Kingi v Mini Bakeries (Mombasa) Limited (Employment and Labour Relations Appeal E166 of 2024) [2025] KEELRC 2897 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2897 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E166 OF 2024

K OCHARO, J

OCTOBER 23, 2025

BETWEEN

KILUMO RUWA KINGI .... APPELLANT

AND

MINI BAKERIES (MOMBASA) LIMITED .... RESPONDENT

(Being an Appeal from the Judgment of Hon. Sogomo PM delivered on 12th July 2024 in Mombasa CMELRC Cause No. E143 of 2023)

JUDGMENT

Background

1. At all material times, the Appellant was employed by the Respondent as a mixer from 1st March 2007 until 6th May 2022, when he was summarily dismissed. Contending that the dismissal was substantively unjustified and lacked procedural fairness, he sued the Respondent for notice pay, service pay, and compensation under section 49[1] of the *Employment Act* for wrongful dismissal, through the lower court claim mentioned hereinabove.

2. The Respondent opposed the claim, contending that the dismissal against the Appellant was procedurally and substantively fair. Further, he was not entitled to the reliefs sought.

3. Upon hearing the parties on their respective cases, the learned trial Magistrate, by his Judgment, the subject matter of this appeal, found the Appellant's claim destitute in merit and consequently dismissed the same. Aggrieved by the whole of the Judgment, the Appellant assails the same, citing five grounds of appeal.

The Appellant's case before the trial court

4. It was the Appellant's case that he first came to the employment of the Respondent on 1st March, 2007, as a mixer at a monthly salary of KShs. 24,411. On 6th May 2022, the Respondent, without any lawful cause or justification, unlawfully, procedurally and unfairly terminated his employment.

5. The Claimant further contended that the termination was not in conformity with the Collective Bargaining Agreement between the Respondent and its Union, and statutory provisions.

6. He contended that in the circumstances of the matter, he was entitled to;

   a) Three months' salary in lieu of Notice............KShs. 73, 233.

   b) Long service award [5 years] ....KShs. 9,600

   c) Compensation for wrongful dismissal.

   d] Costs of the claim.

Respondent's case before the trial court

7. Through its witness, Nancy Gacheru, the Respondent admitted that at all material times, the Appellant was its employee as a mixer. The Appellant was summarily dismissed on 6th May 2022 via a letter of the same date. The dismissal was with a valid reason.

8. The Respondent is engaged in the production of bread. Like any commercially sensible business, it emphasises the optimal production of bread. This is achieved by setting production standards for each employee's adherence.

9. The witness stated that the standard production levels are a result of tried and tested formulas, statutory requirements by entities such as the Kenya Bureau of Standards, and years of experience in the production of bread.

10. On 9th April 2022, the Appellant and his other colleagues, who were Mixers, in an open defiance, refused to meet the production target, which, in any event, they had regularly and customarily achieved. An act that warranted disciplinary action. Per the Respondent's procedures, the Branch Manager prepared a complaint form; however, the Appellant refused to acknowledge receipt by signing it.

11. Since the failure to meet the usual target impacted multiple employees, the Management of the Respondent arranged individual meetings with the Mixers to understand each Mixer's challenges.

12. The meeting with the Appellant was scheduled for 23rd April 2023; however, the Appellant declined to attend, insisting that it must be a plenary session involving all Mixers. He asserted that that was the collective resolution by the Mixers.

13. The deliberate failure to meet the target and refusal to sign the complaint form constituted two distinct offences. The Appellant was, as a consequence, issued two show cause letters, both dated 25th April 2022, in respect of each infraction.

14. By his letter dated 25th April 2022, the Appellant responded to the show cause letters but in a curt manner. In its nature, the response didn't show cause, therefore. Through a letter dated 26th April 2022, the Respondent invited the Appellant to attend a disciplinary hearing on 28th April 2022. The

Appellant attended the hearing and maintained his stance on refusing to sign the complaint form and participate in the meeting.

15. As he didn't provide any lawful reason for his refusal to obey lawful instructions and for his blatant insubordination, the Respondent concluded that a summary dismissal was warranted. He was summarily dismissed.

