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Ochanda v Secretary BOM Rarage Mixed Secondary School & another (Employment and Labour Relations Appeal E032 of 2021) [2022] KEELRC 1229 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1229 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E032 OF 2021

CN BAARI, J

JULY 21, 2022

BETWEEN

JEREMIAH O.M OCHANDA APPELLANT

AND

**SECRETARY B.O.M ST. PETERS RARAGE MIXED SECONDARY
SCHOOL 1ST RESPONDENT**

**CHAIRMAN B.O.M ST. PETERS RARAGE MIXED SECONDARY
SCHOOL 2ND RESPONDENT**

(Being an Appeal from the Judgment and Decree of the Principal Magistrate Court at Ndhiwa by Hon. Mary A. Ochieng PM and delivered on the 2nd July, 2021)

JUDGMENT

1. The Appellant lodged Cause Number 2 of 2020 at the Senior Principal Magistrates Court at Ndhiwa against the Respondents, seeking a declaration that his termination by the Respondents was unfair and unlawful and that he be reinstated to the service of the Respondents.
2. The court delivered judgment on the 2nd July, 2021, wherein, the learned Magistrate dismissed the Appellant's case on the basis that the Respondents followed due process in the termination.
3. The Appellant being dissatisfied with the decision of the court, filed a Memorandum of Appeal on the 6th September, 2021, premised on the following grounds:
 - i. That the Trial Magistrate erred in law and fact and misdirected herself leading to the wrong interpretation of Section 46 of the *Employment Act* 2007, listing reasons not constituting fair termination including inter alia, membership of employee to a trade union, participation of an employee in activities of a trade union outside working hours or without the consent of employer within working hours, employee seeking office in a trade union, or employee



initiation of complaints against employer or legal proceedings and participation in a lawful strike.

- ii. The Trial Magistrate erred in law and fact, when, having reasonably set out the questions “whether the termination reason and procedure for termination of the services of the Plaintiff by defendants was wrongful? she advertently deviated and drifted away from lawful grounds for dismissal from work under Section 44(4) of the *Employment Act* to include absenteeism, neglecting duty, being abusive, refusing to obey lawful command, and suspicion to have engaged in a criminal activity.
- iii. Further to 1) above the Trial Magistrate failed to Paint picture or scene of the school’s administration at the time of interdiction of the Appellant herein and instead gives along unanalyzed record of the proceedings without relevant analysis of issues proposed for determination.
- iv. The Trial Magistrate erred in law when she failed to accept that once elected or appointed as union official to represent workers, he/she has automatic right to represent the workers and defend their employment rights without need for any further authorization by the workers.
- v. The Trial Magistrate erred in law and fact when she failed to notice and accept the documentary evidence provided in the list of documents and annexure proving that the Plaintiff was indeed mandated by the workers to represent them. She also failed to observe that several officials of Kudheiha, Sub County Directorate of Education and Ombudsman, inter-alia visited the school and/or communicated with the Secretary BOM consequent to Plaintiff’s communication with them which meant they recognized his status as workers Secretary/ Representative/Automatic mouth piece of the workers.
- vi. The Trial Magistrate erred in law substantially when she failed to note that the Appellant did not breach his obligations of duty as the school’s Laboratory Technician and consequently failed further to note that the Appellant was eventually put to task by the defence counsel Mr. Owaka in paragraph 3 of page 5 of judgment over matters union contrary to Section 46 of the said Act.
- vii. The Trial Magistrate erred in law when she paradoxically concentrated her analysis on matters union as can be seen on page 5 of the judgment in paragraph 3, 4, 5, 6 page 6 of the judgment in paragraph 1, 2, 3, 4 & 7 contrary to Section 46 of the Act. The same union related matters are discussed by the Trial Magistrate in page 7 of her judgment in paragraph 1, 2, 3, 4 & 4 contrary to Section 46 of the same Act.
- viii. The Trial Magistrates analysis of the submission before her was/is schewed in favour of the Respondents the same worsened by her failure to appreciate the import of Section 45(4) of the Act “a termination of employment shall be unfair if it is for one of the reasons specified in Section 46” and if found out in all the circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employees” and in Section 46 of the Act lists reasons not constituting fair termination to include “... membership of a trade union, participation of an employee in activities of a trade union ... employee initiation of complaint against employer”.
- ix. The Trial Magistrate advertently failed to recognize the role of the Appellant in the school as a union member of KUDHEIHA even after noting the union officials, whose report is not given to court by the Defendants/Respondents attended some of the meetings in the school.



- x. Further to 9 above some other bodies visited or communicated with the school, but the Trial Magistrate advertently ignored their views and comments.
 - xi. The Trial Magistrates instead acted as an advocate for the Defendants/Respondent herein as clearly seen on page 5 of the judgment.
 - xii. The Trial Magistrate made a decision while in a confused state in terms of her jurisdiction as seen in paragraph 7 of page 9 of her judgment.
 - xiii. The Trial Magistrate failed to take into account the impact of oppressive administration of the school during the time of Principal B.B Olang'o who most likely left behind incriminating records against the school workers and the records were not verified at all and taken just at face value and which definitely led to wrongful dismissal of the Appellant's case.
4. The Appellant prays that the judgment of the Trial Court be set aside, and substituted therewith a judgment in favour of the Appellant.
 5. The Appellant further prays that the Honourable Court be pleased to issue orders against the Respondents to pay the Appellant damages for wrongful termination.
 6. Submissions were filed for both parties.

