Ndegwa v Sogea-Satom Kenya (Appeal E163 of 2023)
[2025] KEELRC 2517 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2517 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E163 OF 2023

JW KELI, J

SEPTEMBER 18, 2025

BETWEEN

EZEKIEL CHOMBA NDEGWA ..... APPELLANT

AND

SOGEA-SATOM KENYA ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B.M. Cheloti (PM) delivered on 21st August, 2023 in MCELRC 1531/2019)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. B.M. Cheloti [PM] delivered on 21st August, 2023 in MCELRC 1531/2019 between the parties filed a memorandum of appeal dated the 4th of September 2023 seeking the following orders:-

    a] The whole Judgment and Decree of the Honourable Becky M. Cheloti [PM] delivered on 21st August, 2023 in Nairobi Milimani MCELRC 1531 of 2019 be set aside and this court does proceed to allow the claim as prayed.

    b] The costs of this appeal and those of the lower court's claim be awarded to the Appellant.

Grounds Of The Appeal

2. The Honourable Trial Magistrate erred in law and in fact in holding that the Respondent did not unlawfully terminate the Appellant's employment.

3. The Honourable Trial Magistrate erred in law and in fact in holding that the Appellant did not prove his case on a balance of probabilities.

4. The Honourable Trial Magistrate erred in law by failing to examine the evidence and appreciate the weight of the evidence as led by the parties.

5. The Honourable Trial Magistrate misdirected herself and erred in fact and in law when she primarily based her decision on the notion that the Respondent merely chose not to extend the Appellant's contract once it expired without taking into account:

    a. The facts as pleaded by both parties.

    b. The evidence as led by both parties.

6. The Honourable Trial Magistrate erred by failing to find that;

    a. The contract was not terminated trough effluxion of time.

    b. Without prejudice to the above even if the contract was terminated through effluxion of time [which it was not] there was an apparent mis-calculation leading to the Respondent's failure to pay terminal dues

    c. to the Appellant.

Background To The Appeal

7. The Appellant filed a claim against the Respondent vide a statement of claim dated the 28th of August 2019 seeking the following orders:

    a. A declaration that the decision by the Respondent to terminate the Claimant's contract of employment was procedurally unfair and substantively unjustified.

    b. A declaration that the termination of the Claimant's contract of employment was premature and unlawful.

    c. A declaration that the Respondent breached the Claimant's rights to fair labour practices and fair hearing.

    d. Damages for violation of constitutional rights of fair hearing and fair administrative action.

    e. Damages for defamation.

    f. A certificate of service.

    g. Costs of the suit.

    h. Interest on the above at court rates from the date of filing suit until payment in full.

    [see pages 4-7 of the ROA dated the 21st of March 2025]

8. The Appellant also filed his verifying affidavit, list of documents with the bundle of documents attached, list of witnesses, and witness statement and all dated the 28th of August 2019 [pages 8-19 of ROA].

9. The claim was opposed by the Respondent who entered appearance vide a memorandum of appearance dated 25th October 2019 [pages 26-27 of ROA]. They filed a response dated the 13th of November 2019 [pages 28-33 of ROA], and a list of documents with the bundle of documents attached, list of witnesses, and witness statement of Agnes Anyanje Tikolo, all dated the 18th of May 2022 [pages 34-57 of ROA].

10. The Claimant's/Appellant's case was heard on the 2nd of May 2023, where the Claimant testified in the case. He relied on his witness statement as his evidence in chief, produced his documents, and was cross-examined by counsel for the Respondent Mr. Wanjohi [pages 110 of ROA].

11. The Respondent's case was heard on the same day, when the Respondent's witness, one Agnes Tikolo, testified in the case. She relied on her witness statement as her evidence in chief, produced the Respondent's documents, and was cross-examined by counsel for the Appellant Mr. Olukeke [page 111 of ROA].

12. The parties took directions on filing of written submissions after the hearing. The parties complied.

13. The Trial Magistrate Court delivered its judgment on the 21st of August 2023, dismissing the Claimant's claim in its entirety, with no orders as to costs [Judgment at pages 104-106 of ROA].

