



REPUBLIC OF KENYA



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Hoka v Board of Management Manyoni Girls Secondary School & another (Appeal E014 of 2022) [2023] KEELRC 2123 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2123 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E014 OF 2022
CN BAARI, J
SEPTEMBER 21, 2023

BETWEEN

CYNTHIA HOKA APPELLANT

AND

**BOARD OF MANAGEMENT MANYONYI GIRLS SECONDARY
SCHOOL 1ST RESPONDENT**

SETH ONZERE 2ND RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. Z. J. NYAKUNDI
(SPM) delivered on 9th June, 2022 in Butali SPM ELRC NO. 18 OF 2020)*

JUDGMENT

1. This appeal arises from a Judgment rendered on June 9, 2022, where the Trial Court held that the Appellant herein had failed to prove her case on a balance of probability, and proceeded to make an award for leave allowance, while dismissing the other reliefs sought.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on June 27, 2022.
3. The appeal is premised on the grounds THAT:
 - i. That the Learned Trial Magistrate erred in law and fact in failing to consider, evaluate and take into account the evidence and submissions of the Appellant hence a dismissal of the claim in the circumstances.
 - ii. That the Learned Trial Magistrate erred in law and in fact in believing the Respondent's documents without interrogating the Appellant on the same.



- iii. That the Learned Trial Magistrate erred in law and in fact in holding that the Appellant was informed of the charge she was facing and accorded an opportunity to defend herself when it was not so.
 - iv. That the Learned Trial Magistrate was misled and failed to analyze sections 41, 42, 44 and 45 of the *Employment Act* vis a vis the Appellant's case.
 - v. That the Learned Trial Magistrate erred in law and fact in believing that the Appellant released money without authorization, failed to hand in daily collections and shortage of a cash flow of Kshs 25,000 when such facts were not substantiated at all.
 - vi. That the Learned Trial Magistrate put upon himself into arguing the Respondent's case without giving the Appellant the benefit of challenging the documents purported to have been filed in support of their case.
 - vii. That the Learned Trial Magistrate erred in law and fact in failing to analyze and consider the authorities cited by the Appellants, hence the erroneous judgment award.
 - viii. That the Learned Trial Magistrate erred in law and fact in basing his decision on wrong principles of law thereby dismissing the Appellant's claim without any legal basis and or any explanation of how the same was reached at.
 - ix. That the Learned Trial Magistrate erred in law and fact as he misapplied the law on Employment and termination of employment.
 - x. That the Learned Trial Magistrate erred in law and fact in failing to consider the whole claim of the Appellant as presented, the issue of sexual harassment was not determined hence erroneous judgment.
4. Submissions on the appeal were filed for the Appellant. The Respondents did not file submissions.

The Appellant's Submissions

- 5. It is the Appellant's submission that the Trial Court relied on the letter dated November 11, 2019, and the letter dated October 31, 2019 to verify that she was informed of the charges against her and accorded an opportunity to defend herself, yet the court did not confirm if the said the letters were received by the Appellant. The Appellant had reliance in *Des Raj Sharma v Reginam* (1953) 19 EACA 310 to support this position.
- 6. The Appellant further sought to rely in the Nigerian case of *Michael Husa v The state* (1994) 7-8 SCNJ 144, for the holding that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the documents as evidence.
- 7. It is the the Appellant's submission that the Respondent's documents were never marked and were of no effect for reason that they were not produced before court. She further submits that the trial court erred in believing the Respondent's documents without interrogating the Appellant on the same.
- 8. It is her submission that she was not given a reason for dismissal and did not appear before any committee in respect of her work which was contrary to provisions of the *Employment Act* No 7 of 2007. She sought to rely in the case of *Mary Chemweno v Kenya Pipeline company Limited* (2014) eKLR to buttress this position.



9. The Appellant submits that the trial court did not make a determination on the issue of sexual harassment by the 2nd Respondent, and that she is entitled to damages for sexual harassment.
10. The Appellant prays that her appeal be allowed with costs and the lower court decision set aside and judgment entered in her favour.

Analysis and Determination

11. I have considered the Appellant's Record of Appeal, and her submissions. The grounds of appeal are summarized as follows: -
 - i. That the learned trial Magistrate put upon himself into arguing the Respondent's case without giving the Appellant the benefit of challenging the documents purported to have been filed in support of the case.
 - ii. That the learned trial Magistrate erred in law and fact in failing to consider the whole claim of the Appellant as presented, the issue of sexual harassment was not determined hence, an erroneous judgment.
12. In *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, while handling a first appeal from the High Court, the Court of Appeal held that:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”
13. In *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] EA, Madan JA had this to say on appeals:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
14. The Appellant's contention is that the Trial Court based its decision on the Respondents' documents that were neither produced nor admitted as evidence before court.
15. The proceedings of the Trial Court are a clear indication that the Respondents did not participate in the hearing of the Appellant's case. The Respondents put in their response, filed witness statements and a list and bundle of documents against the appellant's case, but did not call their witnesses to produce the documents and adopt their witness statement during the hearing.
16. In the case of *South Nyanza Sugar Co Ltd vs Mary A Mwita* (2018) eKLR Mrima J held that a Witness Statement filed but not adopted as part of the evidence by the maker and documents filed in a List of Documents but not produced as exhibits do not form part of the evidential record in a suit. A similar position was reached in the case of *Maurice O Okuthe vs South Nyanza Sugar Co Ltd* (2019) eKLR .



