



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fund v Wesonga (Appeal E006 of 2024)**  
**[2025] KEELRC 2608 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2608 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA**  
**APPEAL E006 OF 2024**  
**DN NDERITU, J**  
**SEPTEMBER 26, 2025**

**BETWEEN**

**ONE ACRE FUND ..... APPELLANT**

**AND**

**JUSTINE BYRON WESONGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree issued in Busia Chief Magistrate's Court in ELRC No.06 of 2021 by Hon. P. O. Olengo (SPM) delivered on 16th February 2024)*

**JUDGMENT**

**I. Introduction**

1. In a judgment dated and delivered on 16th February 2024 the lower trial court awarded the respondent (the claimant in the lower court) the following –
  - a. A declaration that the termination of employment was of the claimant by the respondent was unfair and unlawful/illegal.
  - b. Kshs.324,000/= being unpaid salary for 12 months.
  - c. Kshs.27,000/= being unpaid salary for 12 months.
  - d. Gratuity for the year worked  $15 \text{ days} \times 6 \times 1385.20 \times 12 = \text{Kshs.1,496,016/=}$ .
  - e. Kshs.1,000,000 as general damages for defamation.
  - f. Cost and interest on above at court rate.
2. Thereafter, the appellant through L.G. Menezes & Company Advocates commenced this appeal vide a memorandum of appeal dated 14th March 2024 raising the following grounds of appeal –



1. The learned Trial Magistrate erred in law and in fact in making a finding that the respondent's termination was unfair and unlawful which finding was against the weight of evidence on record and the law applicable in instances of summary dismissal.
  2. The learned Trial Magistrate erred in law and in fact in failing to consider and make a finding as to whether there was a valid reason for the appellant to terminate the respondent's employment which failure was contrary to the applicable law and occasioned the erroneous decision.
  3. The learned Trial Magistrate erred in law and in fact in awarding the respondent unpaid salary for twelve (12) months as compensation for unfair termination which award had no basis in law in instances of summary dismissal in the circumstances and as a result arrived at an unjustified decision.
  4. The learned Magistrate erred in law and in fact in making an award for one month's salary without analyzing the evidence on record and parties' submissions on the issue which finding was against the applicable law and weight of evidence on record and as result arrived at an unjustified decision on quantum.
  5. The learned Magistrate erred in law and in fact in awarding the respondent gratuity where the respondent was registered for NSSF and did not prove that there were no remissions of his NSSF which finding was against the applicable law and the weight of evidence on record and as a result arrived at an unjustified decision on quantum.
  6. The learned Magistrate erred in law and in fact in awarding the respondent general damages for defamation when the same was neither pleaded nor proved by the respondent which award has no nexus to instances of summary dismissal in the circumstances and as a result arrived at an unjustified decision.
  7. The learned Magistrate erred in law and in fact in failing to consider the appellant's submissions and by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision.
  8. In arriving at his decision, the trial magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise his discretion within the applicable principles of assessment of damages on quantum and his failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
3. The appeal is opposed and the appellant is seeking for orders that –
- a. That this Appeal be allowed.
  - b. That the Judgment and decree of the Honourable P. A Olengo (SPM), in Busia MC E&LRC No. E6 of 2021 delivered on 16<sup>th</sup> February, 2024) be set aside and the suit be dismissed.
  - c. That the Appellant be awarded the costs of this appeal.
4. By consent, the appeal was canvassed by way of written submissions. Mr. Menezes for the appellant filed written submissions dated 5th March 2025 while Miss Namenge instructed by J. E. Namenge & Co. Advocates for the respondent filed submissions dated 28th March 2025.

## **II. Background**

5. In a statement of claim dated 20th August 2021 the respondent pleaded that he was a fulltime employee of the appellant as a field officer from 8th September 2014 and thereafter rose to the position of field



manager by 1st January 2017. He pleaded that he was unfairly and unlawfully terminated on 19th February 2020.

