



**Adpack Limited v Makau (Appeal E223 of 2022)
[2023] KEELRC 2764 (KLR) (3 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2764 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E223 OF 2022
B ONGAYA, J
NOVEMBER 3, 2023**

BETWEEN

ADPACK LIMITED APPELLANT

AND

JOSPHAT MUTUKU MAKAU RESPONDENT

(Being an appeal from the Ruling and Judgment of the Hon. E. Kimaiyo Suter, Principal Magistrate delivered on 17.11.2022 in Mavoko Magistrates Court MEELRC 33 of 2019)

JUDGMENT

1. The appellant filed a memorandum of appeal on 18.12.2022 through the firm of Okemwa & Company Advocates. The appellant appeals against the trial court's judgment delivered on 17.11.2022 and upon the grounds that he erred in law and fact by:
 - a. Failing to find the appellant (employer) lawfully exercised its disciplinary prerogative to suspend the respondent on alleged misconduct which the respondent failed, refused to subject to, and answer and hence could not be faulted.
 - b. Disregarding cleared evidence of the letter dated 13.10.2017 which the claimant requested reasons for the alleged misconduct contrary to the learned magistrates' finding.
 - c. Finding against the weight of evidence that indeed the matter of leave days and all claims were subjected to the Labour Officer who dealt with and addressed them and the respondent could not make similar demands already addressed without new evidence.
 - d. Failing to hold that the claimant was unlawfully terminated and to award such reliefs.
 - e. Failing to consider all evidence and submissions and binding authorities as supplied by the appellant occasioning a miscarriage of justice.



2. The appellant prayed for the entire judgment of the Hon. E. Kimaiyo Suter (PM) delivered on 17.11.2022 to be set aside in its entirety with costs.
3. Both the appellant and the respondent filed their respective submissions to the appeal. The Court has considered the material on record and returns as follows.
4. The 1st ground of appeal is whether the trial Court erred in finding that the suspension was wrong. It is submitted that the suspension was legitimate exercise of the appellant's prerogative to exercise disciplinary control. The appellant relied on its letter dated 13.10.2017. The letter being on desertion and addressed to the respondent stated as follows. That the respondent had failed to report on duty on 29.09.2017 with the result that all machines did not run due to the respondent's absence and that of his colleague. On 02.10.2017 the appellant asked the respondent to provide for the reasons for the absence but the respondent failed to do so. There after the respondent failed to report on duty. Consequently, the services were terminated. The letter was copied to the County Labour Commissioner at Mavoko and the respondent informed the liberty to clear with the appellant through his supervisor and the Human Resource office. The letter by the County Labour officer shows that the respondent reported a dispute that the appellant had employed him from 15.03.2013 to 28.09.2017 and the respondent claimed from the appellant worked days and leave days. The appellant was required to settle in 7 days. In his witness statement the respondent confirmed that sometimes in September 2017 he reported at work late being 7.30am which was 30 minutes late. Further his supervisor asked him to go home and see the human resource officer the following day but when he reported in compliance, he was asked to sign some form and when he declined, he was asked to go home and await a call. Further, the following day he went at work and he was locked out. He reported the matter to the Labour Officer and the appellant had paid him Kshs.6, 837.00. The appellant exhibited a letter of suspension dated 02.10.2017 stating that on 29.09.2017 the claimant was to report at work by 7.00am and when summoned by the supervisor he delayed to go resulting in the convertex machine he operated not to run. The letter stated that the action amounted to gross misconduct but since the appellant was lenient, a suspension of 7-days was being imposed. He was to report back on 10.10.2017. The letter concluded that the respondent signs the letter to signify that he had read and understood the contents. George Njoroge the HR officer signed for the appellant but there is no signature for the respondent. It appears to the Court that the suspension letter is the document the respondent calls a form and which he admits to have failed and refused to sign.
5. The Court can interfere with the trial Court's findings only if it is shown that the trial Court misdirected itself in material respects thereby resulting in injustice. In finding for the respondent, the trial Court stated that it had considered the letter dated 13.10.2017 and found that it was misleading because the suspension letter did not ask the claimant to give reasons why he had been absent so that the process was unfair. With due respect, the Court finds for the appellant that the trial Court misdirected itself in that finding. The evidence before the trial Court was that the respondent had admitted being late for 30 minutes. Upon that admission, the respondent imposed a punishment of suspension from work for 7 days. The respondent was requested to sign but he refused to do so. He was asked to take leave. As submitted for the appellant, the respondent was entitled to impose a punishment of suspension in exercise of the employer's prerogative to undertake disciplinary process. By refusing to sign in acknowledgement of the lenient punishment of suspension for 7 days in place of a dismissal, the Court finds that the respondent thereby contributed 100% to the loss of his employment. It is that after refusing to accept the lesser punishment of suspension for 7 days in place of dismissal in view of the admitted 30 minutes lateness, nothing was left of the appellant about the disciplinary process that had been initiated and been determined. Thereafter, the respondent must by his own actions be deemed a belligerent employee who had deserted in terms of the letter dated 13.10.2017. Even if he was



