



**National Council of Churches of Kenya v Gachoki (Appeal
E043 of 2021) [2024] KEELRC 1794 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1794 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E043 OF 2021
CN BAARI, J
JULY 11, 2024**

**BETWEEN
NATIONAL COUNCIL OF CHURCHES OF KENYA APPELLANT
AND
PETER MURITHII GACHOKI RESPONDENT**

*(Being an appeal from the Judgment and Order of Hon. R.K Ondieki (SPM)
delivered on 28th September, 2021 in Kisumu CMELRC NO. 85 OF 2020)*

JUDGMENT

1. This judgment relates to an appeal from the decision of R.K. Ondieki rendered on 28th September, 2021, where the Trial Court granted the Respondent a total of Kshs368,700 / = comprising of one month pay in lieu of notice, unpaid salary, pay on account of leave, off days and 6 months salary as damages for unfair termination.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on 26th October, 2021.
3. The appeal is premised on the grounds THAT:
 - i. The Learned trial Magistrate erred in law and in fact by failing to find that the Appellant had discharged the burden that was placed upon it to justify and/or demonstrate the reasons for terminating the Respondent services.
 - ii. The Learned Magistrate erred in law and fact in finding that the Respondent's termination from employment was unfair and not in line with the procedure provided for in the [Employment Act](#), when the evidence on record shows that the Respondent was given an opportunity to explain the loss of Kshs. 12,000 under his watch.



- iii. The Learned Magistrate erred in law and fact in finding that the Respondent's termination was unfair and that the Claimant deserved compensation, when the Claimant had confessed and admitted to the loss of Kshs.12,882.00 belonging to the Appellant.
 - iv. The Learned Magistrate erred in law and fact in allowing the Respondent's claim in the face of an express admission by the Respondent that the funds of Kshs. 12,882.00 which was the subject matter of the suit, were lost in his hands, and the Respondent failed to prove that he taking responsibility for the missing monies was made under any threat and/or coercion.
 - v. The Learned Magistrate failed to appreciate that the law on burden of proof is that the one who alleges must prove and that the burden of proof does not shift from a Claimant to a Respondent until the same has been properly discharged.
 - vi. The Learned Magistrate failed to appreciate that the Respondent had in fact conceded during his testimony that he had been given a 30 days' notice of termination of contract and hence ought not to have awarded a prayer for one month's pay in lieu of notice of termination in the sum of Kshs.44, 500.00.
 - vii. The Learned Magistrate erred in law and in fact in misconstruing the evidence tendered by the Appellant and failed to appreciate that the Respondent had been paid all his dues as such ought not to have awarded the prayer for unpaid salary for the month of May, payment in lieu of untaken leave and off days not paid as sought in the claim.
 - viii. The Learned Magistrate erred in law and in fact in awarding the exorbitant sum of Kshs.267, 000.00 being damages for wrongful dismissal.
 - ix. The decision reached by the Court was against the weight of the evidence on record and submissions made by the Appellant.
4. The Appellant prays that the appeal be allowed and the judgment of the Learned Magistrate be set aside with costs.
 5. The appeal was canvassed by way of written submissions. Submissions were received from the Appellant. The Respondent did not file submissions.

The Appellant's Submissions

6. It is the Appellant's submission that it has justified its reasons for terminating the Respondent and has shown that the procedure adopted therein, was lawful and fair.
7. The Appellant submits that it is clearly evident that it followed due procedure and accorded the Respondent a fair hearing. It submits further that both the accountant and the controller were present and the Respondent was given a chance to respond to all the claims made against him as indicated from the disciplinary minutes, and that at no point during the meeting did the Respondent allude to any coercion. It had reliance in *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd*, Industrial Court Cause No. 66 of 2012 to buttress this position.
8. It is the Appellant's submission that the trial court erred in awarding one month pay in lieu of notice, notice of termination was issued to the Respondent dated 24th April, 2019. It submits further that the Respondent conceded that indeed he was given a 30 days' notice as he was given a notice of termination on 24th April 2019, and his last day of work was to be on 25th May 2019.



9. The Appellant submits that it produced the Respondent's final pays lip showing that he was paid all his dues, and that the said evidence was not challenged by the Respondent. That the trial court's finding that the document produced by the Appellant was a mere tabulation and did not show payment, was erroneous since the Respondent never challenged this document and it was equally upon the Respondent to produce his bank statement in court to prove that the said moneys paid by the Appellant did not reflect in his bank account.
10. It is the Appellant's submission that the Respondent is not entitled to damages for unfair termination on the grounds firstly, that the Appellant had demonstrate that the Respondent has not proved his case for unfair termination against the Appellant as required under Section 47 (5) of the Employment Act 2007 or otherwise, the Appellant justified its reasons for terminating the Respondent's employment on account of the Respondents' gross misconduct under Section 43 of the Employment Act 2007, which constituted valid and justifiable grounds under which the Appellant summarily dismissed the Respondent under Section 44 of the Employment Act 2007, and further having demonstrated that the procedure adopted by the Appellant in terminating the services of the Respondent were lawful and fair as required under Section 41 of the Employment Act 2007 as read together with Section 45 (5) of the Employment Act, 2007.
11. It is further submitted that the award of six months for wrongful termination was highly excessive considering that the Respondent was terminated after failing to account for Kshs.12, 883.
12. The Appellant submits that justice is a two-way street as was held by the court of appeal in Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR, that Employers are Kenyans too, and have rights which courts are duty bound to respect and uphold.
13. It prays that this appeal be allowed and the decision of Honourable R.K Ondieki delivered on 28th September, 2021 be set aside, and the suit in the lower court be dismissed with cost to the Appellant.