6. The respondent prayed for the following reliefs –
  - a. A declaration that the termination of employment of the claimant by the respondent was unfair and unlawful/illegal.
  - b. Kshs.324,000/= being unpaid salary for 12 months.
  - c. Kshs.27,000/= being one month's salary in lieu of notice.
  - d. Gratuity for the years worked  $15 \text{ days} \times 6 \times 1385.20 \times 12 = \text{Kshs.}1,496,016/\text{=}$ .
  - e. Years the claimant would have worked  $30 \text{ years} \times 12 \times 27,000 = \text{Kshs.}9,720,000/\text{=}$
  - f. General damages for breach of the claimant's constitutional rights, underpayments and embarrassment at the time of the dismissal.
  - g. General damages for defamatory and scandalous allegations of sexual harassment.
  - h. Statutory deductions.
  - i. House allowance
  - j. Any other award the court may deem fit to grant
  - k. Costs of this claim.
7. In a response to the claim dated 29th September 2021 the appellant denied the claim in toto pleading that the termination of the respondent was fair and lawful both in substance and procedure. It was pleaded that the respondent was terminated after blatantly breaching the sexual harassment policy. It was pleaded that the dismissal was enforced after thorough investigation and a disciplinary hearing of the allegations and charges against the respondent and that the appellant complied with the substance and procedure as per the law.
8. It is upon hearing of the parties that the lower trial court entered judgment in favour of the respondent as stated above. It is that judgment that is now challenged by the appellant in this appeal.

### III. Submissions by Counsel

9. Counsel for the appellant condensed the grounds of appeal into two thematic areas and submitted on the two issues –
  - a. Whether the respondent's summary dismissal was wrongful, unfair and unlawful in the circumstances; and
  - b. Whether the respondent is entitled to the reliefs sought.
10. On the first issue counsel cited Anthony Mkala Chitavi V Malindi Water & Sewerage Company Limited (2013) eKLR and submitted that leading to the dismissal the appellant accorded the respondent both substantive and procedure fairness. Further, citing British Leyland UK Limited V Swift (1981) I.R.LR 91, it is submitted that based on the gross misconduct on the part of the respondent as established by the evidence availed in the disciplinary hearing the appellant acted reasonably in arriving at the decision to dismiss the respondent.



11. Further, it is submitted that the appellant complied with the provisions of Sections 41, 42, 43, and 44(3) & (4) of the [Employment Act](#). It is submitted that based on the facts, evidence, and the circumstances of the investigation carried out following allegations of sexual harassment against the respondent, the appellant genuinely believed that it had good foundation for taking disciplinary action against the respondent culminating in his dismissal. It is submitted that the appellant fully discharged its burden under Section 47(5) of the [Employment Act](#).
12. On the second issue on the reliefs awarded to the respondent by the lower trial court, it is submitted that since the dismissal was fair and lawful the awards cannot stand. Counsel submitted on each of the awards to the effect that none of the reliefs was awardable for the foregoing reason and also that the respondent failed to prove his case in the trial. It is submitted that the respondent did not plead or prove particulars of the alleged defamation, alleged damages for breach or violation of his constitutional rights, and that he was paid all his terminal dues in accordance with the law.
13. The court is urged to allow the appeal and set aside the judgment and decree of the lower trial court and award costs to the appellant in both courts.
14. At page 4 of the written submissions counsel for the respondent promised “to tackle each ground of appeal separately”. However, from thereon counsel tackled all the issues together and the court shall summarize the said submissions as hereunder.
15. It is submitted that the show-cause letter issued to the respondent lacked in specifics in contravention of Section 41(1) & (2) of the [Employment Act](#). Citing John Rioba Mugo V Riley Falcon Security Limited (2016) eKLR, Anthony Chitavi Mkala V Malindi Water & Sewerage Company Limited (2013) eKLR, and Mary Chemweno Kiptui V Kenya Pipeline Company Limited (2014) eKLR amongst other decisions, it is submitted that by failing to provide the particulars of the charges and allegations against the respondent the appellant denied him a fair hearing.
16. It is further submitted that while the Sexual Harassment Policy of the appellant provided that an employee be given three clear days to respond to allegations and charges of sexual harassment the respondent was only allowed two days. He was also denied access to the particulars missing in the show-cause notwithstanding that he requested for the same in his response thereto. It is further submitted that the respondent was denied the opportunity to cross-examine the complainant both in the disciplinary hearing and the hearing in the lower trial court as she did not testify.
17. It is submitted that the appellant failed to discharge its burden of proving the reason for the dismissal during the hearing in the lower trial court as required under Sections 41 & 43 of the [Employment Act](#).
18. It is further submitted that during the trial in the lower court the appellant admitted that the alleged victim of sexual harassment, Vivian Nerima, was not performing and was dismissed on that account. This is the very issue that the respondent had raised with the appellant about the performance of the said employee.
19. On the awards made by the lower trial court in favour of the respondent it is submitted that the same were based on law and deserved. In regard to the award of Kshs1,000,000/= in damages for defamation it is submitted that the same is awardable under Section 12(3) of the [Employment and Labour Relations Court Act](#). It is further submitted that the other awards made to the respondent are justified under Section 49 of the [Employment Act](#).