16. He was summarily dismissed and not terminated; he was not entitled to three [3] months' notice or pay in lieu.

The Judgment by the Lower Court

17. After reviewing the pleadings, evidence, and submissions, the trial court identified the issues to be determined as whether the Appellant was employed by the Respondent, whether the dismissal was unlawful, and whether the Claimant was entitled to the reliefs sought.

18. The court found that the Appellant had demonstrated that the summary dismissal was on valid reasons and in conformity with procedural dictates as contemplated under the stipulations of the *Employment Act*. Consequently, the court dismissed his claim with costs.

The Appeal

19. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

    1. That the Learned Magistrate erred in law and in fact by finding that the Appellant had failed to prove a case for unlawful termination of employment under section 47 (5) of the *Employment Act* contrary to the evidence on record.

    2. That the Learned Magistrate erred in law and in fact in failing to find that the Respondent failed to prove the reasons for termination were valid and justify the process for termination as provided for under sections 43 and 41 of the *Employment Act*.

    3. That the Learned Magistrate erred in law and in fact in failing to find that termination of the claimant's employment was unlawful for the reason that the claimant was not granted a hearing as contemplated under the mandatory provision of section 41 of the *Employment Act*.

    4. That the Learned Magistrate erred in Law and in fact by failing to find that the terminal dues of long service award were not unremitted NSSF dues but dues payable under the Collective Bargaining Agreement (CBA), and which dues were in fact admitted as payable by the Respondent.

    5. That the Learned Magistrate erred in Law and in fact in making a finding that the claimant was terminated for sub-par performance, yet no iota of evidence was presented to warrant such a finding.

    6. That the Learned Magistrate erred in Law and in fact in dismissing the Claimant's case against the cogent evidence produced in support of the claim.

Appellant submissions

20. The Appellant's Counsel submitted that this appeal turns on a single issue, whether there was insubordination by the Appellant, warranting a summons against him. In arguing the Appeal, Counsel condensed the six grounds on the memorandum of appeal into three grounds. Grounds 1, 2, 3, and

5 were argued together to address the issue of whether the termination was lawful. Ground 4 on the issue whether the trial Court failed to grant a relief that had been admitted and that was provided in the CBA.

21. It was submitted that, in determining the first issue, it is essential to note that the origin of the disciplinary process was initiated by the fact that the Mixers informed management that the Respondent's aspiration of 81 bags per day was not attainable. The Respondent attempted to compel the Appellant to sign a form acknowledging the failure to meet the target. The 81 bags per day was not a contractual obligation but rather an aspirational goal set by the company.

22. The Respondent's witness's statement revealed that the disciplinary process was initiated because of the refusal to meet a target. This Court should note that no specific target of 81 bags per day or 27 bags per shift was established. No evidence was presented before the trial Court from which a conclusion of failing to meet the set target could be drawn.

23. The Appellant could not be required to obey a command that was impossible or contrary to the contract of service or contrary to the law. He would not lawfully obey the command to work beyond the eight [8] hours [shift hours] and without modalities on overtime payment.

24. Section 45[2][b] of the *Employment Act* requires the employer in a claim for unfair termination to prove that the reason for the termination was fair and valid. In the event of default, the termination shall be deemed unfair. Section 47[5] imposes a further legal burden on the employer to justify the grounds for termination of an employee's employment or summary dismissal.

25. The Respondent invoked section 44[4] [e] of the *Employment Act* to summarily dismiss the Appellant. It is essential to note that the provision requires the allegedly disobeyed order or command to be lawful and within the scope of one's duty to obey. Since it is clear that there was no set target of 27 bags per shift or 81 bags per day to be met by the Appellant, the command would not be considered lawful.

26. It was submitted that the learned trial Magistrate veered off the core issue of insubordination and, somewhat, in his Judgment, held that the Appellant attended a disciplinary hearing and the panel found him guilty of sub-par performance and insubordination leading to his summary dismissal.

27. The learned trial Magistrate further determined that there was a dereliction of duty by the Appellant and an act of insolence towards his superiors. This conclusion is both shocking and perplexing. It is not supported by the pleadings or evidence presented by the parties. He therefore took into account extraneous and irrelevant matters.

