



REPUBLIC OF KENYA



KENYA LAW
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**Masters Fabricators Limited v Oiro (Appeal E053 of 2020)
[2023] KEELRC 1723 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1723 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E053 OF 2020
MN NDUMA, J
JULY 13, 2023**

BETWEEN

MASTERS FABRICATORS LIMITED APPELLANT

AND

MICHAEL OCHIENG OIRO RESPONDENT

*(Being an appeal against the judgment delivered by Hon. D.W. Mburu (Mr.)
Senior Principal Magistrate (SPM) on 17th July, 2020 in Chief Magistrate's
Milimani Commercial Courts Case Number CMEL Cause Number 260 of 2018)*

JUDGMENT

1. The appeal is against the Judgment delivered by Hon DW Mburu (Mr) SPM on 17/7/2020 at the Chief Magistrate's Court Milimani Commercial Courts Case No 260 of 2018.
2. The Memorandum of Appeal is dated 14/8/2020 in which the appellant faults the trial Court for finding in favour of the respondent that the termination of his employment was unlawful and unfair without any adequate prove.
3. That the award of Kshs 218,800 was also erroneous and not supported by any tangible evidence.
4. This being a first appeal, the Court is guided by the Principles set out by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 where Sir Clement De Lestang stated as follows:- -

“This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.



However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally,"

5. PW1 testified before the trial Court that he was employed by the appellant as a fitter/Welder at a monthly salary of Kshs 19,200 from September, 2010. That he worked until 27/3/2018 when one Thomas Ochieng verbally terminated his employment. The claimant stated that he was accused of having sued his employer Master Fabricators. On 26/3/2018 the previous day he had attended Court in that Civil suit against Master Fabricators. PW1 testified that he was claiming damages for Work Injury under *Worker Injury Benefits Act* (WIBA). That on 28/3/2018, PW1 reported to work but was denied entry to the Appellant's premises by security guard who told him that he had instructions not to let PW1 into the compound. PW1 then filed this case. PW1 stated that he was not paid for 27 days worked in March, 2018 and was not given termination notice.
6. PW1 also testified that he had not taken leave for the year. That no disciplinary hearing was conducted before the termination. PW1 stated that the termination was unlawful. PW1 produced exhibits of his case. PW1 denied that he had run away from work. He also denied that he had been found with a safety belt. PW1 also stated he had been given permission to attend Court on 26/3/2018. PW1 stated that his Supervisor was one Thomas Ochieng and not Michael Musau. PW1 insisted that his employment was terminated for having sued the Appellant. Under cross-examination PW1 stated that he was employed by the Appellant on 2/9/2010. That he was a casual for one year and then his employment was confirmed on 30/6/2013. That the Appellant paid National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) dues for him. PW1 stated that he sued the appellant on 25/8/2018 after the work injury in September, 2013. PW1 stated he continued working for the respondent until 27/3/2018 when his employment was terminated after attending Court on 26/3/2018. That the Foreman Thomas Ochieng had given him permission to attend Court. PW1 said that his advocate wrote a demand letter to the Appellant on 3/4/2018. PW1 admitted that he had once repaid Kshs 20,000 he had lost at work and had a previous warning for drunkenness.
7. PW1 insisted that the termination was verbal and without notice. He was prevented from entering the company premises the following day. PW1 said he never received any letter of summary dismissal, and denied that he absconded work.
8. DW1 relied on his witness statement dated 25/7/2019 as his evidence in Chief. DW1 stated that he was employed by the appellant on 9/4/2018. That on 27/3/2018 the security guard on duty came to his office with DW1 and one Michael Musau. The security guard reported to DW1 that he carried out a body search on PW1 at 5.00 pm when he was clocking out of work and PW1 dropped a safety belt and the guard requested PW1 to accompany him to the director's office accompanied by Michael Musau. DW1 stated that he accompanied the three to the Director's office and the director asked PW1 to take him to the gate and show him how he had managed to conceal the safety belt. That once at the gate PW1 ran away from the appellant's premises.
9. That the matter was reported to Industrial Area Police Station under Occurrence Book (OB) No 49/28/03/2018 after the CCTV camera footage for 28/3/2019 was reviewed and confirmed the report. That PW1 never returned to work and the company resolved to terminate his employment and the decision was communicated to PW1 by a letter dated 29/4/2018. The said letter gave the reason for the termination and PW1 was also requested to clear with the respondent before he could get his final dues but he did not comply.



