



**H. Young & Co. [E. A] Limited v Masika (Appeal E009 of 2021)  
[2024] KEELRC 1368 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1368 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E009 OF 2021**

**AK NZEI, J  
JUNE 6, 2024**

**BETWEEN**

**H. YOUNG & CO. [E. A] LIMITED ..... APPELLANT**

**AND**

**WYCLIFFEE NYANGI MASIKA ..... RESPONDENT**

*(Appeal from the judgment of Hon. J. Ongondo -SRM delivered on  
18th October 2022 in Malindi CM – ELR Cause No. 66 of 2019)*

**JUDGMENT**

1. This judgment determines the Appellant’s appeal against Malindi Chief Magistrate’s Court in its ELR Case No. 99 of 2019 delivered on 18/10/2022 in favour of the Respondent, who was the claimant in the said suit, declaring that he had been unfairly terminated and awarding him:-
  - a. Twelve months’ salary as compensation for unlawful termination (kshs. 36,52X12) .....kshs. 438,312
  - b. Unpaid annual leave for 3 years at 21 days for the 3 years .....kshs. 76,704.
  - c. Salary in lieu of notice .....kshs. 36,526  
Kshs. 551,542
  - d. Costs.
2. The Respondent had sued the Appellant in the said Court vide a memorandum of claim dated 6/11/2019 and filed in the said Court on 20/11/2019 seeking the following reliefs:-
  - a. A declaration that the Respondent’s termination was unfair, unlawful and wrongful.
  - b. Compensation for unfair termination (kshs. 50,281x12).....kshs. 603,372



- c. Untaken leave in 2017, 2018 and 2019 @ 21 days for each year (kshs. 50,281x3) .....kshs. 150,843
  - d. One month pay in lieu of notice.....kshs. 50,281.
  - e. Refund of illegal union deductions @ kshs. 808 per month for 27 months.....kshs. 21, 816.
  - f. Costs of the suit and interest.
3. The Respondent had pleaded that he was employed by the Appellant on contract on 8/5/2017, and was confirmed to permanent employment on 1/11/2017. That the Respondent worked until 12/9/2018 when he suffered extensive injuries while at work. The Respondent further pleaded that when he instructed an Advocate to seek compensation for him regarding the said injuries, the Respondent's superiors in the Appellant company turned hostile towards him, and that he was on 10/6/2019 served with two purported warning letters back-dated 2/4/2019 and 2/5/2019 respectively, and was on 27/7/2019 at 8.00am served with a purported show cause letter requiring him to appear before a disciplinary committee at a place called Witu in Lamu County at 3.00pm on the same date, (27/7/2019), which place was almost 100KM from Minjila in Garsen where the Respondent was working at the time.
4. It had been pleaded by the Respondent:-
- a. that the Respondent managed to reach Witu at around 3,00pm and found the Appellant's project manager (a Mr. Thiogu) and the Project IT Technician, a Mr. Humphrey Mulonya, who casually asked him a few questions regarding issues raised in the show cause letter, before asking him to sign the minutes and to go back to his work station in Minjila, which he did.
  - b. that on 29/7/2019, 3 days later, the Respondent was handed a terminating letter (dated 29/7/2019) by the site Engineer, Richard Tala, who ordered the Respondent to clear and to leave the place of work.
  - c. that the termination was unlawful and unfair as the Respondent never engaged in misconduct as alleged in the purported warning letters, was not informed of the allegations facing him, was not given a chance to be heard and no hearing was conducted as envisaged in the [Employment Act](#).
  - d. that at the time of termination, the Respondent was earning a gross salary of kshs. 50,281.
  - e. that the Respondent had not taken leave during the years 2017, 2018 and 2019.
  - f. that the Appellant had been deducting union dues of kshs. 808 every month from the Respondent's payslip during the entire period of employment, and yet there was no valid CBA and proper authorization as by law required.
5. Documents filed by the Respondent alongside the memorandum of claim included the Respondent's written witness statement dated 6/11/2019 and an evenly dated list of documents listing 8 documents. The listed documents included a copy of a payslip dated 28/9/2018, warning letters dated 2/4/2019 and 2/5/2019 respectively, a show cause letter dated 25/7/2019 and a termination letter dated 29/7/2019, among others.
6. The Appellant filed a response to the claim on 20/12/2019, dated 19/12/2019, and denied the Respondent's claim. The Appellant did not deny the fact of having employed the Respondent, but stated that the Respondent was duly served with warning letters dated 2/4/2019 and 2/5/2019