28. As held by the Court in the case of Abraham Gumba v KEMSA [2014] eKLR, an allegation of poor performance is an allegation that should be supported by evidence of specific performance targets, appraisal of the performance with specific results. The Appellant did not plead poor performance or present evidence to establish the same. The learned trial Magistrate erred in law in determining the suit on a matter neither pleaded nor proved by evidence.

29. Submitting on the 2nd issue, Counsel stated that the Appellant pleaded that, per clause 40 of the Collective Bargaining Agreement, he was entitled to a Long Service Award of Kshs. 9,600. This claim was expressly admitted in the Statement of Response dated 7th July 2023 at paragraph 7. In declining this relief, the learned trial Magistrate brought up an unpleaded matter regarding unremitted NSSF. He erred in law by not awarding an amount explicitly admitted.

30. Finally, the Appellant urged that he had discharged his burden under Section 47(5) of the *Employment Act*, proving unfair termination. The Respondent failed to justify the dismissal, and the process was merely a box-ticking exercise. The Appellant relied on the principle in McKinley v BC Tel [2001] 2

SCR 161, 2001 SCC 38 (Can LII), where the Canadian Court stated that the question to be posed in summary dismissal claims should be whether, in the circumstances, the behaviour was such that the employment relationship can no longer viably subsist.

31. Misconduct justifying dismissal must be so grave as to make continued employment untenable, which was not the case here.

Respondent's submissions

32. The Respondent's Counsel segmented his submissions into two parts. Part one, considered grounds 1, 2, &5, as an attack on the learned magistrate's decision on the fairness process, and arguments made thereon as such. Ground 4 was considered to raise the issue of the reliefs that weren't availed to the Appellant.

33. It was argued that the Appellant was dismissed due to two specific acts of insubordination: refusing to sign a complaint form on 9th April 2022 and refusing to attend a meeting on 23rd April 2022. The Respondent cited the case of Christopher Komen Chebet v Brinks Security Services Limited [2019] KEELRC 8 (KLR) to affirm that insubordination constitutes failure to comply with reasonable and lawful instructions.

34. While the trial court's reference to sub-performance was acknowledged as erroneous, the Respondent maintained that this slip did not affect the correctness of the finding that the Appellant's conduct amounted to insubordination.

35. This Court should find that the evidence that was placed before the trial Court clearly shows that the Appellant admitted the two episodes of insubordination in his response to the show cause letters and during the disciplinary hearing.

36. On procedural fairness, the Respondent emphasised that the Appellant was accorded due process. He received two show cause letters dated 25th April 2022, responded to them, and was invited to a disciplinary hearing on 28th April 2022, where he was informed of his right to representation. The Appellant attended and maintained his stance. No doubt the requirements of Section 41 of the *Employment Act* were satisfied.

37. With respect to reliefs, the Respondent argued that since the dismissal was substantively and procedurally fair, claims for compensation and notice pay could not stand; however, the admitted sum of Kshs. Nine thousand six hundred should have been granted.

38. In conclusion, the Respondent urged the court to uphold the trial court's Judgment, save for awarding the long service award, and to dismiss the appeal with costs.

Analysis and determination

39. This Court's role as a first Appellate Court is to reconsider the evidence, evaluate it, and draw independent conclusions. However, in executing this duty, it must bear in mind that it neither observed nor heard the witnesses testify and should make appropriate allowances in this regard. Refer also to Selle & Another v. Associated Motor Boat Co Ltd & Others [1968] EA 123.

40. I have carefully examined the grounds of appeal, the pleadings of the parties, the oral and documentary evidence presented before the trial Court, and the written submissions made by the respective Counsel of the parties. In my opinion, this appeal primarily turns on two main issues: (a) whether the Appellant was unfairly dismissed, and (b) whether the Appellant is entitled to the reliefs sought.

a. Whether the Appellant was unfairly dismissed

41. It is not in dispute that the Appellant was an employee of the Respondent from 1st March, 2007, and he was summarily dismissed on 6th May, 2002. What is in question is whether the Appellant's termination was both substantively and procedurally fair as per Section 45(2) of the *Employment Act*.

42. However, before further examining this issue, it is essential to highlight that Section 47[5] imposes two distinct legal obligations on both the employee and the employer. Typically, these obligations are discharged sequentially. The employee is responsible for prima facie establishing that an unlawful termination has occurred by demonstrating, at the outset, that the termination was not in accordance with procedural and substantive fairness. It is only after the employee has met this initial requirement that the burden shifts to the employer to demonstrate that the termination was justified. Essentially, if the employee fails to satisfy their burden, their case fails at that stage.