Determination

14. The appeal was canvassed by way of written submissions. The parties complied.

15. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Further in on principles for appeal decisions in Mbogo v Shah [1968] EA Page 93 De Lestang V.P [As He Then Was] Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

17. In his submissions dated the 30th of May 2025, the Appellant identified the following issues for determination:

    i. Whether the Respondent unlawfully terminated the Appellant's employment.

    ii. Whether the Appellant proved his case on a balance of probabilities.

    iii. Whether the learned Magistrate erred in law by failing to examine the evidence and appreciate the weight of evidence as led by the parties.

    iv. Whether the Appellant's employment was terminated through effluxion of time.

18. The Respondent adopted the list of issues identified by the Appellant and submitted on the grounds of appeal generally in their submissions dated 28th July 2025. The court adopted the issues addressed by the appellant as well.

Whether the Respondent unlawfully terminated the Appellant's employment.

Appellant's submissions

19. The law on unfair termination is trite under Section 45 of the *Employment Act*, Cap 266 of the Laws of Kenya that emphasizes on justice and equity in terminating the employment of the employee by an employer.. Section 41 of the same statute provides for procedural fairness that includes proper notification of the reason for termination where the explanation should be in presence of another employee or his union representative. It further provides for a fair hearing where the employee defends himself. This was the position in Karani v Judicial Service Commission [2024] KEELRC 1175 [KLR] at Paragraph 74, thus: In this regard, an employer is required to notify an employee of the intended termination in a language he or she understands. The employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her and in so doing, the employee is entitled to have another employee or a shop floor union representative of his choice present. In Bakhoya v Chane & another [Employment and Labour Relations Petition E147 of 2023] [2024] KEELRC 293 [KLR] it was held, thus: "The essence of this procedure is to ensure that the employee is terminated in a manner that meets the requirements of section 41 of the *Employment Act* as read with articles 41 and 47 of *the Constitution* of Kenya. It must be demonstrated that the employer had a justifiable ground to terminate the employee and that he accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination.

20. The Appellant submits that the Respondent did not afford him procedural fairness as statutorily mandated where allegations of intoxication at work were levelled against him, he was summoned and forced to take the Alco blow test, taken to the hospital where tests were conducted, brought back and asked to fill a predetermined form in absence of his fellow employee or union representative as required under the law. The Respondent asked the Appellant to go home that they will give him call which never came and when he visited the Respondent on 21st August 2017 he was told to clear and was handed a termination notice disguised as a warning letter dated 17th August 20175. The Appellant was not subjected to any disciplinary hearing conducted by the Respondent. The Appellant was told to write an explanation which the Appellant did, which does not amount to fair procedure. The court in Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company [EA] Limited [2022] eKLR, it was held that: In the instant case, the grievant had been accused of intoxication, which is a grave offence that amounts to gross misconduct under section 44[4] hence a ground for summary dismissal. As such, and given the likelihood that his livelihood was at stake, it was only prudent that the respondent grants the grievant an oral hearing within the terms of section 41. The trial court erred in law and fact in failing to take note of the facts surrounding the alcohol tests as demonstrated below. The Respondent required the Appellant to undergo a blood test after the alco blow test. The Appellant, having been accused of intoxication, saw it reasonable to cooperate and alleviate any doubts to that effect. The Respondent did not produce the blood alcohol test results during trial. The report from the hospital showed that the Appellant had no bloods in his system! The Respondent nonetheless went ahead to dismiss the Appellant. The Respondent neither proved the Appellant's alleged intoxication nor incapability to perform his work due to such intoxication. The Respondent solely relied on the results of the Alco blow test that were never filed in court. During cross- examination the Respondent's witness confirmed to the court that she did not conduct the Alco blow test. That the test was conducted by one Hugo Laville, who was not called to testify. In a different

