



**Kaloki v Board of Management Makivenzi ABC Girls Secondary
School & 2 others (Employment and Labour Relations Appeal
E004 of 2022) [2023] KEELRC 1910 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1910 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL E004 OF 2022**

B ONGAYA, J

JULY 28, 2023

BETWEEN

CLAUDIUS WAMBUA KALOKI APPELLANT

AND

**BOARD OF MANAGEMENT MAKIVENZI ABC GIRLS SECONDARY
SCHOOL 1ST RESPONDENT**

PRINCIPAL MAKIVENZI ABC GIRLS SEC SCHOOL 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Being an appeal from the judgment and decree of Hon. E.W.Wambugu,
Senior Resident Magistrate, delivered on 17th February, 2022
in Employment and Labour relations Cause No. 31 OF 2019)*

JUDGMENT

(Before Hon. Justice Byram Ongaya on Friday 28th July, 2023)

1. The learned trial Senior Resident Magistrate delivered the judgment in the suit before the trial Court in favour of the respondent and against the appellant and held:
 - a. That the termination of the claimant was not unfair and declined to issue any remedy for the alleged unfair termination.
 - b. Awarded the claimant leave pay for the sum of Kshs 30,000/=
 - c. The 1st respondent was to issue the claimant with a certificate of service.
 - d. Save for the award, the claim was dismissed with costs.



2. The appellant filed the memorandum of appeal dated March 11, 2022 through Munguti Ngulukyo & Co. Advocates. The appellant stated that the trial Court erred in law and fact and misdirected itself as follows:
 - a. By failing to consider that the appellant had been working in the institution for close to three years without any case of gross misconduct.
 - b. By failing to acknowledge that it was the 2nd respondent who instructed the appellant not to show his face within the compound ever again on March 1, 2019. Hence constructively dismissing him.
 - c. By failing to find that the termination of the appellant was unfair and failing to issue any remedy.
 - d. By failing to find that the respondents defence was only mere denial and fabrication of the truth.
 - e. By failing to appreciate that neither of the grounds in the termination letter were proved.
 - f. By failing to address herself on the procedure used in dismissing the appellant.
 - g. By ignoring the express testimony of the claimant and failing to appreciate and interrogate the documents filed in support of the claimant's case.
 - h. By finding the appellant's claim partially successful but still condemned him to costs.
 - i. By failing to acknowledge that the claimant had proved his case on a balance of probability.
3. The appellant prayed for orders:
 - a. That this appeal be allowed with costs.
 - b. The appellants prayers in the memorandum of claim be admitted and allowed.
 - c. Any other order the court deems fit.
4. The appellant filed submissions on the appeal. For the respondents, submissions were filed through the Hon. Attorney General.
5. The appellant had filed the memorandum of claim on November 7, 2019 His case was as follows. He was an employee of the 1st respondent having been appointed to the position of school driver on May 5, 2017 at a monthly salary of kshs 15,000/=.
6. He stated that he had been carrying out his duties diligently until sometimes on February 6, 2019 when the Principal of Makivenzi ABC Girls Secondary school deployed him to transport catholic pilgrims from Masinga to Komarock shrine and back.
7. It was agreed between himself and the 2nd respondent that he shall be paid an allowance of kshs 1,000, and that the allowance would be paid by the leader of the pilgrims. However, upon demanding for the same from the leader, he was informed that the same had been paid to the Principal and he ought to demand for the same from the Principal.
8. That he approached the Principal for settlement of the said allowance. In turn the principal referred him to the school bursar who in turn referred him back to the Principal. The Principal in a fit, chased the plaintiff away calling him names and ordered him to immediately hand over the school bus keys to the bursar as his services were no longer needed.