The Appellant's Submissions

7. It is submitted that the termination of the Appellant was irregular, unfair and contrary to his contract of service and labour laws. The Appellant further submits that he was not issued with a warning letter prior to the termination.
8. It is submitted that the Appellant's termination was not based on valid and fair reasons since the Respondent failed to prove the reasons for the termination.
9. The Appellant submits that he did not breach any provisions of Section 44(4) (a-g) to warrant dismissal. He further submits that the Trial Magistrate wrongly concentrated Section 46 of [Employment Act](#) 2007 in arriving at her judgment.
10. The Appellant submits that he is entitled to the remedies sought.

The Respondents' Submissions

11. It is submitted for the Respondents that the Appellant's additional prayer under his Memorandum of Appeal where he seeks damages for wrongful termination of his services, was not sought under the claim before the Trial Court, and hence cannot be determined at this stage and that the court has no jurisdiction to grant that prayer.
12. The Respondents submit that the trial court was guided by the provisions of Section 45 of the [Employment Act](#) 2007, in establishing that the evidence presented confirmed that the Respondents adhered to due process having issued the Appellant with a show cause letter, a letter of interdiction setting out the grounds of the offence and misconduct, an invite to appear for disciplinary proceedings, minutes of the proceedings and finally the verdict. They sought to rely in the case of [Anthony Mkala Chitavi vs. Malindi Water & Sewerage Co. Ltd](#) (2012) eKLR for the holding that the employer should inform the employee of the charges the employer is contemplating using to dismiss the employee, give employee reasonable time to prepare his defense and hear the employee before making the decision to dismiss or give other sanction.



13. It is submitted for the Respondents that the purpose of this Appeal is to delay execution of costs by the Respondents against the Appellant herein.
14. It is further submitted for the Appellant that the trial court directed itself by law, and that its finding was not only fair but also just.
15. The Respondents finally pray that the Appeal be dismissed with costs.

Analysis and Determination

16. I have considered the Appellant's Record of Appeal and the submissions by both parties. Although the Appellant has listed thirteen grounds of appeal, I will summarize them into the following broad grounds:
 - i. That the Trial Court misdirected herself in her interpretation of Section 46 on reasons for termination.
 - ii. That the Trial Court erred in failing to consider documentary evidence produced before it, and in its analysis of the submissions filed by the parties.
 - iii. That the Trial Court erred in failing to recognize the Appellant's role a member of a union, and the that fact that union officials attended meetings at the Respondents' school.
17. The Court of Appeal in *Musera vs. Mwechelesi & Another* ([2007]) KLR 159: stated as follows in regards to appeals:

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”
18. Further in *Selle vs. Associated Motor Boat Co.* [1968] EA 123 the court stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
19. My role in this appeal, which is a first appeal, is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions, while taking into consideration the lower court's exercise of discretion on findings of fact and law.
20. The Trial Court found the termination of the Appellant fair premised on the reasons given for the termination, and compliance with statutory procedures relating to the termination.



21. On the issue of procedure, the Appellant admitted in his testimony before the Trial Court that he was invited for a disciplinary meeting, and further confirmed that he attended the hearing. Further evidence before court indicates that union officials attended the disciplinary hearing to represent the Appellant. Section 41 of the [Employment Act](#), states as follows in respect of disciplinary procedure:

“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.”
22. In the case of [Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited](#) [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
23. The Appellant was issued a show cause letter, a letter of interdiction and invited to appear before the Respondents’ disciplinary committee for a hearing. The evidence before court further show that he was represented at the hearing by a union representative.
24. I find the procedure adopted by the Respondents in terminating the Appellant to be squarely within the requirements of Section 41 of the [Employment Act](#), 2007, and hence rendering the procedure fair.
25. The Appellant contends that the Trial Court misinterpreted Section 46 of the [Employment Act](#) on the reasons for termination. Section 46 of the [Employment Act](#), provides what do not constitutes fair reasons for termination. The Appellant’s assertion is that his termination was premised on his membership to a union, and purporting to represent the Respondents staff.
26. The Respondents’ reasons for terminating the Appellant was that his discipline had deteriorated, working with students against the school management, locking out the Principal and incitement.
27. The Respondents’ presented two witnesses who led evidence on their reasons for terminating the Appellant. In my view, the reasons given for the Appellants termination are valid, fair and reasonable. (See [Pius Machafu Isindu v Lavington Security Guards Limited](#) [2017] eKLR)
28. In whole, this court finds and holds that the Appellant has not proved his grounds of appeal and the court lacks basis upon which to interfere with the judgment of the lower court. (See *Mbogo & another v Shab* [1968] EA 93 at 96)
29. The upshot is that the appeal is dismissed in its entirety.
30. I make no orders as to costs.
31. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21 ST DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ochanda Appellant present in person

Ms. Omollo h/b for Mr. Owaka for the Respondents



MS. Christine Omollo - Court Assistant.

