



**Fineline Industries Limited v Mutuku (Appeal E062 of 2020)
[2021] KEELRC 2420 (KLR) (30 June 2021) (Judgment)**

Neutral citation: [2021] KEELRC 2420 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E062 OF 2020
NZIOKI WA MAKAU, J
JUNE 30, 2021**

BETWEEN

FINELINE INDUSTRIES LIMITED APPELLANT

AND

JOSEPH MWANZA MUTUKU RESPONDENT

JUDGMENT

1. The Appellant, Fineline Industries Limited filed a Memorandum of Appeal dated 14th October 2020 appealing against the Judgment and Decree of the Hon. Principal Magistrate E. Kagoni (Mr.) in CMC Nairobi Milimani Commercial Courts CMEL No. 1388 of 2019, delivered on 17th September 2020 as follows:
 1. A declaration is hereby issued that the Claimant's dismissal from employment by the Respondent was wrong, unfair and unlawful.
 2. One month's salary of Kshs. 15,650/- in lieu of notice is awarded.
 3. The Prayer of twelve months compensation amounting to Kshs. 187,800/-, for unfair termination is hereby granted.
 4. The awarded sum of Kshs. 208,666/- to accrue interest at court rates from date of judgment until payment in full.
 5. The Respondent to bear costs of this suit.
2. The Respondent/Claimant, Joseph Mwanza Mutuku was an employee of Appellant from 2018 and his case is that he was unfairly dismissed from employment on 10th June 2019 by a Director in the Appellant Company and on the allegation of theft. The Appellant/Respondent's case on the other hand is that the Claimant deserted employment and that his employment was not terminated as alleged. The grounds of appeal are as follows:-



1. That the Learned Magistrate erred in law in failing to find that the Claimant had failed to discharge the burden of proof and had not proved his case at all as against the Respondent as prescribed under Section 47 of the *Employment Act*;
2. That the Learned Magistrate erred in law by importing the burden of proof upon the Respondent contrary to the rules of evidence and further that the Respondent was expected to prove its case on a balance of probability without the Claimant first discharging the required burden of proof;
3. That the Learned Magistrate erred in law and fact by holding that the Claimant herein was terminated from the employment of the Respondent on the basis and/or allegations of theft while the evidence tendered by the Claimant and the Respondent did not allege and/or import the termination of the Claimant's employment was on such basis;
4. That the Learned Magistrate erred in law and fact by holding that the Claimant herein was subjected to a disciplinary hearing of which the Respondent herein did not initiate or intended to initiate as the Respondent at all material time did not seek to terminate the employment of the Claimant;
5. That the Learned Magistrate erred in law and fact by holding that the Claimant herein was wrongly, unfairly and unlawfully terminated from the employment of the Respondent while on the contrary, he absconded duty and only filed his Claim after two months after the alleged termination;
6. That the Learned Magistrate erred in law and fact by holding that the Claimant herein attempted to return to work after the alleged termination of his employment while to the contrary, the Claimant herein never attempted to return to work at all from 10th June 2019 or handover his duties to a new worker or request for a termination letter from the Respondent;
7. That the Learned Magistrate erred in law and fact by failing to appreciate the Respondent's evidence which was uncontroverted and never rebutted by the Claimant in his filed pleadings or evidence;
8. That the Learned Magistrate erred in law and fact by departing from the pleadings filed by the parties and evidence tendered during the hearing of the matter in arriving at his judgment/ decision and/or award made and/or delivered on 17th September 2020;
9. That the Learned Magistrate erred in law and fact by failing to appreciate and further excluded the evidence tendered by the Respondent's witness under oath and through documentary evidence and through his witness statement and further holding that the same was hearsay;
10. That the Learned Magistrate erred in law and fact by holding that the Respondent herein failed to produce the CCTV evidence in court and/or have the CCTV video played out in court while on the other hand, the Honourable Magistrate admitted the still CCTV images tendered by the Respondent as evidence and the same were admitted and marked as exhibits in support of the Respondent's case; and
11. That the Learned Magistrate erred in law and fact and contrary to the principle of the doctrine of stare decisis and judicial precedent in entering judgment in favour of the Claimant as against the Respondent contrary to the holdings in the cases of Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers v Mary Immaculate Primary School [2013] eKLR and Daniel Mueke v Bhogals Auto World [2014] eKLR.



