



**Kavoi v Kenya Meat Commission (Appeal E057 of 2021)
[2024] KEELRC 1915 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1915 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E057 OF 2021**

**L NDOLO, J
JULY 25, 2024**

BETWEEN

TITUS KAVOI APPELLANT

AND

KENYA MEAT COMMISSION RESPONDENT

JUDGMENT

1. On 27th April 2021, Hon Edgar Kagoni, PM dismissed the Appellant’s claim for unlawful termination of employment and payment of terminal dues.
2. Aggrieved by the decision of the trial court, the Appellant filed the present appeal. In his Memorandum of Appeal dated 25th May 2021, the Appellant cites the following grounds of appeal:
 - a. The learned trial Magistrate erred in law and fact in holding that the Appellant’s dismissal was lawful, ignoring the fact that the reason for dismissal of the Appellant was not valid;
 - b. The learned trial Magistrate erred in law and fact in holding that the Appellant’s dismissal followed due process contrary to the evidence on record;
 - c. The learned trial Magistrate erred in law and fact by failing to make a finding that the Appellant’s dismissal was unlawful and unfair;
 - d. The learned trial Magistrate erred in law and fact by failing to award the Appellant leave due and payable for 2014 to 2017 which was due and payable regardless of whether the dismissal was lawful or not;
 - e. The learned trial Magistrate erred in law and fact by failing to award the Appellant service gratuity contrary to regulation number 24 of the Regulation of Wages (Protective Security) Order;



- f. The learned trial Magistrate erred in law and fact in analysing the facts, evidence and applicable law hence reached a wrong conclusion.
3. This being a first appeal, I am obligated to re-consider and re-evaluate the evidence on record and draw my own conclusions, always bearing in mind that I did not have the opportunity to hear the witnesses for myself.
4. The duty of a first appellate court was set out by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123 as follows:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

5. The Appellant lists six (6) grounds of appeal, which may be condensed into two (2) broad bands namely:
 - a. Whether the termination of the Appellant’s employment was lawful and fair;
 - b. Whether the Appellant is entitled to the remedies sought.
6. The Appellant’s employment was terminated by letter dated 14th March 2018, stating thus:

“Dear Titus,

Re: Disciplinary Proceedings-decision Of The Kenya Meat Commission Human Resource Advisory Committee

We write to you on the above matter and further to our letter dated 13th February 2018.

We thank you for honouring the Summons contained in our letter aforementioned by attending the Disciplinary Proceedings that were conducted by our Human Resource Advisory Committee on 23rd February 2018 at our Boardroom in Athi River, Machakos County.

We wish to inform you that the Human Resource Advisory Committee considered all the submissions and representations that were made during the said proceedings. The said Committee also considered all the documentary evidence relating to the case and thereafter made its recommendation to the Managing Commissioner.

We regret to inform you that the Kenya Meat Commission Human Resource Advisory Committee resolved to summarily dismiss you from its employment on account of gross misconduct with immediate effect.

In light of the decision to summarily dismiss you, and in line with the provisions of Article 15.6.2 of the Kenya Meat Commission’s Human Resource Policy, Regulations and Procedures Manual, kindly note that you are not entitled to any terminal benefits except:

- a. Payment for days worked up to the time of dismissal;



- b. Payment of any accrued leave days not taken up to the time of dismissal; and

We are now computing your final dues and hereby call upon you to visit the office to commence the clearing process with all the departments so that we can finalise the computation.

We take this opportunity to thank you for the service to us and wish you success in your future endeavours.

Yours Sincerely,

(signed)

Joseph Learamo

Managing Commissioner”

7. According to the evidence on record, the Appellant was accused of stealing a ½ kilogramme of meat valued at Kshs.200. The accusation arose from the fact that the Appellant was unable to produce a purchase receipt when required to do so. The Appellant explained that the receipt was in the pocket of his colleague’s dustcoat and he eventually produced it.
8. Section 43 of the Employment Act requires an employer who has terminated the employment of an employee to establish a valid reason for their action. The standard of proof in this regard has been established in the ‘reasonable responses test’ where the employer’s action is benchmarked against what a reasonable employer would do.
9. The ‘reasonable responses’ test was well restated by Manani J in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR as follows:

