

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

ELRC APPEAL NO. E141 OF 2024

H. YOUNG & CO.(EA)LIMITED.....APPELLANT

VERSUS

ALVIN NDUNDA.....RESPONDENT

*(Being an Appeal from the judgment of Hon. D.O. MBEJA (PM)
delivered on 29th February 2024 in Mombasa ELRC cause No.799
of 2021)*

JUDGMENT

Background

1. Via the Memorandum of Claim dated 17th September 2021, the Respondent sued and sought against the Appellant the following reliefs;
 - a) A declaration that the termination of his employment was unfair and unlawful.**
 - b) One month's salary in lieu of notice (Kshs. 57,454).**
 - c) Compensation for earned but unutilized leave days for 3 years, Kshs. 120,653.40.**
 - d)12 months' salary as compensation for unlawful termination (Kshs. 689,448).**

e) Any further orders the Court deemed fit.

f) Costs of the cause.

g) Interest.

2. The Appellant opposed the Respondent's claim with a Statement of Defence dated 14th February 2022. It acknowledged that at all relevant times, the Respondent was its employee as a tipper driver at its Kipevu site, but denied that his dismissal from employment was unlawful or unfair, and disputed his entitlement to the reliefs sought.
3. Upon hearing the parties on their respective cases, the learned trial Magistrate entered judgment for the Respondent on the date aforesaid.

The Respondent's case before the trial court

4. It was the Respondent's case that he first joined the employment of the Appellant as a tipper driver on 11th December 2017, earning a monthly salary of Kshs. 57,454.
5. He stated that on 19th June 2021, the Appellant's Administration Officer (who was in charge of the site) instructed that the tipper truck managed by the Respondent be loaded with 10 tons of marram, combined with hard-core stones, and offloaded at a location specified by the

Administrator. The Respondent complied, believing that the officer had full authority as the site manager.

6. Subsequently, on 29th June 2021, he received a show cause letter accusing him of colluding with other employees to divert company materials to an unauthorised site.
7. In response, he wrote a letter dated 1st July 2021, explaining that he had simply followed instructions from his superior and was unaware that the site was unauthorised.
8. On 1 July 2021, he was arrested along with some of his colleagues for questioning on suspicion of theft, contrary to section 275 of the Penal Code. They were released after the Administration Officer intervened and agreed to take responsibility, given the circumstances of the case.
9. On 2nd July 2021, he attended a disciplinary hearing, where he explained that he acted under strict orders from the Administrator and did not intend to commit any wrongdoing. The disciplinary panel concluded that the Respondent had indeed acted under instructions and was unaware that the site was unauthorised.

10. Despite this finding, on 5th July 2021, he was summarily dismissed on grounds of collusion, diversion of materials, and misuse of company equipment.
11. He further stated that during his three years of service, he was neither granted annual leave nor paid in lieu of it.
12. He contended that the termination was unlawful, unconstitutional, and in breach of Sections 41, 43, 44, 45, 49 and 50 of the Employment Act, 2007, as well as the stipulations of the Constitution of Kenya, 2010.

The Appellant's case before the trial court

13. The Appellant's case was presented through the evidence of two witnesses who testified on its behalf. They acknowledged that the Respondent was employed as a tipper driver at its Kipevu site but denied that his termination was unlawful. According to them, the Respondent's employment was terminated lawfully and fairly. The dictates of fair procedure were adhered to.
14. It was asserted that investigations by its security department revealed that the Respondent, together with other employees, had colluded to divert company materials, namely murram waste and hardcore stones, to an

unauthorised site. The matter was reported to Changamwe Police Station under OB/17/01/17/2021.

15. Following the investigations, the Respondent was issued a show cause letter outlining the allegations against him and inviting him to respond. He was also summoned to attend a disciplinary hearing scheduled for 2nd July 2021. He was informed of his right to be accompanied by a fellow employee.
16. At the disciplinary hearing, the Respondent admitted that he had made several trips transporting materials to another site under the instructions of the site administrator. He further acknowledged that these trips were mostly undertaken during working hours when work at the station was light, and that he never presented the required gate passes when removing materials from the site.
17. The disciplinary committee reviewed his explanation and found that the Respondent had colluded with others to divert construction materials to an unauthorised site. Consequently, the committee recommended his summary dismissal, in accordance with the Kenya Building Construction, Timber and Furniture Industries Employees Union (KBCTFIEU) Collective Bargaining Agreement (CBA) and the Employment Act, 2007.

