



**Thumbi v Everest Enterprises Limited (Appeal E020 of 2023)  
[2024] KEELRC 2196 (KLR) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2196 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
APPEAL E020 OF 2023  
ON MAKAU, J  
SEPTEMBER 12, 2024**

**BETWEEN**

**MARY WAIRIMU THUMBI ..... APPELLANT**

**AND**

**EVEREST ENTERPRISES LIMITED ..... RESPONDENT**

*((Being an appeal against the Judgment and Decree of Hon. S.Mwangi, Senior Resident Magistrate delivered on 11th January, 2023 in Murang'a MCELRC No.6 of 2019))*

**JUDGMENT**

**Introduction**

1. The appellant was employed by the respondent from 29<sup>th</sup> October 2012 till 30<sup>th</sup> October 2018 when her employment was terminated. She filed suit in the lower court seeking compensation for unfair termination and terminal dues. The respondent filed defence denying liability but tendered no evidence during the trial. After considering the evidence tendered by the appellant, the trial court (Hon.S.Mwangi, SRM) held that the appellant had failed to prove her case on a balance of probability and dismissed the same with costs.
2. The appellant was aggrieved and filed this appeal seeking the court to set aside the lower court judgment and in its place grant the prayers sought in the suit. The appeal stands on the following grounds: -
  - a. The learned Trial Magistrate erred by failing to apply sections 41,43,44,45 and 47 of the [Employment Act](#), 2007, in so far as they are applicable to resolve the Appellant's claim, including by failing to consider: -
    - i. Whether there was a valid reason disclosed by the Respondent to terminate the Appellant's employment.



- ii. Whether the Respondent conducted a fair hearing in accordance with the law prior to issuing the letter of termination.
  - iii. Whether the terminal dues owed and confirmed as due and owing by the Respondent were paid to the Appellant at all.
  - iv. Whether the Respondent had discharged its burden of proof to demonstrate that the termination was effected for a valid reason and that the requisite fair procedure was complied with.
  - v. Whether the Appellant discharged her burden of proof that the terminal dues owed by the Respondent were not paid.
  - vi. Whether the termination of the Appellant by the claimant was unfair and unlawful.
- b. The learned Magistrate erred in law by failing to evaluate, weigh and consider the evidence placed by the claimant before the court.
  - c. The learned Magistrate erred in law and in fact by finding that the Appellant's case was not proved to the required standard.
  - d. The learned Magistrate erred in law and in fact by failing to substantively hear the evidence of the Appellant and determine the dispute on its merits.
  - e. The learned Magistrate erred in law and in fact in failing to find that the Respondent's did not tender any evidence to support their defence and to counteract and/or rebut the Appellant's evidence.
  - f. The learned Magistrate erred in law and in fact in exercising her discretion by misdirecting herself and by failing to consider the evidence of the Appellant and by considering matters and/or facts which she should not have considered and/or by failing to take into consideration matters and/or facts which she should have taken into consideration and in doing so arriving at a wrong decision.
  - g. The learned Magistrate misdirected herself on issues of law and fact and therefore arrived at a wrong finding.
  - h. The judgment of the learned Magistrate contradicted the weight of evidence placed and adduced before the court.

### **Factual background**

3. During the trial, the appellant testified as CW1 and adopted her written statement plus 8 documents as her evidence in chief. In brief, her evidence was that she was employed by the respondent on 29<sup>th</sup> October 2012 as a Technical Mechanic for a gross monthly salary of Kshs.70,000. However, from July 2016 to July 2018, her salary was unilaterally reduced by the employer by Kshs.20,000 and then increased by Kshs.10,000 from August to October 2018.
4. On 30<sup>th</sup> October 2018, the respondent unfairly and unlawfully terminated her employment without any lawful cause or reason and without giving her any opportunity to be heard as required by section 45 of the [Employment Act](#), 2007. She then entered into an agreement with the respondent vide which she was to be paid three months' salary in lieu of notice, 23.75 leave days, service pay at the rate of 15 days per year for the 7 years served, withheld salary in respect of the unilateral reduction, HELB deductions and penalties (Kshs.94,186) and salary arrears (Kshs.69,361).



