**Mwene v Taj Super Foods (Employment and Labour Relations Appeal E027 of 2023) [2023] KEELRC 2634 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2634 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**EMPLOYMENT AND LABOUR RELATIONS APPEAL E027 OF 2023**

**CN BAARI, J**

**OCTOBER 26, 2023**

**BETWEEN**

**DANIEL EMOTO MWENE ..... APPELLANT**

**AND**

**TAJ SUPER FOODS ..... RESPONDENT**

***(Being an appeal from the judgment of Hon Cheruiyot SPM in Kisumu CMCC ELRC Case No E001 of 2021 delivered on 11th May, 2023)***

## JUDGMENT

1. This appeal arises from a Judgment delivered on May 11, 2023, where the trial court held that the appellant resigned from the service of the respondent, and hence his claim had no merit and proceeded to dismiss the same with costs to the respondent.
2. The appellant being aggrieved by the decision of the trial court, lodged this appeal on May 17, 2023.
3. The appeal is premised on the grounds that:
    i. The learned trial Magistrate erred in both law and fact in failing to appreciate the totality of the evidence as placed before him thereby arriving at a wrong decision.
    ii. The learned trial Magistrate erred in both law and fact in failing to appreciate that the appellant was not formally invited to the disciplinary hearing and was not given an opportunity to attend the same with a colleague of his choice, thereby arriving at a wrong decision.
    iii. The learned trial Magistrate erred in both law and fact in failing to consider the explanation that was given by the appellant when asked by the management thereby making the reasons for termination unjustified.
4. The appellant prays that the appeal herein be allowed, and the lower Court judgment be set aside.

5. The Appeal was canvassed through Written Submissions. Submissions were received from both parties.

**The Appellant's Submissions**

6. It is the appellant's submission that the trial magistrate erred both in law and fact in concluding that he resigned from employment and not wrongfuly and summarily dismissed, yet as per the evidence on the court file, there is a dismissal letter signed and rubberstamped by the respondent in the record of appeal, without notice, fair and valid reason.

7. It is the appellant's further submission that no commitment has been given on issuance of a certificate of service as envisaged in section 51 of the *Employment Act, 2007*.

8. The appellant further submits that the respondent did not give an itemized pay statement at the end of each month, yet it was a legal requirement.

9. It is the appellant submission that the trial magistrate erred in both law and fact in concluding that he caused a commotion, yet there is no evidence in the court record.

10. The appellant further submits that the procedure used to dismiss him from employment is wanting, as he was denied a fair hearing as enshrined in article 50 of the *Constitution*.

11. The appellant submits that as per the evidence on record, there are a series of admissions by both the respondent and its witnesses to confirm that indeed, the appellant was dismissed from employment. It is his further submission that the admissions are carried in the respondent's response to the demand letter, the respondent's witnesses' statements and the letter to the County Labour Officer.

12. The appellant submits that while in the employment of the respondent, he worked overtime and on public holidays involuntarily without pay, which is an act or omission by the respondent that amounted to use of compulsory labour.

13. The appellant further submits that attendance register in which he signed in and out daily, is in the custody of the respondent. It is his further submission that he requested orally to go for annual leave on his leave anniversary month, but he was deliberately denied by the respondent and instead, causing him to work involuntarily or unwillingly on that month.

14. The appellant submits that he was either directly or indirectly discriminated by the respondent on the terms and conditions of employment, specifically salary, job tittle, working hour's annual leave and termination of employment.

15. The appellant further submits that during his engagement, the respondent varied, amended and relinquished the terms and conditions agreed upon orally by both parties herein, among them house allowance, salary and working hours.

16. It is the appellant's submission that he was paid as a general labourer and not butchery attendant contrary to the oral contract agreed upon.

17. The appellant submits that it is trite law that cost follow events. It is his prayer that the Court orders the respondent to pay him costs of suit both in the lower court and this with interest from the date of filling.

**The Respondent's Submissions**

18. The respondent's submission is that the appellant voluntarily walked away from duty, and further submits that it did not unlawfully terminate the appellant, since he voluntarily left employment. It is

the respondent's submission that the appellant's walk out was violent, in the presence of customers, and without notice to the respondent thus occasioning the Respondent's business immense losses.