3. The Appellant prays that the Appeal be allowed in its entirety and that the Judgment/Award and/or decision of the Learned Principal Magistrate be set aside in the following terms:
 - i. That a declaration is made that the Claimant herein absconded duty from 10th June 2019;
 - ii. That the Claimant's termination from the employment of the Respondent was initiated by the Claimant's actions of absconding duty and eventual service of the Claimant's pleadings upon the Respondent which indicated that he did not wish to resume employment with the Respondent;
 - iii. That the Claimant is not entitled to one month's salary of Kshs. 15,650/- in lieu of notice;
 - iv. That the Claimant is not entitled to twelve months' compensation amounting to Kshs. 187,800/-, for unfair termination.
4. The Appellant further prays that this Honourable Court be at liberty to make such further or alternative orders as it deems proper in the circumstances and that the costs of this Appeal and the lower court proceedings be borne by the Respondent, together with interest at court rates until payment in full.
5. The matter came up for hearing on 15th June 2021 and the Appellant's advocate highlighted to the Court the salient issues. The Appellant's advocate submitted that the issues raised in their appeal can be collapsed into the fact that the learned Magistrate shifted the burden of proof before the Respondent discharged his burden of proof as per Section 47 of the *Employment Act*. He referred the Court to pages 55 – 62 of the Record of Appeal and further analysed the grounds of the Appeal as enumerated hereinabove. He further argued that there were clear inconsistencies and the Claimant claimed he was suspended and his duties assigned to another worker and that he was orally terminated but that his testimony and pleadings differ. It was argued that the Learned Magistrate erred by departing from the pleadings and found that the Claimant was orally terminated on the grounds of theft yet the Claimant had absconded duty. It was further argued that the Learned Magistrate failed to appreciate the testimony of the Respondent (Appellant herein) which testimony was not controverted as the Claimant did not prove he had not absconded duty. Counsel argued that the Learned Magistrate erred in law and fact by finding that the Director should have testified yet the suit is against a company. The Appellant's advocate prays that the Court sets aside the decree and judgment and grants the Appellant the prayers in the appeal as sought and stated that they rely on the appeal, the record before the Court, the pleadings before the lower Court and the submissions they filed in the Court below.
6. The Respondent submitted that his evidence is captured at page 10 of the record of appeal to effect that he was unfairly terminated since the procedure set out in the *Employment Act* was not followed. The Respondent submitted that the Appellant's witness in court, an accountant, was not present when the said Director was talking to the Respondent and that the said witness stated in court that the said Director was relying on some CCTV footage to identify the Respondent. He submitted that however the appellant witness never saw the CCTV footage and that instead of the appellant producing the CCTV footage in court, it produced photographic evidence. The Respondent argued that the photographic evidence actually helped to exonerate him since the appellant witness could not identify the Respondent in the photographs and could not therefore connect the Respondent with theft at the Appellant's premises. The Respondent further submitted that the Appellant did not call the person who was calling the Respondent back to work as a witness and that it should have called the said Director, Mr. Modu, and that neither did the Appellant rebut the evidence that the Respondent made a follow up the following day. The Respondent argued that further, no evidence was produced i.e. call log or SMS to show that indeed he was called back to work and that to make it worse, the



person who allegedly made those calls was not called as a witness. The Respondent submitted that his evidence that he went back was not rebutted at all and that the Court ought to look at the entire conduct of the Appellant to know that it lacks credibility and is bent to suit its preferred outcome. He referred this Court to page 132 of the record of appeal where the Appellant admitted it was served with summons to enter appearance on 10th September 2019, yet it reported the alleged theft on 18th September 2019; three months down the line and only after receiving summons to enter appearance from the Respondent. The Respondent submitted that it is clear that due process was not followed in terminating his employment and that the appeal herein lacks merit and ought to be dismissed with costs.

7. The Court on appeal at the first instance must remind itself that it neither saw nor heard the witnesses who testified in the court below but must nonetheless evaluate the evidence and weigh the same in order to ascertain whether the Court from which the Appeal has arisen failed to take into account a matter it ought to have or took into account a matter it ought not have taken into account. Put another way, as the first appellate Court, it is now well settled my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter as held in the case of *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123. Ordinarily, an appellate Court will not interfere with findings of fact by the trial Court unless the findings were based on no evidence at all, or on a misapprehension of it or the trial Court is shown demonstrably to have acted on wrong principles in reaching the impugned findings. Having sufficiently warned myself of this, let me delve into the appeal proper.
8. In the case before the Chief Magistrates Court in CMEL No. 1388 of 2019 – *Joseph Mwanza Mutuku v Finline Industries Limited*, the Learned Magistrate held that the Respondent’s dismissal from employment by the Appellant was wrong, unfair and unlawful. The Learned Magistrate proceeded to grant some relief which precipitated the instant appeal. Having perused the record, the Learned Magistrate applied his mind correctly to the facts and isolated for determination the issues that related to the alleged theft (cause of termination) the evidence adduced by the Appellant’s witness and the Claimant’s testimony. I am bound to agree with the Learned Magistrate that the Appellant having failed to call a very crucial witness (the Director) cannot claim to have proved the allegations of theft. The director is the one who alleged to have spotted the Respondent in the CCTV footage, which incidentally was also not produced as evidence by the Appellant, and his absence at trial meant the claims against the Respondent were speculations at best. The witness for the Appellant was not able to identify the Respondent in the photos the Appellant produced and could only identify an employee named Kennedy.
9. The foregoing illustrates that the Appellant’s appeal lacks merit and is for dismissal. The quantum in compensation was not over the statutory limit and being discretionary no evidence or suggestion was made that the Learned Magistrate took into account any factor not permitted by Section 49 of the *Employment Act*. The decision of Hon. Kagoni is upheld as being sound in both law and fact. Appeal dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2021.

NZIOKI WA MAKAU

JUDGE

