



**University of Nairobi v Sifuna (Appeal 22 of 2020)
[2023] KEELRC 2258 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2258 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 22 OF 2020
NJ ABUODHA, J
SEPTEMBER 29, 2023**

BETWEEN

UNIVERSITY OF NAIROBI APPELLANT

AND

GEORGE MABELE SIFUNA RESPONDENT

(Being an appeal from the judgment, orders and decree of Hon. Andayi W. Francis (CM) issued in Chief Magistrate's Court at Milimani CMCC No. 6142 of 2004 George Mabele Sifuna–vs- University of Nairobi issued on 14th January 2016)

JUDGMENT

1. Through the Memorandum of Appeal dated 10th February 2016, the Appellant appeals against the Judgment of Honourable Andayi W Francis (CM) delivered on 14th January 2016 in Milimani CMCC No. 6142 of 2004 (George Mabele Sifuna v University of Nairobi).
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred both in law and fact in holding that the court had jurisdiction to hear and determine the matter when clearly the matter fell within the jurisdiction of the Industrial and labour Relations Court established under Article 162(2) (a) of the *Constitution* of Kenya.
 - ii. The Learned Magistrate erred both in law and fact in determining matters neither specifically pleaded nor evidence led on during hearing.
 - iii. The Learned Magistrate erred both in law and fact in holding that whereas the Respondent's employer was the Appellant's Council the terms of service applicable to him are those of the Public Service Commission a position that is not known to law.



- iv. The Learned Magistrate erred both in law and fact in holding that the Respondent's retirement on medical grounds was procedurally wrong contrary to the uncontroverted evidence adduced by the Appellant.
 - v. The Learned Magistrate erred both in law and fact in failing to take in to account the evidence on record in totality prior to arriving at a decision that was manifestly wrong and unjust.
 - vi. The Learned Magistrate erred both in law and fact in granting reliefs not specifically pleaded and proved as by law required.
 - vii. The Learned Magistrate erred both in law and fact by failing to appreciate the facts of the case, the issues for determination, evidence on record and the viva voce testimonies of the witnesses and therefore arriving at a decision was manifestly wrong and untenable in law.
3. The Appeal was disposed of by written submissions.
 4. The Appellant in its submissions dated 28th April, 2023 submitted on the duty of first appellate court that is, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the Appeal. Counsel relied on the case of *Selle & another v Associated Motor Boat Co. Ltd & others*.
 5. The Appellant proposed to cluster the grounds of Appeal to three, that is jurisdiction of the lower court, Procedure for termination and reliefs sought, proved and granted.
 6. On the issue of the jurisdiction of the lower court the Appellant submitted that the lower court did not have jurisdiction to hear and determine this matter as it fell under Section 12(1) of the [Industrial Court Act](#) and that once the Act came in to force on 30th August, 2011 the lower court jurisdiction was ousted.
 7. The Appellant relied on the cases of [Phoenix of E.A Assurance Company Limited vs S.M Thiga t/a Newspaper Service](#) (2019) eKLR and [James Kinyua v University of Nairobi](#) (2011)eKLR.
 8. On the issue of Procedure for termination the Appellant submitted that the learned Magistrate erred in finding that the Respondent's termination was wrongful for being procedurally flawed and that the Respondent was terminated on account of mental illness which rendered him incapable of discharging his duties.
 9. The Appellant submitted that the Learned Magistrate relied on Respondent's Submissions disregarding the evidence on record by the Appellant and relied on the case of [Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another](#) (2014)eKLR that submissions do not take place of evidence.
 10. On the issue of reliefs sought, proved and granted the Appellant submitted that the learned magistrate erred in law and in fact in determining matters neither specifically pleaded nor evidence adduced and therefore arriving at a manifestly wrong and unjust decision.
 11. The Appellant challenged the award of Kshs 3,240,000/- in terminal dues up to the age of 60 years the Respondent was to retire and challenged how the same was computed.
 12. The Appellant submitted that the Respondent in any event the court finds he was unfairly terminated he is entitled to Kshs 384,000/- as damages for wrongful termination.
 13. The Appellant relied on the case of [Postal Corporation of Kenya v Andrew K. Tanui](#)(2019) eKLR to submit that the Respondent was not entitled to maximum compensation of 12 months.