Analysis and Determination

14. I have considered the Memorandum and the Record of Appeal, and the Appellant's submissions. The grounds of appeal present the following issues for determination: -
 - i. Whether the Respondent was unfairly terminated as found by the trial court
 - ii. Whether the awards by the Trial Court should stand.
15. The Court of Appeal in *Selle & Another vs Associated Motor Boat Co Ltd* (1968) EA 123 set the guiding principles in dealing with a first appeal as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”
16. Again in *Peters v Sunday Post Ltd* [1985] EA 424, the Court had this to say on a first appeal;

“Whilst an Appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the Trial Judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the Appellate Court will not hesitate so to decide”

17. As a first Appellate Court, my role is to re-evaluate the evidence adduced before the trial court in its entirety and arrive at my own conclusion on whether or not the decision appealed against should stand.
18. The Trial Court found the termination of the Respondent unfair for want of both valid reasons and fair procedure, and entered judgment in his favour and awarded him some of the prayers sought.
19. The evidence tendered before the Trial Court is that the Respondent was issued a termination notice dated 24th April, 2019 on account of absence from office and for loss of money belonging to the Appellant. It is the Appellant’s position that the notice followed a show cause letter issued on 25th February, 2019 and a disciplinary procedure that ensued in March, 2019.
20. The Court heard that the Respondent was then summarily dismissed from the service of the Appellant vide a letter dated 25th May, 2019. The record reveals that the Respondent on cross-examination admitted having been issued with a show cause letter, that he responded to the show cause and further that he appeared before a disciplinary committee for the hearing of his case.
21. It is his further evidence that he admitted taking responsibility for the variance in the cash received by the Appellant, and that the sum of the variance was KShs. 12,882/-. The record further confirms that the Respondent admitted cross-examining witnesses presented by the Appellant before the disciplinary committee.
22. The Court in the case of Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR, had this to say on due procedural fairness:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

23. The Respondent confirmed receipt of a show cause, he further confirmed that he did respond to the show cause and was invited to a disciplinary hearing in the company of a representative of his choice as shown by the invitation letter dated 14th March, 2019. The minutes tendered in evidence are prove that the disciplinary hearing did take place, and that the Respondent did interview the Appellant’s witnesses.
24. By dint of the foregoing, I have not doubt in my mind that the Respondent was accorded due procedure and which renders his dismissal procedurally fair. I thus find the Respondent’s dismissal fair, and the contrary finding by the Trial Court is set aside.



25. On the reason for the dismissal, the Respondent took responsibility for the money lost by the Appellant, and which is the subject of his dismissal. His admission/responsibility is on record and where he further stated that he took the money for his personal use.
26. The Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held:

“..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”
27. In my view, the Respondent having admitted liability for the money lost by the Appellant and his evidence that he utilized the money for personal needs, is sufficient prove that the reasons for his dismissal are both fair, valid and justified.
28. In sum, I find and hold that the Respondent’s dismissal was both procedurally and substantively fair, and the finding of the Trial Court is set aside.

Whether the Respondent is deserving of the award by the Trial Court

One Month’s Pay in lieu of notice

29. After the resolution to dismiss the Respondent was reached, the Appellant issued the Respondent with notice of termination dated 24th April, 2019, which took effect on 25th May, 2019. Nothing in the record showed that receipt of this notice was disputed by the Respondent.
30. The prove that the Respondent was issued termination notice goes to say the award of one month pay in lieu of notice by the Trial court has no legal basis. It is set aside.

Unpaid Salary for May, 2019

31. The letter dismissing the Respondent indicated that he was to be paid salary for May, 2019 upon clearance. There is no prove that this pay was made to the Respondent, and the recovery said to have been made in respect of the salary, concerns matters that arose after the decision to dismiss the Respondent had been reached, and for which the Respondent was not heard.
32. I thus find the award in respect of salary for May, 2019 justified and is upheld.

Pay in lieu of leave and off-days not utilized

33. Leave and pay for off-days not taken similarly formed part of the Respondent’s terminal dues, and for which no prove was given that the same were remitted. The awards thus are valid and are upheld.

Damages for wrongful termination

34. This court has reached a finding that the Respondent was procedurally and substantively dismissed, which finding renders the award of damages unsustainable. The award is set aside.
35. In whole, the appeal partly succeeds and orders made as follows: -
 - a. A declaration that the Respondent was fairly dismissed.
 - b. The award of one-month salary in lieu of notice is set aside.
 - c. The award of unpaid salary for May, 2019 is upheld at Kshs. 26,700/-



- d. The Award on account of both leave and off-days is upheld at Kshs. 30,500/-
- e. The award of damages for unfair termination is set aside.
- f. Parties shall bear their own costs of both the appeal and the suit before the lower court.

36. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11TH DAY OF JULY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Oduor present for the Appellant

N/A for the Respondent

Ms. Debra O. - Court Assistant.

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