



Newnham Services International Limited v Midenyo & another (Employment and Labour Relations Appeal E111 of 2021) [2023] KEELRC 2609 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2609 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E111 OF 2021
MA ONYANGO, J
OCTOBER 26, 2023**

BETWEEN

NEWNHAM SERVICES INTERNATIONAL LIMITED APPELLANT

AND

BERNARD SOLOMONS MIDENYO 1ST RESPONDENT

WILLIAM KIKUMU 2ND RESPONDENT

(Being an appeal from the Judgment and Order of the Chief Magistrates Court at Nairobi, by the Hon. D.A Ocharo PM dated 1st July 2020 in the CMEL No. 189 of 2019)

JUDGMENT

1. The Appellant herein was the Respondent in Nairobi CMEL No 189 of 2019 while the Respondents were the Claimants in that suit. The Respondents sued the Appellant seeking their terminal dues following the alleged wrongful and unlawful termination of their employment by the Appellant.
2. After hearing both parties, the trial court rendered its judgment on 1st July 2020 in which it held that the Respondents were unlawfully terminated and awarded the 1st Respondent Kshs 173,500.40 and the 2nd Respondent Kshs 159,018.50. The Respondents were also awarded costs and interests at courts rates from the date of the said Judgment.
3. The Appellant being dissatisfied with the said Judgement filed the instant appeal vide the Memorandum of Appeal dated 5th October 2021. The grounds of appeal are:
 - i. That the learned trial magistrate erred in law and was evidently wrong when he failed to appreciate that the Respondents herein were dismissed summarily under section 44(1) and (4) of the Employment Act for a serious misconduct of dishonesty



- ii. That the learned trial magistrate was wrong and erred in law and in fact in awarding a sum of Kshs 173,500.40 and Kshs 159,018.50 to the Claimants in a summary dismissal claim
 - iii. That the learned trial magistrate was wrong and erred in law and in fact by making a finding in favour of the Claimants without considering that the Claimants had issues with absenteeism and laxity which their performance deteriorated leading to clients complaints where they were reprimanded and required to work well.
 - iv. That the learned trial magistrate erred in law and in fact by failing to find that the Claimants on or about 9th December 2018 arrested by police and confined at Kasarani Police Station following a break in to Nanchang foreign Engineering Company Limited premises which led to loss of property estimated at Kshs 86,000
 - v. That the learned Trial magistrate was wrong and failed to consider that after the Claimants were released from custody on 11th December 2018, they never went back to their workplace even after several phone calls to their personal lines and letters to their last known postal address inviting them to come to the office to clear the issue.
 - vi. That the learned trial magistrate erred in law and in fact in considering the Respondent's action was unlawful whereas the Claimants were given a fair hearing which they avoided and chose to cross the bridge before they reach it (*sic*) by suing the Respondents as they ought to have assisted the Respondent in resolving the theft matter.
4. The Appellant therefore prays for the following reliefs:
- a. That the appeal be allowed;
 - b. That the order of the Chief Magistrates court made on the 1st July 2019(*sic*) delivered by Hon. D.A Ocharo in CMEL No 186 of 2020 be set aside Judgement/decree of the Hon. Chief Magistrate issued on 28/2/2022 be reviewed and/or set aside.
 - c. That the Honourable Court do make any other order to satisfy the ends of justice as may deem fit.
 - d. That the costs of this Appeal be awarded to the Appellant
5. On 24th January 2022 the court gave directions that the Appeal be disposed of by way of written submissions. The submissions for the Appellant are dated 26th January 2022 and the Respondents submissions are dated 15th February 2022.

Appellant's submissions

- 6. In its submissions, the Appellant only submitted on grounds 1, 2 and 3 in the Memorandum of Appeal.
- 7. On the first ground counsel for the Appellant submitted that there is evidence on record that on 10th December 2018, the Respondents were arrested and locked up at Kasarnai Police Station the police station on allegations of theft. That at the hearing the Respondents confirmed that the theft occurred while they were on duty. It is submitted that the trial court was wrong and erred in fact and in law in failing to find that the Respondents were dismissed for a serious misconduct and absconding duties.
- 8. It was further submitted that the termination of employment of the Claimants was lawful and procedural on account of absconding duty without prior authorization or reasonable explanation and that the trial court failed to note that the Respondents were given a fair hearing which they avoided by failing to attend to internal disciplinary process and instead rushed to court. The case of Walter



Ogal Anuro v Teachers Service Commission (2013) eKLR was cited to support the position that the Appellant passed the fairness test in dismissing the Respondents.