5. The respondent only paid Kshs.163,547 comprising salary arrears and HELB deductions and penalties. The respondent ignored demand for payment and the appellant filed this suit seeking Kshs.895,492 terminal dues as per the agreement dated 30<sup>th</sup> October 2018 plus Kshs.840,000 being 12 months salary as damages for unfair termination. She also prayed for costs.

### **Submissions**

6. It was submitted for the appellant that her employment was unfairly terminated by the respondent for no valid reason and without prior notice or being accorded any hearing as required by Section 41 and 45 of the *Employment Act*, 2007. It was submitted that the termination was therefore unlawful, unfair and unjustified as the respondent did not discharge its burden of proof of fairness and justification. Reliance was placed on the case of *Waite v Lets Go Travel Limited (2022) KEELRC 1163 (KLR)*.
7. In view of the foregoing matters, it was submitted that the appellant is entitled to the reliefs sought. Reliance on the Court of Appeal decision in *Coastal Bottlers v Kimathi Mithika (2018) eKLR* that a settlement agreement constitutes a binding contract.
8. As regards compensatory damages, it was urged that the maximum award of 12 months was justified because the appellant was exposed to diminished income and unnecessary embarrassing treatment.
9. On the part of the respondent, it was submitted that the appellant was duly notified and she attended a meeting in which her terminal dues were computed. Consequently, it was urged that the respondent complied with section 41 and 45 of the *Employment Act*. It was further submitted that the agreement failed to tender evidence to prove unfair termination as required by section 47 (5) of the *Employment Act*, 2007.
10. It was submitted that the respondent filed a list of documents dated 13<sup>th</sup> July 2021 including a CR12 for Evereg Exporters Limited to prove that the appellant had registered a company to compete with the respondent in the same business and to confuse the potential customers by the names. Consequently, it was submitted that the respondent had proved that it had a valid reason for terminating the appellant's employment as required under section 43 and 47 (5) of the *Employment Act*, 2007.
11. In view of the foregoing matters, it was submitted that the appellant is not entitled to the reliefs sought in the lower suit since she failed to prove the same. Besides, it was submitted that she had admitted receipt of Kshs.163,547 and as such she is estopped from the reliefs sought. Consequently, the court was urged to dismiss the appeal with costs to the respondent.

### **Analysis and determination**

12. This being a first appeal, my mandate is to re-evaluate the evidence on record and arrive at my own independent conclusion, but with a precaution that I did not see the witnesses during their testimony. I am guided by the decision of Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd (1968) EA 123* where the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate 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, the 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 materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. Having considered the record of appeal and the submission herein, the following issues fall for determination: -
- a. Whether the respondent terminated the appellant’s employment unfairly and unlawfully.
  - b. Whether the appellant is entitled to the reliefs sought in the suit.

### **Unlawful and unfair termination**

14. Section 45 (1) and (2) of the *Employment Act*, 2007 provides that: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (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. That the reason for the termination is a fair reason -
    - i. Related to the employee’s conduct, capacity or compatibility, or
    - ii. Based on the operational requirements of the employer; and
  - c. That the employment was terminated in accordance with fair procedure.”

15. In this case, the termination was vide the letter dated 26<sup>th</sup> September 2018 which gave one month notice up to 30<sup>th</sup> October 2018 when the separation was to take effect. The letter did not cite any reason for the termination but under paragraph 5 of the response to the claim, the respondent pleaded that the appellant had started a company called Evereg Exporters Ltd to do competing business in flagrant breach of conflict of interest which went against the terms of his contract. It averred that the said conduct justified summary dismissal but it opted to terminate the contract by notice.