43. The Appellant's witness statement [turned evidence in chief] and even his pleadings, before the trial Court, were so sketchy, in my view. They didn't bring out clear material facts. As regards the vital aspects of procedural and substantive fairness, they were too general.

44. Neither litigants nor their advocates should overlook the fact that when they seek the Court to accept and rely solely on their witness statement as evidence, such a statement must adequately articulate that party's case.

45. Considering the material presented to the trial court to demonstrate that the appellant was subjected to a process conforming with the stipulations of section 41 of the *Employment Act*, weighed against the appellant's vague and generalised evidence, it would be unreasonable to conclude that he provided evidence that would prima facie establish procedural unfairness.

46. In conclusion, he did not discharge his legal burden under section 47[5]. Though the learned trial Magistrate, in his unclear Judgment [as comes out hereinafter], did not elaborate on this point, the Appellant's case before him rightly failed.

47. Elaborating on the obligations imposed on an employer in disputes concerning the termination or summary dismissal of an employee, the Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR) stated that,

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. 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. A mandatory and elaborate process is then set up under section 41, requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed, thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:
>
> "...to declare and define the fundamental rights of employees, to provide basic conditions of employment for employees."

48. Section 41 of the *Employment Act*,2007, provides a mandatory procedure that an employer contemplating terminating an employee's employment or summarily dismissing an employee must adhere to. A failure to comply with the procedure would often render the termination or summary

dismissal unfair by virtue of the provisions of section 45[2] of the Act. The process contemplated under the provision encompasses three vital ingredients, namely, notification, hearing, and consideration. The Court of Appeal in Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR) observed that the essential requirements for procedural fairness are;

> " (i) an explanation of the grounds of termination in a language understood by the employee;
>
> (ii) the reason for which the employer is considering termination;
>
> (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made;
>
> (iv) hearing and considering any representations made by the employee and the person chosen by the employee."

49. It is important to note that the absence of any of these ingredients in the process leading to the employer's decision to terminate or summarily dismiss an employee shall make the termination or dismissal procedurally unfair.

50. Counsel for the parties, by their submissions, expressed their appreciation of the foregoing position of the law.

51. Undeniably, the Respondent scheduled a meeting for 23rd April 2022, to discuss with the individual Mixers their failure to meet the anticipated production targets, which they had previously been achieving. The Appellant did not attend, insisting that the meeting should be a group meeting. Further, the Appellant had been served with a Complaint Form following the alleged failure to achieve the target. The Appellant refused to sign the same.

52. The Respondent considered the two incidents, failure to sign the form, and to attend the meetings, acts which amounted to gross misconduct and that would attract a sanction of summary dismissal. Following this, the Appellant was issued two distinct show-cause letters, each addressing one of the alleged infractions and calling upon the Appellant to respond. They were both dated 25th April 2022. By his letter dated 25th April, 2022, the Appellant responded to both show cause letters.

53. By a letter dated 26th February 2022, the Respondent informed the Appellant that it had found his explanation unsatisfactory, and invited him to a hearing scheduled for 28th April 2022. I note that the invitation letter clearly stated the charges against the Appellant, and that he had a right of accompaniment.

54. On the 28th April 2022, the hearing was undertaken. The Appellant does not deny it. I note from the minutes that he was allowed to explain himself regarding the two accusations.

55. By reason of the foregoing premises, I am convinced that the learned trial Magistrate didn't err in finding that the dismissal was procedurally fair.

56. I have observed that certain grounds of appeal and the detailed submissions presented by Counsel for the Appellant indicate that the summary dismissal of the Appellant was based on poor performance. Upon reviewing the record of appeal, I find that this position is entirely, and indeed intentionally, incorrect. From the outset, through the two show-cause letters, the Respondent was clear about the charges against the Appellant, both of which constituted gross misconduct: insubordination.

57. This Court has not overlooked the fact that, in his response letter, the Appellant was clear. The letter's heading referenced the two alleged infractions that served as the basis for the two show-cause notices.