statement by one Reinhard Willy Okoth, Mr. Okoth claims to have conducted the Alco blow test on 17th August 2017! The established facts showed that both the Alco blow test and the toxicology test happened on 16th August 2017. Mr. Okoth was not called to testify yet his statement, that was full of falsehoods and lies, was the basis of terminating the Appellant's employment. The failure to cross examine the author of the Alco blow test statement as he never testified was prejudicial and detrimental to the Appellant's right to fair trial. The Respondent's only witness –Agnes Anyanje Tikolo, failed/ refused to answer questions on the Alco blow test or the Alco blow machine. This begs the question on the validity and accuracy of the Alco blow test and results which the trial court failed to make adverse inferences. Generally, Breathalyzer tests measure the concentration of alcohol in an individual's breath, which is then used to estimate their blood alcohol concentration. Had the Appellant consumed a significant amount of alcohol the night before the test, it could still be detectable in their breath the following day, even if they no longer feel intoxicated; an explanation given by the Appellant provided on 16th August 2017. In of John Rioba Maugo v Riley Falcon Security Services Limited [2016] eKLR, where the Learned judge opined thus: "Drunkenness is a very shaky ground to found liability for purposes of summary dismissal. First, drinking alone or smelling alcohol par se is not a ground for summary dismissal. Section 44[4] [b] specifically provides that the employee is liable for dismissal if; "during working hours, by becoming intoxicated, an employee renders incapable to perform his work properly." [Emphasis added] The employer therefore has the burden not only of proving intoxication, but also the incapability of the employee to perform his work due to such intoxication."

21. Lastly, during cross-examination, the Respondent's witness averred that the Respondent never terminated the Appellant, yet in the Respondent's response, the Respondent avers that the reason for termination was in tandem with the provisions of section 44[4][b] of the *Employment Act*. The fact is the Appellant was dismissed on 17th August 2017 when Mr. Okoth and Madam Euphraiser told the Appellant to go home, promising to call the Appellant. When no calls came through, the Appellant returned to the Respondent's construction site on 21st August 2017. On that same day, Mr. Hugo ordered the Appellant to clear with the company; the Respondent's documents buttressed this point as the clearance date on the clearance form is 21st August 2017. On 21st August 2017, the Respondent issued the Appellant with a document dated 17th August 2017. The document's title is "WARNING LETTER"; however, at the bottom, the option highlighted is the termination for gross misconduct. The Appellant submits that the trial court failed to find and hold that the Respondent denied the Appellant this fundamental right of procedural fairness before terminating his services which is boldly unfair termination within the province of Section 45 of the *Employment Act* and fair labour practices .It is against this backdrop the Appellant submits that the Respondent did not follow the dictates of Section 41 of the *Employment Act*; thus, the Appellant's dismissal was unfair and illegal. In furtherance, the trial court erred in fact and law on not finding and holding that the dismissal was unfair and illegal.

22. On Whether the Appellant's was terminated through effluxion of time. The Appellant submitted that he was employed by the Respondent on or about 7th June 2017, as a foreman in the Respondent's construction site on a one [1] month contract. On 10th July 2017 the Respondent extended the Claimant's employment contract for three [3] months valid up to 11th September 2017. On 17th August 2017, the Respondent proceeded to terminate the Claimant's employment contract even before the whole trial process was concluded basing on the Respondent's claim that the claimant was drunk! This was followed by a termination notice dated 31st August 2017 fashioned to escape the jaws of unfair termination yet in reality, the Respondent had terminated the employment contract vide a "Warning Letter" dated 17th August 2017 that read clearly "Termination Notice for gross misconduct." The sending away of the Appellant with a promise to call him speaks of a predetermined decision which the trial court failed to establish. The finding and holding of the trial court that the termination was not unlawful but a choice by the Respondent not to extend the contract; was both

an error in law and fact. The trial magistrate failed to see the mathematical error in the Addendum contract that provided for extension of 3 months effective from 12th July 2017 to 11th September 2017. The correct position should be the extension should expire on 12th October 2017..It is settled that a fixed contract has a starting and ending date. The general rule is that there is no expectation for renewal of fixed contracts unless such a contract explicitly provides for a renewal clause. This was correctly held in Osoti v Trees for the Future INC [Cause E002 of 2023] [2024] KEELRC 962 [KLR], thus: The general rule is that a fixed term contract carries no expectation for renewal. It is however settled that fixed term contracts with a renewal clause may create expectancy of renewal on the part of the employee based on previous contract renewals.. Whether the Respondent would have renewed the employment contract with the Appellant or not was immaterial. The notice dated 31st August 2017 was an error since the Addendum contract provided for the wrong expiry date as highlighted above.It is the Appellant's submission that he was unfairly terminated since the contract had not reached its sun set. The contract did not expire through contract effluxion of time. The trial court missed to accurately calculate the expiry date for the 3 months extension period.

