



REPUBLIC OF KENYA



**Nyanchoka v Saab (K) Limited (Employment and Labour Relations Appeal E018 of 2022) [2023] KEELRC 2296 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2296 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E018 OF 2022  
ON MAKAU, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**JOHN NYANGAU NYANCHOKA ..... APPELLANT**

**AND**

**SAAB (K) LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and decree of Honorable B.Mararo, Principal Magistrate in Nanyuki ELRC No.8 of 2019 delivered on 27th September, 2022)*

**JUDGMENT**

1. The appellant was employed by the respondent on 1<sup>st</sup> April, 2010 as a contractor logistics support and rose through the ranks to become Field Team Site Management System Assistant earning Kshs.78,143.00. On 30<sup>th</sup> April, 2018 he was served with a show cause letter and on 8<sup>th</sup> May he attended disciplinary hearing. On 11<sup>th</sup> May, 2018 his services were terminated summarily. He appealed against the dismissal but the same was dismissed.
2. He filed suit alleging that his dismissal was unfair and unlawful and sought damages amounting to Kshs.1,655,294.00 plus costs and interest. The respondent filed a response admitting that it had employed the appellant between 2010 and 2018 but it dismissed him for failure to perform his duties together with 14 other employees on 7<sup>th</sup> and 8<sup>th</sup> March 2018 which amounted to a fundamental breach of his contract of employment. As a result he was served with show cause letter and thereafter summoned to a disciplinary hearing. The said process ended with his summary dismissal on 11<sup>th</sup> May 2018 and signing of an agreement that Kshs.49,863.00 was the only terminal dues payable to him.
3. The suit went to full hearing and both sides gave evidence. The appellant testified as PW1. He adopted his written statement dated 20<sup>th</sup> February, 2019 and 26 documents as his evidence. He testified that, on 7<sup>th</sup> March 2018, he reported to work at Archers post at 7.30am and worked until 8.00pm. His work



was to establish a camp, prepare stores and prepare equipment for collection. He was then to be on duty the following day from 6.00am.

4. He contended that his dismissal was unlawful. He further contended that his complaint about house allowance was disregarded by the employer after his contract was amended. Upon cross examination, he admitted that he refused to work extra hours on 7<sup>th</sup> March 2018 though in his contract he had agreed to work extra hours. He admitted that on the said date, they were to work in 30 minutes shifts. He contended that it was unreasonable to work from 7.30am to 9.00pm and be required on duty at 6am the next day. He further admitted that the equipment in issue was very expensive.
5. He admitted that he was served with show cause letter and thereafter accorded a hearing before the summary dismissal. He also admitted that he received his final dues.
6. The respondent was represented by its HR Manager Mr.Trashy Juma who testified as DW1. He adopted his written statement dated 4<sup>th</sup> November, 2018 and produced 12 documents as exhibits. He then testified that on 7<sup>th</sup> March 2018, the respondent provided British Army with equipment and it was also to provide security for the equipment before they started execution.
7. A team was organized to work in shifts but all the employees refused. As a result they were served with show cause letter and thereafter they were invited to disciplinary hearing on 2<sup>nd</sup> May 2018. They had the right to be accompanied by fellow employee to the hearing. They attended the hearing and the appellant cross examined Mr.Sean who was the accuser. The appellant understood the charges and he had ample time to respond. Thereafter he appealed against the dismissal and the appeal was heard and a decision conveyed.
8. On cross examination DW1 admitted that the accuser Mr.Sean, also sat in the disciplinary hearing to judge the appellant. He further admitted that the appellant's pay slip indicated union dues deduction. He contended that out of the 15 employees who refused to work only 4 were dismissed including the appellant. He contended that the four were the ring leader and they were vocal and argumentative. Finally he admitted that the appeal against the dismissal was determined by the Managing Director instead of a panel. He confirmed that there were no minutes for the appeal hearing.
9. After considering the evidence presented by the two sides the trial court rendered his decision on 27<sup>th</sup> September 2022 in which he concluded that the appellant had failed to discharge the burden of proof of unlawful dismissal as provided under section 47 (5) of the [Employment Act](#). In the end the trial court dismissed the appellant's suit.

### **The appeal**

10. The appellant was aggrieved by the said decision and appealed to this court on the following grounds:
  1. That, the learned Trial Magistrate erred in making a finding that the Appellant's termination from employment was procedurally and substantively fair.
  2. That, the learned Trial Magistrate erred in failing to appreciate the Respondent breached the principles of natural justice in the process leading to termination of the Appellant's employment.
  3. That the learned Trial Magistrate erred in making a finding that the Appellant was not discriminated against leading to termination of this employment.
  4. That the learned Trial Magistrate made a determination by relying on a manual provided by the Respondent and disregarding a manual provided by the Appellant.



