



**Mirk General Agencies Limited v Atieli (Appeal E353 of 2024)
[2025] KEELRC 2633 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2633 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E353 OF 2024
NJ ABUODHA, J
SEPTEMBER 26, 2025**

BETWEEN

MIRK GENERAL AGENCIES LIMITED APPELLANT

AND

RICHARD AMWAYI ATIELI RESPONDENT

(Being an appeal from the Judgment of Hon. D. O Mbeja (Mr.) delivered on 15th November 2024 in CMEL NO. E709 of 2021 at the Chief Magistrate's Court, Milimani)

JUDGMENT

1. Through the Memorandum of Appeal dated 10th December 2024, the Appellant appeals against the whole of the Judgment of Honourable D. O Mbeja.
2. The Appeal was based on the grounds that:
 - i. The Honourable Magistrate erred in law and in fact in finding that the Claimant was unfairly terminated despite there being evidence of a fair termination.
 - ii. The Honourable trial Magistrate erred in law and in fact in finding that the Claimant was terminated verbally despite documentary evidence showing that the Claimant was terminated in accordance with the law.
 - iii. The Honourable trial Magistrate erred in law and in fact in finding that the Claimant was entitled to house allowance despite the Respondent demonstrating that the Claimant earned a consolidated gross salary.
 - iv. The Honourable trial Magistrate erred in law and in fact in finding that the Claimant was entitled to unpaid leave days for 30 days despite clear evidence on record indicating that the remainder of the leave days for the Claimant was seven (7) days at the time of termination.



- v. The Honourable trial Magistrate erred in law and in fact in failing to consider the Respondent's evidence including the probative value of the CCTV recordings provided by the Respondent in support of its case.
 - vi. The Honourable trial Magistrate erred in law and in fact in failing to take consideration of all the documentary evidence provided by the Respondent.
 - vii. The Honourable trial Magistrate erred in law and in fact by allowing the claim for overtime despite the Claimant having not established and proved the said claim.
 - viii. The Honourable trial Magistrate erred in law and in fact by granting the maximum damages of 12 months despite the Claimant having only worked for a period of one (1) year.
 - ix. The Honourable trial Magistrate erred in law and in fact in granting the Claimant the claim for service pay despite the Claimant being a member of NSSF. The Claim was per incuriam by dint of section 35(6) (d) of the *Employment Act*.
 - x. The Honourable trial Magistrate erred in law and in fact in failing to consider the appellant's evidence and submissions in making his determination hence arriving at an erroneous finding.
 - xi. The Honourable trial Magistrate erred in law and in fact in issuing interest of the awarded claim from the date of filing the suit.
3. The Appellant prayed that the appeal be allowed with costs and the judgment and resultant decree of the Hon. D.O Mbeja delivered on 15th November, 2024 be set aside in its entirety and or varied.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Mwaniki Gachoka & Co. Advocates filed written submissions dated 10th April, 2025 and submitted on the role of the first Appellate court while relying on the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
6. On the issue of whether the trial court erred by failing to consider sufficiently and evaluate the evidence presented by the Appellant counsel submitted that the reasons for termination of the Respondent's employment was as per the summary dismissal letter dated 31st August, 2020 was theft by the Respondent of goods from the shop. That the employer under the *Employment Act* is entitled to summarily dismiss his employee if he commits or on reasonable sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.
7. Counsel relied in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* (2021) eKLR on employer terminating an employee on reasons he believed to have existed. Counsel submitted that the trial court disregarded the evidence produced in court and held that the Respondent was verbally dismissed which was against the record since he was dismissed through a formal letter following a disciplinary hearing which he declined to respond to.
8. Counsel submitted that the Appellant substantiated its justification for the dismissal of the Respondent by producing CCTV footage along with a timesheet detailing the Respondent's actions including theft. That the Appellant presented a goods inventory record which showed the items taken by the Respondent supporting the case for Respondent's misconduct. Counsel submitted that the trial court disregarded the CCTV footage which was crucial evidence in this case.