Respondent's submissions

23. Whether the Respondent unlawfully terminated the Appellant's employment- Though phrased slightly differently, this issue was the first issue listed in the Appellant's submissions in the lower court trial according to his submissions dated 29.5.2023 to be found at page 1 of the Supplementary Record of Appeal. As is the case in the instant submissions the same issues were adopted in the Respondent's submissions dated 18.7.2023 as were listed by the Appellant's in their list of issues in those Appellant's submissions dated 29.5.2023. Those Respondent's submissions can be found at page 61 of the Record of Appeal. To this particular issue an in-depth and expansive response was given with specific reference to both procedural fairness and substantive justice. The Learned Trial Court obviously made a consideration of these submissions. The respondent reiterated those submissions and rely on them completely. 1At paragraphs 13 and 15 of his submissions dated 30.5.2025 the Appellant raises as follows respectively:-

> " 13. The Appellant submits that the Respondent did not afford him procedural faimess as statutorily mandated where allegations of intoxication at work were levelled against him, he was summoned and forced to take the Alco blow test, taken to the hospital where tests were conducted, brought back and asked to fill a predetermined form in absence of his fellow employee or union representative as required under the law."... " The Appellant was not subjected to any disciplinary hearing conducted by the Respondent. The Appellant was told to write an explanation which the Appellant did, which does not amount to fair procedure." In these two paragraphs, the Appellant has raised the issue of procedural fairness which is one of the two aspects to a claim for unlawful/ unfair termination, the other being the aspect of substantive justice. It is however clear that the Appellant was given an opportunity to explain himself in the "Request for Explanation" form to be found in page 39 of the Record of Appeal. In this respect and in case of Amos Ngugi Maina -vs- Premier Bag & Cordage Limited [2018] eKLR the Court held as follows:- " In terms of section 41 of the *Employment Act*, 2007, an employer is under a statutory obligation to observe what in employment law is called procedural faimess [akin to naturaljustice in public/administrative law]. It is now settled that an employer can observe the statutory requirements through correspondence/documentation, oral intervention or a combination of both.

