



BOM Our Lady of Lourdes Girls High School v Maina (Employment and Labour Relations Appeal E015 of 2022) [2023] KEELRC 2294 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2294 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E015 OF 2022
ON MAKAU, J
SEPTEMBER 29, 2023**

BETWEEN

THE BOM OUR LADY OF LOURDES GIRLS HIGH SCHOOL APPELLANT

AND

AGOSTINO KAGWANJA MAINA RESPONDENT

(Being an Appeal against the Judgment and decree of the Chief Magistrate Court at Nyeri delivered by Hon.Nelly Kariuki (PM) on 18th August, 2022 in Nyeri MCELRC No.11 of 2020)

JUDGMENT

1. The appellant employed the respondent as a teacher from 3rd July 2017 for a monthly salary of Kshs.27,000.00. In the month of October and November 2019, he was not paid his salary amounting to Kshs.54,000.00 and a misunderstanding arose between him and the school Principal On 28th November, 2019 he was invited by the principal to her office and he went believing that his salary issue would be settled. However, it turned out that he was being called to disciplinary hearing. The charges were strange to him. After fifteen minutes of interrogations by the respondent, he was served with a dismissal letter dated the same date.
2. The respondent was aggrieved by the said decision and filed suit against the appellant contending that the dismissal was unfair and sudden and prayed for compensation, salary in lieu of notice, salary arrears for October and November, 2019 and arrears for remedial tuition for the said two months. He also prayed for costs of the suit and interest. The respondent adopted his written statement as evidence in chief and produced four documents as exhibits. His statement was a reproduction of the averments in the statement of claim.
3. On cross examination he testified how on 27th November 2019, the principal called him over the phone and invited him to her office on 28th November, 2019 at 9AM. He honored the invitation thinking that his salary dispute which he had reported to the Labour officer on 15th November 2019 would be sorted



out. He waited outside the office up to 2PM when he was called in only to be told that the meeting was for disciplinary hearing against him. The charges were read to him but he denied all of them. He became aware of the allegations that day as he had not been notified of the same before. He was asked question for a period of 15 minutes and then he was given a termination letter which seemed to have written before the said proceedings. He denied that his daughter, had fees balance in the school as at the time she left the school in November, 2019.

4. The appellant was represented by one John Muchiri, a BOM member who testified as RW1. He also adopted his written as his evidence in chief and produced 7 documents as exhibits. He testified that the respondent had inappropriate relationship with school girls and gave them his phone to talk to outsiders, and that he also threatened the principal among other allegations. The meeting took place from 10.30AM and the respondent was present. Further that, the respondent admitted that he was dismissed by Teachers Service Commission (TSC) for allegations of inappropriate relationship with girls. He contended that the respondent never sought for time to prepare for disciplinary case.
5. RW1 further testified that the respondent was paid his remedial allowance of Kshs.3,000.00 for October 2019 and nothing for November, 2019 because he could not do remedial classes during examination time. Finally, he stated that the respondent's daughter had fees balance of Kshs.51,000.00 which was deducted from his salary for October and November 2019 plus his electricity bill.
6. After considering the evidence tendered, the trial court (Hon.N.Kariuki) concluded that the dismissal of the respondent from employment was not done in accordance with fair procedure and it was therefore unfair termination. The court observed that the procedure followed ought to be just and equitable. Further the court held that the respondent did not adduce evidence to prove that it gave the respondent notice of the pending disciplinary issue against him and therefore the disciplinary meeting was an ambush and a sham not done in good faith. As a result, the court awarded the respondent six months' salary as compensation for unfair termination, one month salary in lieu of notice, certificate of service, costs and interest.

