



REPUBLIC OF KENYA



KENYA LAW
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**Mombasa Apparel [EPZ] Ltd v Gundu (Appeal E010 of 2022)
[2022] KEELRC 1126 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1126 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E010 OF 2022**

**AK NZEI, J
JUNE 16, 2022**

BETWEEN

MOMBASA APPAREL [EPZ] LTD APPELLANT

AND

MUNGA CHIGOMBI GUNDU RESPONDENT

(Being an appeal from part of the judgment and decree of Hon. Maureen Nabibya-PM on 20th January 2022 at Mombasa Chief Magistrate's Court Cause No. 1094 of 2019)

JUDGMENT

1. The Appeal before me is against the judgment of Mombasa Principal Magistrate (M.L. Nabibya) delivered on 20th January 2022 in the said Court's Cause No. 1094 of 2019 wherein the Respondent herein had sued the Appellant and pleaded: -
 - a) that the Respondent was employed as a Mass Production Mechanist from 2nd January 2014 to 9th August 2019 when the Appellant terminated the Respondent's services without assigning any reasonable cause.
 - b) that during the period of employment, the Appellant was supposed to pay the Respondent a basic salary of ksh.15,385 per month and an annual leave allowance of ksh.15,385 per annum.
2. The Respondent sought the following reliefs:-
 - a) one month salary in lieu of notice.....Ksh. 15,385
 - b) annual leave allowance (15,385x5 years)ksh.76,920
 - c) unpaid public holidays (15,385x5)ksh.75,900
 - d) compensation for unfair termination(15,385x12)...ksh.184,608



3. The Respondent also sought a declaration that termination of his employment by the Appellant was unfair.
4. Alongside the Memorandum of Claim dated 8th December 2019, the Respondent filed his written witness statement and a list of documents dated 18th December 2019, both of which accompanied the memorandum of claim. Documents listed on the claimant's list of documents included the Respondent's demand letter dated 25/10/2019, the Appellant's response to the demand dated 8/11/2019, a copy of the Respondent's payslip for August 2019, Certificate of Service dated 19th August 2019 and the Respondent's provisional NSSFstatement.
5. In its reply to the Respondent's memorandum of claim dated 7th February 2020, the Appellant pleaded:-
 - a) that the Respondent was employed by the Appellant on a fixed term contract running from 2/1/2019 to 25/8/2019.
 - b) that the Respondent worked upto 27/7/2019, after which he absconded and deserted duty, and never went back.
 - c) that on 8/8/2019, the Appellant caused a Notice to show cause to be issued to the Respondent's last known address through registered post, to show cause why he could not be dismissed from employment for deserting duty, and also invited him for a disciplinary hearing on 23/8/2019, which notice the Respondent ignored.
 - d) that a decision to summarily dismiss the claimant was reached on 23/8/2019 when the claimant failed to appear for the disciplinary hearing.
 - e) that a certificate of service was issued to the claimant and his final dues were paid in full into his bank account.
 - f) that the Appellant's act of summarily dismissing the Respondent was in tandem with Section 44(4) (a) of the [Employment Act](#).
6. At the hearing, the Respondent adopted his written and filed witness statement as his testimony and produced in evidence the documents listed on his list of documents referred to at paragraph 4 of this judgment.
7. It was the Respondent's evidence that he applied for/sought leave on or about 27/7/2019 and the same was granted by the Appellant, but when he resumed duty on 19/8/2019, the Respondent informed him that they no longer required his services, and proceeded to issue him with a Certificate of Service dated 19/8/2019. That the Respondent was not invited for any disciplinary meeting/hearing.
8. It was the Respondent's further testimony (as stated in his adopted witness statement) that upon issuance of a demand notice by his Advocate on 25/10/2019 and service of the same upon the Appellant on 7/11/2019, the Appellant wrote a letter dated 8/11/2019 and enclosed a letter back-dated to 8/8/2019 but posted on 9/11/2019; and that the letter was meant to defeat the demand letter dated 25/10/2019, which had been served on the Appellant on 7/11/2019.
9. Cross –examined, the Respondent testified, inter-alia:-
 - a) that he was working on contract, and a working month ran from 1st to 25th of a month, with another month starting on 26th.