respectively, and a show cause letter dated 25/7/2019 inviting him to a disciplinary hearing on 27/7/2019. That following the disciplinary hearing and failure by the Respondent to show cause why disciplinary action could not be taken against him, the Respondent's employment was terminated vide a letter dated 29/7/2019.

7. At the trial, the Respondent adopted his filed witness statement produced in evidence the documents mentioned in paragraph 5 of this judgment. Cross examined, the Respondent testified that he had worked on contracts and then on permanent and pensionable basis as from 1/11/2017 to the date of termination, for a period of less than 2 years. He denied having been given an opportunity to defend himself.
8. The Appellant called one witness, Humphrey Maloya (DW-1), who adopted his filed witness statement dated 12/11/2020 and produced in evidence the documents listed on the Appellant's evenly dated list of documents, the documents being letters dated 15/4/2019 and 2/5/2019 respectively, a show cause letter dated 25/7/2019, proceedings for the hearing held on 26/7/2019, letter dated 29/7/2019, a certificate of registration of a CBA with the Respondent's Union and a leave statement in respect of the Respondent.
9. The witness (DW-1) testified that disciplinary action had been taken against the Respondent on account of reporting to work, clocking in and absconding after that, and negligence of duties given to him. That several warnings had also been given. DW-1 further testified that the Respondent's gross salary was kshs. 36,000 and that what made his salary for September 2018 to be kshs. 50,000 was an overtime payment of kshs. 18,760. That upon termination, the Respondent was asked to collect his benefits but he refused. That the Respondent's union dues (deductions) were 2.5% of his gross salary as per Gazette Notice No. 1269 of 25/1/2022. The trial Court delivered its judgment on 18/10/2022 and made awards in favour of the Respondent as stated in paragraph 1 of this judgment.
10. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal; that the learned magistrate of the trial Court misdirected himself by:-
  - a. failing to fully appreciate and correctly analyze the pleadings and evidence before the trial Court.
  - b. by making a finding that the Appellant failed the test of substantive and procedural fairness in the disciplinary proceedings taken against the Respondent herein.
  - c. making a finding that termination of the Respondent by the Appellant was unfair.
  - d. making a finding that the Respondent was entitled to the prayers sought in the memorandum of claim.
  - e. Making a finding that the Respondent was entitled to 12 months' salary as compensation.
  - f. making a finding that the Respondent was entitled to annual leave for 3 years at kshs. 76,704.
11. The Appellant sought the following reliefs on appeal:-
  - a. that the appeal be allowed.
  - b. that the judgment delivered by the trial Court on 18/10/2022 and the ensuing decree be set aside, and the claim filed by the Respondent be dismissed with costs to the Appellant.
  - c. costs of the appeal be awarded to the Appellant.



12. This is a first appeal, and both the pleadings filed in the trial Court and the evidence adduced thereon are before this Court for fresh analysis and consideration. This Court, however, has taken cognizance of the fact that it neither saw nor heard the witnesses first hand. Issues that fall for determination, in my view, are:-

- a. whether termination of the Respondent's employment was unfair.
- b. whether the reliefs granted by the trial Court were deserved.

13. On the first issue, the show cause letter issued to the Respondent by the Appellant, dated 25/7/2019, stated in part:-

“Reports held in this office indicate that on 25/7/2019, you have been reporting to duty clocking in and neglecting your duties despite the several verbal warnings given to you by site supervisor, despite that you have received several warning letters on several occasions pertaining the negligence of duties, dated 15<sup>th</sup> April 2019 and 2<sup>nd</sup> May 2019 respectively without any improvement.

The above act constitutes serious gross misconduct under the company policy and shall not be tolerated henceforth.

In view of this, you are given one (1) day from the date of this letter to show cause why disciplinary action should not be taken against you.”