Where correspondence/documentation route is taken it should be simple to furnish the documentation [such as show cause notice and minutes of the disciplinary hearing] to demonstrate compliance."This gave the Respondent the option of dealing with the matter through correspondence as it did. It is important to note that when the Appellant was given the opportunity to explain himself on paper, he had the choice and opportunity to do it in consultation with any person he so chose. The Respondent chose to proceed by way of correspondence in accordance with the decision in Amos Ngugi case [supra] and the case of Peter Wafula Wasike -vs- Lockwood Girls' High School [2017] eKLR where it was held:- 16. "It is now widely accepted that the hearing contemplated by section 41 of the *Employment Act*, 2007 can be conducted through correspondence or verbally. The process does not require an employer to hold a mini-court." Further, the Appellant made admissions in the "Request for Explanation" document which rendered unnecessary any further proceedings on the matter. He admitted to having drank alcohol on the night preceding the material day and admitted that the alcoblow test was positive. In the case of Simon Karuga Waweru -vs- Twiga Stationers Limited [2019] eKLR the Court held as follows:- "In a number of previous decisions, I have held that whenever an employee admits misconduct in a response to a show cause letter, the employer is not bound to conduct any further disciplinary hearing. In this case, I dare repeat that any demand for an oral hearing under section 41 of the *Employment Act* was superfluous in the face of the said unequivocal admission by the claimant that he absconded duty on 9.6.2014." Similar sentiments were echoed by Rika J in the case of Said Ndege -vs-Steel Makers Limited [2018] eKLR the Learned Judge stated as follows:- "the procedure also, cannot be faulted. The Claimant was suspended and given 7 days to allow for further investigations. He wrote his letter admitting the employment offence, thus making it unnecessary for the Respondent to make further investigations. It would not make sense to call the Claimant to disciplinary hearing, while he had answered to the charge facing him, with a no contest. In moving the process of investigation and suspension forward, the Respondent involved the Claimant's Union, through the Shop Stewards, at every turn. Procedure was fair." With all this, it is clear that the process followed by the Respondent in determining whether the Appellant was liable for termination was procedurally fair. Meanwhile and at paragraph 18 of their submissions dated 30.5.2025, the Appellant has stated as follows:- "18. The report from the hospital showed that the Appellant had no bloods [sic] in his system! The Respondent nonetheless went ahead to dismiss the Appellant. The Respondent neither proved the Appellant's alleged intoxication nor incapability to perform his work due to such intoxication." We need not go too far in proving that the Appellant was intoxicated. In his explanation in the "Request for Explanation" document, he admitted to having taken alcohol on the the previous evening. He also admitted that the alcoblow tester showed a red light indicating that there was alcohol in his breath and blood. There were reports of him being seen staggering and his supervisor smelled alcohol in his breath. It is important to note that he was working in a construction site in the company of other employees. He posed a danger not only to himself but also to others at the site and any amount of intoxication posed this danger. In case

of J Kenya Hotel & Allied Workers Union For And On Behalf Of Benjamin Otieno Adala -vs- Tamarind Management Limited T/A Nairobi Carnivore Restaurant [2024] KEELRC 1223[KLR] the court held thus:- "The Grievant had no valid claim against the Respondent as the fact of his intoxication was ascertained by the Grievant's managers and colleagues. The Grievant worked in a section where knives and other sensitive equipment was inoperation and any degree of intoxication posed a danger to the Grievant and other employees let alone the customers of the Respondent. The suit is therefore only fit for dismissal. Suit dismissed with costs to the Respondent. It is so ordered." At paragraph 20 of the Appellant's submissions dated 30.5.2025, the Appellant raises an issue about confusion on the date on which the alcoblow test was done and specifically whether it was done on 16.8.2017 or on 17.8.2017. Two questions arise here. Is he denying that a test was conducted? Is he denying that it was positive for alcohol? The answer to both questions is a resounding no. He admitted in the 'Request for explanation' document not only that the test was carried out but also that the gadget showed a red light indicating alcohol in his blood at the highest level measurable by the gadget. He also admitted in the same document that he had taken alcohol the previous night on 15.8.2017. Raising further contention regarding the issue is clearly an afterthought. At paragraph 24 of the submissions dated 30.5.2017, the Appellant states as follows:- "24. Lastly, during cross-examination, the Respondent's witness averred that the Respondent never terminated the Appellant, yet in the Respondent's response, the Respondent avers that the reason for termination was in tandem with the provisions of section 44[4][b] of the *Employment Act*." Clearly, the Appellant's insinuation is that he was terminated from his duties before the end of his contract scheduled to end on 11.9.2017. To find out the truth regarding this insinuation, we would need to look more closely at the letter dated 31.8.2017 directed at the Appellant to be found at page 45 of the Record of Appeal. The letter written 15 days after the material date, inter alia advised the Appellant that his contract scheduled to expire on 11.9.2017 would not be renewed. The wording of the letter clearly shows that it was written to a person who was considered by the Respondent to be still in service. A closer look at the letter shows that it does not bear the recipient's postal address or email address. The letter not denied which means that the Appellant received it. This is consistent with an employee on duty receiving hand mail from the employer. It should be noted that he never raised the objection that he didn't receive the letter. A look at other correspondence he received from the Respondent shows that similarly they bore no recipient's address. These letters are to be found at pages 36, 38, 39 and 44 of the Record of Appeal. It can safely be stated there was a usage by which correspondence was delivered by hand and this required the presence of the recipient at the Respondent's premises for delivery to be effected. The clear conclusion is that the Appellant was deemed to be on duty on 31.8.2017 and had not been terminated as he claims. It becomes clear that though the Respondent had sufficient reasons to terminate the Appellant, it retained him until the expiry of his term as per the latter dated 31.8.2017.

