



Mugweru v St Andrews ACK Zimmerman Primary School & another (Employment and Labour Relations Appeal E005 of 2023) [2023] KEELRC 2881 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2881 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023
SC RUTTO, J
NOVEMBER 10, 2023**

BETWEEN

CATHERINE WAMUYU MUGWERU APPELLANT

AND

ST ANDREWS ACK ZIMMERMAN PRIMARY SCHOOL 1ST RESPONDENT

THE VICAR ST ANDREWS ACK ZIMMERMAN PARISH ... 2ND RESPONDENT

(Being an appeal from the whole Judgment of Hon. Senior Resident Magistrate, M.W Murage delivered on the 9th December 2022 in the Chief Magistrate's Court at Milimani in MCELRC Cause No. E757 of 2021)

JUDGMENT

1. The Appellant instituted a suit at the Chief Magistrate's Court at Milimani being MCELR Cause No. E757 of 2021 through which she averred that she was employed by the 1st Respondent as an ECDE teacher with effect from 15th June 2017. It was the Appellant's case that from 1st July 2020, she was sent on compulsory unpaid leave citing Covid-19 challenges. That the purported compulsory unpaid leave was intended to last until the Ministry of Education provided a way forward.
2. The Appellant further averred in her Memorandum of Claim that the notice addressing the unpaid leave that was issued included a provision for recall once the Ministry communicated on the resumption of school activities. It was the Appellant's case at the trial Court that despite the Ministry of Education giving direction on partial resumption of schools late in the year 2020 and eventually ordering full resumption of learning in January 2021, the Respondents had failed to offer an explanation as to why she was not called back.
3. According to the Appellant, she was injured by the actions of the Respondents as she was rendered jobless and had no means of livelihood as she depended solely on the income from her job for provision



for herself and her family. Against this backdrop, the Appellant sought against the Respondents, the sum of Kshs 542,250/= being one month's salary in lieu of notice, unpaid leave days, gratuity and compensation for unlawful loss of employment.

4. Opposing the Claim, the Respondents filed a Response through which it admitted that the Appellant was sent on unpaid leave on 1st July 2020, due to challenges occasioned by the Covid-19 pandemic. That the Board of Management of the school was to give directions on the way forward once the school reopened and the situation normalized. The Respondents further stated in its Response at the trial Court, that whereas the Ministry of Education gave directions on partial reopening of schools in late 2020 and full reopening of schools in January 2021, it was not possible to recall all their members of staff at the same time as many students did not report back. Gradually and on a need basis, the Respondents recalled the members of staff who had been sent on unpaid leave.
5. In the Respondents' view, the Appellant was impatient and started making unreasonable and unlawful demands alleging that she had been terminated. That she refused to accept the Respondents' offer to resume work and instead filed the suit at the trial Court.
6. It was the Respondents' case that the Appellant's position remained vacant. It was the Respondents' further contention that they had not terminated the Appellant's employment and that they had not taken deliberate action to injure her. That it is the Appellant who had refused to take up her position which was still available.
7. The Respondents further stated that the action to send the Appellant home was occasioned by circumstances beyond the control of both parties which amount to force majeure. That the Respondents, mitigated this by offering the Appellant a chance to resume her duties but she declined. On account of the foregoing, the Respondents asked the trial Court to dismiss the Appellant's suit with costs.
8. At the trial Court, the Appellant testified in support of her case while the Respondents called oral evidence through Mr. Dickmoline Njue Mugushu. Upon close of the trial, both parties filed written submissions.
9. Upon evaluating and analyzing the evidence on record as well as the submissions, the trial Court delivered its Judgment on 9th December 2022, thereby dismissing the Appellant's Claim with costs. In dismissing the Appellant's Claim, the trial Court observed that the Respondents had a justified reason for sending teachers on unpaid compulsory leave. The Court further noted that the Appellant had not been given a letter of termination by the Respondents and neither had she been told that they had terminated her employment. It was the Court's finding that the Appellant's position had never been filled up and when called to fill the said position, she declined the offer to resume her duties at the school. The Court concluded that the Appellant was never terminated but voluntarily declined to report back to work when she was recalled.

The Appeal

10. The Appellant being aggrieved by the Judgment of the trial Court, lodged the instant Appeal through which she raises the following grounds: -
 1. The learned Trial Magistrate erred in law and in fact in holding that the Respondents never terminated the Appellant despite evidence on record showing that the conduct of the Respondents implied termination of the Appellant without any justifiable reasons.