not locked out as he alleged, he had indicated that he will not accept the suspension as imposed. While making the finding, it is instructive that the suspension was not a preliminary and interlocutory step pending further investigation and disciplinary processes but, it was a final punishment imposed for the respondent's admitted lateness. The 1st ground of appeal must therefore succeed. The 2nd ground of appeal (b as stated earlier herein) also succeeds in that regard.

6. The 3rd ground (stated as (c) herein) is whether the respondent was entitled to move the Court after he got the payment following his reported dispute to the Labour Officer. The Court finds that the trial Court did not err in finding that under section 47 of the *Employment Act*, the respondent was at liberty to complain to the Labour Officer and that the section was express that by filing a complaint with the Labour Officer, the employee was not barred from approaching the court on the same issue or other infringement of his statutory rights. Indeed subsection 47(3) states,

“The right of an employee to present a complaint under this section shall be in addition to him to complain to the Industrial Court on the same issue and to the right to complain on any other infringement of his statutory rights.”

7. On the 4th ground of appeal, the Court has already found that the trial Court erred in finding that the termination was unfair. The submissions for the appellant in that regard are upheld. The Court has found that the respondent admitted he was late for 30 minutes, punishment of 7-days suspension was imposed, he refused to sign in acceptance, and he was told to go away. He alleges he was locked out. But even if he was locked out, the Court has found he had been categorical that he would not accept punishment as imposed. He must be deemed to have constructively become a deserter, for what would the appellant do with an employee who had rejected a lenient punishment upon his own admission of lateness? It cannot be said that the reason for separation was not genuine as envisaged per section 43 of the *Act* or that it did not exist and further, as envisaged in section 45 of the *Act*, the appellant cannot be said to have adopted an unfair procedure.

8. The 5th ground is on remedies. The Court returns as follows:

- a. The Court returns that it was not enough for the respondent to simply testify that he never went on leave. The Court finds that as submitted for the appellant, the issue of leave was before the Labour Officer and the respondent received payment in that regard. Without showing the manner the Labour Officer may have failed in computation or further claim in that regard, it cannot be found, as found by the trial Court that 3 years of leave was due. The Court further finds that the trial Court appears not to have justified the reliance on section 90 of the *Act* in awarding Kshs.47, 037.00 for three and not 4 years worked when the trial Court stated,

“I however find that the claim is payable for three years only as limited in Section 90 of Employment Act.”

The particulars of the leave days ought to have been particularized in pleadings and then strictly proved as is trite law for special damages. That was not done and the award will be set aside.

- b. The separation or termination was not unfair as already found in this judgment. The award of notice payment and for one-month salary Kshs.15, 679.00 and then compensation Kshs.94,074.00 will be set aside as well.

9. The Court has found that the respondent fully at 100% contributed to his predicament by rejecting the punishment of suspension for 7 days as was imposed and in the circumstances that he had admitted the gross misconduct of being late for 30 minutes on the material date. He will bear costs of the appeal and of the proceedings in the trial Court.



In conclusion the appeal is hereby determined for the appellant against the respondent with orders:

1. The entire judgment and decree of the trial Court herein is set aside with costs.
2. The respondent to pay costs of the appeal.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 3RD NOVEMBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

