



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

ELRC APPEAL NO. 4 OF 2019

(Before D.K.N.Marete)

DANIEL MUTHOKA MUINDI.....APPELLANT

VERSUS

INTEX CONSTRUCTIONS CO.LTD.....RESPONDENT

J U D G M E N T

This is an appeal dated 9th December, 2019 and comes out as follows;

1. *THAT the learned Principal Magistrate erred in Law and facts by failing to appreciate the appellant evidence in total hence arriving to a wrong judgment/Decree.*
2. *THAT the learned Principal Magistrate court erred in law and facts by failing to consider the respondent oral testimony.*
3. *That the learned Principal Magistrate court erred in law and facts by not finding the respondent action to terminate the appellant job as unlawful.*
4. *That the learned Principal Magistrate court erred in law and facts by not finding the respondent in breach of his employment.*
5. *That the learned Principal Magistrate court erred in law and facts for not ordering the respondent to pay the appellant damages and cost despite finding him entitled certificate of service.*
6. *That the learned Principal Magistrate court erred in law and facts for not ordering the respondent to compensate the appellant Kshs.15,000/- he deposited at police station and later surrendered to the respondent.*
7. *That the learned Principal Magistrate court erred in law and facts for finding the respondent were entitled to summary dismiss of the appellant without a fair hearing or justified offence.*
8. *THAT the learned Trial Magistrate erred in law and facts for admitting the respondent evidence without any documentary evidence.*

He prays as follows;

- a) *That the appeal be allowed and lower court judgment/Decree set aside.*
- b) *The Claimant be awarded cost of the appeal and lower court claim be allowed with cost.*

The Appellant faulted the decision of the learned magistrate by denying default on his part. It is his case that the allegations of fraud at the NSSF leading to his arrest and a criminal prosecution were all accepted by the learned magistrate without justification or cause.

The Appellant further lays blame on the Respondent for inciting the NSSF and therefore leading to his arrest and prosecution. It is his case and submission that the learned magistrate should have seen through this and discarded the evidence of the Appellant thereby allowing his case.

The Respondent admit and submits that this court is duty bound to scrutinize and walk through evidence in the events of a first appeal as is the case here. On this she seeks to rely on the authority of **Oserian Development Company Limited v Jackson Oteyo Sila (2018) eKLR**, where the court held as follows;

“Appeals to this court in terms of section 17 of the Employment and Labour Relations Court Act, 2011 are ordinarily on points of law. However, this court sitting as a first appeal court over the decision of the magistrate’s court is required according to Peters versus Sunday Post Ltd (1958) EA 424, to reassess the entire evidence tendered at trial and make its own independent findings. If the finding of the trial court is supported by evidence and the law, then such a finding may not be interfered with.”

The Respondent moves on to submit a clear court case of lawful termination of employment as was demonstrated by evidence tendered at the Magistrate’s court and therefore the decision of the learned magistrate.

It is her case that the appellant was summarily dismissed pursuant to Section 44 (4) of the Employment Act, 2007 which comes out as follows;

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if-

a)

b)

c) An employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly,

.....

g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.

The Appellant in the circumstances was involved in fraud and subsequently charged on the same. This amounts to a criminal offence and is misconduct calling for summary dismissal. The Appellant cannot therefore sustain an appeal on this kind of background.

This appeal is frivolous and vexatious. It is an abuse of the process of court. I say this because there is clear evidence of an elaborate and elucidate analysis and determination of the cause by the learned magistrate. The judgment of the lower court tells it all.

I am therefore inclined to dismiss the appeal with costs to the Respondent.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Mutunga instructed by MMboos Mutunga & Company Advocates for the Appellant.

2. Mr.Rapondo instructed by Ameyo Guto, Etole & Company Advocates for the Respondent.