2. The learned Trial Magistrate erred in law and in fact in failing to enter judgment in favour of the Appellant in respect of the claims for leave days and award compensation for unlawful dismissal despite the Appellant's evidence being uncontroverted by the Respondents.
3. The learned Trial Magistrate erred in law and descended into the arena of the disputants by stating that the Appellant was recalled to report back when situations normalised but never reported back to work without tangible evidence as though she spoke for the Respondents.
4. The learned Trial Magistrate misapprehended the fact that the Appellant had proved her case on the required standard and proceeded to give judgment that went against the weight of the evidence before Court.
5. The learned Trial Magistrate erred in law and in fact by wrongly exercising her judicial discretion against the Appellant and against reason in the circumstances of the matter by failing to award costs of the claim to the Appellant.

The Submissions

11. It was the Appellant's submission that the Respondents had the agenda of frustrating her by placing her under a never-ending compulsory leave which was not paid. That this was only aimed at making her tired and probably give up on her employment. To this end, the Appellant argued that the Respondents' actions amounted to constructive dismissal and was therefore unfair and unlawful. In support of the Appellant's arguments, reliance was placed on a number of authorities including the case of *Coca-Cola East and Central Africa Limited v Maria Kagai ligaga*, (2015) eKLR, *Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani* (2018) eKLR and *Wambati Simiyu Merit v Music Copyright Society of Kenya Limited & another* (2018) eKLR.
12. The Appellant further submitted that the Respondents' failure to pay her salary for a period of 8 months is a repudiation of the contract of employment which is an element of constructive dismissal.
13. It was her further submission that the attempt by the Respondents to call her back to work after receiving the demand letter and pleadings was an attempt to regularize an already repudiated contract.
14. The Appellant further contended that the learned Trial Magistrate had no regard for her evidence during the hearing that constructive dismissal had arisen by the time she was called back to report to work. Consequently, the Appellant faulted the trial Magistrate's finding that she was never terminated but voluntarily declined to report back to work when she was recalled.
15. She further faulted the trial Magistrate's finding for ignoring the fact that the Respondents did not make any attempt to reach out to her before the demand letter was issued and she moved to Court.
16. The Respondents on the other hand submitted that the Appellant declined her recall to work as she had been engaged by Kiota School. The Respondents further argued that by the time of filing the Response, the Appellant's position had not been filled but she did not take up the offer. The Respondents further submitted that this did not amount to an indefinite suspension. According to the Respondents, the reason for failure to recall the Appellant had been explained.
17. It was the Respondents' further submission that the trial Magistrate was right in finding that the Appellant's employment was not terminated.



18. The Respondents further contended that the Appellant agreed that she was recalled back but declined because the matter was with her lawyers. On this account, the Respondents urged that this piece of evidence was not a creation of the trial Court.

Analysis and Determination

19. This being the first appeal, this Court is enjoined to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. In so doing, the Court ought to bear in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. This position was reiterated by the Court of Appeal in the case of *J. S. M. v E. N. B.* [2015] eKLR.
20. In following with the above determination, I have carefully considered the record before me, the opposing submissions, as well as the law, and to my mind, the following issues fall for determination by the Court: -
 - a. Whether the Appellant was terminated from employment;
 - b. If the answer to (a) is in the affirmative, whether the Appellant's termination from employment was unfair and unlawful;
 - c. Whether the remedies sought by the Appellant lie in law.