#### IV. ISSUES FOR DETERMINATION

20. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, there are two main issues raised in the grounds of appeal and counsel for both parties submitted on the same – Whether the dismissal of the respondent by the appellant was fair and lawful; and, whether the remedies granted to the respondent were fair and just. Overall, the issues that commend themselves to the court for determination in this appeal are -
  - a. Whether the dismissal of the respondent by the appellant was fair and lawful.
  - b. Whether the lower trial court arrived at the wrong and improper verdict and made the wrong and unlawful orders in the impugned judgment.
  - c. Is there a reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?
  - d. What appropriate orders should this court make in regard to the above issues and on costs?

#### V. The Dismissal

21. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle & Another V Associated Motor Boat Company Ltd (1968) EA*.
22. The facts of the employment relationship between the appellant and the respondent are uncontested and are as laid out in the summary of the pleadings and submissions in the foregoing part of this judgment. It is not contested that the respondent was dismissed on grounds of alleged gross misconduct on charges of sexual harassment against a co-worker under his supervision by the name of Vivian Nerima.
23. While the appellant takes the view that the respondent was accorded both substantive and procedural fairness the respondent takes the position that he was denied both and as such the dismissal was wrongful, unfair, and unlawful as held by the lower trial court.
24. On the first issue, to a large extent the jurisprudence on what constitutes or does not constitute fair and lawful dismissal or termination is to a large extent now settled. There are two main components to this – substantive and procedural fairness. Substantive fairness is about the employer having a genuine lawful reason for taking disciplinary action that culminated in the termination or dismissal. Procedural fairness is about the process, due process, and fair hearing. The foregoing is captured in Articles 47 & 50 of *the Constitution* and Sections 35, 40, 41, 42, 43, 44, 45, & 47 of the *Employment Act* (the Act), amongst other provisions of the law that deal with natural justice including those in the Fair Administrative Actions Act.
25. A multitude of decisions have also come from this court (ELRC) on this issue – see *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* and *Mary Chemweno Kiptui V Kenya Pipeline Company Limited (2014) eKLR* on what entails substantive and procedural fairness under Sections 41 and 47(5) of the *Employment Act*.



26. The process that culminated in the summary dismissal of the respondent was commenced by the appellant vide a show-cause letter dated November 4<sup>th</sup> 2019. For ease of reference the said letter stated as follows –

Show Cause Letter One Acre Fund

November 4<sup>th</sup>, 2019

Mr. Justin Wesonga,

Field Manager, Nambale District

Dear Justin,

One Acre Fund has a high standard of performance, and we value your contributions to our Field Team. Referring back to the concerns brought to HR desk concerning your conduct, please treat this as a show cause notice for you to explain why disciplinary action should not be taken against you over this misconduct as mentioned below:

The concerns(s) being: Sexual Harassment of a Field Officer.