9. On the second ground of appeal the Appellant submitted that the Respondents chose to abscond duty without giving notice in writing hence under the contract of Employment, the Appellant is entitled to claim from the Respondents one month's salary in lieu of notice i.e Kshs 10,571 and Kshs 8,050 respectively.
10. On the third ground of appeal it was the Appellant's submission that under Section 44(a) and (g) of the *Employment Act*, where the employee without leave or other lawful cause absents himself from work or where an employee commits or on reasonable and sufficient grounds is suspected of having committed an offence to the detriment of his employer he is liable to summary dismissal.
11. The Appellant did not submit on grounds 4, 5 and 6 of the Memorandum of Appeal.

Respondent's submissions

12. The Respondents on their part crystallized the issues for determination as follows:
 - i. Did the Appellant terminate the Respondents' employment
 - ii. Was the termination of the Respondent's wrongful, unfair and unprocedural
 - iii. Did the Appellant pay the Respondents their terminal dues
13. In addressing the first issue, counsel for the Respondents submitted that from the Respondents' list of documents, the investigation report dated 23rd December 2018 indicated that the Respondents were replaced after the theft incident. According to the Respondents, the new employees had already taken up their positions and hence it was impossible for them to resume work as their positions were already occupied.
14. As to whether the termination of their employment was wrongful, unfair and unprocedural, counsel for the Respondents submitted that the *Employment Act* makes it obligatory for employers to substantively justify termination decisions and carry out the termination process in a procedurally fair manner.
15. According to the Respondents, the Appellant did not afford them any hearing as there is no proof in the form of communication such as a show cause letter issued by the Appellant to the Respondents summoning them to any hearing. To buttress this position, the Respondents cited the case of *Zephania O Nyambane and another v Nakuru Water and Sanitation Services Company Limited*, Industrial Cause No 13 of 2013.
16. On the last issue on whether the Respondents were paid their terminal dues, counsel for the Respondents cited the case of *Katembe Mtumwa & another v Steel Makers Limited*, ELRC No 76 of 2012 for the position that employers ought to pay employees who are summarily dismissed all their monies, allowances and benefits due as envisaged in Section 18(4) of the *Employment Act*.
17. The court was urged to find the judgment of the trial court delivered on 1st July 2020 to be valid and merited and to dismiss the instant Appeal with costs.
18. This being a first appeal, this Court has a duty to re-evaluate all the evidence adduced before the lower court with a view of drawing its own conclusions thereon while giving due allowance for the fact that it did not have the benefit of seeing or hearing the witnesses as was held in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123.



19. At the hearing the 1st Respondent testified as CW1 on his behalf and on behalf of the 2nd Respondent. He stated that he was employed by the Appellant as a night security supervisor while the 2nd Respondent was employed as a security guard. He stated that they were on duty on 10th December 2018 when they were called by the deployment officer Mr Oduor, taken to a room and a CCTV screen was displayed. They saw some young men going into the Appellant's property where they were guarding and carrying away metals. He testified that they were at the watch tower and that the place was totally dark as a result of which they did not see the young men getting into the premises.
20. He testified that police officers were called and they were arrested and locked up at Kasarani Police Station until the following day, the 11th of December 2018 when they were released after the complainant failed to go to the police station to record a statement.
21. It was the 1st Respondent's case that they did not go back to work as they were dismissed.
22. On cross examination by counsel Mapesa, the 1st Respondent confirmed that a theft incident occurred while he was on duty and that he did not see the thieves entering the premises as the area was very dark. It was his evidence that after he was dismissed from work he requested for his dues through SMS which request was not honoured. That he was not called to clear with the Appellant.
23. In re-examination, CW1 stated that he was constructively sacked by being taken to the police.
24. The Respondent called Mr Saul Munoko its Human Resource Director who testified as RW1 in furtherance of the Appellant's case. RW1 maintained that the Respondents were neither terminated nor dismissed from employment, but that they absconded duty.
25. In re-examination, RW1 stated that the Respondents were replaced while they were in custody.

