



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2080 OF 2014**

**DAVID NJUGUNA MUNGAI.....APPELLANT**

**VERSUS**

**REGISTERED TRUSTEES OF**  
**SISTERS OF MERCY T/A MATER HOSPITAL.....RESPONDENT**

**Mr. Mburugu for the Appellant**

**Mr. Otieno for the Respondent**

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgment and decree of Honourable Meoli (Mrs.) Senior Principal Magistrate as she then was, delivered on the 16<sup>th</sup> March, 2005, appealed against the whole Judgment and decree on various grounds set out in the Amended Memorandum of Appeal filed on 7<sup>th</sup> May, 2007. The initial Memorandum of Appeal had been filed in April, 2005 and within time. Leave is sought to admit the Amended Memorandum of Appeal out of time which leave is duly granted.
2. The brief facts of the case are that the Appellant resigned from his employment by a letter dated 26<sup>th</sup> June, 2001 giving three (3) months' notice in terms of his Contract of Employment. The Employer, now the Respondent, on the same day acknowledged the resignation and accepted it in writing and offered to pay the Appellant;
  - a. a salary for the period served up to the end month
  - b. three (3) months' salary in lieu of notice; and
  - c. in lieu of accrued leave days.
3. The said amount was to be paid less any amounts owed to the Employer.
4. Five (5) days later, the employer told the Appellant that he was released from serving the three (3) months' notice and to leave employment forthwith.
5. Three days later, the Appellant cleared with the Employer and admitted that Ksh.337,197.00 was due to the Employer. This amount is indicated in the clearance form submitted by the Appellant to the

Respondent.

6. Twenty six(26) days after the Appellant had stopped working, the Respondent wrote to the Appellant informing him that his admission that he owed money to the employer was proof of malpractices of unauthorized cash withdrawals for the exact amount admitted and this entitled the Respondent to summarily dismiss the Appellant.

7. The Respondent then summarily dismissed the Appellant notwithstanding that he had formally resigned 26 days prior and reneged on the offer to pay the Appellant terminal benefits made in the letter of acceptance of the resignation.

8. The grounds of Appeal may be summarized as follows for the purpose of this Judgment;

i. The Learned Magistrate erred in law and in fact in failing to find that the Appellant had lawfully resigned from his employment and therefore could not subsequently be summarily dismissed from the same employment

ii. The Learned Magistrate therefore erred in law and in fact in finding that the purported summary dismissal was lawful

iii. The Learned Magistrate erred in law and in fact in finding that the Appellant had not proved the claim for accrued leave in the sum of Ksh.182,197.00

iv. The Learned Magistrate erred in law and in fact in failing to find that the Appellant was entitled to 3 months' salary in lieu of Notice

v. The Learned Magistrate took into account matters that were not adduced in evidence in the suit and thereby arrived at the wrong decision.

9. The claim by the Appellant was for Ksh.452,802.40 after deduction of the admitted Ksh.337,197.10 owed to the Employer which formed the subject of the counter claim filed by the Respondent.

10. The issues for determination are as follows;

i. was it open to the Employer to denounce the resignation tendered and accepted together with the offer to pay terminal benefits?

ii. if the answer to the above question is in the negative, what remedy is available to the Appellant?

11. In the case of **William Kariuki V. Keye Civil Aviation Authority(2008)** eKLR, the court was faced with a similar situation to the once in casu. An employee had resigned and his resignation was accepted. One month later the employer wrote to the employee informing him that the acceptance of resignation had been rescinded and that he was summarily dismissed based on an investigation report released after the acceptance of the resignation.

12. The court held;

*“The Plaintiff’s resignation having been accepted and taken effect the contractual relationship of an employer – employee had already been severed and so there was nothing to dismiss. The said alleged dismissal was therefore a purported dismissal. .... In law the relief of summary dismissal could only be available to an employer if the action is taken while the relationship still subsists. Herein, the relationship had ceased on 31st March, 2005. By 20<sup>th</sup> April, 2005 the cord had been severed and there was nothing to dismiss.”*

13. In casu, the Appellant resigned on 25<sup>th</sup> May, 2001 and the resignation was accepted immediately with offer to pay terminal benefits.

14. On 26<sup>th</sup> June, 2001, the Respondent purported to recede the resignation and summarily dismissed the Appellant for gross misconduct.

15. It was not competent for the employer to summarily dismiss the Appellant many days after the Appellant had tendered his resignation and after the same had been accepted by the Respondent.

16. The conduct by the Respondent has no basis in law and could not be used to deny the Appellant benefits that had accrued by fact of resignation.

17. The court Aquo erred in law in finding that the Respondent could proceed with a summary dismissal in circumstances where the employment contract had long been terminated by fact of resignation.

18. The issue of procedural fairness does not arise in the circumstances of this case because the contract of employment was severed by a resignation by the employee.

19. This case is in fours with the following three (3) cases from the Kingdom of Swaziland namely; **Simon Dlodlu V. Emalangení Foods Industries – (IC Case No. 47/2004; Graham Rudolf V. Mananga College Case No. 94/2007 and Nana Mdluli V. Conco Swaziland Limited case No. 12 /2004.**

20. In **Simon Dlodlu V Emalangení Foods Industries (IC Case No. 47/2004)**, the President of the Industrial Court of Swaziland P.R. Dunseith stated;

*“Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance. Whilst the Respondent took every effort to ensure that the disciplinary hearing was procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the Applicant himself on 20<sup>th</sup> October, 2000. The question whether the termination of the Applicant’s services was fair and reasonable does not arise in circumstances where the Applicant has resigned and no case for constructive dismissal has been pleaded or established.”*

21. I could not agree more with this position. The Hon. Magistrate erred in failing to uphold the resignation of the Appellant with an order of payment of the terminal benefits already accrued to him by fact of the resignation.

22. To this extent, the Appeal succeeds and the court substitutes the Judgment of the lower court and the decree with the following orders;

- a. the Appellant having lawfully resigned could not subsequently be summarily dismissed
- b. the Respondent was obliged to pay the terminal benefits accrued to the Appellant by fact of resignation as follows;
  - i. salary up to 31<sup>st</sup> May, 2001 in the sum of Ksh.182,000.00
  - ii. three(3) months’ salary in lieu of Notice in the sum of Ksh.426,000.00
  - iii. payment in lieu of accrued leave in the sum of Ksh.182,197.60 less the admitted debt in the sum of Ksh.337,197.00

Net award is Ksh.452,802.40. The amount is payable with interest at court rates from the date of this Judgment till payment in full.

25. The Appellant is awarded the costs of the Appeal and proceedings in the lower court.

**Dated and Delivered at Nairobi this 17<sup>th</sup> day of April, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**