5. That the learned Trial Magistrate erred when he held that the Appellant's termination was based on good cause as provided under section 41 of the [Employment Act, 2007](#).
6. That, the learned Trial Magistrate erred in failing to consider both factual and legal consideration for termination of Employment thus arriving at a faulty finding.
7. That the learned Trial Magistrate erred when he failed to find that the Appellant was entitled to the reliefs sought.
8. That the judgment was based on faulty appreciation of the law.

### **Submissions**

11. The appellant argued ground 1, 4, 5 and 6 together and the rest separately. On the first ground, he submitted that the reason for the dismissal was not valid and the court merely relied on the termination letter dated 11<sup>th</sup> May 2018. He contended that the letter was not in harmony with the proceeding of the disciplinary hearing and as such there was no valid reason for termination established before the trial court.
12. Further, he submitted that the trial court failed to consider that the accuser, also sat as a panelist during the disciplinary hearing. He also submitted that he was denied representation and the right to a companion and witness to the disciplinary hearing since all the 15 employees were charged.
13. While admitting that he was notified of the charges against him, he submitted that he was not supplied with or shown the investigation report. He further faulted the trial court for applying the HR Manual produced by the respondent to hold that the Managing Director was the proper person to hear and determine the appeal against dismissal. He submitted that the Managing Director was not allowed to determine the appeal alone but in a panel.
14. In view of the matters above, the appellant submitted that his dismissal from employment was unfair and in breach of the rules of natural justice. He cited the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR*, *Anthony Mkalla Chitavi v Malindi Water & Sewerage Co.Ltd (2013) eKLR* and *Egal Muhamed Osman v Inspector General of Police & 3 others (2015) eKLR* where the court upheld the tenets of fair termination of employment and rules of natural justice.
15. As regards the 5<sup>th</sup> ground of the appeal, the appellant maintained that he was discriminated by being handpicked from the 15 employees who allegedly had done the same breach. He submitted that the reason for the dismissal was because he was vocal member of the group and therefore a ringleader. He further submitted that he was never given a chance to defend himself of the said allegation.
16. Finally, the appellant submitted that the trial court erred when he concluded that he was not entitled to the reliefs sought in the suit. He urged this court to find that he had proved his case on a balance of probability and thus entitled to the relief sought in the lower court.
17. The respondent argued ground 1, 4, 5, 6 and 7 of the appeal together and the rest separately. On the first ground, the respondent submitted that position advanced by the appellant in his appeal is misleading. It referred to page 95 of the record of Appeal to urge that there was a valid reason for the dismissal, namely refusal to work extra time. It submitted that the appellant confirmed during the hearing before the trial court that his contract of service provided for working extra time where necessary for no extra pay. The respondent further submitted that the appellant admitted during cross examination (page 65 of the record) that he refused to work for extra 30 minutes shift on the material date.



18. The respondent further submitted that the request for extra hours of work was in line with section 27 of the *Employment Act* and the trial court was right in finding that the reason for the termination was valid. Consequently, the respondent maintained that the reason for the dismissal was valid since the appellant refused to do his work and was the most vocal of his colleagues.
19. The respondent further submitted that the procedure followed before dismissing the appellant was fair because he was taken through a disciplinary hearing as required by the HR Manual and Section 41 of the *Employment Act*.
20. As regards breach of the rules of natural justice, the respondent acknowledged that its witness admitted that the appellant was not given the right to fair hearing. However, it averred that the appellant never raised any complaint on the procedure when Mr. Sean Rourke sat in the panel for the disciplinary hearing. Further, Mr. Sean was not the only one who sat to hear the case but a panel of several members. It was also submitted that the proceedings show that Mr. Sean's role at the hearing was investigator.
21. As regards representation at the disciplinary hearing, the respondent submitted that the trial court rightly found that the appellant was given the right to bring a representative as required under section 41 of the *Employment Act*. Consequently, it is the respondent's case the allegation that the appellant was denied right to call fellow employee or union official during the disciplinary hearing was just an afterthought. For emphasis, reliance was placed on *Judith Brenda Onyango v Sanlam General Insurance Limited (2020) eKLR* where I made a finding that fair procedure had been followed before the dismissal of the claimant.
22. As regards the failure to supply the investigation Report to the appellant, the respondent submitted that, the appellants never requested for the same and never showed how he was prejudiced. For emphasis, reliance was placed on *Peter Mbithi Mutia v Jubilee Insurance Company of Kenya Ltd (2020) eKLR*.
23. With respect to the alleged discrimination, of the appellant on ground of race, and membership to a trade union, the respondent submitted that the trial court was right in concluding that the alleged discrimination had not been substantiated. For emphasis reliance was placed on the decision by the Supreme Court in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) eKLR* where discrimination was dealt with.
24. Finally, the respondent submitted that the trial court correctly heard that the HR Manual on page 125 of the record of appeal gave the Managing Director the power to determine whether or not an appeal would go to hearing. It was argued that the Managing Director has a discretion on the matter of constituting a panel to hear an appeal, and therefore the trial court was right in upholding the said discretion in the impugned judgment.