24. The second aspect of unlawful termination is substantive justice. The respondent stated that it was prompted to submit on this due to paragraph 28 of the Appellant's submissions dated 30.5.2025

which generally mentions unlawful termination in as it states:- "28. It is against this backdrop the Appellant submits that the Respondent did not follow the dictates of Section 41 of the *Employment Act*; thus, the Appellant's dismissal was unfair and illegal. In furtherance, the trial court erred in fact and law on not finding and holding that the dismissal was unfair and illegal." 26. According to Section 47[5] of the *Employment Act*, the onus of justifying the grounds of termination is on the employer. It states:- "[5] For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." 27. Section 43 [1] and [2] of the Act require the employer to prove the reasons for termination of employment in as they state:- "[1] In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45." "[2] The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." 28. Section 45[2] of the Act defines unfair termination as follows:- "[2] A termination of employment by an employer is unfair if the employer fails to prove29. [a] that the reason for the termination is valid; [b] that the reason for the termination is a fair reason- [i] related to the employee's conduct, capacity or compatibility; or [ii] based on the operational requirements of the employer, and [c] that the employment was terminated in accordance with fair procedure." It is clear from the above that the employer has the duty to prove that there is a valid reason for terminating a contract of service. The valid reason in this case stems from the Appellant's intoxication. That he was intoxicated on the material day can be proven from his admission in the 'Request for Explanation' document where he admits not only that he had taken alcohol on the 15th of August, 2017, but also that an alcoblow test was carried out in which the light went red indicating intoxication at the highest level 10measurable by the alcoblow tester which do not negate the fact that the Breathalyser test had been done and turned positive. Throughout his case, from the pleadings, to the hearing, to submissions and even to his Appeal, the Appellant has not altered this initial admission that he made in the 'Request for Explanation'. Though he has not retracted his admission aforementioned, he raises issues over the date when the test was conducted and the fact that a toxicological test was not done. 31. In the Said Ndege case [supra] the Court held:- "17. The Claimant was correctly summarily dismissed, for an employment offence, which he owned up to having committed. Once an Employee has conceded to wrongdoing, latter-day complaints about lack of valid reason and faimess of procedure, in the process of termination, can only be of academic value. The Claimant was caught red-handed, in an act of gross misconduct. He accepted wrongdoing, and as he had done in the past, sought forgiveness. When forgiveness was not forthcoming, he turned around and alleged he was unfairly dismissed. 32. 18. The Respondent had valid reason, based on Claimant's confession, to summarily dismiss the Claimant. The Claimant was guilty of an employment offence under Section 44 [4] [g] of the *Employment Act*, and clause 24 [b] [viij] of the applicable CBA. The Court is in no doubt that termination was substantively fair, as required under Section 43 and 45 of the *Employment Act*." Based on the Appellant's admission there was substantive justice for the termination of employment of the Appellant for gross misconduct in being intoxicated on duty. The termination based on the events of 16.8.2017 was going to be procedurally fair and substantively just in the circumstances. However and as has been mentioned before and which fact was not traversed, though there existed sufficient ground for termination, the Appellant was not dismissed but his contract was allowed to run to conclusion as by dint of the letter dated 31.8.2017.

25. Whether the Appellant's contract was terminated through effluxion of time- By dint of the 'Addendum to Contract' dated 10.7.2017, the expiry of the contract was fixed at 10.09.2017. Any other construction will amount to rewriting the contract on behalf of the parties which it is trite law the

Courts should not engage in. According to the letter dated 31.8.2017 referenced 'End of Contract', the contract was allowed to run up to this date of 11.09.2017. Payment was also made up to this date as per the payslip to be found at page 51 of the Record of Appeal. A prayer for any further payment is a quest for payment for services not rendered.

Decision.