18. Subsequently, on 5th July 2021, the Respondent was summarily dismissed through a formal dismissal letter. The Appellant asserted that the procedure adopted was fair, lawful, and in compliance with employment laws.
19. The Respondent's final dues were computed, including pay for accrued leave days, and a cheque of Kshs. 50,095 (cheque No. 06856) was prepared for his collection. He was therefore not entitled to the reliefs sought.

The Judgment by the Lower Court

20. Upon consideration of the pleadings, evidence, and submissions, the trial court identified the issues for determination as whether the termination was unfair and unlawful, and whether the Respondent was entitled to the reliefs sought. The court noted that although the Respondent had undergone a show cause process and disciplinary hearing, the Appellant, in reaching the final decision, failed to consider the crucial fact that he was acting under the direct instructions of the Administrator. The court held that it was unjust for the Respondent to be held solely responsible while disregarding the administrator's role. The termination

did not meet the fairness threshold set out in Section 45 of the Employment Act.

21. Regarding the issue of reliefs, the court found that the Respondent had not proved the claim for unpaid leave, as records showed he had taken 25 leave days with the balance included in his terminal dues. However, the court held that the termination was unlawful and unfair. Consequently, the Respondent was awarded one month's salary in lieu of notice and six months' salary as compensation for unfair termination. Judgment was therefore entered in favour of the Respondent for the sum of Kshs. 402,178.

The Appeal

22. Unsatisfied with the judgment of the lower Court, the appellant filed this appeal, setting out the following grounds;

a. THAT the learned trial Magistrate erred in law and in fact and misdirected himself in holding that the Respondent was wrongfully and unfairly terminated.

b. THAT the learned trial Magistrate erred in law and in fact and misdirected himself in failing to find that the Respondent was complicit in his own termination.

c. THAT the learned trial Magistrate erred in law and in fact in failing to find that the Respondent was aware

that the site where the materials were being diverted was unauthorised.

- d. THAT the learned trial Magistrate erred in law and in fact and misdirected himself in awarding the Respondent six (6) months' salary in compensation for unfair termination.
- e. THAT the learned trial Magistrate erred in law and in fact and misdirected himself in awarding the Respondent salary in lieu of notice.
- f. THAT the learned trial Magistrate erred in law and fact in failing to take into account the Appellant's evidence and submissions.
- g. THAT the learned trial Magistrate erred in law and in fact and misdirected himself in awarding interest from the date of filing the suit.

Analysis and determination

23. In the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, the court pronounced itself 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...”

24. I have thoroughly reviewed the grounds of appeal, together with the parties’ pleadings, the oral and documentary evidence adduced before the trial court, and the written submissions by counsel. In my assessment, this appeal turns on two key issues: (a) whether the Respondent was wrongfully dismissed, and (b) whether the Respondent was entitled to the reliefs sought.

Whether the Respondent was wrongfully dismissed

25. It is not disputed that the Respondent was the Appellant’s employee. He was employed from 11th December 2017 as a tipper driver until 5th July 2021, when he was summarily dismissed. For an employee’s employment to be lawfully

terminated or for a summary dismissal to be considered fair, it must be demonstrated that both substantive and procedural fairness were observed, as commanded by Section 45(2) of the Employment Act. I have no doubt. The learned trial Magistrate appreciated this position. See also **Pius Machafu Isindu vs. Lavington Security Guards Limited [2017] KECA 225.**

26. It is clear and, as Counsel for the Appellant correctly submitted, the aspect of procedural fairness was not in contestation in the dispute before the trial Court. Controversy was as to whether or not the decision to dismiss the Respondent summarily was substantively justified.
27. The Respondent, as shown by the show cause letter dated 29th June 2021 and the minutes of the disciplinary proceedings, was accused of colluding with other employees to divert materials from the company site to an unauthorized location. The Respondent consistently maintained that he delivered the materials to the site under the instructions of the Administration Officer, who was his superior and had told him that the site belonged to the Appellant company. He had to obey the instructions which he believed were lawful.
28. After hearing the matter, the Appellant's Disciplinary panel concluded, and it is discernible from the minutes that;

“Min. 03: Conclusion

It was apparent that the driver was under strict instructions to do as told by the Administrator, Mr Asunga and confessed to have not known that the site was not Hyoung's as the Administrator always portrayed such authority as the site in charge."

