**Lubonga v Security Alert Services Limited (Appeal E009 of 2022)**
**[2023] KEELRC 1966 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1966 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL E009 OF 2022**

**NZIOKI WA MAKAU, J**

**JULY 27, 2023**

**BETWEEN**

**SHEILA NASIMIYU LUBONGA ..... APPELLANT**

**AND**

**SECURITY ALERT SERVICES LIMITED ..... RESPONDENT**

## JUDGMENT

1. Aggrieved by the Judgment and Decree emanating from the decision of the Honourable Mr. D. M. Kivuti, Principal Magistrate delivered on August 4, 2021 in Nairobi CMELR Cause No. 375 of 2020 – Sheila Nasimiyu Lubonga v Security Alert Services Ltd, the Appellant appealed to this Court vide a Memorandum of Appeal dated January 31, 2022 setting out the following grounds of appeal:

    1. That the learned trial magistrate erred in law and in fact in holding that termination of the Appellant's employment followed strict requirements of the law when in fact —

        a. The Respondent had already locked the Appellant out of her office, coerced her to sign a dismissal letter and accede to tabulated dues by the time it was purporting to subject her to a disciplinary hearing;

        b. The Respondent had already terminated the Appellant's employment, calculated her dues and given her 3 days to accept them, by the time it was purporting to subject her to a disciplinary hearing;

        c. The Respondent had already asked the Appellant to return company property in her possession by the time it was purporting to subject her to a disciplinary hearing;

d. The Respondent purported to issue a show cause letter and conduct a disciplinary hearing after it had already terminated the Appellant's employment;

e. It's the same person who chaired the purported disciplinary hearing's despite the Appellant's expression of discomfort, displeasure, biasness and partiality from him;

f. That the Appellant's accuser was allowed to form part of the purported disciplinary panels that unanimously terminated her employment despite being conflicted;

g. The Respondent failed to comply with the mandatory provisions of Section 41 (1) of the *Employment Act* No. 11 of 2007;

2. That the learned trial magistrate misdirected himself in basing his finding on wrongful dismissal under section 44 of the *Employment Act* No. 11 of 2007 notwithstanding that the Appellant's claim was in unfair termination under Section 45 of the *Employment Act*.

3. That the learned trial magistrate erred in law and in fact in failing to distinguish the disciplinary hearing of April 11, 2020 from the purported disciplinary hearing of April 25, 2020 notwithstanding the centrality of the distinction to the Appellant's claim.

4. That the learned trial magistrate erred in law and in fact by finding that the Appellant's employment was terminated in accordance with a fair procedure against the weight of the evidence adduced by the Appellant.

5. That the learned trial magistrate erred in law and fact in placing the burden of justifying the validity or propriety of the grounds and/or reasons for the termination upon the Appellant contrary to Sections 43 and 47(5) of the *Employment Act* No. 11 of 2007.

6. That the learned trial magistrate erred in law and in fact in relying on the Respondent's allegation that the Appellant was not one of its best of employee and that she had been paid her dues as at the time of termination to hold that termination of her employment was fair notwithstanding failure by the Respondent to prove the allegation as required under section 47 (5) as read together with section 45 (2) (a) and (b) of the *Employment Act* No. 11 of 2007 and the Respondent's admission at paragraph 15 of the Statement of Defence.

7. That the learned trial magistrate misdirected himself by ignoring, disregarding and/or refusing to take into account the totality of circumstances preceding and succeeding the Respondent's purported disciplinary hearings notwithstanding the preponderance of the evidence in that regard hence arriving at an erroneous finding that a hearing rendered termination of the Appellant's employment lawful.

8. That the learned trial magistrate erred in law and in fact in failing to hold that the Respondent had failed to appreciate that measures put in place to combat the spread of Covid 19 had altered the normal way of doing things in places such as banking halls.

9. That the learned trial magistrate erred in law and in fact in the manner that he framed the issues for determination in the case and by doing so arrived at an erroneous decision.

10. That the learned trial magistrate erred in law and fact by misunderstanding and misapprehending the Appellant's case and in so doing arrived at an erroneous decision.

11. That the learned trial magistrate erred in law and in fact in completely disregarding the evidence that was led in the case and in so doing arrived at an erroneous decision.