9. That the appellant went to the boarding master and handed over the school items in his possession, including the school bus. However, he did not hand over the school bus keys, pending official communication. At 13:59hrs the Principal sent the appellant a text message which read “rudisha funguo za bus. We have seen your machinery and gratuity”.
10. That at 19:18 hrs on the same day, the school bursar sent the appellant a text message demanding that he hands over the keys to the principal as the school bus was expected to go to undisclosed place the following day.
11. It was the appellant’s case that when he reported for work on March 4, 2019 he found another driver had taken over his duties and was using a spare key. The principal reiterated that his services were no longer needed and he was supposed to hand over the school bus keys to the school bursar.
12. That when terminating his services, the principal called him Ngukuta which means urchin causing him untold mental and psychological torture and suffering. That on 28.03.2019 he wrote to the Principal demanding for his dues, however, in a response dated March 29, 2019 the Principal stated that the appellant had deserted work. It was the appellant’s case that the Principal by her actions unfairly terminated his services.
13. The respondents filed a reply to memorandum of claim dated December 10, 2019. The respondents witness Lucy Elizabeth Wanja (DW1) the 2nd respondent stated that she did not know the appellant personally, having been appointed Principal after his termination of services. That the Principal who was manning the school during the period when the appellant was in the employment of the 1st respondent, was Ms. Grace Nzuki and she had since retired.
14. It was her statement that from the documents filed in Court, the appellant had been appointed to the position of school driver effective May 5, 2017. That on March 1, 2019 a client had approached the school through the accounts clerk and requested to hire the school bus for the weekend, and that on the same date, the former Principal received a complaint from the accounts clerk concerning the claimant in regards to the intended absenteeism of the driver on Saturday when the bus was to be hired. That the former Principal asked the appellant to come to the office to discuss said issue. At the meeting the Principal informed him that she could not grant him leave on Saturday as he had not sought for permission earlier to be away on Saturday. That in response the appellant rudely clicked and walked away.
15. The appellant is said to have approached the Principal at her residence later in the day, insisting that he would not work that Saturday. However, the former Principal declined to grant him permission, for reasons that it was too late. That the former Principal proceeded to look for an alternative driver for the sake of the clients and she instructed the bursar to find the claimant for purposes of getting the bus keys. Unable to get the keys, the former Principal managed to get instructions from the appellant on how to get the spare key.
16. That on March 4, 2019 the appellant went to the former Principal’s office with a list of bus items dated 01.03.2019 - two spare tyres were excluded from the list and on asking him where the two spare tyres were, the claimant failed to account for them. When asked about the items he uttered words to the effect that “I Will Not Drive”.
17. On March 28, 2019 the appellant wrote to the school stating that the school had terminated his employment, in response through a letter dated March 29, 2019 he was informed that he had absconded work from March 1, 2019. He was asked to show cause why he had prepared a list of bus items and why he had failed to report for duty from March 1, 2019. The appellant through a



letter dated May 16, 2019 was invited for hearing with the board on May 21, 2019 at the school compound to explain why he should not be terminated. He failed to appear for the hearing and a board of management resolution was passed to pay the appellant Kshs 15,000/=.

18. Through a letter dated May 27, 2019 the appellant was requested to attend a hearing on May 31, 2019, which hearing he failed to attend. He was then invited through a letter dated June 3, 2019 to avail himself at the school on June 18, 2019 for yet another hearing. He attended the said hearing and a resolution was made by the 1st respondent, which resolution was communicated vide a letter dated July 1, 2019, to terminate the claimant's employment on account of gross misconduct. This resolution was communicated to the sub-county director of education Yatta Sub County.
19. It was the respondents' case that due process was followed and that the appellant was lawfully terminated from employment due to gross misconduct. Further, the appellant's NSSF contributions was always remitted, and the appellant had not produced any evidence that he applied for annual leave and that the same was denied.
20. This is a first appeal and the role of the Court is to re-evaluate the evidence and arrive at conclusions one way or the other bearing in mind it did not by itself take the evidence. The decision of the trial Court ought not be disturbed unless shown it misdirected itself and thereby arrived at conclusions that were not just or correct.
21. The 1st main issue in the appeal is whether the trial Court erred in finding that the appellant's dismissal was not unfair. The letter of termination is dated July 1, 2019. It states that on March 1, 2019 the appellant did not report at work. Instead he went to the Principal's office and produced a list he had prepared and signed on March 1, 2019 and left it at the office. The letter states the list lacked two spare tyres and when asked by the Principal about the missing items the appellant shouted back "I will not drive". The letter concluded that after the Board met the appellant and discussed the issue, the Board had decided that the appellant be dismissed. The trial Court found that the Board had a good and valid reason to dismiss the appellant by reason of the failure to hand over the keys on March 1, 2019, the manner he replied the Principal, and the manner he replied the school bursar by SMS that he should not be disturbed and the bursar should go and drive. The Court finds the trial Court's findings consistent with the evidence and the appellant was indeed rude to his superiors. The reason for termination was valid per section 43 of the Employment Act and related to the appellant's capacity, compatibility, conduct and respondent's operational requirements per section 45 of the Act. The Court returns that the reason for termination was valid and fair in the circumstances and the trial Court did not err in that respect. As for the procedure, the appellant confirmed that the Board summoned him, he attended and he was duly accorded a hearing and the procedure adopted by the respondent was fair per sections 41 and 45 of the Act. The submissions made for the respondent in that regard are upheld.
22. To answer the 2nd issue, there is no established error by the trial Court in the manner the final remedies were awarded.

In conclusion the appeal is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28TH JULY, 2023.

BYRAM ONGAYA, PRINCIPAL JUDGE