9. On the issue of whether the trial court erred in awarding the Respondent the claim of Kshs 478,276.44 plus interest from the date of filing the suit counsel submitted that the trial court allowed each and every claim sought by the Respondent without qualification despite the Appellant's rebuttal through documentary and oral evidence.
10. On the claim for notice pay counsel submitted that the Respondent was not entitled to salary in lieu of notice having been summarily dismissed for gross misconduct by the Appellant invoking provisions of section 44 of the *Employment Act*. Counsel relied on the case of [*Samuel Nyasimi v Merica Hotel*](#) (2019) eKLR on this assertion.
11. On the claim for house allowance counsel submitted that the Respondent was not entitled to house allowance since his employment contract dated 2nd September, 2019 provided for gross salary of Kshs 22,500= inclusive of all statutory entitlements including house allowance. Counsel relied on the case of [*Charity Wambui Muriuki v Ms Total Security Surveillance Limited*](#) (2017) eKLR on this assertion. That the Respondent did not plead or produce any evidence to demonstrate that the gross salary excluded house allowance or raise any objection of the composition of his salary during his employment period.
12. On the claim of leave pay counsel submitted that the Respondent did not present cogent evidence in rebuttal despite the Appellant denying that the Respondent went on leave and he had a balance of seven days.
13. On the claim for service pay counsel submitted that the trial court relied on the reasoning that the claim was un rebutted just like leave pay which was a misdirection because the Respondent was a member of NSSF which falls under the exclusion of section 35(6) (d) of the *Employment Act*. Counsel relied on the case of [*Sylvester Kiprono Kurgat & 2 Others v Riara Group of Schools Limited*](#) (2019) eKLR on this assertion. The Respondent confirmed during cross examination that the Appellant used to remit his NSSF deductions as per payslips.
14. On the claim for compensation for unlawful termination of 12 months counsel submitted that an award of 12 months compensation must be grounded in evidence and justified by the circumstances of the case since that was the maximum compensation provided by the law. The same should not be awarded automatically as there are factors to be considered like the manner of dismissal, the employee's length of service and conduct of both parties.
15. Counsel submitted that the Respondent worked for the Appellant for around one year and he was summarily dismissed for theft hence not entitled to maximum compensation. Counsel relied on among others the case of [*Kenya Broadcasting Corporation v Geoffrey Wakio*](#) (2019) eKLR on the need for justification of maximum compensation.
16. On when the Appellate court can interfere with the discretion of the trial court in awarding damages under specific circumstances, counsel relied on the case of [*Oraro v Nyaigoti*](#) (civil Appeal E015 of 2021) (2022) KEHC 14296(KLR) and submitted that this court should interfere with such discretion.
17. On the claim for overtime counsel submitted that the trial court awarded the same without providing any basis or explanation in its judgment. The Respondent failed to provide any evidence to substantiate the claim for overtime work. That the Respondent's contract of employment provided for working hours which were standard and the Respondent was not entitled to any overtime compensation for extra hours worked. The contractual provision was binding and reflected the mutual agreement between the parties. Counsel relied on the case of [*Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu*](#) (2019) eKLR on terms of employment contract being binding. During the trial the Respondent admitted not being entitled to overtime. The burden of proof was on the Respondent to demonstrate



that he worked overtime and the same remained unpaid. Counsel relied on among others the case of *Ndungu v Segera Limited* (2024) KEELLRC 66(KLR) on this burden.

18. On the claim for interest of the award and costs from the date of filing the suit counsel submitted that this decision warrants this court's interference as it deviates from established legal principles governing the accrual of interest in civil suits. The discretion is not absolute and must be exercised judiciously. Counsel relied on the case of *Gateri v Munyi*(Civil Appeal 22 of 2018) (2023) KEHC 24225(KLR) on this discretion.
19. Counsel submitted that since the claim was not that of liquidated damages, the general principle is that the interest on a principal sum and costs awarded in a judgment should accrue from the date of the judgment not from the date of filing the suit. Counsel relied on among others the case of *Joseph Osewe Ogola and 46 Others versus Republic, Singh Sandhu* (2017) eKLR on this assertion. Counsel submitted the same was not pleaded by the Respondent hence parties are bound by their pleadings.