26. The court will deal with the issue of whether the Appellant's contract was terminated through effluxion of time under grounds of appeal namely-

    A. The Honourable Trial Magistrate misdirected herself and erred in fact and in law when she primarily based her decision on the notion that the Respondent merely chose not to extend the Appellant's contract once it expired without taking into account:

        c. The facts as pleaded by both parties.

        d. The evidence as led by both parties.

    B. The Honourable Trial Magistrate erred by failing to find that;

        d. The contract was not terminated trough effluxion of time.

        e. Without prejudice to the above even if the contract was terminated through effluxion of time [which it was not] there was an apparent mis-calculation leading to the Respondent's failure to pay terminal dues to the Appellant.

27. The addendum contract was dated July 10th, 2017, and stated in part, 'We wish to notify you that your contact, which will expire on July 12th, 2017, has been extended for a further period of 3 months and will be valid up to September 11th, 2017. If no explicit communication in writing is provided, the contract will be deemed to have expired on the last day of the contract period. Section 43 of the *Employment Act* places the burden of proof of reasons for termination of employment on the employer-'Proof of reason for termination',

    [1] In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

    [2] The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

28. RW1 was Agnes Tikolo and told the trial court that the Appellant was issued with a warning letter for being intoxicated while at work. That he was warned and not employment terminated. That he was issued with a termination letter as his contract was ending . That his employment ended when the contract expired.[page 111 of ROA]. The Trial Magistrate held that the claimant failed to prove his case beyond a balance of probabilities as the respondent did not unlawfully terminate his employment but rather chose not to extend the same once it expired.

29. The role of the court at first appeal is as stated in Selle v Associated Motor Boat Co. [1968] EA 123 and in Mbogo v Shah [1968] EA Page 93 De Lestang v.P [As He Then Was] Observed At Page 94: "I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

30. The addendum contract extended the contract for three months starting from July 12, 2017, and further specified the termination date as September 11, 2017. The appellant argues there was a miscalculation of the expiry date. The respondent asserts that the expiry date was clear, and any other interpretation would be rewriting the contract of the parties by the court. I reviewed the statement of claim, and the issue of miscalculation of the contract period was not raised. The issue raised was that the contract was terminated based on false allegations of being drunk. The court examined the appellant's submissions presented to the trial court, which addressed this issue. The claimant did not raise any concern about the addendum contract in his witness statement [pages 18-112 of the Record of Appeal]. At the lower court, the appellant argued that the three-month extension was until October 12, 2017. It is well established that submissions are not pleadings. Therefore, the issue of miscalculation regarding the duration of the addendum contract was not considered at the lower court. Confronted with a dispute over contract interpretation, Justice Onyango, in John Rioba Maugo v Riley Security Services Limited [2016] e KLR, held: "the claimant has not testified that he raised any objections to the letter after it was served upon him. By the time of his summary dismissal, he had been working under the terms of the letter for more than three years. The only conclusion that can be drawn from his conduct is that he had no objection to the contents of the letter." Similarly, in the present case, the appellant was issued an addendum to the employment contract with an explicit expiry date. He did not object nor raise any issue with the expiry date in his witness statement, which was adopted as his evidence in chief. The issue was only raised during submissions. Based on the above, the court upholds the decision in John Rioba Maugo v Riley Security Services Limited [2016] eKLR, affirming the trial court's ruling, as there is no basis to find misapprehension of facts before the trial court or misapplication of the law. [Mbogo v Shah]

31. The appellant admitted he was paid upto the end of the contract and indeed terminal dues were not in question in the claim [page 7 of ROA]. Having upheld the decision of the trial court that the contract ended by effluxion of time I find it it superfluous to delve into the other issues.

32. In the upshot the appeal is dismissed for lack of merit. The Judgment and Decree of the Hon. B.M. Cheloti [PM] delivered on 21st August, 2023 in MCELRC 1531/2019 is upheld. To temper justice with mercy, taking into account the former employment relations between the parties, I make no order as to costs in the appeal.

33. The file is marked as closed.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – absent

Respondent: Wanjohi