



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**ELRC APPEAL NO. 11 OF 2017**

**(Before D. K. N. Marete)**

**NEMWEL MOMANYI.....APPELLANT**

**VERSUS**

**JAMES FINLAY (K) LTD.....RESPONDENT**

**JUDGMENT**

This matter was originated by way of Memorandum of Appeal dated 30th May, 2012. It seeks the following findings and orders of court;

- 1. THAT the learned trial Magistrate erred in law and fact in finding for the Respondent without giving concise reasons why she believed that the Respondent was justified to dismiss the Appellant from employment and why she believed that the Appellant's dismissal was not unlawful.*
- 2. The learned trial Magistrate erred in law and infact in not believing the Appellant's evidence to the effect that the Respondent failed to observe the employment contract under the collective management procedures.*
- 3. The learned trial Magistrate erred in law and infact in believing the Respondent's evidence when it was conceded that there was summary dismissal in the part of the Appellant which was reduced to normal termination at the behest of the Respondent.*
- 4. THAT the learned trial Magistrate erred in law in not believing the Appellant evidence when the Respondent had violated the Collective Bargaining Agreement by dismissing the Appellant without 3 month's salary in lieu of notice.*
- 5. THAT the learned trial Magistrate erred in law and infact in finding for the Respondent when the Respondent did not give the Appellant 3 warnings before termination only by using a blanket assumption of gross misconduct.*
- 6. THAT the learned trial Magistrate erred in law and infact in finding for the Respondent by relying on conjectures, suppositions and on extraneous matters.*
- 7. THAT the learned trial Magistrate erred in law and infact in finding for the Respondent when the Respondent now failed to accord the Appellant the right to be heard against the rules of natural justice.*

The Appellant prays that the lower court judgement be set aside and it is proposed that the appeal be allowed and a retrial ordered.

The respondent in her written submissions dated 6th December, 2016 submits that this application lacks merit and should therefore be dismissed with costs.

The appellant's written submissions are a recitement of his case at the trial court. Here, it was his case that his dismissal from employment by the respondent was unfair in that there was no issue of absconding duty and that all this time, he was in police custody, a matter well known to the respondent.

The respondent at the onset of her submissions rubbishes the appeal on grounds that the decree from which the appeal is preferred and annexed at page 158 of the record of appeal is not dated, signed or certified by the appellant. It is her submission that this renders the appeal premature, incompetent and outright material for dismissal. She prays as such.

The respondent further goes on to a mission of analysis of the trial at the lower court in which the following facets are established;

- That the appellant was terminated from employment for gross misconduct as a result of assault and inflicting of injuries to a person who was well known to him at the respondents work place.
- This matter (assault) was reported to the police leading to the appellant's arrest and incarceration with a view to assisting in investigations.
- In the cause of this incarceration, the appellant absconded duty and was subsequently dismissed from employment.
- On further consideration as per a letter dated 27th February, 2003, the respondent reduced the decision of summary dismissal to normal termination on the intervention of the labour officer.
- The appellant on reduction of finding above was paid all wages earned, prorata, leave for 45 days and travel allowances all amounting to Kshs.13,575.00 of which receipt is admitted.
- That all this (dismissal) was occasioned by the appellant's involvement in a fight with one of the workers at the work place and amounted to gross misconduct.

She sums it thus;

*In the circumstance to the foregoing there is no error committed by the trial court to warrant this court to interfere with, set asides, and quash the decision of the court dated 2/2/2011. We urge the court to uphold the decision thereof and dismiss this appeal with costs to the Respondent. The decree appealed against is not dated, signed and certified as required by law. Therefore this appeal lacks merit and should be dismissal with costs.*

The learned magistrate in her judgement issued on 2nd February, 2011 observed as follows;

*The plaintiff further avers that he was not granted any warning before his dismissal.*

*The plaintiff finally states that the balance of probability proved that the plaintiff is entitled to the relief sought and the plaintiff's claim should succeed the plaintiff attached testimonials to support his claim.*

*The defendant in its submissions states that the plaintiff's involvement in a fight with DW 1 within the defendant premises amounts to gross misconduct on the part of the plaintiff. The defendant*

*further avers that the documents sought to be relied on that the plaintiff were marked and hence do not form part of the court records and hence urged the court to find that the plaintiff has failed to prove his case to the required standard hence his suit ought to be dismissed.*

*On the issue of a wrongful confinement the defendant states that the plaintiff ought to have sued the AG. On behalf of police officer who confined him and not the defendant. Since all the defendant did was to file an incident report which the police required to act on and the defendant has filed various testimonies to support this assertion.*

*I have looked at the proceeding before 2 other court that had this matter and also considered reactions sited by both the plaintiff and the defendant. The plaintiff also provided this court with a copy of CBA.*

*I am inclined to agree with the defendant the plaintiffs documents were marked but never produced hence I would uphold the contention by the defendant that the said documents do not form part of the court record I believe the failure to produce the records was due to the plaintiff's ignorance of the rules of production of documents and would consider the said documents all the same in order to achieve end of justice.*

*Clause 22 of the CBA provides for a warning system and this is the clause the plaintiff relies on by stating that the defendant did not comply with. The said clause states that the misconduct for which ought to be warned should not amount to gross misconduct and the employer is given the discretion of deciding whether it amounts to gross misconduct or not as did the defendant in this case who says they relied on clause 24 (g) which helps of reasonable and sufficient grounds the employee is suspected. ....this arguments are neither here nor there in this case as the defendant states the plaintiffs dismissal was converted to termination under clause 23 (b) where the employees is entitled to 45 days notice as was issued the plaintiff as testified by DW III. The plaintiff admitted he was paid the money by cheque. According to the CBA the employer is not reg. to give reasons to the employee for termination as unjust or unreasonable as this may sound. This is the agreement under which the plaintiff was employed in essence this takes care of issues 1 & 2 of the plaintiffs submission & I would therefore find that the plaintiffs prayer a , b and d are on his bent on prayer c the policy on gratuity. I would therefore find that the plaintiff has failed to prove its case on this claim on a balance of probability and would accordingly dismiss the said prayer c.*

I would agree with the respondent. This matter is clear cut. A look at the proceedings and evidence at the trial court does not dispel a case for setting aside of judgement and the findings of the lower court. As set out above, one finds a clear and logical analysis of the respective cases of the parties and a decision on the same. It would be difficult to make a deviation from the analysis and findings of the trial magistrate. It would be utterly difficult to justify any such deviation.

I am therefore inclined to dismiss the appeal with orders that each party bears their own cost of the appeal.

Delivered, dated and signed this 11th day of December, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Claimant in person.

2. Mr. Anyona instructed by Asati Anyona & Company Advocates for the respondent.