Whether the Appellant was terminated from employment

21. The Appellant's case at the trial Court was that she was terminated from employment as the Respondents had failed to offer an explanation as to why she had not been recalled back to work from the unpaid leave despite full resumption of school learning activities. On the other hand, the Respondents contended that the Appellant refused the offer to resume work and instead filed the Claim at the trial Court.
22. It is common cause that the Appellant was sent on unpaid leave following the outbreak of the Covid-19 global pandemic. This was evidenced by a letter dated 1st July 2020, which was exhibited at the trial Court by the Appellant. It is also common ground that the Ministry of Education allowed partial reopening of learning institutions towards the end of the year 2020 and eventually full resumption of learning in January 2021.
23. The record reveals that during her testimony at the trial Court, the Appellant stated under cross-examination that the Secretary told her to go back to work but she declined. Further cross-examined, the Appellant testified that the school called her to go back to work but she declined and told them to go through her lawyer. She further admitted that she was never issued with a letter of dismissal.
24. This position was reiterated by the Respondents' witness in his testimony as he stated that the Appellant was recalled to resume work but she declined.
25. According to the Appellant, the Respondents' action of recalling her back to employment was a reactionary move as the Court had already assumed jurisdiction of the matter. The Appellant further attributed her recall to the Respondents' fear of legal action.
26. What is discernible from the testimony of both parties at the trial Court, is that the Appellant's employment was not terminated as she was recalled back to work but she declined. Her only contention seems to be that her recall came when she had decided to take legal action against the Respondents.
27. The Appellant's argument is that by the time she was being recalled, the Respondents had already repudiated the contract of employment hence she was constructively dismissed by then. It is worth



pointing out that the Appellant did not plead constructive dismissal at the trial Court and only raised the same in its submissions in the instant Appeal. Indeed, the Appellant has heavily submitted on the principle of constructive dismissal despite not pleading the same at the trial Court.

28. On this issue, my thinking aligns with the determination of the Court in the case of *Rem Ogodo Ogana v Kenya Sugar Board* [2016] eKLR where it was held that a case for constructive dismissal or termination must be specifically pleaded setting out the specific particulars which the employee believes pushed him/her out of employment involuntarily even though the employer did not actually terminate the employment relationship.
29. Be that as it may, the fact that the Appellant was recalled to work and by her own admission declined to resume, invalidates her claim that she was terminated from employment. In my considered view, it did not matter that she was recalled after she had engaged an Advocate. The bottom line is that the 1st Respondent still considered her its employee hence the recall. The recall was enough evidence to confirm that the employment relationship was still subsisting and there was no complete severance thereof.
30. It is also worthy to note that Section 47(5) of the *Employment Act* places the burden of proving that an unfair termination or wrongful dismissal has occurred on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.
31. Addressing the import of Section 47(5), the Court of Appeal in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, reckoned as follows: -

“So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
32. In light of the foregoing, the Appellant was required to prove that her employment had been terminated unlawfully. In this case, there was no evidence that the employment relationship between the parties had been severed.
33. It is also my consideration that in failing to accept the recall back to work, the Appellant failed to mitigate her loss.
34. Indeed, under Section 49(4) (l) of the *Employment Act*, an employee is expected to mitigate his or her losses. In this regard, the Court in determining the appropriate remedies to be awarded on account of wrongful dismissal and unfair termination ought to consider amongst other factors, any failure by the employee to reasonably mitigate the losses.
35. On the mitigation of loss, the Court of Appeal in the case of *African Highland Produce Limited v John Kisorio* [2001] eKLR, held that:

“The prime factor is that he(sic), plaintiff, has a duty to mitigate loss if it is within his means to do so. Herein the plaintiff had the means to do so but did not act prudently.... It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident.”



36. In this case, the Appellant had an opportunity to mitigate her loss by resuming work but she declined to do so. In the end, she failed to mitigate her losses as expected in the circumstances.
37. In total sum, I find that the Appellant failed to prove on a balance of probabilities, that she had been terminated from employment.
38. To this end, the Court is unable to fault the finding by the learned trial Magistrate.
39. Having found that there was no termination of employment, it is not logical to consider whether the said termination was unfair and unlawful, as that issue falls by the wayside.

Reliefs

40. As there has been no finding of unfair termination, the claim for compensatory damages and notice does not lie.
41. The claim for leave is denied as the Appellant admitted at the trial Court that she proceeded on leave 3 times a year. Further, having so admitted, the Appellant did not specifically plead the period for which she was claiming the leave pay.
42. On the question of gratuity, the Appellant did not provide the basis for the same. I have perused the contract of employment which was exhibited at the trial Court and ascertained that it does not provide for payment of gratuity. Therefore, it is evident that the same was not contractually agreed upon between the parties. For that reason, the said relief cannot be sustained.

Orders

43. Ultimately, I find no reason to cause me to overturn the decision by the learned trial Magistrate. Accordingly, the instant Appeal fails and is dismissed in its entirety.
44. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Appellant Ms. Kedogo

For the Respondents Mr. Kimani

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the



duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