14. On the other hand, the Respondent filed his submissions dated 19th June, 2023 and submitted on the role of the first appellate court as stated above and relied on the above case of Selle.
15. The Respondent also grouped the grounds in to the three clusters same as those of the Appellant.
16. On the Issue of jurisdiction the Respondent submitted that the lower court had jurisdiction to hear and determine this matter as by the time the Industrial court came in to operation in 2011 the matter was already partly heard in the lower court.
17. It was the Respondent's Submission that the Appellant filed a preliminary Objection at the trial court and after hearing both parties the trial court dismissed the preliminary objection with costs to the Plaintiff and that the trial court reasoning was that the matter had already significantly progressed and partly heard.
18. The Respondent relied on Article 1622(a) and 3 and transitional provision in section 22 of the 6th Schedule and submitted that the case could only be heard by the court it existed since it was filed in 2004 and this court was established by an act of parliament in 2011 when the case was partly heard.
19. The Respondent relied on the case of *Paul Etemesi & 11 Others v Executive Council Church of God in East Africa (Kenya) & 2 Others* (2017) eKLR to submit that the trial court had jurisdiction to conclude pending matters.
20. On the Procedure for termination the Respondent submitted that the termination was wrongful for being procedurally flawed.
21. The Respondent relied on the case of *Nyamodi Ochieng Nyamogo vs Telkom Kenya Limited* (2012) eKLR to submit that the Respondent was to be retired as per applicable laws in this case the letter of appointment and the *Public Service Commissions Act* now repealed and Public Service Commission Regulations 1965.
22. It was the Respondent's Submission that the authorized officer as per the terms and conditions of service was the council as held by the trial court and considered that the medical board was illegally constituted hence the proceedings leading to the recommendation of retirement of the Respondent on medical grounds was procedurally flawed hence null and void.
23. It was the Respondent's submission that no minutes of the council were filed in court to confirm resolutions of the council to retire the Respondent on medical grounds and that the communication was unilaterally from the Deputy Vice Chancellor not the University council. On this issue of the power of the University Council the Respondent relied on the case of *Republic vs Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries* JR (2018).
24. It was the Respondent's submission that he was not afforded an opportunity to attend and present his case and/or be represented before the decision to terminate him was reached and if at all he was not fit to perform his obligation as alleged the Appellant, how come the Appellant retained his services over 12 years from 22nd May, 1990 to 4th July, 2002.
25. The Respondent relied on the cases of *Felix Mutie Musango v Tin Can Manufactures Limited* (2020) eKLR and *Ayub Imbira v Teachers Service Commission* (2018) eKLR to submit on fair procedure under Section 41 of the *Employment Act*.
26. On the third issue of reliefs sought, proved and granted the Respondent submitted that since he was submitted to unfair and unprocedural process it goes that his termination was wrongful and hence he was entitled to damages and reliefs he was seeking.



27. The Respondent relied on the case of *Gad David Ojwando versus Prof.Nimrod Bwibo Chairman Maseno University and Another* Kisumu CA No.336 of 2005, *Kenya Ports Authority vs Silas Obengele*(2008) eKLR, *Joseph Sitati Nato vs Kenya Ports Authority*(2010) eKLR and the Nyamondi's case above to submit on his entitlement to damages until the date he was to retire in which case he was retired at 46 years when he would have worked to 60 years.
28. The Respondent finally submitted that since the Respondent was allowed leave to enjoy part of the judgement sum of Kshs 1,620,000/= which is half of the decretal sum then the Appeal should be dismissed and he enjoys his other half of decretal sum although this has taken over 22 years in court.