10. That the suit has no merit. That PW1 did not prove that he had obtained an off on 26/3/2018 to attend Court. That the theft of Safety belt took place on 27/3/2018 and the claimant did not return to work on 28/3/2018.
11. Under cross-examination by Mr Kamau for PW1, DW1 told the trial Court that he joined the company in 1995. He told the Court that on 27/3/2018, he could not recall which guard was on duty. He added that the guard recorded a statement with the police. That the police officers came to the company premises. DW1 did not produce a copy of the statement recorded by the alleged guard. DW1 said that he did not have the CCTV footage. DW1 stated that he did not have a copy of the shift roster for the day. DW1 said Mr Musau was the supervisor of PW1 on that day. DW1 said he did not witness the incident of PW1 hiding a safety belt at the gate but a report was made to him by the guard and one Musau. DW1 stated that the guard opened the gate and PW1 ran away. That these events were captured on CCTV but DW1 had no footage of the same.
12. DW2 Rebecca Kivinda stated that she was the Human Resource Manager of the Respondent and relied on the written statement dated 22/8/2019. She stated that she joined the company on 3/3/2018 and was not present when the incident occurred as she had left at 5.00 pm. DW2 said she did not know the name of the guard on duty. That the security is out sourced. That the security company could easily provide the name of the guard. DW2 stated that she did not have a statement from the security guard and had not seen any such statement. DW2 stated that PW1's employment was terminated on 9/4/2018. That PW1 did not pick telephone calls before the termination though they had tried to get him. The letter was sent to his postal address. DW1 said she had no evidence that she had tried to call PW1 before the termination. DW2 said she did not write any notice to show cause to PW1. because he was nowhere to be found and so no hearing took place before the termination. DW2 said she had no document to show who between Michael Musau and Thomas Ochieng was the supervisor of PW1. DW2 stated that the theft was reported to the police by the security department.
13. In his judgment, the learned trial magistrate analysed the evidence adduced before Court and identified two issues for determination:-
 - (a) Whether the termination of the claimant's employment was lawful and fair.
 - (b) Whether the claimant is entitled to the remedies sought.
14. In evaluating the record of evidence adduced before the trial Court, it is pertinent to note that PW1 had produced the pleading in respect of Nairobi CMCC No 7174 of 2016, in which he had sued the Appellant in respect of injuries sustained by him in the course of duty. This record gave credibility to the testimony by PW1 that he had obtained permission on 26/3/2018 to attend the hearing of the suit against his employer. That upon his return on 27/3/2018, he was warned by his supervisor that he could face severe consequences for suing his employer and his employment was verbally terminated on that day and he was refused entry upon his reporting to work on 28/3/2018. This in the Court's considered view is credible direct evidence corroborated by official Court records in the WIBA suit. To the contrary, the Appellant in their attempt to rebut the testimony by PW1 failed to produce the CCTV footage in respect of the allegation that PW1 had absconded work upon being caught with a Safety belt at the gate. Further the Appellant failed to call the security guard who had arrested PW1 and reported the matter to one Michael Musau. The said Michael Musau testified and told the Court that he could not remember the name of the guard who had caught PW1 with stolen Safety belt. DW2 also testified that she could not remember the name of the guard who had arrested PW1. DW2 also was unable to produce any statement on record of the alleged theft of Safety belt by PW1 or the allegation that PW1 had escaped through the gate upon being caught and never returned to work.



15. The court is satisfied that the analysis and the reasoning by the learned trial magistrate of the facts presented before him and the law applicable led to a just and fair decision that the Appellant victimized PW1 for daring sue the Appellant and unlawfully and unfairly verbally terminated his employment without notice, notice to show cause or hearing. That the letter of summary dismissal written about one month after the verbal termination was just a ruse to sanitise an otherwise unlawful action by the Appellant.
16. Accordingly, this Court upholds the judgment by the lower Court that the termination of employment of PW1 violated Sections 36, 41, 43 and 45 of the *Employment Act, 2007* and was unlawful and unfair. The cases relied on by the trial Court of *James Kabengi Mugo v Syngenta East Africa Limited* [2013] eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR were on point and relevant to the circumstances of this case.
17. The Court cannot also fault the terminal benefits granted by the trial Court in favour of PW.1 as against the appellant. This Court therefore upholds the award granted by the Court comprising one month salary in lieu of notice; payment in lieu of two years untaken leave and unpaid salary for March, 2018. However, the trial Court ought to have provided reasons as guided by Section 49(1) (c) read with subsection (4) of the *Employment Act* as to why the Court awarded the claimant the equivalent of eight (8) months' salary in compensation for the unlawful and unfair termination of employment. This Court has considered this aspect of the case and has considered that PW1 had served the respondent for a period of eight (8) years. That he had suffered work injury in the course of employment in respect of which he sued the Appellant.
18. That the Appellant instead of complying with *Work Injury Benefits Act* (WIBA) to have PW1 compensated for the work injury, obstructed PW1 from accessing justice and victimized PW1 by terminating his employment after attending a hearing of the suit. This is an aggravating factor relevant to this matter. The Appellant did not pay any terminal benefits to PW1 after verbally terminating his employment without notice. PW1 suffered loss and damage and had not obtained alternative employment at the time of the trial.
19. The Appellant did also not compensate PW1 for the loss of his employment unjustifiably. The case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited (supra)* is on point in this issue.
20. The Court upholds the award to PW1 (the respondent) herein of the equivalent of eight (8) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs 153,600.
21. In the final analysis, the appeal is dismissed in its entirety and the Court upholds the award by the trial Court to the respondent as against the Appellant in the sum of Kshs 218,800. The award is payable with interest at Court rates from the date of the judgment by the trial Court (17/7/2020) until payment in full. The appellant to meet the costs of the suit before the trial Court and this Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF JULY, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Kariuki for Appellant

Mr. Kamau for Respondent

Ekale: Court Assistant

