



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Board of Governors, Kenya Baptist Theological College v Dyuya (Appeal E017 of 2021) [2021] KEELRC 2419 (KLR) (30 September 2021) (Judgment)**

Neutral citation: [2021] KEELRC 2419 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**APPEAL E017 OF 2021**  
**NZIOKI WA MAKAU, J**  
**SEPTEMBER 30, 2021**

**BETWEEN**

**THE BOARD OF GOVERNORS, KENYA BAPTIST THEOLOGICAL COLLEGE ..... APPELLANT**

**AND**

**EVANS MWANA KATANA DYUYA ..... RESPONDENT**

*(Being an Appeal against part of the Judgment of the Senior Principal Magistrates Court at Limuru – Hon. C. N. Mugo in ELRC Cause No. 1 of 2019 delivered on 8th December 2020)*

**JUDGMENT**

1. The appeal is against the trial court's award of compensation for unfair termination assessed at Kshs. 483,000/- being the equivalent of the Respondent's 12 month's pay. The appeal was disposed of by way of written submissions.
2. The Appellant submitted that it seeks to appeal against part of the judgment delivered on 8<sup>th</sup> December 2020 at the Senior Principal Magistrate's Court at Limuru by Hon. C. N. Mugo in ELRC Cause No. 1 of 2019. The Appellant's grounds of appeal are as set out in the Memorandum of Appeal dated 24<sup>th</sup> June 2021 and as reiterated hereunder:
  1. That the Honourable learned trial Magistrate erred in law and in fact in failing to consider the appellant evidence on record.
  2. That the Honourable learned trial Magistrate erred in law and in fact in awarding the respondent compensatory damages for unfair termination quantified as Kshs. 483,000/-
  3. That the Honourable learned trial magistrate erred in law and in fact by failing to consider that the respondent used to misappropriate funds, which funds he never accounted for.



3. The Appellant submitted that the Respondent's employment was terminated on gross misconduct on account of misappropriation of college funds. It submitted that the Respondent admitted in cross examination that he indeed misappropriated college finances by collecting money and not following the internal financial process put in place and by utilizing money collected without approval from the respondent. It was submitted that the learned trial Magistrate ignored this evidence and instead made a finding that the Respondent was wrongfully dismissed. The Respondent further submitted that upon misappropriation of college funds, a decision was arrived by the Appellant's board of governors dismissing the Respondent on account of gross misconduct and a communication to that effect was given to the Respondent vide a letter dated 29<sup>th</sup> April 2019 and this was after an internal process was conducted and the Respondent appeared before the internal administration council which was a mechanism established to afford the respondent an opportunity to be heard where the respondent indeed confirmed the aspect of misappropriation of funds. It was submitted that misappropriation of college funds as admitted by the Respondent is a criminal offence against or to the substantial detriment of an employer hence the same rightly attracted summary dismissal in line with *Employment Act* No. 11 2007 specifically section 44(4)(e) and (g). The Appellant submitted that by misappropriating the college funds by collecting money and using the same without following the laid internal financial process the respondent fundamentally breached his obligations arising under the contract of service and it is our submissions that this conduct attracted summary dismissal in terms of Section 44(3) of the *Employment Act* and therefore, the learned trial Magistrate erred in awarding a sum of Kshs. 483,000/- as compensation for unfair termination. The Respondent submitted that the amount of Kshs. 483,000/- awarded as compensation for unlawful termination was manifestly excessive since the same was awarded notwithstanding the fact that the Respondent also admitted having misappropriated funds hence. The Respondent submitted that at least the learned trial Magistrate should have considered that the Appellant also lost funds as a result of the Respondent's conduct in awarding this sum. The Respondent relied on the case of *George Okello Munyollo v Unilever Kenya Ltd [2019] eKLR* where the court in amplification of the import of Section 44(4)(g) observed as follows;

The respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the respondent and its property, and was justified in summarily dismissing the claimant under Section 44(4)(g) of the *Employment Act*, 2007. The Employer was not required to have conclusive proof of the claimant's involvement; it was only expected to have reasonable and sufficient grounds.