The letter did not suggest at all that he believed he was accused of, or being asked to respond to, allegations of subpar performance. The demand letter dated 8th June, 2022, from his Counsel did not miss the point, either. It stated in part, "You unlawfully terminated his employment purportedly on account of failure to attend a meeting."

58. By reason of the foregoing premises, I find the Appellant's Counsel's submissions to the effect that the Appellant was summarily dismissed on account of subpar performance, and the subpar performance was not proved, misleading and irrelevant. However, that isn't to say that it is not true, that, as Counsel for the Appellant contends, the learned trial Magistrate, surprisingly and inexplicably, raised the issue of under par performance in a line within his Judgment. However, this unfortunate digression by the learned Magistrate does not change this Court's view that the dismissal was on account of the two reasons set out in the two show cause letters and the invitation letter for the disciplinary hearing.

59. Section 44 [3] of the *Employment Act* provides that an employer may dismiss an employee summarily when the employee has, by his conduct, indicated that he has indicated that he has fundamentally breached his obligations arising under the contract of service.

60. The Respondent contended that the two infractions committed by the Appellant amounted to gross misconduct in terms of section 44[4][e] of the *Employment Act*, which provides

> (e) ....an employer knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer."

61. Critically examining the provisions of section 44[3] of the Act, it can be safely stated that it is not enough for an employer to merely cite that an employee has committed one or more of the acts or omissions listed under section 44[4] of the Act, or in their Human Resource Manual, or Collective Bargaining Agreement. An employee's misconduct does not inherently justify a summary dismissal unless it is "so grave" that it intimates the employer's abandonment of the intention to remain in employment. In Laws v Landon Chronicle Limited [1959] 2 ALLER page 287, it was held;

> " Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential condition of the contract of service."

62. Whether an employee's misconduct attracts summary dismissal requires an assessment of the degree and the surrounding circumstances, the contextual approach. In McKinley v BC Tel [supra], the Supreme Court of Canada, and I agree:

> " 29. When examining whether an employee's conduct justifies his or her dismissal, Courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.
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> 39. To summarise, the first line of case law establishes that the question whether dishonesty provided just cause for dismissal, for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In

this respect, courts have held that factors such as the nature and degree of the misconduct, and whether it violated the "essential conditions" of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of the just cause."

63. I have considered the circumstances of the matter, including the industry in which the Appellant was working, his role as a Mixer, his admission during the disciplinary hearing that the commission of the two infractions was motivated by his desire to show solidarity with other Mixers, his apparent lack of remorse about it, and his behaviour would justify a summary dismissal under the *Employment Act* and the CBA, and draw the conclusion that the dismissal was on valid and fair ground.

64. In the upshot, I find that the dismissal was substantively fair.

65. I am compelled to state that correctly identified and framed issues are like navigation beacons. They guide the sails in preparation for a focused, just, and easily comprehensible Judgment. They diminish wandering as one prepares a Judgment. The learned trial magistrate should take heed of this.

b. whether the Appellant was entitled to the reliefs sought

66. This Court observes that the reliefs the Appellant sought in his pleadings before the lower court fell into two categories: those dependent on the claim for unfair summary dismissal, such that if the claim failed, these reliefs would also not be available to him, and those that were independent of the claim. As the reliefs of notice pay and compensation for wrongful dismissal were based on the claim, they were rightly not granted by the trial Magistrate.

67. Clause 40 of the Collective Bargaining Agreement provided for the benefit of the Long Service Award. Having served for five [5] years, the Appellant pleaded for Kshs. 9,600/=. The Respondent expressly admitted his entitlement to this relief in its pleadings. The learned trial Magistrate erred in law when he failed to award this admitted relief.

68. In the upshot, the Appellant's appeal succeeds to a minimal extent. The learned trial Magistrate's Judgment is hereby limitedly disturbed. The Appellant is awarded Kenya Shillings Nine Thousand, six Hundred Shillings [KShs. 9,600]. The amount shall attract interest at court rates from the date it fell due for payment [the date of dismissal, 6th May 2022] until full payment.

69. Each party to bear its own costs.

READ SIGNED AND DELIVERED THIS 23RD DAY OF OCTOBER 2025.

OCHARO KEBIRA

JUDGE