16. The foregoing pleading is an admission that the appellant’s employment was terminated for a reason which was not explained to her before the decision was taken as required under section 41 of the *Employment Act*, 2007 which provides that: -

- “(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

17. The emerging jurisprudence in Kenya is that even where employer serves a termination notice or pays salary in lieu as provided by the contract or the statutes, the employer has a legal duty to accord the employee a hearing as required under section 41 above. I gather support from the Court of Appeal decision in *Kenfreight EA Limited v Benson K. Nguti* [2016] eKLR, thus: -

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

18. In this case, the respondent filed a defence but failed to adduce evidence to rebut the appellant’s evidence and to prove its defence case. The failure by a respondent to adduce evidence to prove its defence rendered the defence futile. As such, I find that the respondent did not discharge its burden of proof under section 43 and 45 of the *Employment Act*, which requires an employer to prove substantive and procedural fairness in its separation with the appellant. Consequently, the termination was unfair and unlawful.
19. In arriving at the foregoing conclusion, I have satisfied myself that the trial court erred both in law and fact by holding that the termination was fair and lawful because the appellant was served with one-month notice before the termination. As indicated above, even where notice has been served or salary in lieu of notice is paid, the employer is not absolved from the legal duty to act fairly by according the employee a hearing in the presence of another employee. The said duty becomes more pronounced where the employer is terminating the employment for a reason.

### Reliefs

20. In view of the foregoing, I am satisfied that the appellant gave sufficient evidence which proved unfair termination on a balance of probability. As such, I find she is entitled to declaration that the termination of her employment was unfair and unlawful.
21. Under section 49 of the *Employment Act*, 2007, she is entitled to compensation for unfair termination. Considering that no offence was proved against her, and that she had served for six years, I award her four months’ salary equalling to Kshs.280,000. However, she is not entitled to the claim for salary in lieu of notice because she served with one-month notice before termination. Further, she did not adduce any evidence to prove that she was entitled to three months’ notice before termination.
22. The claim for withheld salary of Kshs.20,000 per month from July 2016 to July 2018 was admitted in the computation letter dated 25<sup>th</sup> October 2018 and the agreement to pay the dues by instalments dated 30<sup>th</sup> October 2018. The same was admitted with respect to Kshs.10,000 withheld from August to October 2018. There are also letters dated 29<sup>th</sup> July 2016 and 30<sup>th</sup> July 2018 confirming the said salary reduction without prior consent from the appellant. Hence, she is entitled to Kshs.20,000 x 24=Kshs.480,000 plus Kshs.10,000 x 3=Kshs.30,000 as withheld salary totalling to Kshs.510,000.
23. She is also entitled to claim for leave of 23.75 days as admitted in the computation dated 30<sup>th</sup> October 2018. Hence Kshs.70,000 x 23.75/30=Kshs.55,416.66.



24. The claim for service pay is merited as it was also admitted in the said computation of terminal dues by the respondent. The respondent did not adduce any evidence during the hearing to prove that the appellant had registered for NSSF and it duly contributes for his benefit. Had that been the case, the respondent could not have factored the said benefit in the computation dated 30<sup>th</sup> October 2018. Hence the appellant is entitled to service pay at the rate of 15 days salary for every year of service for six years equalling to Kshs.210,000.
25. Finally, the appellant is not entitled to the claim for HELB deductions and penalties of Kshs.94,186 and salary arrears of Kshs.69,361 since she admitted that the said sum was paid vide deposit slip dated 3<sup>rd</sup> December 2018.

**Conclusion**

26. I have found that the appellant proved her case of unfair termination on a balance of probability. She also proved the claim for compensatory damages and terminal dues as highlighted above. Consequently, I allow the appeal, set aside the impugned judgment, and award the appellant the following orders: -

- i. A declaration that the termination of the appellant’s employment by the respondent was unlawful and unfair.
- ii. Compensation for unfair termination .....Kshs.280,000.00
- iii. Withheld salary.....Kshs.510,000.00
- iv. Leave.....Kshs.55,416.66
- v. Service pay.....Kshs.210,000.00  
Kshs.1,055,416.66
- vi. The award is subject to statutory deductions.
- vii. The Appellant is awarded costs of the appeal and court below.
- viii. The Appellant is awarded interest at court rates from the date of the judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

