time even after the authorization was issued by NHIF until the father of the patient calls back to NHIF complaining for not been attended on time. NHIF later responded by calling the hospital after you have made arrangements that the child will be operated by Dr. Gitu on March 11, 2019.
- b. Mary Wathegeni Gitonga was referred to PGH by Dr. Okech but you decided up on yourself to make arrangements with the patient to come back for lab tests therefore causing further losses to the hospital.

The management would like you to show cause why disciplinary action should not be taken against you by March 18, 2019.

Yours faithfully,”

33. The appellant responded to this show cause letter indicating that she was not concerned with the tracker template but people handling shifts and that she was not one of them.
34. She also denied leaving patients unattended. She denied being responsible for the loss of over 2m suffered by the respondent.
35. On the way she handled a patient called Nadya, she indicated that she was advised by NHIF to have the patient operated upon by Dr. Gitu as Dr. Podho was delaying the patient.
36. The appellant was thereafter summoned for disciplinary hearing which she attended on 19/3/2019. As per the minutes of the meeting the appellant attended the meeting with Victor Ochieng her representative.
37. During the meeting the appellant denied any wrong doing indicating that she was not responsible for the un-finalized bills though she agreed she was the person in charge of the records team. She also indicated that there were a number of new staff in records office who were making errors while billing notwithstanding that she was in charge of the new staff orientation.
38. She indicated that she was not responsible for the loss of Kshs2,981,351/= by the hospital but a collective responsibility of all record staff including herself and so the blame should be shared among all employees in Records Department.



39. On billing, she indicated that she only attended to billing when called upon and sometimes bills were not closed because of major challenges like unavailability of Smart Cards and billing errors.
40. She denied any wrong doing in respect of the way she handled the case of 2 other patients indicating she was doing it as instructed by NHIF.
41. As per the meeting minutes, the appellant was given an opportunity to be heard and she responded to the accusations.
42. After the disciplinary hearing, the appellant was found culpable and was terminated vide a letter dated 27/3/2019 due to the same issues that she had been taken through the disciplinary processes.
43. The hospital decided not to pay her any terminal dues indicating that the dues would be utilized to partly offset the hospital loss incurred due to her negligence.
44. During the hearing before the lower court, the appellant testified indicating what transpired.
45. From the evidence before court, her written statement was adopted as her evidence in chief plus all documents she had filed. The respondents also adopted their statements and documents filed.
46. From the judgment of Hon. JB. Kalo learned Magistrate, he considered the evidence submitted before him as indicated above.
47. He also considered the fact that the appellant was taken through a disciplinary process as per the minutes alluded to above.
48. The appellant had indicated before the lower court that she was employed as a receptionist and later deployed to records department.
49. During that period, the respondent digitized its records department but did not retrain or retool her to enable her fit in her new ICT environment.
50. She indicated that she raised this issue with the management but no action was taken by the respondent.
51. It is however clear from the evidence that the management tried to respond to the concern raised by the appellant and developed a template to capture unclosed bills.
52. It was during this period of trying to implement the new template by the ICT department that liability occurred.
53. The trial court in adjudicating this considered the submissions of the appellants that the reasons for which the appellant was subjected to disciplinary hearing were different from the reasons for which she was terminated being negligence of duty and gross misconduct.
54. He also made a finding that the termination letter indicated that the amount lost was Kshs2,957,351/ = whereas pleadings state that the amount was to be split between all employees in the department.
55. In his finding the trial court found that the submission that the reason for disciplinary action and for termination were the same.
56. He also found that the appellant was subjected to a fair disciplinary hearing. He considered the minutes of the disciplinary hearing and made this finding.
57. From the finding above, I also note that the appellant was indeed notified of allegations tendered against her. She was thereafter subjected to a disciplinary hearing to which she responded to allegations levelled against.



58. She attended the proceedings in the company of a colleague. The requirements of Section 41 of the [Employment Act, 2007](#) which states as follows were adhered to:-

“41. Notification and hearing before termination on grounds of misconduct

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.
59. In all allegations levelled against her, the appellant acknowledged her mistake together with others. The appellant was terminated for valid reasons as per Section 43 of the [Employment Act, 2007](#) and also given a fair hearing. Section 45 (2) of the [Employment Act, 2007](#) states as follows;
- (1)
 - (2) A termination of employment is unfair if the employer fails to prove-
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason-
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure”.
60. In relation to there being valid reasons and there being a fair disciplinary process, the appellant was accorded both.
61. The trial court made a finding accordingly based on facts and the law and for which I find no reason to interfere with save to add that the appellant should be issued with a Certificate of Service.
62. I find the appeal on the circumstances lacks merit and the same is dismissed accordingly.



63. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njogu for Respondent – present

Wafula holding brief for Oira for Claimant – present

Court Assistant – Fred