“In terms of section 43 of the Employment Act, an employer will be deemed to have a substantive justification for terminating a contract of service if he/she genuinely believed that the matters that informed the decision to terminate existed at the time the decision was taken...what the law is concerned with here is whether the circumstances surrounding the decision to terminate would justify a reasonable man on the street, standing in the same position as the employer, to reach a similar decision as him/her regarding the termination.”
10. There is no doubt that when the Appellant was found with the meat in issue, he did not have a purchase receipt as required. This put his integrity into question and I therefore find and hold that the Respondent had a valid reason for terminating the employment.
11. The next question is whether in effecting the termination, the Respondent observed the procedural fairness dictates set by Section 41 of the Employment Act. These requirements were rehashed by Radido J in *Alphonce Machanga Mwachaya v Operation 680* [2013] eKLR as follows:
 - a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
 - b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
 - c. That the employer has heard and considered any explanations by the employee or their representative;



- d. That where the employer has more than 50 employees, it has complied with its own internal disciplinary rules.
12. Prior to the dismissal, the Appellant had, by letter dated 29th January 2016, been placed on interdiction pending finalisation of his case. The interdiction letter also required the Appellant to show cause why disciplinary action should not be taken against him.
13. The Appellant's response came on the same day but from the record, his personal hearing took place more than a year later, in February 2018. This long delay, which was not explained, ought to have caught the attention of the trial court, especially because the Appellant was on interdiction all this while.
14. The purpose of the procedural fairness procedure decreed by Section 41 of the *Employment Act* is to ensure that an employee facing disciplinary proceedings is afforded a fair opportunity to prepare a defence and respond to the charges at the shop floor. To my mind, this cannot be achieved where the employee is kept on interdiction for such a long period that the interdiction acquires the character of a termination.
15. On this ground, I find and hold that in effecting the termination of the Appellant's employment, the Respondent failed the procedural fairness test set by Section 41 of the *Employment Act*. As a result, I return a verdict that the termination was procedurally unfair.
16. Flowing from the foregoing, I award the Appellant six (6) months' salary in compensation. In making this award, I have taken into account the Appellant's long service but also the finding that he contributed to the termination. I further award the Appellant one (1) month's salary in lieu of notice.
17. In response to the claim for leave pay, the Respondent stated that the Appellant had forfeited all his accrued leave. The finding by the trial court on this issue is rather intriguing. I say so because although the learned trial Magistrate found that the Appellant had 32 leave days to his credit, he went ahead to take away this entitlement on account of forfeiture.
18. The relevant part of the judgment by the learned trial Magistrate reads as follows:
- “...the evidence before the court and which evidence was adduced by the Respondent shows a trend that leave days were accumulated. This is evidenced by the leave application forms dated 28.10.2014 and 13.06.2014. Therefore, this court will grant the Claimant leave days for 32 days. Since the intention showed by the Respondent as at that date his leave days were 32. Since no other leave application form is before court to show further evidence of more leave days, the contractual directive stands that the days were forfeited when not taken. Having so found I hereby dismiss the said prayer noting that the contract signed did not provide for accumulation of leave days.”
19. From the record, I was unable to find any document in support of the position taken by the learned trial Magistrate that the Appellant had forfeited his accrued leave. Moreover, as held by Rika J in *John Kyalo Mulela v Pan African Logistics Ltd* [2017] eKLR:
- “There is no provision in the *Employment Act*, which supports forfeiture of annual leave. Annual leave is either utilised by the Employee or paid for in cash by the Employer. Forfeiture of annual leave is a term which is alien to the *Employment Act*, 2007.”
20. Consequently, and in view of the foregoing, I will award the Appellant leave pay for 32 days.



21. According to the record, the Appellant did not adduce any evidence to support his claims for overtime and service gratuity.
22. In the end, I set aside the judgment by the trial court dismissing the Appellant's claim and enter judgment in his favour in the following terms:
- a. 6 months' salary in compensation Kshs.111,792
 - b. 1 month's salary in lieu of notice Kshs.18,632

18,632

- c. Leave pay for 32 days ($\frac{18,632}{30}$ x 32) Kshs.19,874
Total Kshs.150,298

23. The Respondent will meet the costs of this appeal and of the proceedings in the court below.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY JULY 2024

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JUDGE

Appearance:

Mr. Nyabena for the Appellant

Mr. Maalim h/b for Mr. Millimo for the Respondent