12. That the learned trial magistrate erred in law and fact by putting reliance on authorities whose facts and circumstances were not only incongruent but also incomparable with the Appellant's case and in so doing arrived at an erroneous decision.

13. That the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the Appellant's submission and the authorities that had been tendered and in so doing arrived at an erroneous decision.

2. The Appellant prayed that the Appeal herein be allowed and the Judgment of the learned Trial Magistrate be set aside and that this Court makes a declaration that the Appellant's termination was unlawful and unfair and further assess the quantum of damages payable. She also prayed for costs of this Appeal be awarded to the Appellant and for issuance of such further orders or directions as this Court may deem fit.

3. The matter was disposed by way of written submissions.

4. Appellant's Submissions

The Appellant submitted that his being a first appeal, the duty of this court is now settled in law as held by the Court of Appeal at Nakuru in Civil Appeal No. 71 of 2017, Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited [2021] eKLR. The Appellant canvassed her grounds of appeal under the following three issues:

a. Whether termination of the Appellant's employment met both the substantive and procedural tests?

b. What is the quantum of damages due to the Appellant?

c. Who bears the costs of this appeal?

5. It was the Appellant's submission that under section 43 and 47(5) of the *Employment Act* No. 11 of 2007, the burden of justifying and proving the grounds and/or reasons for the termination of employment or wrongful dismissal rests on the employer. That in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, the Court held that it is the duty of the court to analyse the validity, genuine and fairness of the reasons for termination and arrive at its own proper conclusion.

6. The Appellant submitted that in her case, it is common ground that her employment was terminated for the reason that she failed to report back to work on 9th April 2020 after depositing NHIF statutory deductions payment cheque at 10.02am. That however, the Respondent deliberately refused to produce before court the Cheque Deposit Slip showing the transaction had been posted at around 3.00pm on the said date and that it had also not given her fare for the said errand, thus contributing to her failure to return to work that day. That section 10(6) and (7) of the *Employment Act* place the burden of keeping, producing employment records and proving or disproving an alleged term of employment on the employer. That the cheque deposit slip indicating the posting time in the Respondent's custody ought therefore to have been produced in these proceeding by the Respondent. She cited the case of *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR in which the Court found that where work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. It was the Appellant's submission that the Respondent thus failed to discharge and/or shift the burden placed on it and a presumption in law has been made that had the cheque deposit slip and/or bank inquiry

been produced or the Appellant's immediate boss called to testify, they would have corroborated her testimony and thus be unfavourable to the Respondent.

7. She further submitted that the reason for terminating her employment was equally unfair because the Respondent failed to consider that the period in question was during the outbreak of the COVID-19. Moreover, that the reason was tainted with bad faith since the Respondent having acceded to her explanation via the phone while at the bank and the issue having been put to rest, it was estopped from using the same as a basis for terminating her employment. It was the Appellant's submission that termination of her employment was thus flawed substantively and that grounds 6 to 11 of the Appeal stand proved. She invited the Court to make this finding and allow the said grounds of appeal.

8. On the procedural test, the Appellant submitted that section 45(2)(c) of the *Employment Act* provides that termination of employment is unfair if not done in accordance with fair procedure and section 41 of the Act provides for the procedure that should be followed by an employer before terminating an employee's contract. That this position has also severally been affirmed by courts such as in the case of *Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR. It submitted that the Respondent did not produce its alleged policy and the disciplinary hearing minutes before the Trial Court for purposes of scrutiny and satisfying itself that the disciplinary hearing was indeed conducted in tandem with the Respondent's testimony. That in the absence of the said documents, her testimony that she was neither explained to her mistakes, charges, given reasons for the termination of her employment, never represented by any employee nor given any opportunity to defend herself during the disciplinary hearing of 11th April 2020, must be taken as the truth. On this submission she relied on the decision of the court in *Saeed Hussein Said v Banoda Oil Ltd* [2017] eKLR and further relied on the case of *Walter Ogal Anuro v TSC* (*supra*) wherein the Court stated that it does not matter whether there were substantive justification and/or valid reasons for termination; if the procedure adopted was wrong, the termination would still be unlawful, unfair and/or wrongful for want of due procedure.