19. The respondent submits that it is well established law that an employee has the burden of proving that an unfair termination of employment has occurred as was stated in the case of *George Onpango Akuti v Securit Services Kenya Limited* [2013] eKLR.

20. It is the respondent's submission that the appellant was a rebellious employee who was insubordinate and quarrelsome. The respondent further submits that during cross examination, the appellant admitted that this is not the first suit in which he is suing an employer. Reliance was had in *Dede Esi Arnie Amanor Wilks v Action Aid International* [20141 e-KLR, for the holding that employers generally have the right to weed out employees who are insubordinate and incompatible, who exhibit verbal and non-verbal forms of insubordination, and who fail to fit in the corporate culture of the employer.

21. The respondent submits that employers are entitled to have peaceful and harmonious work environment, and to rid themselves of eccentric employees.

22. The respondent further submits that the appellant having voluntarily quit his duty, means that he was not entitled to notice pay as he willingly discharged himself from further performance of his obligations. It is its further submission that there is no actual dismissal by the respondent, and hence the reason the Appellant failed to produce a termination letter.

23. It is the respondent's submission that during cross examination, the appellant admitted that he sat down with the respondent and conducted calculations at the end of which, the appellant collected the sum of Ksh.23, 500 as his final dues, and that a discharge voucher was produced in this regard.

24. On the claim for accrued unpaid leave, it is the respondent's submission that the appellant was paid his leave days in full, and he voluntarily annexed his signature on the discharge vouchers.

25. On the claim for unpaid public holidays, the respondent submits that it always closed for public holidays and hence the appellant is not entitled to the claim for Ksh.9, 159.80. The respondent submits that the appellant was issued a certificate of service, but he declined to take it.

26. The respondent prays that this Court finds that the appellant has not discharged the onus of prove that he was terminated unlawfully and unfairly, and hence this appeal must fail.

**Analysis and Determination**

27. I have considered the appellant's Record of Appeal, his submissions and the submissions by the respondent. The grounds of appeal are summarized as follows: -

    a. The learned trial magistrate erred in both law and fact in failing to appreciate the totality of the evidence as placed before him thereby arriving at a wrong decision.

    b. The learned trial magistrate erred in both law and fact in failing to appreciate that the Appellant was not formally invited to the disciplinary hearing and was not given an opportunity to attend the same with a colleague of his choice, thereby arriving at a wrong decision.

28. In *Abok James Odera t/a A.J 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"

29. Further in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA, Madan J.A 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."

30. The appellant's contention is that the respondent unfairly dismissed him from service. It is his position that he was neither given a hearing nor told of the reasons that informed his dismissal. The trial court on its part, found that the appellant voluntarily resigned or terminated his contract with the respondent, and hence the dismissal of the appellant's claim before the trial court.

31. The Record of appeal does not show that either of the parties herein, raised the issue of voluntary resignation or that the appellant voluntarily terminated his employment with the respondent. The appellant's claim, is that he was unfairly dismissed and the respondent's defence is that the appellant became unruly on the afternoon of December 7, 2020, resulting in his summary dismissal.

32. In a response to the appellant's demand letter dated December 18, 2020, the respondent stated thus:

> " That Mr Daniel Emato Mwene's services were not terminated but that, he was summarily dismissed for gross misconduct (emphasis mine). on the fateful day, the complainant caused a commotion by shouting at his supervisor in the presence of other employees and customers. He also refused to obey lawful order from his supervisor. Efforts to cool him down were fruitless as he even threatened to close the doors of his work place and stop operations. We accordingly applied section 44(1) and (4) of the *Employment Act, 2007*..."

33. Further, the respondent at paragraph 12 of his Statement of Response dated February 1, 2021, stated as follows:

> " The respondent states that the claimant's behavior and or conduct on the said day warrants his summary dismissal from employment."