In conclusion, the Appellant urged the Court to allow the appeal and vacate the order of payment of compensatory damage amounting to Kshs. 483,000/- issued by the trial Magistrate.

4. The Respondent filed submissions in which he submitted that the Appellant challenges the award of quantum in compensation anchoring its appeal on 3 vaguely pleaded grounds. He submitted that the Appellant faults the trial court for:
- a. Ignoring the Appellant's evidence on record;
  - b. Wrongly awarding the Respondent Kshs. 483,000/- compensation for unfair termination; and
  - c. Overlooking the fact that the Respondent habitually misappropriated the Appellant's funds hence lawfully terminated.
5. The Respondent submits that without more, the Appellant cries foul alleging procedural and substantive propriety in summarily terminating the Respondent. There is reliance on the case of *George Munyollo v Unilever Kenya Ltd [2019] eKLR* for this. The Respondent submitted that even



at this infant stage of his submissions, it is pellucid that the Appellant's appeal is not only self-limiting, but undeserving of a positive outcome for these reasons: First, the Appellant needed to look no further than the *George Munyollo v Unilever Kenya Ltd* case (supra) that the Appellant relies on for guidance on what constitutes fair termination. In the said case, Marete J. held that summary dismissal under Sections 44(3) or (4) of the *Employment Act*, 2007 only comes to the aid of an employer who complies with the dictates of Section 41(2) thereof which enjoins an employer, in the very least, to hear representations from the employee prior to summary dismissal. The Respondent submits that since the employer filed in evidence proof of a notice and hearing prior to summary dismissal, Marete J. held the termination of employment to be fair. The Respondent submits that in the instant proceedings, neither notice nor hearing was given prior to termination. Further, not a scintilla of evidence such as audited accounts, warnings and/or proof of disciplinary sanction, was shown to buttress the empty allegation that the Respondent, in the Appellant's words at paragraph 3 of the Memo of Appeal, 'used to misappropriate funds, which funds he never accounted for.' The Respondent submits that the Appellant's half-heartedness on its claim of misappropriation of an unquantified amount of its funds by the Respondent cannot be more manifest than its failure to file a counterclaim. The Respondent submits that secondly, Section 49 of the *Employment Act* 2007, provides for a closed catalogue of remedies available for a party that has been unfairly terminated from employment. It donates discretion to the trial court to award compensation up to a pecuniary ceiling equivalent to 12 months' pay. He submits that in assessing the appropriate remedies to award the Respondent, the trial court exercised discretion within the 4 corners of the requisite parameters set out under Section 49(4) of the *Employment Act*, 2007 inter alia the wishes of the Respondent, longevity of the employment relationship and the manner in which the termination was conducted. The Respondent submits that the trial court further called in aid the dictates of the binding authorities of *Shankar Saklani v DHL* [2012] eKLR and *Nicholas Kyula Muasya v FarmChem Ltd* [2012] eKLR where this Honourable Court issued similar reliefs in similar circumstances. The Respondent submits that the principles for setting aside discretionary remedies on appeal as espoused in *Mbogo and Another v Shah* (1968) EA 93 have been so often repeated that it would be prima facie doubtful labour at this late day to question it. The Respondent submitted that in the celebrated case of *Mbogo v Shah* (supra) the Court of Appeal unanimously held that an appellant ought to demonstrate that the trial court exercised its discretion wrongly by:

