



**Omuga v Judicial Service Commission (Appeal E014 of 2023)
[2023] KEELRC 2352 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2352 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E014 OF 2023
CN BAARI, J
OCTOBER 5, 2023**

BETWEEN

SAMUEL MBECHÉ OMUGA APPELLANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. S.N. Abuya (CM)
delivered on 6th February, 2023, in Kisii in CMELRC NO. 15 OF 2020)*

JUDGMENT

1. This appeal arises from a Judgment rendered on 6th February, 2023, where the Trial Court found that the Appellant had not proved his case, and proceeded to dismiss the entire claim with costs.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 2nd March, 2023.
3. The appeal is premised on the grounds that:
 - i. The Learned Trial Magistrate erred in law and mis-directed herself fundamentally in not holding that the Appellant had proved his case on a balance of probabilities.
 - ii. The Learned Trial Magistrate erred in law by considering extraneous matter which had no relevance to matters in issue before her hence arriving at wrong judgment.
 - iii. The Learned Trial Magistrate erred in law by not taking into consideration the evidence adduced by the Appellant and the Respondent's witness which confirmed his claim hence arrived at a wrong decision.



- iv. The Learned Trial Magistrate erred in law and misdirected herself by relying on the Judicial Manual of Human Resource Policies and Procedures and ignored the main sections of the *Employment Act* laws of Kenya and arrived in a wrong decision.
- v. The Learned Trial Magistrate erred in law by dismissing the Appellant's Memorandum of Claim wrongly.

The Appellant's Submissions

4. The Appellant submits that the *Employment Act* at Sections 41 and 45, sets out what constitutes unfair or unlawful termination, and that the fairness arises from the process that gives a fair hearing to the employee and the reasons for termination. He placed reliance in the cases of Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR and Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR for the holding that an employer should not terminate an employment contract without a valid and fair reason and without according the employee a fair hearing.
5. The Appellant further submits that although the Respondent, by law, is the custodian of all employment documents relating to the Appellant's employment, it did not produce any warning letter cautioning the Claimant of absconding duty.
6. It is submitted for the Appellant that there was no evidence produced in Court that indicates that the Appellant was accorded an opportunity to have another employee of his choice at the purported hearing of the 1st day of November, 2018, hence violation of the statutory requirement on fair process.
7. The Appellant submits that the Respondent failed to follow its own laid procedure on termination, hence making the termination wrongful, unfair and unlawful. It is further submitted that the Claimant was not informed of his right to representation as per the Judiciary Manual and in accordance with Section 41 of the *Employment Act*. He sought to rely on Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR, for the holding that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is sacrosanct right.
8. It is the Appellant's further submission that the termination violated his right to fair labour practices and the right to fair administrative action envisaged under Articles 41, and 47 of *the Constitution* and Section 41 of the *Employment Act*, and as such, pray that the Honorable Court do find and declare the dismissal unlawful.
9. The Appellant further prays that the Honourable Court be pleased to set aside the decision of the Trial Court dated and delivered on the 6th day of February, 2023, and in its place, the Respondent be ordered to reinstate the Appellant to his position with immediate effect.

The Respondent's Submissions

10. The Respondent submits that the Trial Magistrate did not err in law by holding that the Appellant had not proved his case on a balance of probabilities. It further submits that in employment matters, the standard of proof is on a balance of probabilities as held by the Court of Appeal in Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others (2019) eKLR. where the Court held thus: -

“The standard of proof is on a balance of probabilities and not beyond reasonable doubt, and all the employer is required to prove are the reasons it "genuinely believed to exist" causing it to terminate the employee's services.”



11. The Respondent sought to rely in *William Kabogo Gitau vs. George Thuo & 2 Others* (2010) wherein, the Court spelt out what constitutes a balance of probabilities in the following words:-