Analysis & Determination

29. The duty of a first appellate court was well stated in the Court of Appeal in *Selle vs Associated Motor Boat Company Limited* [1968] EA 123 thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, 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 or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
30. In determining the Appeal herein, this Court shall similarly seek to reanalyze the evidence tendered before the Trial Court vis-à-vis the court's conclusion and disposition.
31. In this case, the judgment of trial court was as follows
 - a. A declaration that the Defendant's termination of the Plaintiff's employment was wrongful for being procedurally flawed.
 - b. Terminal benefits to be calculated in line with the terms of service in force when the Plaintiff would have attained 60 years of age.
 - Salary for 4 days worked in July, 2002 Kshs 4,267/= less statutory deductions.
 - c. Damages for wrongful termination Kshs 3,240,000/= less statutory deductions.
 - d. Pension Benefits.
 - e. Costs of the suit.
32. From the grounds in the memorandum of Appeal and pleadings of the parties three major issues arise for determination.
 - a. Whether the trial Court had jurisdiction to hear and determine this matter
 - b. Whether the Appellant followed the fair procedure in terminating the Respondent's Employment
 - c. Whether the Respondents is entitled to the reliefs sought, proved and granted.



a. Whether the trial Court had Jurisdiction to hear and determine this matter.

33. It is noted that the hearing of witnesses in this matter from the attached proceedings kicked off on 20th October, 2010 and the Industrial Court became operational by an Act of Parliament in 2011. This then meant that by the time the Industrial Court became operational the matter was already part heard. The transitional regulations under section 22 on the Sixth Schedule of the Constitution provides that those matters would proceed in the trial court up to conclusion without interfering with them. In this regard the trial court had jurisdiction to hear and determine this Matter. This finding is in line with the case of Paul Etemesi & 11 others (suing of their own behalf and on behalf of the members of the Local Congregation of Buruburu Community Centre Church of God in East Africa (Kenya) v Executive Council Church of God in East Africa (Kenya) & 2 others [2017] eKLR relied on by the Respondent where the court held that the Transitional and consequential provisions of the Constitution were not subsidiary provisions of the Constitution and the courts retained residual jurisdiction to conclude any pending issues if at all between parties as the suit arose prior to 27th August, 2010. This ground of Appeal therefore fails.

b. Whether the Appellant Followed the Fair Procedure in Terminating the Respondent's Employment

34. The Court agrees with the trial court that the reason for termination of the Respondent's employment due to ill health was a reasonable one bearing in mind the reports of his violent actions to his fellow employees in all the departments he worked with the Appellant and the fact that his brother Lawrence Sifuna intervened in different scenarios to restrain the Appellant from undertaking disciplinary action against the respondent for his conduct and told the Appellant's officers of his mental issue.
35. Even though the medical examinations done later when the matter was in court stated he was mentally okay, the Court will go with the medical examinations before the matter was filed and the fact that the Respondent was mostly on sick leave which he took without any opposition from the respondent.
36. In addition the respondent did not call his own independent doctor to dispute or challenge the Appellant's doctor who examined him during the hearing of the case before the trial court.
37. The Respondent therefore cannot come later to challenge a process which he willingly took part in all along without disputing. This ground of Appeal therefore succeeds.
38. Regarding procedural fairness, it was held in the case of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR that for termination to pass the fairness test, it must be shown that there was not only substantive justification for termination but also procedural fairness.
39. The Respondent was retired from employment on medical grounds which reason the Court has found as above to be a valid one since any reasonable employer would do the same as the Respondent had become a threat to fellow employees and was therefore not fit to continue working.
40. In order to analyze the procedure employed by the Appellant to retire the Respondent on medical grounds it is important to bring out clearly the law which was applicable between the parties.
41. I agree with the trial court findings that the applicable law in this case was the terms of employment contained in his letter of appointment dated 27/05/1990. These were Appellant's Terms of service for staff in the Senior Clerical, Administrative and Technical Grades and the Public Service Regulations under service Commissions (Act Cap 185) Laws of Kenya (Now Repealed).



