



**Texas Alarm [K] Limited v Sikhumbili (Appeal E005 of 2023)  
[2024] KEELRC 13650 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13650 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E005 OF 2023**

**AK NZEI, J  
MAY 6, 2024**

**BETWEEN**

**TEXAS ALARM [K] LIMITED ..... APPELLANT**

**AND**

**PETER SIFUNA SIKHUMBILI ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of the Hon. D.O. Mbeja –  
Pm in CM -ELR Cause No. 311 of 2021 delivered on 29th December 2022)*

**JUDGMENT**

1. This judgment is on an appeal against part of the judgment of D.O. Mbeja (PM) delivered on 29/12/2022 in Mombasa Chief Magistrate’s Court Employment Case No. 311 of 2021, wherein the Respondent herein had sued the Appellant vide a statement of claim dated 6/5/2021 and filed in the said Court on 12/5/2021. The Respondent had sought the following reliefs against the Appellant.
  - a. A declaration that dismissal and/or termination of the Respondent’s employment by the Appellant was unlawful and unfair.
  - b. 12 months’ compensation for unfair and/or unlawful termination of employment .....kshs. 360,000
  - c. Salary for March 2020.....ksh. 30,000
  - d. One month salary in lieu of notice .....ksh. 30,000
  - e. Refund of uniform deduction.....ksh. 3,600
  - f. Unremitted NHIF .....ksh. 100,000



- g. Service pay.....ksh. 242,307.67
  - h. Leave pay for 14 years .....ksh. 180,000
  - i. Holiday pay 13 years .....ksh. 355,384.58
  - j. Overtime pay.....ksh. 5,063,972.2
  - k. Certificate of service.
  - l. Costs of the suit and interest at Court's rates.
  - m. Any other relief the Court may deem fit to grant.
2. The Respondent had pleaded in the said primary suit that he had been employed by the Appellant as a watchman on 12/3/2012 and had risen through the ranks to the rank of a security supervisor, earning a gross salary of ksh. 13,900 at the time of termination, which was a gross underpayment. The Respondent had further pleaded:-
- a. that he worked continuously seven days a week from 6.00am to 6.00pm and at times from 6.00pm to 6.00am, hence working for 4 extra hours per day; a total of 28 overtime hours per week.
  - b. that on 19/4/2020, the Respondent was given a termination letter dated 9/3/2020, terminating his employment on account of absconding without permission, which allegations the Respondent vehemently denied.
  - c. that termination of the Respondent's employment was unfair, and that the Respondent was not paid his terminal dues.
  - d. that the Respondent was not served with a show cause letter, no hearing took place and due process was not followed.
  - e. that the Respondent never took annual leave during the period of employment, and worked on public holidays without pay.
  - f. that a refundable sum of ksh. 200 was deducted from the Respondent's salary per month, and a further sum of kshs.600 was deducted monthly towards NHIF but no remittance was made.
3. Documents filed alongside the Respondent's statement of claim in the trial Court included the Respondent's written witness statement, which replicated the statement of claim, dated 6/5/2020 and an evenly dated list of documents. The listed documents included the Respondent's employment identity card, letter of promotion dated 12/3/2012, minutes of a meeting held on 30/4/2015, payslips, dispatch notes, summary dismissal letter dated 9/4/2020, NSSF provisional statement of account, demand letters dated 14/8/2020 and 3/3/2021 respectively, the Respondent's National Identity Card and the Respondent's letter to the Appellant dated 2/4/2020.
4. The Appellant entered appearance on 8/6/2021 and subsequently filed response to the claim against it on 18/11/2021, denying the Respondent's claim. The Appellant pleaded that the salary paid to the Respondent was inclusive of house allowance and overtime payment, and that the Respondent worked for six days a week with one rest day. That the Respondent earned a gross salary of kshs. 13,900 at the time of termination; which was not a gross underpayment.
5. The Appellant had further pleaded:-