“In percentage terms, a party who is able to establish his case to a percentage of 51 % as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
12. It is the Respondent’s submission that the Appellant was accorded numerous opportunities to prove that his medical sheets were authentic as to prove his claim of absenteeism due to sickness but failed to do so and only clinging to the belief that he was sick without additional evidence to prove his case.
13. The Respondent further submits that the Appellant has not specified which extraneous matters the Trial Court considered that she ought not to have considered.
14. The Respondent submits that the learned magistrate relied on the provisions of the *Employment Act* and considered the twin issue of substantive and procedural fairness in her determination, hence the ground of appeal suggesting that she did not, is not anchored on the reality of the judgement but speculation and conjecture.
15. It is the Respondent’s submission that there was a reliance of both the applicable laws and the HR Manual which can be seen from the judgment. It further submits that the Trial Court not only cited the applicable law, but applied it correctly to the facts of the case.
16. The Respondent further submits that the Trial Court did not err in dismissing the Appellant's claims, but that it rightly found that the Appellant was absent from work without leave, that the Appellant did not discharge his burden of proof and that the Respondent demonstrated that it had a valid reason to terminate the Appellant’s employment and further that he was accorded a fair hearing before the termination.
17. The Respondent urges the Court to find that the appeal is ill-advised, unmeritorious, frivolous and an abuse of this Court’s process, amenable for dismissal with costs to the Respondent.

Analysis and Determination

18. I have considered the Appellant’s Record of Appeal, and the rival submissions. The five grounds of appeal are summarized into one, as follows: -
 - i. The Learned Trial Magistrate erred in law and mis-directed herself fundamentally in not holding that the Appellant had proved his case on a balance of probabilities.
19. The Court of Appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, guided on the handling of a first appeal as follows:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and re-analyse 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”
20. The Learned Trial Court found that the Appellant herein did not prove his case of unfair termination on a balance of probability and proceeded to dismiss the Appellant’s entire claim with costs.



21. The Appellant's assertion of an unfair termination emanates solely from the procedure adopted by the Respondent in terminating his services. His assertion is that the Respondent did not adhere to both the law and their Human Resource Manual.
22. Although the Appellant was accused of three charges, the first two were dropped during disciplinary hearing on account of acquittal of criminal charges that had been leveled against him, leaving only the charge of absconding duty as the sole allegation for trial by the disciplinary advisory committee.
23. The Appellant's contention is that the Respondent has never issued him with a warning of misconduct, nor attended an advisory committee meeting on account of misconduct.
24. The Appellant admitted having been informed through a show cause letter, which the Respondent confirmed issuing, about the allegations against him and having responded to the allegations. It is the Appellant's position that he received a letter dated 8th January, 2020, dismissing him from the service of the Respondent, having appeared for a disciplinary hearing on invitation by letter dated 7th June, 2019.
25. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited (2017) eKLR* the Court expounded on the provisions of Section 41 thus: -
 - “To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.
 27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.
26. Again, in *Philip Kimosop v Kingdom Bank Limited (2022) eKLR*, the Court stated that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing, constituted fair procedure.
27. The evidence on record confirms that the Appellant was issued with a show cause letter which he admitted having responded to, an invitation to appear before a disciplinary committee and confirmation that he indeed made an appearance before the disciplinary advisory committee of the Respondent.
28. The evidence thus in my view confirms, contrary to the Appellant's assertions, that the Respondent adhered to both the law and its own disciplinary manuals on procedural fairness when terminating the Appellant.
29. The issue of whether or not the Appellant proved his case on a balance of probabilities, is really the make or break in this appeal. In *Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another*, the Court of Appeal held:
 - “In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer.....”



30. It is not disputed that the Appellant faced a sole charge of absconding duty. His defense both at the hearing and in his response to show cause, was that he fell ill and hence, the reason he was absent from duty.
31. Further, the only evidence he placed both before the trial court and the disciplinary committee, are sick-off notes from a hospital named Hema Hospital where he is said to have sought treatment. The Respondent's evidence is that it wrote to Hema Hospital who confirmed having treated the Appellant, but wrote him a three (3) days sick-off as opposed to his assertion that he had been given a sick-off of 30 days.
32. The issue then is whether indeed the Appellant had proved his case. Section 47(5) of the *Employment Act*, states thus on the burden of proof: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
33. The Appellant by dint of this provision was under duty to prove that his termination was unfair, for the employer/Respondent to be called upon to justify its reasons for termination.
34. The Appellant did not prove that he was unwell. Evidence before Court shows that he was fairly terminated and which burden he did not discharge.
35. In the end, I uphold the decision of the Trial Court that the Appellant did not prove his case against the Respondent on a balance of probability. The appeal fails and is dismissed with no orders on costs.
36. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 5TH DAY OF OCTOBER, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Maswari present for the Appellant

Ms. Kirimi h/b for Mr. R.G. Mwangi for the Respondent

MS. Christine Omolo - Court Assistant.

