**Muchoki v Board of Management, St.Paul's Junior Seminary (Appeal E016 of 2021) [2022] KEELRC 13083 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13083 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**

**APPEAL E016 OF 2021**

**DKN MARETE, J**

**OCTOBER 31, 2022**

**BETWEEN**

**BONIFACE MUCHOKI ..... APPELLANT**

**AND**

**BOARD OF MANAGEMENT, ST.PAUL'S JUNIOR SEMINARY ... RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Honourable Nelly W. Kariuki-Principal Magistrate, Delivered on 21st October, 2021 in Nyeri CMELRC No.40 of 2020.)***

**JUDGMENT**

1. This matter is brought to court vide a Memorandum of Appeal dated 18th November, 2021. It comes out as follows;

    1. That the learned trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim thereby occasioning a miscarriage of justice

    2. That the learned trial Magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim under the head of underpayment, service pay and housing allowance, thereby occasioning a miscarriage of justice.

    3. That the learned trial Magistrate erred in law and fact by applying the wrong principles of law by failing to make a finding that the Appellant was not accorded due process towards his termination of employment, thereby occasioning a miscarriage of justice.

    4. That the learned trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgment, thereby occasioning a miscarriage of justice.

    5. That the learned trial Magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.

6. That the learned trial Magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant, thereby occasioning a miscarriage of justice.

2. The Appellant's case and submissions comes out as follows;

> ... we similarly invite you to look at a letter by the Respondent dated 14th August, 2020 as contained at page 37 of the Record of Appeal. The said letter is in response to the Appellant's letter dated 6/8/2020 demanding for terminal dues upon his termination. In the Respondent's it is alleged that the Appellant had failed to report to work on 1/8/2020. The Respondent even threatened that if the Appellant did not report to work, from the date of the said letter they would terminate his contract. What followed was a series of letters in which the Respondent purported to convene a disciplinary hearing which in our view was an afterthought. The Appellant was never subjected to the disciplinary action or process as intimated in the said letters as he had been terminated on 31/7/2020 without following due process.

3. He further seeks to rely on the authority of *Msagha v Chief Justice & 7 Others Nairobi* HCMCA No.1062 of 2004 (Lessit, Wendo & Emukule,JJ on 3/11/06)( HCK) [2006] 2 KLR 553, the court held thus;

> "...The court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court established the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material..."

4. Again, in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the court stated the following on the burden of proof;

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and

hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees."

5. The Respondent's submissions come out thus;

> ... it is trite law that the threshold or proof in civil case cases in on a balance of probabilities. The term "balance of probability" was defined by the court in *Kanyungu Njogu vs Kimani Miangi* (2000)eKLR as follows;
>
> "When the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other."

6. It is her further case that section 44(3) and section 44(4) (a) have clearly indicated when an employee can be summarily dismissed.

7. The Respondent further seeks to rely on the provisions of section 44 (4) of the employment 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 of 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) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

8. In the penultimate, the Respondent seeks reliance of section 47 (5) of the *Employment Act*, 2007 to foment her case. This comes out thus;

> 5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

9. It is the Respondent's case that through and through, the appellant was not able to in evidence establish or demonstrate a case of unlawful termination of employment and therefore this appeal must fall by the wayside.

10. This matter tilts in favour of the Respondents case. This is because a scrutiny of the record of appeal does not come up with any failure or default by the learned magistrate. The trial court thrashed out all the issues at hand and came up with a finding of lawful termination of employment. The Appellant's has not dispelled this in his case and evidence at this level.

11. I am therefore inclined to dismiss the appeal with orders that each party bears their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

**Appearances**

1.Mrs.Magwa instructed by Magua & Mbatha Advocates for the Appellant.

2.Mr. Gichuki instructed by D.Mutahi & Associates Advocates for the Respondent.