Respondent's Submissions

20. The Respondent's Advocates MS Mutunga & Muindi & Co. Advocates filed written submissions dated 5th June 2025 and submitted that the Appeal was frivolous and should be dismissed with costs to the Respondent.
21. Counsel relied on section 43 of the *Employment Act* on what amounts to unfair termination and section 47(5) of the act on the burden of proof. Counsel submitted that it was only on 31.8.2020 that he was called to the managing director's office to be paid his salary and he was paid and there and then he was orally summarily dismissed.
22. Counsel submitted that the Respondent was not given any reason for the dismissal but shown two gentlemen seated at director's office who later he learnt to be police officers who told him the reason for the dismissal was claims of theft and they escorted him out of the Appellant's offices. That the claim of theft was baseless.
23. Counsel submitted that no termination letter was issued to the Claimant on 31.8.2020 hence unfair termination. The dismissal letter dated 31.8.2020 and the report to the police were prepared after the dismissal to try and sanitize the unfair dismissal. The Respondent was not accorded a fair hearing before dismissal to respond to the allegations of theft for he never stole anything and it was not his duty to record the spares he had been given to bring to the counter or take back from the counter.
24. Counsel further submitted that the trial court looked at the CCTV footage plus the confirmation by the Claimant that security offices at the gate searched every employee at the time of leaving the premises and no one could take out any spares from the premises hence the allegations of theft were purely a cooked-up story to justify the unfair termination of the Claimant from employment.
25. On the claim for notice pay counsel submitted that the court should uphold this award of Kshs 24,000= as he was never given any notice. On the claim for house allowance counsel submitted that the employment letter was silent on house allowance hence it was not provided for. Further the payslips never showed that the Respondent was paid house allowance.
26. On the claim for leave pay counsel submitted that the Appellant only submitted that it granted the Respondent compassionate leave and the respondent denied that he went on leave and that compassionate leave was different from annual leave.
27. On the claim for service pay counsel submitted that the Appellant never used to remit the NSSF deductions and that the appellant had not registered the respondent as a member of NSSF. The



Appellant never table any evidence before the court to show it used to remit any money to NSSF for and on behalf of Respondent.

28. On the claim for compensation for unlawful termination counsel submitted that the summary dismissal of the Respondent was traumatizing without any reason hence he was entitled to the 12 months compensation. Concerning the claim for overtime counsel submitted that normal working hours should be 8 hours and any extra work done amounted to overtime and that a contract of employment cannot change the provision under regulation 5 of the Regulations of Wages (General Order) 1982 which provided for maximum hours of an employee to be 10 hours per day.
29. Counsel submitted that the trial court appreciated that the Respondent used to report to work at 7.00 am and leave at 5.00pm which was 11 hours hence it rightfully awarded overtime. The Appellant did not produce to court the work register kept at the gate despite it being under their custody to prove otherwise.
30. On the claim for interest on the award and costs from the date of filing the suit counsel submitted that this was within the discretion of the court which is wide. That the Appellant did not show to the court that the court was not right in exercising its discretion. That the Respondent had prayed for costs and interest in prayer (c) and (d) of the claim dated 28.4.2021 hence the court rightfully awarded the same.

Determination

31. The court has considered this Appeal, the record of appeal and submissions filed by the both parties and notes that the principles which guide this court in an appeal from a trial court are now more or less settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”

32. In this case, the trial court entered judgment in favour of the respondent against the appellant by finding that the termination was unfair and awarded him a total of Kshs. 487,276.44= together with costs of the suit and interest from the date of filing suit. The trial court allowed the prayers as sought by the Claimant in his claim specifically; notice pay Kshs 24,000=, House Allowance Kshs 43,000=, leave pay Kshs 24,000=, service pay Kshs 13,346.15=, Overtime pay Kshs 90,000= and 12 months' compensation for unfair termination Kshs 288,000=.
33. The Appellant being dissatisfied with the above judgment appealed against the whole of the Judgment. The court is of the opinion that the issues for determination on this are:
 - i. Whether the trial court erred by finding that Respondent's termination of employment was unfair and unlawful
 - ii. Whether the trial court erred in awarding the Respondent his reliefs as sought in his claim.

Whether the trial court erred by finding that Respondent's termination of employment was unfair and unlawful

34. It is not in dispute that the Respondent was an employee of the Appellant from 15th August,2019 to 31st August 2020 when the Respondent claimed that he was orally dismissed. The appellant claimed



that the Respondent was summarily dismissed on account of theft and a dismissal letter issued to that effect. The Appellant produced the CCTV footage and time sheet which the trial court considered.