This behavior is considered unacceptable and is a breach of the sexual harassment policy under our employment terms and HR policies that you did sign to adhere to as staff. We would like to give you an opportunity for you to explain why disciplinary action should not be taken against you over this misconduct as per HR policies, on staff code conduct (pg. 16-19).

HR department would like to request that you respond to this show cause letter in writing to the HR Manager by Wednesday 6<sup>th</sup> November 2019 at 11.00 a.m. Hand in your hard copy written and signed response to HR Manager by the above stated time at our HQ Kakamega office.

You are also requested to continue staying away from duty to the completion of this HR follow up process.

Also plan to attend a hearing session in the presence of a HR representative and other stakeholders on Tuesday 12<sup>th</sup> November 2019 at the HQ office in Kakamega, starting at 11:00 am. Please feel free to invite a witness of your choice who should be a One Acre Fund staff. Failure to respond in writing or attend a hearing with us by the stipulated date decision (s) will be taken without further reference to you.

Your attendance to all meetings that HR may invite you to in the next coming days is mandatory and failure to do so, may lead to decision(s) being taken without further reference to you.

Please note that this is an HR process to facilitate management's decision into the alleged misconduct and also to allow you the opportunity to present your case.

.....

Staff signature Justine Wesonga 4/11/2019

Print name Date

Titus Masinde 4/11/2019

Witness Signature Print name Date

Martha Meongi 4/11/2019



27. The respondent replied to the above show-cause letter and denied the allegations and charges against him pointing out that the letter lacked particulars of the accuser/complainant and the details and particulars of the allegations against him. He went further stating that the allegations were false and intended to cover the failure by members of staff under him, and in particular one Vivian Nariama, to perform their duties as expected. He denied ever asking for or demanding any sexual favours from this co-worker and insinuated that if she had ever made any claims of sexual harassment against him, she must have done so to preempt any action being taken against her for the poor execution and performance of her duties as per the reports he had made after visiting the station where she served.
28. As indicated in the show-cause letter the respondent was invited to attend a disciplinary hearing on 12th November 2019 where he attended accordingly. The court has seen and read the minutes of that disciplinary hearing and shall comment on the same shortly.
29. The court has looked into the above show-cause letter and made two outstanding and consequential observations. Firstly, the victim of the alleged sexual harassment is not disclosed or named. Secondly, the particulars of where and when the alleged sexual harassment occurred are also not disclosed and stated. The respondent raised the two issues with the appellant but instead of the appellant providing the missing particulars it went ahead to hold a disciplinary hearing.
30. The show-cause raises a third concern – the appellant invited the respondent for a disciplinary hearing even before receiving and evaluating the respondent’s reply to the show-cause letter. This by itself raises a fundamental presumption that the appellant had made its mind on the outcome of the disciplinary hearing even before considering the response and explanation that was to be offered by the respondent.
31. It is the respondent’s case that he was further denied fair hearing as the alleged victim of sexual harassment neither attended the disciplinary hearing nor the trial in the lower court and this denied him an opportunity to cross-examine the alleged victim/complainant.
32. Further, there is no evidence that the investigation report relied upon by the appellant in trial in the lower court was at anytime availed and supplied to the respondent to defend himself against the contents therein.
33. The foregoing confirms that indeed the respondent was denied both substantive and procedural fairness. The respondent further stated that the human resources manual provided that he was entitled to three days to respond to the show-cause but he was only allocated two short days. However, neither of the parties availed the said manual for scrutiny by the court.
34. Justice is about fairness. The failure and or refusal by the appellant to supply the particulars of the charges and allegations as stated above in my view negated and obscured the very essence of fair hearing as enshrined in the rules of natural justice, as founded in the constitutional and statutory provisions stated above. The disciplinary process was a non-starter and clearly and evidently offended the law and the constitutional provisions cited above.
35. Having failed to supply the details of the charges and allegations, the appellant had no basis upon which to prove and or justify the reason for the summary dismissal of the respondent. The court finds and holds that the lower trial court arrived at the right decision in finding and holding that the appellant failed to comply with Sections 41 & 43 of the [Employment Act](#) (pages 194-195 of the record of appeal).



