



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. E006 OF 2021

ALLAN BARASA WAFULA.....APPELLANT

v

RONGO UNIVERSITY COLLEGE.....RESPONDENT

(Being an Appeal from the Judgment of the learned

Magistrate R.L.K. Langat (SRM) on 8th October 2020)

JUDGMENT

1. Allan Barasa Wafula (the Appellant) sued Rongo University College (the Respondent) before the Magistrates Court alleging unfair termination of employment.
2. After hearing the evidence, the Magistrate delivered a judgment on 8 October 2020, wherein it was found that the termination of the Appellant's contract was fair.
3. The Appellant was dissatisfied, and he filed a Memorandum of Appeal contending:
 - (1) THAT the Learned trial Magistrate erred in fact and in law in holding that the entire process of dismissal or termination of the Appellant was within the confines of the law, fair and lawful.
 - (2) THAT the learned trial Magistrate erred in fact and in law in holding that the Appellant absconded duty.
 - (3) THAT the learned trial Magistrate failed to appreciate and hold that the reasons afforded by the Respondent in terminating the Appellant were greatly unjustified and unfair.
 - (4) THAT the learned trial Magistrate erred in law and, in fact, in failing to analyse the evidence on record appropriately with the result that he arrived at a judgment that was against the weight of evidence on record.
4. The Appellant filed a Record of Appeal on 26 February 2021, and the Respondent filed a Supplementary Record of Appeal on 15 July 2021.
5. Pursuant to Court directives, the Appellant filed his submissions on 19 July 2021, while the Respondent filed its submissions on 26 July 2021.
6. The Court has considered the record and the submissions.

Role of the Court on the first appeal

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. The Court will keep the interdict in mind.

Unfair termination of employment

Procedural fairness

9. The Appellant asserted before the Magistrates Court that the termination of his employment was unfair because he was not afforded an opportunity to be heard and that no reasons were given for the decision.

10. On the other hand, the Respondent contended that the Appellant had been heard and that the reason for termination of employment was because he had absconded work from June 2016 to January 2018 upon being redeployed from Awendo campus.

11. There was evidence before the trial Court that the Respondent had summoned the Appellant through a letter dated 23 January 2018 to explain his absence from duty from June 2016 to January 2018. The Appellant responded on 23 January 2018, explaining that he had been taken ill and apologising.

12. On 16 February 2018, the Deputy Vice-Chancellor requested the Appellant to report to the Human Resource office on 21 February 2018 for further instructions.

13. The Respondent thereafter issued a suspension/interdiction letter dated 20 March 2018.

14. The letter indicated that the suspension was to facilitate further investigations, and the offences or allegations would be communicated in due course.

15. Under clause 8(c) of the collective bargaining agreement between the Respondent and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers, interdiction should be for 21 days.

16. As a result, the Respondent informed the Appellant through a letter dated 12 April 2018 that the interdiction had been extended because investigations had not been completed.

17. On 14 August 2018, the Respondent invited the Appellant to a disciplinary hearing to be held on 23 August 2018. The allegation was that the Appellant was in contravention of section 6(g)(i) of the collective bargaining agreement as read with section 44(4)(a) of the Employment Act, 2007 (absence without permission). The Appellant was informed of the right to be represented by his trade union.

18. The Respondent produced evidence in the form of minutes to show that the Appellant and his trade union representatives attended the disciplinary hearing on 23 August 2018.

19. The Appellant pleaded guilty to the charge, but the hearing was adjourned in order to establish more facts.

20. The next hearing was on 13 November 2018, where the Appellant again pleaded guilty and stated that he did not have medical records to back up the claims of ill-health.

21. The Committee recommended dismissal, and the Appellant was dismissed through a letter dated 23 November 2018.

22. There was also further evidence that the Appellant appealed, and the appeal was considered and rejected.

23. The Court has reviewed all these records. The Union of which the Appellant was a member was copied on all the correspondences, and union officials were present during the oral hearing phases.

24. The Appellant and the union also participated in the appeal.

25. Therefore, the Appellant was lying through the teeth when he testified before the Magistrates Court that he was not summoned to appear before the Disciplinary Committee.

26. The Appellant was equally dishonest when he asserted in the pleadings and during oral testimony that he was dismissed in March 2018, yet in his letter dated 25 November 2018, he clearly referred to the dismissal letter of 23 November 2018.

Substantive fairness

27. The reason for the dismissal of the Appellant was absent without permission or lawful cause.

28. The Appellant pleaded guilty to the charge twice during oral sessions and in writing.

29. Although alleging ill-health, the Appellant did not place any form of evidence during the disciplinary process or before the trial Court to show that ill-health was a lawful cause to be away from work.

30. Having re-evaluated the evidence on record, the Court finds that the trial magistrate did not fall into any error of law or fact.

31. The trial Court's judgment is upheld, and the Appeal is dismissed.

32. No order on costs considering the Appellant has not secured any gainful employment.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF DECEMBER 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Omondi Abande & Co. Advocates

For Respondent Manyonge Wanyama & Associates LLP

Court Assistant Chrispo Aura