



**Janta Kenya Limited v Otieno (Appeal 62 of 2019)
[2024] KEELRC 2025 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2025 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 62 OF 2019
NZIOKI WA MAKAU, J
AUGUST 2, 2024**

BETWEEN

JANTA KENYA LIMITED APPELLANT

AND

MILICENT ACHIENG OTIENO RESPONDENT

JUDGMENT

1. Being dissatisfied with the judgment of the Hon. A. N. Makau delivered on 4th October 2019, the Appellant filed this appeal raising the following 7 grounds:
 - a. That the learned trial magistrate erred in law and fact in finding that the Respondent's termination was substantively unfair and unlawful, which finding was against the weight of the evidence before her.
 - b. That the learned trial judge failed to properly appreciate facts and the Respondent's own acknowledgment of absenteeism from duty which amounted to gross misconduct as defined in the Employment Contract between the Appellant and the Respondent as well as under section 44(4)(a) of the *Employment Act* 2007, Cap 226.
 - c. That the learned trial magistrate erred in failing to acknowledge that the gross misconduct entitled the Appellant to terminate the employment contract to which procedural and substantive fairness were employed by the Appellant.
 - d. That the learned trial magistrate erred in law and in failing to adequately analyze the evidence tendered by the Appellant herein and giving undue weight to the Plaintiff's case and least weight to the Defendant's case.
 - e. That the learned trial magistrate erred in law and fact in failing to properly construe and appreciate the intent and purpose of Section 49 as read with Section 50 of the *Employment Act*.



- f. That the learned trial magistrate erred in erroneously compensating the Respondent Kshs. 143,712.00/- being the equivalent of twelve (12) months' pay without laying any legal basis for the same and/or properly taking into account the circumstances under which the termination took place.
 - g. That the learned trial magistrate erred in basing the judgment in faulty appreciation of the law.
2. The Appellant asserts that these are sufficient reasons for the grant of the following prayers that:-
 - i. This Appeal against the judgment and orders delivered on 4th October 2019 in the Chief Magistrate Employment and Labour Court CMEL No. 93 of 2018 be allowed;
 - ii. The Appellant's application dated 28th October 2019 in the Chief Magistrate Employment and Labour Court CMEL No. 93 of 2018 be allowed;
 - iii. That the Judgment and Orders delivered by Honourable A.N. Makau and dated 4th October 2019 be quashed and;
 - iv. Costs for this Appeal be awarded to the Appellant.
3. The Appeal was to be disposed of by way of written submissions. As at the time of penning this judgment, no submissions had been filed by either the Appellant or the Respondent. The Court has therefore read the entire record of appeal and made the determination of the said appeal on the material before it.
4. The Appellant was found to have dismissed the Respondent without a hearing despite the Respondent having absconded work for 7 days. She has indicated to her supervisor that she was going to attend her mother-in-law's funeral and when the supervisor declined to give her permission she went anyway. She returned to find a dismissal letter. Under the provisions of section 41 of the *Employment Act*, any employee who misconducts themselves is liable to termination. However, the law provides that the employer gives an employee a hearing before the said termination in the presence of an employee or representative of her choice at the time the explanation is given. This did not happen in respect of the Respondent hence the finding in her favour. The Learned Magistrate declined various heads in the Claimant's claim but awarded one month's salary in lieu of notice – Kshs. 11,976.36, Kshs. 10,497/- for pro rata leave, and 12 month's salary as compensation – Kshs. 143,716.32.
5. The award of 12 months was on account of the unfair loss of her job. She sought the maximum 12 months and there was no evidence to oppose the prayer and the Respondent's statement remains unsubstantiated and not evidence. The Learned Magistrate other than stating the foregoing, did not analyse the factors one may consider in an award of the compensation before making an award for the maximum 12 months. The grounds for an award such as this is that the Respondent would have difficulty in obtaining alternative or suitable employment and this did not come out in evidence. It is unclear if the Respondent was unemployed. That issue would be resolved in her favour as the Appellant seemed to have cut her career abruptly without regard to the human face in employment. As she had been bereaved – she lost the mother to her husband, she could not fail to attend the funeral – and her only fault was not filling the requisite leave form. Her supervisor knew what form was required to be filled but instead simply denied her oral request with no additional follow up to ensure she filled the correct form for the leave which she was entitled to. It was not discretionary given the circumstances. She was not going for a holiday. She was to attend to the funeral of her mother-in-law and therefore the denial of this opportunity means there was basis for a grant of 12 month's salary compensation since it was egregious to contemplate a refusal – which the dismissal was. She could have been warned and had pay for the 7 days deducted but instead the Respondent was dismissed. I would for these reasons



decline to disturb the award of quantum for the Learned Magistrate made the right call even if not as well articulated. In the final result, the appeal is dismissed albeit with no order as to costs. The money deposited in Court to be released to the Respondent forthwith.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2024

NZIOKI WA MAKAU

JUDGE