### **Analysis and determination**

25. My role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach my own conclusion. However, I am conscious that I did not have the benefit of observing the witnesses as they testified. Further, I ought not to interfere with findings of fact by the trial court except if such findings are not based on evidence or principle of law or were reached in consideration of irrelevant factors, or without taking into account relevant factors.
26. I have considered the record of appeal and the rival submissions filed. The issues for determination arising from the appeal are:-
  - a. Whether the reason for dismissal of appellant was valid and fair



- b. Whether a fair procedure was followed
- c. Whether the appellant is entitled to the reliefs sought in the suit.

### **Reason**

27. Section 43 of the *Employment Act* provides that in any suit challenging termination of employment, the employer has the burden of proving the reason. Section 45 (2) of the *Employment Act* provides that

- “(2) A termination of employment by an employer 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.”

28. In this case the reasons for dismissal as captured in the dismissal letter dated 11<sup>th</sup> May, 2018 are:-

- a. Admission by the appellant before the disciplinary committee that he exchanged words with his supervisor and refusal to accept and follow instructions, and failure to perform duty assigned.
- b. Admission by the appellant before the disciplinary committee that it was within his rights to refuse to work and follow instructions by his supervisor.
- c. Willful neglect and disrespect by the appellant by refusing to perform assigned duty.
- d. The appellant took a position that made all the other staff to refuse to work until the matter was resolved.
- e. The appellant’s position caused the dispute to get out of hand.

29. I have considered the evidence on record and it is clear that indeed the appellant admitted before the disciplinary committee that he had indeed refused to work extra time after 9.00pm. He explained that he started working on the material day at 7.30am and as late as 8.00pm he was still working. He explained that he was already tired and on the following day, he was expected to start work at 6.00am. The work he and his colleagues were being given to do was to guard the expensive material they had assembled for work the following day.

30. A couple of observation arises from the dispute between the appellant and his supervisor. First, the duty assigned was of a watchman and not in line with the appellant’s work of a technician. Two, the respondent had the opportunity of securing another person to do the work of guarding the expensive items at night. Three, the extra work of guarding the items was not for any pay. Four, the appellant had worked for over 12 hours continuously and he needed to sleep and to re-energize for the following day’s work. Five, the circumstances of the case required consultation with the claimant and not a unilateral decision by the supervisor since the assigned work was beyond the scope of his employment contract.



31. In view of the above observations, I find that the reason for dismissing the appellant was not only invalid but also unfair with respect to the night of 7<sup>th</sup> March, 2018. First he did not absent himself from his place of work since it is clear from the record that he did his work as a technician up to late in the evening and rested to start his duty again the following day at 6 am. Second, he never neglected or failed to perform work which was within his scope of his employment contract.
32. However, I am satisfied that the failure by the appellant to report to work on 8<sup>th</sup> March, 2018 was an offence under section 44(4) (a) and (c) of the *Employment Act* and the employer was justified to dismiss him summarily. He fundamentally breached his contract of service by absenting from the place assigned to discharge his duties without permission or lawful cause, and secondly by refusing or neglecting to perform duties which was his duty to perform under his contract of service. To that extent I find and hold that the trial court was right to find that the reason for dismissing the appellant was valid.

### **Procedure**

33. 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.”
34. In this case there is evidence that the appellant was served with show cause letter and thereafter a letter inviting him to a disciplinary hearing. The letter is dated 2<sup>nd</sup> May, 2018 and it allowed him to call any colleague from the company as a witness during the hearing. The hearing was held on 8<sup>th</sup> and 9<sup>th</sup> May, 2018 and the appellant was heard. His representations are on page 95 of the record of appeal. Thereafter the appellant was served with the dismissal letter dated 11<sup>th</sup> May, 2018 which conveyed the decision of the disciplinary committee.
35. The appellant exercised his right of appeal but the appeal was not successful based on the grounds that he and other colleagues refused to perform their duties.
36. Having considered the evidence on record, I am satisfied that a fair procedure was followed before the dismissal of the appellant. He was informed of the misconduct alleged against him and he was given a fair opportunity to defend himself in writing and later orally before a committee as required by section 41 of the *Employment Act*.

### **Reliefs**

37. In view of the finding above that the dismissal of the appellant was substantively and procedurally fair, I agree with the trial court in its decision that the appellant was lawfully dismissed and he is not entitled to the reliefs sought. Consequently, I dismiss the appeal with costs.



**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 15<sup>th</sup> 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**