42. The trial court noted that the parties did not produce the terms of service during hearing but the same were produced by the Respondent's counsel on his submissions.
43. The Appellant argued that submission should not override evidence produced in court. The Court is of the opinion that the said terms bound the parties and even if they were not produced during hearing they existed before the hearing and it was even the obligation of the Appellant to produce them since they were his. The Appellant referred to the same terms in his letters to the Respondent for example the letters terminating his services and the medical board reports even though the said terms did not provide for the procedure to be followed.
44. The trial court relied on provisions of *Public Service Commission Regulations, 1965* made under Section 3 of the Service Commission Act (now repealed) which the court noted the Appellant had not objected to their applicability even though in this appeal the Appellant had objected to their applicability without giving the court the applicable law.
45. The Court therefore finds that at the material time the applicable law for any public servant was *Public Service Commission Regulations, 1965*. Under section 19, the regulations they provided for retirement on grounds of ill health and the authorized officer under those regulations applicable to the respondent was the Council.
46. The trial court also relied on section 15(1) of the *University of Nairobi Act (Cap 210) Now Repealed* which provided for control and administration of the University to be vested in the council. In addition, according to the terms of service cited earlier Clause 6(c) the council determines if an employee is in any physical or mental incapacity which the council shall deem to be such as to render the person concerned unfit to hold office”
47. From the reading of the Section 19 of the regulations the Medical Board was to be appointed by the Chief Medical Officer to ascertain and examine if the Public officer is incapable of working and the chief medical officer was to forward to the medical board proceedings together with his comments.
48. In this case the Appellant set up its own medical board without involving the chief medical officer.
49. The letter retiring the Respondent does not mention the council anywhere yet the letter of appointment stated that it was the Council that appointed him. Further the Appellant did not attached any minutes or resolutions to retire the Respondent on medical grounds after the Medical boards recommended the Respondent be retired. The Court therefore agrees with the trial court finding that the Appellant's termination of the Respondent's employment was procedurally flawed however the Court takes the view that the omission did not occasion the respondent any prejudice since it had become inevitable that the respondent could no longer work due to his mental condition.

Whether the Respondent is entitled to the reliefs sought, proved and granted

50. It was the Appellants case that the Learned Magistrate erred in law and fact in determining matters that were neither specifically pleaded nor evidence adduced in respect thereof and that the award of Kshs 3,240,000/- up to the retirement age of 60 years, was excessive. This was the position in *Nyamodi Ochieng Nyamogo v Telkom Kenya Limited [2012] eKLR* where the Plaintiff was retired at 45 years and pleaded the remainder of the 9 years plus 9 months up to the age of 5 years when he would have retired and the court awarded him the same.
51. It was the Appellant's case that it had been punished for something it had no control yet it is the Respondent's ill health which made his services to be terminated and awarding him salary to the age of 60 years had no basis in law. In this regard the Court agrees with the Appellant that this award was



not only excessive but lacked any legal basis. In any event, employment contract is not servitude and any party to it can at any time terminate the same for any reason. Further other vagaries of life such as death or illness as is the case here can bring it to an end. The Court further notes that the cause of action herein accrued in 2002 when the applicable law was the repealed *Employment Act* (cap 226). Under that Act the remedy of reinstatement was not available and further that the maximum amount of compensation for wrongful dismissal or unfair termination was the salary or wages equivalent of the notice period which could have been given had the employment been terminated normally. This ground of Appeal therefore succeeds.

52. In conclusion the Court hereby allows the Appeal and substitutes the order of the Trial Court entering Judgment against the Appellant with an order dismissing the suit in the Trial Court.
53. Considering the nature of the claim and the circumstances under which the respondent left employment, the Court will order that each party bears their own costs of the Appeal.
54. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023

DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2023

ABUODHA JORUM NELSON

JUDGE