- a. Misdirecting itself on law;
  - b. Misapprehending the facts of the case;
  - c. Taking into account Irrelevant considerations; and
  - d. Side-stepping relevant considerations in arriving at its decision.
6. The Respondent submits that there has not been an attempt, even remotely, by the Appellant to demonstrate how the trial court was heretic in departing from the crystallized principles of exercising discretion in awarding compensation for unfair termination. The Appellant did not even raise a single principle in *Mbogo v Shah* (supra) to fault the trial court. The Respondent submits that suffice to say, the appeal is for dismissal with costs to the Respondent.
7. I have considered the matter noting that as the first appellate Court, I neither saw nor heard the witnesses who testified and have warned myself of the fact that I am relying on the record and evidence admitted by the trial Court. The Learned Magistrate in the decision made on 8<sup>th</sup> December 2020 determined as follows at paragraphs 12, 13, 18, 19, 20 and 23 and I quote verbatim:-
12. Therefore, the Claimant must therefore adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair



procedure in terminating his employment. Once the Claimant presents prima facie evidence to that effect, the burden shifts to the employer to rebut that evidence by demonstrating that he/she had a valid reason to terminate the employment and that in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the Claimant is said to have proved his case on a balance of probabilities.

13. In the present case, the Claimant adduced evidence to demonstrate that there was no valid reason to terminate his employment and that the employer did not follow a fair procedure. A casual look at the letter of termination dated 29<sup>th</sup> April 2019 detail that the Claimant was basically terminated for misappropriation of funds. According to the Claimant, he appealed this decision and his appeal was not considered.
  18. From the evidence on record, it is clear the Respondent did not comply with the procedural fairness requirements set out in Section 41. It denied the Claimant a hearing even after the Claimant filed an appeal against the Respondent's decision to terminate his employment contract. In his appeal dated 2<sup>nd</sup> May 2019, the Claimant tried to exonerate himself from the allegations levelled against him and the least the Respondent would have done is give him a hearing to put forward his case.
  19. While the Court appreciates the fact that the Respondent may have some genuine reasons to terminate the Claimant's contract since in his evidence, the Claimant conceded that he had no written authorization to use the Ksh. 13,000 in Iten and further conceded that he had never handed over the proceeds from the sale of the books to the accountant as required. Be as it may, the procedure followed in the said termination fell below the threshold set out in law. In the case of *Nicholas Muasya Kyula v FarmChem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (1CK)* the Court held that; "it is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at."
  20. Overall, I have arrived at the conclusion that the termination of the Claimant's employment was unfair for want of procedural fairness.<sup>M</sup> January 2018 and in paragraph 7(a) thereof, the employer is given authority to terminate the contract without notice and the employee is not entitled to any compensation in lieu of notice and the Claimant having signed the contract, he is bound to the terms.
  23. Firstly, having found that the dismissal of the Claimant was unfair, he is entitled to compensation for unfair dismissal. The Claimant having worked for the Respondent for a period of about 7 years, I do believe a 1 year's gross salary would be fair compensation in the circumstances. The Claimant has also sought Ksh. 54,428.97 being an amount for 28.75 unpaid leave days. However, upon perusal of the documents produced as well as the employment contract, there was no indication as to how many leave days the Claimant was entitled to, if any. This being the case, this relief must fail. In respect to the reimbursement of Ksh. 13,000, the Respondent was able to prove that the Claimant used the funds without proper authorization and in respect to the amount claimed being salary for the remainder of the term of employment, since the Claimant is getting compensation for unfair termination, this would result to double compensation. In respect to pay in lieu of notice, the Court has carefully scrutinized the employment contract made on 1
8. The Court has carefully perused the judgment and the portion reproduced above is clear that the Learned Magistrate considered the length of service of the Respondent which was 7 years and



proceeded to award compensation for the period of 12 months which is the maximum. Nothing has been shown to have been considered outside of the parameters of Section 49 of the *Employment Act* nor was it demonstrated that the award was in excess of what is permitted in law. The inevitable result is that the Appeal on the quantum of compensation fails with the result that the Appellant's appeal is dismissed with costs to the Respondent in this Appeal. As the sum was deposited in this Court pending the outcome of this Appeal the sum can be released to the Respondent – Mr. Evans Mwana Katana Dzuya.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**NZIOKI WA MAKAU**

**JUDGE**