34. In light of the foregoing, the record does not support a finding of resignation, be it voluntary or otherwise. This is clearly a case of summary dismissal, and for which this Court has to decide on whether or not the dismissal was unfair.

35. The respondent's position is that it invoked the provisions of section 44 (1) & (4) of the *Employment Act*, when dismissing the appellant. These provisions allow for dismissal without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term, where an employee uses abusive or insulting language or behaves in a manner that is insulting to the employer.

36. The question is whether the appellant's behavior prior to dismissal justified dismissal without notice and without being accorded fair process in accordance with section 41 of the *Employment Act, 2007*.

37. The provisions of section 44(1) of the *Employment Act, 2007*, where an employer had the luxury to dismiss without notice or with less notice, was only in my view, applicable post article 47 of the 2010 *Constitution*. Upon the coming into force of article 47, an employer's obligation to accord an employee fair process irrespective of the nature of the misconduct, became unassailable.

38. By dint of the constitutional requirement, the provisions of section 41 of the *Employment* must be adhered to, even when summarily dismissing an employee.

39. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited*, [2013] eKLR, the Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case for termination as well as in a case that warrants summary dismissal.

40. Again in *Prof Macha Isunde vs Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal held as follows:

> " There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

41. In the upshot, I find and hold that the appellant's dismissal failed the procedural fairness test, and which renders the dismissal unfair.

42. The appellant was dismissed for using abusive or insulting language and behaving in a manner that is insulting to the employer. He admitted in his testimony being in a confrontation with his employer on the December 7, 2020. This fact was further corroborated by RW1, also an employee of the Respondent, and who was present at the time of the confrontation.

43. In *Mckinley vs BC Tel*, [2001] 2 SCR 161,2001 SCC 38 [CanLII], it was held:

> " 29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of alleged insubordination. Within this analysis a finding of misconduct does not by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship can no longer viably subsist."

44. I have considered the circumstances under which the appellant was summarily dismissed and find that the dismissal on the account given by the Respondent was substantively fair.

45. In whole, I find the appellant's dismissal unfair only on account of procedure, and I so hold.

46. The trial court did not address itself to the remedies sought, even when it is clear that most of the remedies were not depended on whether or not the dismissal was fair. I will therefore proceed to address each of the reliefs sought.

47. On the claim for pay in lieu of notice, it is clear from the foregone analysis that the appellant was summarily dismissed one afternoon, and was only required to return the following day to collect his

final dues. This confirms that the appellant was not given notice prior to the dismissal and the payment made per the voucher produced in evidence did not include notice pay.

48. I thus find the claim for one month pay in lieu of notice merited, and is hereby awarded.

49. On the claims for days worked in December, 2020, and accrued leave, the record bears payment vouchers made to the appellant on account of 40 leave days and the days worked in December, 2020. This claims thus fail on this account.

50. On the claim for compensation for wrongful dismissal, the Court had found the appellant's dismissal unfair on account of procedure. This Court has also found that the respondent had valid reasons to dismiss the appellant owing to his conduct at the work place on the date of his dismissal.

51. The appellant was in the service of the respondent for slightly over a year and a half. Considering the time he served the respondent and the reason for his dismissal, I find that the appellant has not proved a case for maximum compensation, and I deem an award of two months' salary sufficient compensation for the unfair dismissal.

52. On the claim for house allowance, the respondent's position is that the appellant's Kshs.15,000 monthly salary, was consolidated with house allowance. Under the *Employment Act*, payment of a consolidated salary is allowed, and this position was not rebutted and the claim fails, and is dismissed.

53. The claims on account of overtime, compulsory labour and discrimination were not proved, and they fail.

54. In sum, I find and hold that the appeal has merit and is allowed as follows: -

    i. Payment of one-month salary in lieu of notice at Kshs. 15,000/-

    ii. Two months' salary for unfair dismissal at Kshs. 30,000/-

    iii. Costs in respect of disbursements for both the claim before the lower court and for the appeal.

55. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26TH OCTOBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Daniel Emoto Mwene Appellant present in person

Mr. Khaemba h/b for Mr. Onsongo for the Respondent

MS. Christine Omolo - Court Assistant.