9. The Appellant also noted that her final dues had been tabulated and she was presented with a dismissal letter prior to the disciplinary hearing. That the only logical and inescapable conclusion is that the decision to terminate her employment was predetermined and that the purported disciplinary hearing was for cosmetic purposes therefore a nullity. She cited the case of *Peterson Muriuki v Flame Tree Africa Limited* [2021] eKLR in this regard. It was the Appellant's submission that re-termination of employment does not exist under the employment laws. That once her employment had been terminated via the disciplinary hearing of 11th April 2020, there was no employment to re-terminate in the subsequent disciplinary hearing of April 25, 2020. That the subsequent disciplinary hearing was therefore inconsequential and null ab initio. She cited the case of *Angela Wokabi Muoki v Tribe Hotel Limited* [2016] eKLR in which the Court held that convening a disciplinary hearing after the decision to terminate employment had been made was contrary to the mandatory statutory procedure. The Appellant urged this Court to find that the learned trial Magistrate therefore erred in making a contrary finding and allow grounds 1 to 6 of the Appeal.

10. On grounds 9 to 13 of the Appeal, the Appellant submitted that the learned trial Magistrate did not critically analyse her submissions on the salient and/or distinct features of the disciplinary hearings she had been taken through. She opined that failure to give concise reasons for a holding in a judgment as per rule 28(2) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* is a fatal omission with the effect that the judgment is rendered null. Further, that the learned trial Magistrate contradicted himself by holding on one hand that the termination was unlawful while on the other hand holding that termination was lawful because the Respondent had conducted a formal disciplinary hearing and paid her final dues without proof of such payment. That this contradiction runs counter

to what a judgment ought to be and that it was against rules of natural justice for the learned trial Magistrate to approbate and reprobate at the same time. She beseeched this Court to make this finding and allow grounds 9 to 13 of the Appeal.

11. As regards the quantum of damages due to her, the Appellant referred the Court to section 49(1)(c) and (4) of the *Employment Act* that provides for the parameters of assessing compensation once a finding of wrongful dismissal and unfair termination of employment has been made. That having proved her case, she was entitled to maximum compensation and notice pay and that for the claim for salary underpayments, the Respondent did not produce any written employment contract to disprove her position on the same. That pursuant to the Respondent's admission that her last working day was April 11, 2020 and that it was willing to pay her the wrongfully withheld the salary for the days worked up to termination, she was entitled to the pleaded amount of withheld salary. The Appellant further submitted that the Respondent's argument that it had not issued her certificate of service because she had filed a suit is superfluous as she is entitled to a certificate of service as a matter of right and dictated by statute. She referred the court to the holding in the *Angela Wokabi Muoki case* (*supra*). It was the Appellant's submission that costs follow the event unless sufficient cause is shown why the court should depart from the settled law, as reiterated in the case of *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR. The Appellant thus urged the Appeal be allowed as prayed.

12. Respondent's Submissions

The Respondent submits that the issues for determination are whether the Appellant was unfairly terminated and whether she is entitled to the reliefs sought. The Respondent submitted that whereas the Appellant alleged that she was unfairly terminated, it is an established principle in sections 107(2) and 108 of the *Evidence Act* that, 'He who alleges must prove'. It asked the Court to analyse the circumstances that led to the termination of the Appellant so as to ascertain whether the conditions provided for in section 41(1) were met thereby justifying the termination. It submitted that the Appellant was aware of the procedure for requesting for leave since she had sought and had been granted leave on several occasions before as evidenced by the request for leave forms on pages 84, 102, 113, 118, 122, 125 and 126 of the Record of Appeal. That even assuming that the Appellant was informed by the bank to collect the deposit slips in the afternoon, she ought to have gone back to the office and not choose to run her own errands. That the Appellant's failure to report to work on 3rd April 2020 without leave and on April 9, 2020 for the rest of that day amounted to gross misconduct. Further, that this Court should consider whether a bank receipt issued to the bank's customer on instruction from their employer forms part of the customer's employment records as alluded to by the Appellant. This is because in the Respondent's opinion, a bank receipt does not form part of the employee's records and there was thus no legal obligation on its part to keep and produce the same.