The appeal

7. The appellant was dissatisfied and filed the Memorandum of Appeal dated 16th September, 2022 seeking to dislodge the said judgment on the basis of five (5) grounds which it compressed to three in its written submissions thus:-
 1. That the trial magistrate erred in law and in fact in finding that the termination of employment of the respondent by the appellant failed to meet the threshold required by section 41 of the *Employment Act* which finding is contrary to the evidence adduced during the trial.
 2. That the trial magistrate erred in interpreting section 41 of the *Employment Act* arriving at an erroneous finding that a notice before a disciplinary hearing was necessary in instances warranting summary dismissal.
 3. That the trial magistrate erred in law and in fact in departing from the parties pleadings specifically on the import of the disciplinary hearing conducted on 28th November 2019 and holding that the meeting was an ambush, sham and not done in good faith, the trial magistrate went beyond the matters pleaded by the respondent and answered by the appellant.
8. The appellant submitted that a notice before a disciplinary hearing is not a pre-requisite element under section 41 of the Employment Act. For emphasis it relied on my earlier decision in *Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited* (2022) KEELRC 1302 (KLR) (21st July 2022) judgment where the court held that service of a notice to show cause is not mandatory



unless it is provided under the contract of service, collective agreement or the employer's HR Policy and Procedures Manuals; and that all what matters is whether the employee is informed the reason upon which termination was being considered, and then he be availed opportunity to defend himself.

9. The appellant further submitted that the trial court departed from the parties' pleadings on the import of disciplinary hearing that was conducted on 28th November, 2019 to the disadvantage of the appellant. Specifically it faulted the trial court for making a conclusion that the disciplinary meeting was an ambush and a sham and was not done in good faith. Such conclusion was not based on the pleadings and evidence adduced during the trial.
10. Finally, the appellant submitted that the procedure followed before dismissing the respondent was fair and in line with section 41 of the *Employment Act*. It reiterated that the respondent was accorded a fair hearing on 28th November, 2019 as demonstrated by the minutes of the BOM meeting of that day. Consequently, it submitted that the dismissal was fair and the trial court erred in concluding that it was unfair.
11. The respondent opposed the appeal and submitted that his dismissal was unfair as it did not comply with section 41, 43 and 45 of the *Employment Act*. He contended that the allegations against him were not substantiated as no witnesses were called to testify against him in the disciplinary hearing. Further, he was not given fair hearing since he was not served with a show cause letter or notice of the charges prior to the disciplinary hearing on 28th November, 2019.
12. For emphasis he relied on the case of *Standard Group Ltd v Jenny Luesby* (2018) eKLR among other authorities to support his submissions.

Analysis and determination

13. This being a first appeal, my mandate is to re-evaluate the evidence on record in order to arrive at my own independent conclusions, of course bearing in mind that a finding of fact by the trial court ought not to be interfered with unless it was not founded on no evidence or it was reached after taking into account irrelevant factors or not taking into account relevant factors. Having considered the record of appeal and submissions filed, the main dispute revolves around procedural fairness before the dismissal of the respondent from employment on 28th November, 2019. Consequently, the issues for determination are:-
 - a. Whether the dismissal of the respondent was in accordance with a fair procedure.
 - b. Whether the damages awarded should be interfered with.
 - c. Who bears the costs of the appeal?