- b) that he was on duty in July and August 2019 and did not abscond duty, that he did not abscond duty on 27/7/2019, but applied for leave on the said date; and was paid July and August 2019 pay.
10. The Appellant called one witness, Herbert kea, who adopted his witness statement dated 2/9/2020 and produced in evidence the documents listed on the Appellant's list of documents. These documents included an extension of the Respondent's fixed term contract of employment from 25/7/2019 to 25/8/2019, a show cause letter dated 8/8/2019, minutes of a disciplinary meeting held on 23/8/2019, summary dismissal letter dated 29/8/2019, a Certificate of Service dated 29/8/2019, and August 2019 payment advise.
11. Cross-examined, the Appellant's witness (RW-1) told the Court that the show cause letter which also communicated the disciplinary meeting, was served on the Respondent by registered post, but the witness had not produced any document to show that the Respondent was indeed served by registered post. That Certificate of postage was dated November 9, 2019.
12. The trial Court made a finding that termination of the Respondent's employment was unfair, and proceeded to award the Respondent one month salary in lieu of notice (Ksh.15,385) and the equivalent of six months' salary (ksh.92,310) being compensation for unfair termination of employment. The Respondent was also awarded costs of the suit and interest at Court rates.
13. Dissatisfied with the said judgment, the Appellant filed the present appeal and set out the following grounds of appeal:-
- a) the learned Magistrate erred in law and fact by finding that the claimant was unlawfully terminated while ignoring facts and evidence on record and thereby awarding compensation.
- b) the learned Magistrate erred in law and fact (in) awarding notice pay to the claimant and ignored to appreciate the provisions of Section 44(1) of the *Employment Act*.
- c) the learned Magistrate erred in fact and in law by totally disregarding the Appellant's evidence on record.
14. This is a first appeal. A first appeal is by way of a re-trial. This Court's duty as a first appellate Court is to re-evaluate, re-analyze and to reconsider the evidence adduced, and to draw its own conclusion, bearing in mind that it did not see the witnesses testifying, and therefore give due allowance for that.
15. The fact of the Respondent having been in the Appellant's employment at the time of termination of employment is not in dispute. The Respondent's monthly salary at the time of cessation of employment is also not in dispute.
16. The main dispute appears to be whether the Respondent's employment was terminated by the Appellant on 19th August 2019 or whether the Appellant absconded duty as from 27th July 2019, the date on which the Respondent testified that he applied for leave. I will deal with the three grounds of appeal together.
17. It was held in the case of *Stanely Omwoyo Onchwari -vs- Bom Nakuru Ymca Secondary School* [2015] eKLR that:-
- “the employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone



calls, colleagues or family members) issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”

In the case of *Godfrey Anjere –vs- Unique supplies Limited* [2015] eKLR, the Court stated as follows:-

“in a dismissal on account of absconding duties, the employer is required to show what steps he took to inform the employee that his or her dismissal will result if they did not report to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse, such as illness, or circumstances beyond his control, and yet unable to communicate to the employer in good time.”