- a. that it was a term of the Respondent's employment contract that the Respondent's employment could be terminated by either party giving a one month termination notice.
  - b. that on 19/3/2020, the Respondent left his guard post at Naivas Supermarket before the end of his night shift and subsequently absented himself from duty without permission after he was asked by his supervisor to visit the Appellant's office to explain his action.
  - c. that the Respondent visited the Appellant's office on 1/4/2020 and was given a show cause letter dated 30/3/2020, to which the Respondent responded vide his letter dated 2/4/2020 and submitted to the Appellant's office on 4/4/2020.
  - d. that dissatisfied with the cause shown by the Respondent vide his said letter, the Appellant summarily dismissed the Respondent from employment vide a letter dated 9/4/2020 on account of deserting duty. That the Respondent collected the dismissal letter on 17/4/2020.
  - e. that the Appellant had valid reasons to dismiss the Respondent.
  - f. that the Respondent did not work during public holidays and that if at all he did, he was sufficiently remunerated.
  - g. that all NHIF and NSSF deductions made from the Respondent's salary were submitted to the relevant authorities.
  - h. that the Respondent never at any time earned kshs. 30,000 as a security supervisor, and that his salary as a security guard at the time of termination was ksh. 13,900, inclusive of house allowance.
  - i. that termination of the Respondent's employment was procedurally fair.
6. The Appellant filed a list of witnesses dated 12/11/2021 and listed three witnesses, namely Samuel Sikuku, Vincent Oduor and Bernard Odhiambo Adunda, whose written witness statements were also filed. The Appellant had also filed an evenly dated list of documents listing some 26 documents. The listed documents included the Respondent's promotion letter dated 12/3/2012, 3 warning letters issued to the Respondent and dated 3/10/2018, 8/4/2019 and 7/9/2019 respectively the Appellant's work attendance register for March 2020 (01/03/2020 to 19/3/2020), a show cause letter dated 30/3/2020, the Respondent's response to the show cause letter dated 2/4/2020, the dismissal letter dated 9/4/2020, payslips and leave forms for the years 2012 to 2019.
  7. The Respondent filed a reply to the Appellant's response to the claim, and the Appellant filed a supplementary list of documents, listing the Respondent's payslips covering the period of employment and his NHIF member data summary.
  8. At the trial, the Respondent (being the Claimant in the trial Court) testified and adopted his filed witness statement and produced in evidence the documents referred to in paragraph 3 of this judgment. He denied having left his guard post unmanned. He denied having been given a show cause letter dated 30/3/2020, and testified that he wrote the letter dated 2/4/2020 after he had seen the Human Resource (HR) the previous day (as directed by the Operations Manager). That he was called on 17/4/2020 and was given the termination letter. That the termination was unfair. He denied having been paid overtime.
  9. Cross-examined, the Respondent testified that he was expected to ask for permission in the event of any absence, and was not expected to leave his post unmanned. He admitted that he did not go to work from 20/3/2020 to 1/4/2020.



10. The Appellant called the 3 witnesses named in paragraph 6 of this judgment, who adopted their respective filed witness statements as their respective testimonies in the suit before the trial Court.
11. RW-3 (Barnard Odhiambo Aduda), produced in evidence the Appellant's documents referred to in paragraphs 6 and 7 of this judgment. The witness further testified that the Respondent earned ksh. 13,900 per month, that his salary was inclusive of holiday and overtime worked as the Respondent worked 4 hours overtime, that the amount of overtime payable was determined by the number of hours worked and that the Respondent's payslip indicated the amount paid.
12. RW-3 further testified that he wrote a show cause letter on 30/3/2020, that the same was served on the Respondent on 1/4/2020 and that he responded to the same. That there was no disciplinary sitting, and that the Respondent was summarily dismissed.
13. I have perused the Respondent's letter to the Appellant dated 2/4/2020, and the same is not shown to have been written in response to a show cause letter, but pursuant to the Appellant's Human Resource Manager's request that the Respondent explains why he was absent from work. The show cause letter dated 30/3/2020 is not shown to have been served on the Respondent. The Appellant exhibited a certificate of postage dated 2/4/2020 and issued at 13:23 hours. It cannot be reasonably believed that the Respondent received the show cause letter on the date of its postage and responded to the same on the same date. The Respondent's assertion that he was not issued with a show cause letter, which in labour law is the formal catalogue of charges against an employee, is not far-fetched.
14. I have also perused the numerous payslips of the Respondent, and I have noted that payments for overtime and off days were regularly made to the Respondent by the Appellant. The Respondent did not specify, in his pleadings, specific periods during the period of employment when payment for overtime was not paid, and the amounts payable in respect of those specific periods. The Respondent did not also specifically plead/specify the public holidays on which he worked without pay.
15. Further, this Court has perused the leave forms exhibited by the Appellant at the trial, and I have noted that through out the Claimant's employment period, the Respondent applied for, and was granted annual leave. The Respondent did not question the validity/authenticity of the said leave forms.
16. The trial Court delivered its judgment on 29/12/2022 and awarded the Respondent a sum of ksh. 240,000 which the Court stated was made up of the Respondent's salary for March 2020, six months' (salary being) compensation for the Respondent's termination and one month salary in lieu of notice. The Court ordered that the Respondent be issued with a certificate of service within 30 days of the judgment.
17. The Respondent was also awarded costs of the suit and interest at Court rates from the date of filing suit.
18. Aggrieved by the said judgment, the Appellant preferred the appeal herein challenging:-
  - a. the award of salary for the month of March 2020 of kshs. 30,000.
  - b. the award of one month salary in lieu of notice of ksh. 30,000
  - c. the award of six (6) months' salary compensation for unfair termination totaling ksh. 180,000.
19. The Appellant seeks the following reliefs on appeal:-
  - a. that the appeal be allowed.