Procedural fairness

14. section 41 of the *Employment Act* provides that:-

“(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.”
15. The law requires that the employer explains the reasons upon which termination of services is being considered. The above provision does not expressly state whether prior notice is required. However, Article 47 of the Constitution read with section 4 of the Fair Administrative Actions Act require that the administrator ought to serve the person to the affected by administrative action with the reasons for the intended action and avail him an opportunity to be heard on the allegations. Such action reflects the tenets of the rules of natural justice and it is what is contemplated in section 41 of the Employment Act, as it also codifies the rules of natural justice.
16. Procedural fairness demands that an employee should ordinarily be notified of the allegations in advance, and depending on the circumstances of each case, that he is being subjected to disciplinary process. He should also be informed of his rights during the process including right to representation, right to make written defence; right to be present when witnesses tender evidence against him; right to cross examine the witnesses; and the right to make oral representations in his defence and to call witnesses and right of appeal. Such rights are usually amplified in the employer’s HR Policies and Procedures Manuals.
17. In the instant case, the unrebutted evidence by the respondent is that, on 27th November, 2019 the school Principal called him through phone call and invited him to her office the following day at 9AM. The agenda was not disclosed and according to the respondent he believed that his grievance about withheld salary was going to be sorted out. However, after being kept waiting up to 2 PM, he was shocked to be told that he was being called for disciplinary hearing. The allegations against him were never communicated to him earlier.
18. For 15 minutes he was taken through questions by the BOM members in a process which he described as sudden and unfair. The trial court agreed with the respondent and made a finding of fact that the procedure followed was not fair as the respondent was ambushed and no prior notice was served. The said conclusion was based on the evidence adduced that the disciplinary proceedings were an ambush and unfair. I totally agree with the trial court.
19. To begin with, the minutes of the BOM held on 28th November, 2019 sets out the Agenda on page 1 including Agenda No.2 as
- “Proposal to give a hearing to Mr.Agostino Maina on the following allegations:-
- i.”
20. The said agenda obviously confirms that it was a proposal to accord a hearing to the respondent and therefore no hearing was to be conducted until the proposal was deliberated and agreed upon. It means that the principal had invited him prematurely in the hope that the proposed hearing would be approved by the BOM. This corroborates the respondent’s evidence that he was kept waiting up to 2pm before he was ushered into the meeting.
21. The question that arises is why did the appellant not alert the respondent the previous day or at least when he arrived at the office at 9AM that he was there for disciplinary hearing and serve him with the allegations to prepare for the hearing and even to call another employee or witnesses to the hearing?



Having considered the totality of the evidence on record, it is manifestly clear that the fair procedure was not followed before dismissal of the respondent from service as it was not done in accordance with equity and justice as required by section 45 (2) of the *Employment Act*.

22. The facts of this case are distinguishable from the case of *Kenya Plantation and Agricultural Workers Union v Eastern Produce (K) Limited, supra*, because the employee in that case was contending that the procedure followed was unfair because he had not been served with a show cause notice before the disciplinary hearing. In the judgment the court held that service of a show cause notice was not a mandatory requirement unless provided for under the employees contract, collective agreement or employers HR Policy Manual. The court further clarified that all what is required is that the employee should be informed of the reasons for the intended termination, and then be given an opportunity to defend himself of the allegations.

Damages awarded

23. The trial court awarded the respondent one month salary in lieu of notice and six months' salary as compensation for unfair termination. No reasons were cited to justify the said award. Section 49 (4) of the *Employment Act* provides for the factors to be considered in deciding what relief to award under section 49 of the *Act*.
24. It is a well settled principle of law that a discretion award by a trial court will be disturbed on appeal if it is shown that it was based on no evidence, or if it was reached without considering relevant factors or irrelevant factors were taken into account. In this case an award of six months' salary was a mere pronouncement. The court ought to have given a justification for the award..
25. Consequently, I reduce the award to three months because the respondent served for just two years period. Secondly, the trial court, formed opinion that the allegations against the respondent were valid and they justified termination of employment. Had the trial court taken into account the said relevant factors provided under section 49 (4) of the *Act*, he would not have arrived at the same award which in the circumstances is manifestly excessive.
26. The award of one month salary and certificate of service are not disturbed since they are contractual benefits anchored on the *Employment Act*. I will also not interfere with the award of costs and interest. However, I direct the award of damages shall be subjected to statutory deductions.

Costs of the Appeal

27. Since the appeal has partially succeeded, I award no one costs of the appeal.

Conclusion

28. I have found that the trial court was right in concluding that the dismissal of the respondent was unfair because fair procedure was not followed. I have further found the discretionary award of compensation for unfair termination was arrived at without taking into account relevant factors as set out under section 49 (4) of the Employment Act and proceed to interfere with it. Consequently, I allow the appeal to the extend stated above, set aside the impugned judgment and substitute therewith, the following orders:

- a. The appellant to pay the respondent:-
- i. Notice.....Kshs.27,000.00
 - ii. Compensation.....Kshs.81,000.00



- b. Appellant to issue the respondent with certificate of service.
- c. Costs and interests as ordered by the lower court are not disturbed.
- d. The award in (a) is subject to statutory deductions.
- e. Each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