18. The Appellant did not demonstrate having taken any step, or made any effort to trace the Respondent, if at all he had absconded duty. The allegation by the Appellant that it sent out a notice to show cause to the Respondent (dated 8/8/2019) by registered post is unacceptable as the said letter is not shown to have been received by the Respondent. Indeed, RW-1 told the Court that he had nothing to show that the service by registered post was done, and that the certificate of postage was dated November 9, 2019. There is nothing to show that the notice to show cause dated 8/8/2019, which also invited the Respondent for a disciplinary hearing on 23/8/2019, was served on the Respondent, and was received by him. This alone invalidates any purported disciplinary proceedings against the Respondent.
19. It was incumbent upon the Appellant to prove that indeed, the Respondent absconded duty on 27/7/2019 as alleged. The Appellant did not produce in evidence any employment records, including any duty attendance registers, to show that the Respondent was not on duty on 27/7/2019 when he alleges to have taken leave and on 19th August 2019 when he alleged to have reported back on duty. It is worth noting that the Appellant issued a Certificate of Service to the Respondent on 19/8/2022, the date on which the Respondent testified to having resumed duty after leave and to having been terminated. The said document states that the Respondent worked upto 27/7/2019. Further, the Respondent exhibited a payslip for the month of August 2019.
20. If the Respondent absconded duty on July 27, 2019 as alleged by the Appellant, why would he earn a salary for the month of August 2019. Further, if, indeed, the Respondent was summarily dismissed on August 29, 2019, why did the Appellant issue the Respondent with a certificate of service on 19th August 2019, long before the alleged disciplinary proceedings on 23/8/2019. By dint of Section 51(1) of the *Employment Act*, issuance of a certificate of service brings to a close an employer-employee relationship. It was held in the case of *Elizabeth Wasbeke & 62 Others –vs- Airtel Networks [k] Ltd & Another* [2013] eKLR as follows:-

“the issuance of a Certificate of Service is indicative of the end of employment for the noted duration in the Certificate as the date when the employee ceased being in the employ of the employer must be noted in this Certificate. It creates a closure of the relationship. Any other engagement will open a new relationship. As indicated in Section 51(1) of the Act, failure to issue this certificate, an employer faces criminal sanctions as failure to comply one commits an offence...In this case, the 1st Respondent in compliance of these requirements issued this certificate to the Claimants on 31st January 2011...To go back, they had to be on a new contract of service/employment.”
21. How does the Appellant explain the second certificate of service dated 29/8/2019 produced in evidence by its witness (RW 1). The Appellant did not deny having issued a certificate of service dated 19/8/2019 that was produced in evidence by the Respondent.



22. On a balance of probability, I find and hold that the Appellant terminated the Respondent's employment on 19/8/2019 as pleaded and demonstrated by the Respondent.
23. The question that follows is whether termination of the Respondent's employment was fair. For a termination of employment to pass the fairness test, it must be demonstrated that the employer complied with Section 41 of the *Employment Act*. Section 41 of the Act sets out mandatory procedural requirements which must be complied with by any employer wishing to terminate an employee's employment. Section 41 of the *Employment Act* provides that:-
- “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
24. The Court of Appeal stated as follows in the case of *CMC Aviation Limited v Mohamed Noor* [2015] eKLR:-
- “In view of the foregoing, we find that the Appellant's act of summarily dismissing the Respondent without giving him an opportunity to be heard amounted to unfair termination as defined under Section 45 of the *Employment Act*. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Ssacco Limited* [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under Section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR”
25. Further in the case of *Kenfright [E.A] Limited v Benson K. Nguti* [2016] eKLR, the Court of Appeal held as follows:-
- “apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding...”
26. In the present case, all that the Appellant did was to exhibit an alleged notice to show cause inviting the Respondent for a disciplinary hearing on 23/8/2019, five days after termination of the claimant's employment and issuance of a certificate of service on 19/8/2019. Both the alleged Notice to Show



Cause and every other document that the Appellant purported to issue to the Respondent after the purported disciplinary meeting said to have been held on 23/8/2019 were issued after termination of the Respondent's employment on 19/8/2019, and cannot be said to have been issued in compliance with Section 41 of the *Employment Act*, or any other provision of the Act.

27. The Appellant did not comply with the aforesaid mandatory statutory provisions before terminating the Respondent's employment on 19/8/2019. Termination of the Respondent's employment by the Appellant was unlawful and therefore unfair. I so find, hold and declare.
28. In view of the foregoing finding, I find no merit in the appeal, and I decline to disturb the awards made by the trial Court in its judgment delivered on 20th January 2022.
29. Consequently, the appeal herein is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... for Respondent