- b. that part of the trial Court’s judgment making the awards totaling to ksh. 240,000 be set aside and be substituted with an order dismissing the three awards made by the trial Court.
  - c. that costs of the appeal and of the suit in the lower Court be borne by the Respondent.
20. this is a first appeal. Echoing the decision in SELLE -VS- ASSOCIATED MOTOR BOAT COMPANY [1968] E.A., the Court in MURSAL & ANOTHER -VS- MUNENE (SUING AS THE LEGAL ADMINISTRATORS OF DALPHINE KANINI MANESA) CIVIL APPEAL NO. E20 OF 021 [2021] eKLR, stated as follows:-
- “ A first appellate Court has jurisdiction to reverse or to affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law....
- A first appellate Court is the final Court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust.....”
21. Evidence adduced before the trial Court is before this Court for re-evaluation. This Court takes cognizance of the fact that it did not have the advantage of seeing and hearing the witnesses testify. In my view, the issues for determination are as follows:-
- a. whether termination of the Respondent’s employment was unfair.
  - b. whether the Respondent was entitled to the reliefs granted by the trial Court.
22. Section 45(2) (a) & (c) of the *Employment Act* provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination was valid and that termination was in accordance with fair procedure. Section 45(4) (b) of the Act on the other hand provides that a termination of employment shall be unfair if it is found out that in the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
23. Section 41 of the *Employment Act* spells out a mandatory procedure that must be adhered to by every employer considering termination of an employee on account of misconduct, poor performance or physical incapacity. The Section provides as follows:-
- “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  - (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
24. In the present case, the Appellant is shown to have terminated the Respondent’s employment on account of absenting himself from duty without permission which, under Section 44(4) (a) of the



Employment Act, is a gross misconduct. The Appellant was, therefore, obligated to comply with the procedure set out in Section 41 of the Act. It did not.

25. It was stated as follows in WALTER OGAL ANURO -VS- TEACHERS SERVICE COMMISSION [2013] eKLR:-

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

26. The Court of Appeal stated as follows in the case of NAIMA KHAMIS -VS- OXFORD UNIVERSITY PRESS [E.A] LTD [2017] eKLR:-

“...We wish to take note of the provisions of Section 43(1) of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair.

Also, Section 45(2) (c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair.

A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord an employee an opportunity to be heard as by law required.”

27. On substantive fairness in the present case, the Respondent admitted in evidence that he absented himself from duty, and he did not demonstrate that he did so with leave or lawful cause. I will, therefore, not belabor the point on this issue. I find and hold that termination of the Respondent’s employment was based on a valid reason, and was therefore substantively fair.

28. On procedural fairness, the mandatory procedure set out in Section 41 of the Employment Act was not complied with by the Appellant. RW-3 admitted in evidence that no disciplinary proceedings were conducted before termination of the Respondent’s employment. The Respondent’s employment was terminated without him being given an opportunity to be heard. This was in breach of the principle of natural justice which demands that an accused person and/or every person against whom accusations have been made be given an opportunity to be heard. Section 41 of the Employment Act is founded on that principle.

29. I find and hold that termination of the Respondent’s employment was procedurally unfair, and I so declare.

30. The trial Court fell into error in making a finding that the Respondent was subjected to a disciplinary hearing. That finding is hereby set aside.

31. Before delving into the second issue, it is imperative that this Court first establishes the Respondent’s monthly salary at the time of termination. The Respondent pleaded that he earned a gross salary of ksh. 13,900 at the time of termination, and both parties stated as much in evidence. No evidence was presented to show that the Respondent ever earned a salary of kshs. 30,000 during the entire period of employment. The evidence on record shows that the Respondent earned a gross salary of ksh. 13,900 per month.



32. On the second issue, the Respondent was not shown to have been served with a termination notice under Section 35(1) (c) of the Employment Act, and he was not shown to have been paid in lieu of notice. I uphold the trial Court’s finding that the Respondent is entitled to payment of one month salary in lieu of notice. I however fault the award of ksh. 30,000, which I hereby set aside and substitute with an award of ksh. 13,900 being one month salary in lieu of notice.
33. Having made a finding that termination of the Respondent’s employment was procedurally unfair, and having taken into consideration the circumstances in which the Respondent’s employment was terminated, I uphold the trial Court’s award to the Respondent of the equivalent of six (6) months’ salary, but fault the calculation thereof which the trial Court erroneously based on earnings of ksh. 30,000 per month. The award of ksh. 180,000 is hereby set aside, and is substituted with an award of ksh. 83,400 being compensation for unfair termination of employment.
34. The award of ksh. 30,000 being the Respondent’s salary for March 2020 is hereby set aside. As already stated, the evidence on record shows that the Respondent was earning a gross salary of kshs. 13,900 at the time of termination, but not ksh. 30,000. Further evidence on record shows that the Respondent was paid his salary for March 2020. A payslip on payment of the Respondent’s March 2020 salary was produced in evidence by the Appellant, as it did regarding the other months.
35. The appeal herein partly succeeds, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Respondent against the Appellant as follows:-
  - a. One month salary in lieu of notice.....ksh. 13,900
  - b. Compensation for unfair termination  
of employment .....ksh. 83,400

Total Ksh. 97,300.
36. Each party will bear its own costs of the appeal, but the Respondent will have costs of proceedings in the Court below, plus interest at Court rates, calculated from the date of the trial Court’s judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> MAY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