14. It is to be noted from the wording of the show cause letter, which has NO indication on when it was served on the Respondent, that the said letter did not set out any specific incident when the Respondent clocked in and neglected any specific of his duties. The accusation was general. Reference to alleged warning letters, which the Respondent stated had been back-dated and given to him on 10/6/2019, did not make the situation any better as warning letters themselves are in the nature of disciplinary actions. Allegations made in warning letters cannot be the basis of future disciplinary actions, though they can inform the severity of a disciplinary action to be taken by an employer in the event of future misconduct on the part of the employee concerned.

15. In his letter of response to the show cause letter dated 26/7/2019, the Respondent denied the allegations levelled against him and stated in detail the instructions given to him on 25/7/2019 and how he and his shift team executed them. The Respondent further denied the allegations levelled against him when he appeared before the disciplinary committee at Witu.

16. Section 43(1) of the *Employment Act* provides as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”

17. On the other hand, Section 45(2) (b) & (c), provides as follows:-

“(2) A termination of employment by an employer is unfair if the employer fails to prove:-

- (a) that the reason for the termination is valid;
- (b) .....



- (c) that the employment was terminated in accordance with fair procedure.”

18. Section 45 (4) (a) of the *Employment Act* provides:-

- “(4) A termination of employment shall be unfair for the purpose of this part where
- (a) .....
- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”

19. As already stated in this judgment, the show cause letter, which in labour laws serves as a memorandum of charges levelled against an accused employee, was general and lacked specific and particular allegations to which the Respondent could specifically respond to. Further, the show cause letter, in which the Respondent was accused of gross misconduct, did not inform the Respondent of his rights under Section 41 of the *Employment Act*. The Respondent was given one (1) day to respond to the show cause letter, and was forced to travel 100 kilometers from his duty station to attend a disciplinary hearing on 27/7/2019; a date which he pleaded was communicated to him on the date of the hearing. He appeared before the disciplinary panel without a fellow employee or a union official as provided in Section 41 of the *Employment Act*.

20. The Respondent is not shown to have been given reasonable time to respond to the show cause letter and prepare for the disciplinary hearing. The entire disciplinary process, from issuance of the show cause letter, to disciplinary hearing and to the termination of employment, took a record 4 days from 25/7/2019 to 29/7/2019. What was the Appellant’s intention in causing the Respondent to cover a distance of about 100KM to attend a disciplinary hearing of which he was informed on the date of the hearing.”

21. The Appellant did not demonstrate any valid reason for terminating the Respondent’s employment and the procedure adopted by the Appellant in effecting the termination was extremely unfair. In all the circumstances of the case, the Appellant did not act in accordance with justice and equity. The Court of appeal stated as follows in the case of *Naima Khamis v Oxford University Press [E.A] Limited* [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.”

22. I find and hold that termination of the Respondent’s employment by the Appellant was substantively and procedurally unfair, and I so declare, and uphold the trial Court’s finding in that regard.



- 23. On the second issue, and taking into account the manner and circumstances in which the Respondent’s employment was terminated, I uphold the award of the equivalent of 12 months’ salary as compensation for unfair termination of employment.
- 24. On the award of kshs. 76,704 regarding the Respondent’s untaken leave days, although the Appellant presented in evidence before the trial Court what the Appellant referred to as the Respondent’s leave statement, no evidence was presented showing when the Respondent applied for leave during any particular leave earning period, and how many outstanding leave days the Respondent had at the time of termination. The alleged leave statement exhibited by the Appellant was a computer-generated sheet with no form of authentication on it. The said document does not, in my view, accord with the provisions of Section 74(g) of the Employment Act. I decline to attach any evidential value to it, and I uphold the award of kshs. 76,704 made by the trial Court.
- 25. On the award of kshs. 36,526 being payment in lieu of notice, it was not demonstrated that the Respondent was given a termination notice pursuant to Section 35(1) (c) of the Employment Act. I uphold the award made by the trial Court in lieu of notice. I also uphold the award of costs to the Respondent in the lower Court suit.
- 26. In sum, I find no merit in the Appellant’s appeal, and the same is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH JUNE 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