## V. Reliefs

36. The lower trial court awarded to the respondent as stated in the introductory part of this judgment. The awards challenged in grounds 3, 4, and 6 of the memorandum of appeal are the compensation equivalent to 12 months' gross salary, gratuity, and general damages for defamation respectively. The court shall now deal with each one of those awards as hereunder.
37. In regard to the award of compensation equivalent to 12 months' gross salary, the court has found and held above that the dismissal wrongful, unfair, and unlawful in concurrence with the lower trial court. Section 49 of the *Employment Act* provides for the factors that the court ought to consider in making an award for compensation. The appellant shot itself in the foot by failing to disclose the particulars of the charges and allegations against the respondent to enable him defend himself. It also failed to disclose the identity of the purported victim and did not call her to testify during the disciplinary hearing or even during the trial in the lower court. This highly prejudiced the respondent in mounting his defence.
38. As at the time of dismissal the respondent had been in the employ of the appellant for about five years. There is no evidence on record to confirm whether the respondent thereafter located another job and if so how long it took him to do so. The parties have not expressed willingness to re-engage and the respondent did not plead reinstatement. The court has found and held that the appellant approached the disciplinary process with a pre-determined mindset by inviting the respondent for a disciplinary hearing even before considering his response to the show-cause letter.
39. In my considered view, the award of compensation equivalent to 12 months' gross salary was not excessive in the entire circumstances of the cause. The court shall thus not interfere with the award as made by the lower trial court under this head.
40. On the award of gratuity, this court (ELRC) has repeatedly stated that gratuity is not an automatic right to an employee. It is a gratuitous payment made by an employer to a departing employee as a sign of gratitude. It can only be paid upon satisfaction of set out terms and conditions as agreed between the parties to the contract of employment or at the discretion of the employer. Gratuity is thus paid if it forms part of the terms of the contract or at the discretion of the employer as an appreciation for services rendered – see *Solio Ranch Limited V Waithira Githinji* [2010] KEHC 3670 (KLR).
41. The court has gone through the contract of employment by way of a letter of appointment executed by the parties on 1st January 2017 and noted that the same does not provide for payment of gratuity. There is no other evidence either by way of an amendment or addendum to the contract or a collective bargaining agreement (CBA) evidencing that the respondent was in any way or manner entitled to payment of gratuity.
42. In the circumstances, the award of Kshs1,496,016/= made by the lower trial court as gratuity was not only without any legal basis or foundation but unlawful for the reasons stated above. The said award is hereby set aside and dismissed.
43. The other award that is challenged is that of award of Kshs1,000,000/= as compensation for defamation. It is important to note that no particulars of defamation were pleaded in the memorandum of claim and no evidence was adduced in support of the alleged defamation. The award of the said compensation was not only without any evidential support but also lacked legal foundation and basis. The alleged tort of defamation was not proved.
44. The above award for defamation is hereby set aside and dismissed.



## **VI. ORDERS**

45. Flowing from the foregoing, the court makes the following orders –
- a. This appeal is hereby partially allowed in the terms set out in the judgment.
  - b. The award of Kshs1,496,016/= for gratuity is hereby set aside.
  - c. The award of Kshs1,000,000/= in damages for alleged defamation is hereby set aside.
  - d. Each party shall meet own costs in this appeal.
  - e. The other orders made by the lower trial court are hereby upheld and affirmed.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

.....

**DAVID NDERITU**

**JUDGE**