Determination

26. Upon considering the Record of Appeal and the submissions by both parties, I find that the issues for determination are;
 - i. Whether the Respondents were dismissed from employment or absconded duty
 - ii. Whether the trial court erred in holding that the Respondents were unlawfully terminated.
27. From the evidence on record, it is not disputed that there was a break-in at the premises where the Respondents were guarding on the night of 8/9th December 2018. It is also not in dispute that the Respondents were arrested on 9th December 2018 but released from police custody on 11th December 2018.
28. From the letters attached to the bundle of documents filed by the Appellant especially the email at page 41 of the Record of Appeal, the investigation report at page 43 and 44, the letter to Bernard Midenyo dated 24th December 2018 and the response to demand letter addressed to Remy Rigau & Company Advocates dated 1st February 2019 it is clear that the Respondents were summoned to appear at the Appellants head office to assist with investigations after they were released from custody but did not do so. It is further evident that they were never dismissed from service by the Appellant.
29. In the judgement of the trial court, the learned Principal Magistrate held thus:

“It is the Claimants' case that they were sacked constructively by being taken to police station. It is their evidence that they were locked up in a police station on allegations of theft that had taken place at their place of work, but they were released on the same day because the



Respondent did not show up to record statement. On being released, they did not go back to work because they were released. The Respondent on the other hand, tendered evidence that they replaced the two claimants while they were in custody.

I find that issue (a) is determined in the affirmative.

Whether the Claimants are entitled to the Reliefs sought

Having found that the claimants were unlawfully terminated, I find that they are entitled to the prayers sought. However, I do not grant salaries for the months of November and December. The first Claimant shall have Kshs. 173,500.40/= while the second Claimant shall have 159,018.50/=.”

30. There is no analysis or reasons for the decision. It would appear that the trial Magistrate relied on the fact that the Respondents were replaced while in custody to hold that they were unlawfully dismissed.
31. In the email dated 10th December 2018 at page 41 of the Record of Appeal the Appellant’s Mr. Bernard Oduor while reporting the incident states in the penultimate paragraph thereof that “I have since replaced the team and asked Edward and Kamisore to report to head office for further direction.”
32. In the Preliminary Investigations Report at page 43 of the Record of Appeal the Appellants Operations Manager Mr. Jeremiah O. Obia wrote to the Human Resources and Administration Director that:

We understand that both Benard Midenyo and William Kikumi had allegedly been released from the police cells and were accordingly instructed to visit our head office for further direction. However, they are yet to heed to this advice hence we seek your indulgence so you can give executive direction going forward.”
33. In the conclusion of the preliminary report Mr Obia wrote Given that the Client has raised a formal complaint and demanded for compensation of the lost items, it would be prudent to put the suspected guards on stop pay as we investigate The Security Guards be recalled formally to present themselves to assist in the investigations into the matter The Client be requested to surrender a footage of the CCTV footage at the assignment to assist in investigations and any other evidence This investigation be handled independent of the police investigation The Security Guards make an undertaking to co-operate during the investigation.
34. By letter dated 24th December 2018 the Appellant wrote to Midenyo the 1st Respondent reminding him that he was expected to appear at the office concerning the theft at Nanchang Kasarani. The letter states: “This serves as the last reminder”
35. From the foregoing evidence it is clear that the Appellant did not wrongfully and unlawfully terminate the services of the Respondents as alleged in the Statement of Claim or in the judgment of the trial Court. On the contrary, the Respondents absconded duty after they were released from police custody.
36. This fact was admitted by PW1 in his testimony before the trial court when he stated “We did not go back to work because we were dismissed.” In re-exam he again stated “I was constructively sacked by being taken to the police station”
37. From the forgoing I find that the trial magistrate erred in law and fact in making a finding that the Respondents were unlawfully terminated and awarding them Kshs. 173,500.40 and Kshs. 159,018.50 respectively.



38. The appeal succeeds. I accordingly set aside the whole of the judgment of the trial court and in place thereof make a finding that the Respondents did not prove that their employment was unfairly terminated. The Statement of Claim is accordingly dismissed.

39. Each party shall bear its costs both in the appeal and in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 26TH DAY OF OCTOBER, 2023

M. ONYANGO

JUDGE