35. The courts have always held that for termination to pass fairness test, there should be both substantive and procedural fairness. This court is guided by the holding in *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR among others.
36. The court is of the view that the Respondent had a duty under section 47(5) of the *Employment Act* to prove that termination occurred. He illustrated that the termination had occurred and the burden shifted to the Appellant to illustrate that the reasons for the termination were fair under the said provision.
37. The Appellant claimed that the Respondent was summarily dismissed for theft and the letter dated 31st August, 2020 issued. It is dated the same date the Respondent claimed he had been verbally dismissed. The court notes that there was no evidence produced to show that the Respondent received the said letter.
38. The court is also guided by the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
39. On the substantive test the employer must give a fair and valid reason as per section 43 of the *Employment Act*. Section 45 of the *Employment Act* is clear that where there is no valid and fair reasons such termination is unfair. Section 44 of the *Employment Act*, 2007 provides for situations when summary dismissal can occur in particular under Section 44(4) (g) of the *Employment Act*, summary dismissal can be on grounds of gross misconduct and especially in a case where one is alleged to have committed a criminal offence against the employer or its property.
40. The court agrees with the trial court that the reasons for terminating the respondent’s service was never proved by the Appellant. The terms and conditions of work signed by the Respondent stipulated that the employees would be inspected as they left the appellant’s premises and no item was shown to have been found with the Respondent upon the said search. There was no evidence tendered to show that the Respondent left with the goods outside the Appellant’s premises for it to be construed as theft. The CCTV footage played at the trial which captured activities going on at the Appellant’s premises did not show the Respondent taking anything outside the premises.
45. Regarding procedural fairness as provided for under section 41 of the *Employment Act*, the court notes that the same was never adhered to as the Appellant did not issue any show cause letter to the Respondent on the issue of the theft, the Respondent was never invited for any disciplinary hearing hence the Appellant violated the clear provisions of section 41 of the *Act*. The court is guided by the holding in the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair



as the affected employee has not been accorded a hearing in the presence of their union representative.

46. From the foregoing, the court agrees with the trial court's decision that the Respondent's termination was both substantively and procedurally unfair hence unjustified.

Whether the trial learned Magistrate erred in awarding the Respondent his reliefs as sought in his claim.

47. On the issue of the trial court awarding the Respondent 12 months as compensation for wrongful dismissal, the Appellant faults it as excessive because the trial court did not justify the reasons for the award. The court exercising appellate jurisdiction can only interfere with such discretion if there was an error leading to an erroneous decision as was held on the case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

48. The court will therefore disturb an award if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. An award of compensation is discretionary however the discretion must not be exercised whimsically but judiciously. The court ought to be guided by considerations set out under Section 49(4) of the *Employment Act* in awarding compensation for unfair termination. In this regard and after considering the judgment, the court takes the view that the trial court failed to properly justify the reasons for awarding maximum compensation. As was held by the Court of Appeal in *Kenya Broad casting Corporation v Geoffrey Wakio*(2019) eKLR that;

(22) This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Ol Pejeta Ranching Limited vs. David Wanjau Muboro* [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.

49. Taking note of the duration the Respondent worked with the Appellant which was one year and the fact that the employment could be terminated by either party for lawful reasons, it agrees with the appellant that an award of 12 months' salary as compensation was excessive. The Court therefore revises the award to three months' salary to be a fair compensation in the circumstances.

50. Save for the claim for overtime which is hereby disallowed, and interest on the decretal sum, the Court agrees with the findings of the trial court on other heads of claim and finds no reason to disturb them.

51. On the issue of interest on the decretal sum, this awardable from the date of judgment and not the date of filing of the suit. Claim for unfair termination is akin to claim for general damages which is determinable only after the trial and not at the time of filing suit. The appellant is therefore justified in contesting this award and this ground of appeal and it is therefore allowed.

52. Since the Appeal partially succeeds each party shall bear their costs of the appeal.

53. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025



DELIVERED VIRTUALLY THIS 26TH DAY OF SEPTEMBER, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

