

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 3 OF 2018

MOSES OTIENO MURUKA.....APPELLANT

VERSUS

B.O.G MURANG'A HIGH SCHOOL.....RESPONDENT

(Being an Appeal from the Principal Magistrate's Court Murang'a in PMCC No. 57 of 2006 on 26th January 2009)

BETWEEN

MOSES OTIENO MURUKA.....PLAINTIFF

AND

B.O.G MURANG'A HIGH SCHOOL.....DEFENDANT

JUDGMENT

1. The Appeal herein is from the decision of the learned Chief Magistrate Hon. J. Gathuku made in the case between the Plaintiff (Appellant herein) and the Defendant (the Respondent herein). In the appeal, the Appellant raises 6 grounds which were in the main that the learned Resident Magistrate misconstrued or misdirected himself in relation to the application of statutory laws, regulations and orders governing the employer-employee relationship and hence came to the wrong conclusion that the Appellant's case was unproved, that the learned Resident Magistrate wrongly applied case law to arrive at the conclusion he did that the Appellant had been rightly dismissed without analyzing the evidence to see if the allegation against the Appellant had been proved, that the learned Resident Magistrate disregarded legal notices on the grounds that they had not been produced yet they are matters of law not facts, that the learned Resident Magistrate relied on hearsay evidence and failed to make any adverse inference from the Respondent's failure to call direct evidence and that the learned Resident Magistrate's decision was against the weight of evidence. The Appellant thus sought the appeal be allowed with costs and the suit in the lower court be allowed with costs.

2. The Respondent sought the dismissal of the appeal as it raised no legal grounds for determination by the court. The Respondent asserts that the grounds of appeal were dealt with by the learned Resident Magistrate in arriving at his decision.

3. The appeal raises both factual and legal challenges to the decision of the learned Resident Magistrate in his determination. This is a first appeal and my mandate as the first appellate court is to evaluate the evidence afresh by relooking at the evidence adduced and the law applied and determine the appeal independently. The Court of Appeal in **PIL Kenya Ltd v Opong [2009] KLR 442 held** as follows:-

“It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that.”

4. The matter proceeded before Hon. Githuku who heard and saw the witnesses. He delivered the judgment on 26th January 2009. In the record of proceedings recorded before the learned Resident Magistrate, there was evidence adduced that there were items that were lost and the Appellant herein was suspected to have stolen them. He was asked to give an explanation and subsequently given a suspension letter. After the letter of suspension dated 22nd March 2004, there was no further communication from the Respondent. This letter was treated by the learned Resident Magistrate as the dismissal letter. The dismissal of the Appellant was under the regime of the repealed Employment Act cap. 226 Laws of Kenya. Section 5 thereof made provision for dismissal for gross misconduct. The Appellant was constructively dismissed for cause and there was no error in the finding by learned Resident Magistrate to warrant interference with his decision. The failure to call witnesses by the Respondent is no panacea for the failure by the Appellant to prove his case on a balance of probabilities. The appeal is devoid of merit and the finding of the learned Resident Magistrate is upheld. The appeal is dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 13th day of December 2018

Nzioki wa Makau

JUDGE