In my view, this conclusion was exculpatory. It aligned with the Respondent's defence to the charge. Having concluded as such, in my view, no reasonable employer would then proceed to dismiss an employee on the charge summarily.

29. This Court has not overlooked the fact that after this conclusion, which I find vindicates the Respondent, the Panel proceeded to make the subsequent findings and recommendations, which, in my view, inexplicably did not align with the conclusion. The findings and recommendations read in part;

"Findings

- *He failed to relay information to the Project Manager's office about the delivery of materials off site despite not knowing the site was not Hyoung's.*
- *He made several trips for delivery of personal construction items during non-working hours without the Project Manager's approval.*

Conclusion and Recommendation by the Panel

The committee members recommended a summary dismissal in line with the CBA and the Employment Act.”

30. These two matters, which appear to have diverted the panel from the conclusion previously mentioned and influenced the decision to dismiss the Respondent summarily, were not issues that were the subject of any charge against the Respondent. He had not, at any point, been asked to defend himself against them. A decision to summarily dismiss an employee, which is inexplicably not aligned with all the vital conclusions made by a disciplinary panel, premised on matters that were not the subject matter of the disciplinary process and or that an accused employee was not called upon to answer, can only be described as unreasonable. One that offends an employee’s right to a fair administrative action and fair hearing under Articles 47 and 50 of the Constitution.

31. Heed should be taken that fair disciplinary processes are now a constitutional imperative, as has been stated by the Supreme Court in the case of **Judicial Service Commission & Another v. LMN, Petition No. 040 of 2024.**

32. Based on the foregoing premises, I am unable to find that the learned trial Magistrate erred in holding that, in deciding to dismiss the Respondent from employment summarily, the Appellant did not act with justice and equity as required under Section 45[7] of the Act. I agree that the dismissal was unfair.

Whether the Respondent was entitled to the reliefs sought

33. The Appellant asserted that the award of the compensatory relief under section 49[1][c] of the Employment Act, by the trial Court, was excessive. Legally, the authority to award the relief contemplated in the provision is discretionary. As such, an Appellate Court can only disturb its grant not freely, but if the specific factors required under law are established. It must be demonstrated that the trial Court acted on a wrong principle of law, or misapprehended material facts, or took into account irrelevant factors or failed to take into account relevant matters, therefore arriving at an erroneous estimate of the damages award. See also, **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47.**

34. The Appellant has not demonstrated that any of these factors exist. All they have done is cite decisions, highlight the length of service of the employees [Claimant's], and

urge this Court to act solely on that basis and disturb the award. This submission overlooks the fact that, in exercising its discretion to make the award, the Court considers not only the longevity of the employee's service. There are numerous other factors to consider.

35. I have carefully considered how the Respondent's employment was terminated, the Appellant's failure to adhere to the canons of substantive justice and the constitutional stipulations mentioned above, and the length of service, and conclude that the Respondent was entitled to relief and to the reasonable extent granted by the trial Court.

36. Under section 35 of the Employment Act, the Respondent's employment was terminable by a twenty-eight days' notice. Undeniably, this notice, which a summary dismissal would ordinarily disentitle an employee from, was not issued. Having found that the summary dismissal was unfair and wrongful, I have no reason to hold otherwise than that the Respondent was entitled to notice pay under section 36 of the Act, as the learned Magistrate found.

37. In the upshot, I find the Appellant's appeal herein lacking in merit. It is hereby dismissed with costs.

Read, Signed and Delivered this 30th Day of September 2025.

OCHARO KEBIRA
JUDGE.

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