13. It further submitted that the Appellant's allegations that her employment was terminated on April 11, 2020 are unsubstantiated as she failed to provide any evidence to prove the same. That the Appellant was given a chance to redeem herself on April 11, 2020 but upon realising she had no reasonable explanations to explain her absenteeism on that day, she chose to walk out of the meeting. The Respondent submitted that it complied with the provisions of section 41 of the Act as the Appellant had been given an opportunity to be heard and for an employee of her choice to be present and she chose Mr. Solomon Pamba to make representations on her behalf. The Respondent questioned why the Appellant deliberately failed to call Mr. Solomon Pamba as a witness if it was true that the meeting held on April 25, 2020 was a sham conducted for the cosmetic purpose of sanitizing the illegal termination of the Appellant's employment.

14. On the claim for compensation for unlawful termination, the Respondent submitted that they are guided by the provisions of section 47(5) of the *Employment Act* and also rely on the case of

*Nicholus Kipkemoi Korir v Hatari Security Guards Limited* [2016] eKLR. That having explained the circumstances surrounding the termination of the Appellant's employment, the claim for unfair termination is unfounded, considering the termination was due to several instances of gross misconduct, which were justifiable reasons. That it also follows that the Appellant is not entitled to one month's salary in lieu of notice.

15. On the claim for salary underpayments, it relied on the provisions of the Regulation of wages (General) (Amendment) Order 2015, which provided that House Allowance is 15% of basic salary, as the Appellant was employed as a general worker undertaking clerical duties. It submitted that section 31(2) of the *Employment Act* envisages such consolidation where the employer is not expected to pay a separate amount as house allowance, as was the oral agreement between the Appellant and the Respondent. It relied on the case of *Charity Wambui Muriuki v M/S Total Security Surveillance Limited* [2017] eKLR where the Court held that a consolidated salary is inclusive of the basic salary and all allowances payable to an employee, including house allowance and placed the burden upon the claimant to demonstrate through production of pay slips that house allowance was not part of the consolidated salary. It also referred the Court to the pay slips provided at pages 4 to 47 of the Record of Appeal showing a provision of house allowance as part of the consolidated salary. It was the Respondent's submission that having found that the Appellant was not being underpaid, the claims for salary underpayments and unpaid house allowance are unmerited. The Respondent thus sought the appeal be disallowed.

16. This Court, as the first port of call on appeal must remind itself that it never saw the witnesses testify and therefore did not have the advantage of the trial court in assessing the demeanour of witnesses who testified and the like. The Court is also minded that award of damages is a discretionary power exercised by the trial court and that except where there is demonstration that there was a wrong exercise of that power, an appellate court will not interfere with the exercise of the said discretionary power.

17. The Appellant was dismissed for allegedly running truant one afternoon after banking a cheque in settlement of the Respondent's NHIF obligations. The Appellant was terminated on April 11, 2020. The record shows there was a disciplinary hearing held on April 11, 2020 after which the Appellant was terminated. The Respondent had even tabulated her final dues. She was also ordered to surrender her staff ID. In the eyes of the Court, there was no employment to terminate in the subsequent disciplinary hearing of April 25, 2020. The subsequent disciplinary hearing was therefore inconsequential and null ab initio. After the Respondent dismissed her from employment, she is yet to get her certificate of service. The Respondent is bound by statute to issue the certificate of service in terms of section 51 of the *Employment Act*. Having failed to do that, the Respondent is guilty of unfair labour practices. The Certificate of service must be issued within the next 24 hours failing which the Respondent shall pay a sum of Kshs. 10,000/- per day to the Appellant for the default until the certificate is issued. The Appellant must also deliver the Staff ID card to the Respondent within the next 24 hours failing which she will forfeit the sum due as the dues for default to issue the certificate of service.

18. The Appellant was paid a salary which factored house allowance and the claim for the same was properly declined by the trial court. Having succeeded to some degree, the Appellant is entitled to the following remedy:-

    a. One month's salary as notice – Kshs. 24,040/-

    b. 6 month's salary as compensation – Kshs. 1442,40/-

    c. Certificate of service strictly in compliance with section 51 of the *Employment Act* within 24 hours and in default the sanctions in paragraph 17 of this judgment to apply.

d. The Appellant to return the Staff ID card within 24 hours failing which she will forfeit the sum the Respondent was to pay for any delay in issuing the Certificate of service.

e. Costs of the appeal

f. Interest on the sums in a) and b) above at court rates from the date of this judgment till payment in full

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023**

**NZIOKI WA MAKAU**

**JUDGE**