17. A paragraph in the judgment of the Trial Court states thus:
- “The defence did not tender any evidence during the hearing, nevertheless the court is duty bound to consider the documents in the Respondents list of documents.”
18. The foregoing was obviously an error on the part of the trial court to have considered the Respondents’ documents that were neither produced nor adopted in evidence before him.
19. The Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs Nigeria Breweries PLC* SC 91/2002 stated that: -
- “....It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it.....”
20. I concluded by holding that the Trial Court erred in considering the Respondents’ documents that were not produced as exhibits in the case before him.
21. The next ground of appeal for my consideration is whether the Trial Court considered the evidence put before it by the Appellant’s in arriving at its determination.
22. Section 47(5) of the *Employment Act* requires that in any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal occurred rests on the employee, while the burden of justifying the ground for the termination or wrongful dismissal rests on the employer.
23. The Appellant adopted her witness statement and produced documents filed in support of her case. Amongst the documents produced as exhibits is a letter of appointment, and a letter of termination dated November 10, 2020.
24. The question is whether the evidence adduced were prove that the Appellant was unfairly terminated.
25. In *Josephine M Ndungu & others v Plan International Inc* [2019] eKLR, the court stated: -
- “Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”
26. The letter terminating the Appellant’s employment and produced in evidence by the Appellant, indicated the reason for her termination to be failure to perform her duties, unprofessional conduct and incompetence.
27. The Appellant’s only response to the issues as listed in her witness statement, is that the Respondents had no policy in place to measure good performance as against poor performance. She further stated that no measures were put in place to address the poor performance amongst others.
28. At no point in her evidence did the Appellant show that she performed her duties as to discharge the burden that she was unfairly terminated. In *Muthaiga Country Club v Kudbeiha Workers* [2017] eKLR the Court had this to say:
- “The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their



claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment.”

29. In my view, the Appellant did not show that she was unfairly terminated as to discharge the burden placed upon her by Section 47(5) of the Employment, and so as to require the Respondents to justify the grounds for her termination.
30. In the premise, I find and hold that the Appellant did not prove that her termination was unfair.
31. As correctly submitted by the Appellant, the Trial Court did not address itself to the issue of sexual harassment raised by the Appellant in her statement of claim. In the case of CSL v CASN (2020) eKLR, it was held that where a court fails to determine a pleaded case of sexual harassment, the failure would automatically occasion a miscarriage of justice.
32. The Appellant in her witness statement states that the 2nd Respondent herein, occasioned acts of sexual harassment against her on January 30, 2019 and again on March 15, 2019, by use of explicit language and making unwelcomed sexual advances.
33. The Appellant further stated that the 1st Respondent did not have in place a policy on sexual harassment and thus failed to protect her against sexual harassment.
34. Section 6 of the Employment Act, 2007, the ILO Convention 111 and the UN Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) provides acts which constitute sexual harassment. Under these laws, the conduct complained of must be sexual in nature and offensive to the employee.
35. Acts of sexual harassment comprise of overt and covert overtures by the offending party and victims are thus expected to report such acts to the employer immediately they occur.
36. In JWK v (Particulars Withheld) College of Kenya & Another (2019) eKLR the Court held thus: -

“In the case of the Claimant herein, she stood in a place of superiority as a Director of the 1st Respondent, she is an educated person, she had many opportunities to complain about these incidents of sexual harassment. Unfortunately, she told no one and only brought out these issues after she was dismissed by the 1st Respondent in this case and even reported to the police after filing this case.”
37. Although the Appellant told the Trial Court that she reported the acts of sexual harassment to the school Principal, no proof of this report was placed before court.
38. Further, this issue only arose when the Appellant was terminated in November, 2020, yet the acts are said to have been committed in January, 2019. The Appellant was terminated more than a year after the acts/incidents of sexual harassment, yet no complaint was lodged in that respect prior to her termination.
39. In my view, the allegation of sexual harassment is an afterthought on the part of the Appellant for having failed to report the incidents when they happened, and only bringing it up when she was terminated.
40. In sum, I find the appeal devoid of merit and is hereby dismissed in its entirety.
41. The Respondents did not defend the appeal and I therefore make no orders on costs.



42. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST SEPTEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mrs. Khayo present for the Appellant

N/A present for the Respondent

MS. Christine Omolo - Court Assistant.

