



**Kombo v Awadh Omar Bayusuf Sons and Limited (Civil Appeal
E155 of 2024) [2025] KEELRC 2940 (KLR) (23 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2940 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CIVIL APPEAL E155 OF 2024
K OCHARO, J
OCTOBER 23, 2025**

BETWEEN

KOMBO KATAMBO KOMBO APPELLANT

AND

AWADH OMAR BAYUSUF SONS AND LIMITED RESPONDENT

JUDGMENT

1. The appeal before this Court stems from a judgment by Honourable H. Adika, Senior Principal Magistrate, delivered in Mombasa MCELRC Case No. E 382 of 2023 on 9th July 2024. The learned Magistrate found that the appellant's case lacked substantial merit and awarded him only KShs. 3800 as unremitted NSSF contributions. Dissatisfied with the judgment, the appellant filed this appeal, challenging it on the grounds outlined in the Memorandum of Appeal filed herein, dated 26th July 2024.
2. When this appeal came up for directions concerning its disposal, this Court directed that it be canvassed through written submissions. Subsequently, the parties filed their respective submissions in accordance with the issued directions.

The Appellant's case before the trial court

3. By a Statement of Claim dated 26th June 2023, the Appellant sued the Respondent in the above-mentioned suit and sought the following reliefs;
 - I. A declaration that the termination of his employment/summary dismissal was unfair, illegal, and /or unlawful and/or unfair.
 - II. An award of twelve [12] months' gross salary as compensation for unfair and or unlawful termination of employment, KShs. 201,600.00.
 - III. One month's salary [Notice pay], KShs. 16,800.



- IV. Accrued leave days, KShs. 16,800.00
 - V. Compensation for unutilized rest days, KShs. 160, 648.00
 - VI. Overtime pay, KShs. 80, 264.00
 - VII. Unremitted NSSF, KShs. 3,800.00
 - VIII. Holiday Pay, KShs. 3,025.30
 - IX. Service pay, 15 days' salary for every year worked.
4. It was his case that she was first employed by the Respondent on 21st August 2021 as a turnboy and worked continuously until 26th January 2023, when he was summarily dismissed from his employment.
 5. He stated that as at the date of dismissal, he was earning a salary of KShs. 16,800.
 6. He used to work from 8 am to 5:30 pm, thus 9.5 hours daily for seven days, but was not remunerated for the overtime worked. Further, during his employment, the Respondent did not allow him to take his annual leave at any time. Notwithstanding the earned but unutilised leave days, the Respondent didn't compensate him.
 7. In December 2022, he and his driver were engaged in transporting cargo to Kampala; during their operation, their vehicle, KCC 063 H, experienced a mechanical problem in Kampala. They communicated the incident to the Respondent, and a mechanic was sent to handle the problem five [5] days after the communication.
 8. Over the course of five days, the two were responsible for guarding the vehicle, a duty they performed diligently. Unfortunately, during this period, a spare part was stolen from the vehicle. They reported the incident to the Respondent.
 9. On 12th January 2023, he was called to the Human Resource Office to explain the circumstances under which the spare got stolen. On 26th January 2023, he was served with a summary dismissal letter.
 10. He argued that the summary dismissal was unfair, unlawful, and inhumane, as no notice to show cause was issued to him demanding an explanation for any accusation; he had not committed any infraction that could justify the sanction of summary dismissal; he was not heard before the dismissal; and his terminal dues remained unpaid.

The Respondent's Case before the trial Court.

11. The Respondent called one witness, Shem Ouma Onyango, its Human Resources Manager, to testify on its behalf. The witness stated that the Appellant was employed by the Respondent on 21st August 2021, as a turn boy, under a letter of appointment. His terms of employment required him to work according to trip needs, and, as a result, he did not work continuously.
12. The witness further indicated that it is customary for the Respondent not to operate on Public Holidays or to require overtime work. The Appellant was granted days off, which, in most instances, exceeded one day due to the nature of his employment, resulting in certain days when he was not required to report to work.
13. On 26th January 2023, the Claimant was dismissed from employment because he had failed to discharge his duty in the course of his employment, which led to the loss of a computer that was mounted on the dashboard of the motor vehicle. They alleged that it was stolen.



14. The witness further stated that the Appellant was given an opportunity to defend himself alongside the vehicle's driver. They both recorded their statements.
15. His explanation was, however, not satisfactory. He failed to satisfactorily explain how the theft occurred, yet both of them were in the cabin. As a result, he was summarily dismissed.
16. He was paid his terminal dues, which amounted to KShs. 44,669 being the salary, for the days worked. KShs.13,501, Compensation for earned but untaken leave days [38 days], KShs. 18,506, and service pay, KShs. 12, 662. He acknowledged the same and signed a discharge on which he committed that he had no further claims against the Respondent.

The Appeal

17. Aggrieved by the Judgment of the learned trial Magistrate, the Appellant impugns the decision, setting out six [6] grounds. That;
 - I. The learned trial Magistrate erred in law and fact in dismissing the Appellant's claim against the weight of the evidence adduced.
 - II. The learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and the authorities relied on.
 - III. The learned trial Magistrate erred in law and fact in failing to find that the Respondent failed to prove that the termination /or dismissal was in accordance with fair procedure.
 - IV. The learned trial Magistrate erred in law and fact in holding that the Appellant's termination was lawful without considering the procedure adopted by the Respondent.
 - V. The learned trial Magistrate erred in law and fact in arriving at the conclusion that the Appellant was undeserving of the reliefs sought in the claim.
 - VI. The learned trial Magistrate erred in law and fact in failing to award the Applicant the costs of the Claim.

Analysis and Determination.

18. I have carefully considered the pleadings and evidence that were placed before the trial Court by the parties herein, the learned trial Magistrate's Judgment and the grounds of appeal, and hold that the appeal herein revolves around two main issues;
 - I. Whether the summary dismissal against the Appellant was procedurally unfair.
 - II. Whether the Appellant was entitled to the reliefs he had sought in his pleadings.
19. The role of a first Appellate Court is now well-established. It re-evaluates the material presented before the trial Court and reaches its own independent findings and conclusions. The findings and conclusions of the trial Court are not binding on it. However, whenever it diverges from them, it must provide reasons for doing so. See also *The German School Society & another vs Ohany & another* [2023] KECA 894 [KRL], and *Kenya Ports Authority v Kuston [Kenya] Limited* [2009]2EA 212, cited by the Respondent's Counsel.
20. It is imperative to emphasise that fairness in the termination or summary dismissal of an employee encompasses both procedural and substantive fairness, per section 45 of the *Employment Act*. Procedural fairness concerns the process leading to the employer's decision to terminate an employee's



employment or summarily dismiss an employee. Substantive fairness concerns the decision. Where both of them or any of them are absent, the termination or summary dismissal is considered unfair.

21. I have meticulously examined the grounds of appeal, and I observe that they solely contest the learned trial Magistrate's ruling concerning procedural fairness. The findings regarding the substantive justification for the summary dismissal are not challenged under any of the grounds outlined in the memorandum of appeal. Consequently, in addressing the first issue identified for determination, I will confine myself to procedural fairness. In fact, the submissions filed by Counsel for the Appellant didn't concern the substantive fairness aspect.
22. Section 41 of the *Employment Act* provides for a procedure that every employer contemplating terminating an employee's employment or summarily dismissing them on the grounds of misconduct, poor performance, or physical incapacity must adhere to. As correctly submitted by Counsel for the Appellant, and as elaborated in the case of *Winnie Mbete Mutua v Brackenhurst Kenya Limited* [2021] eKLR, the process contemplated in the provision comprises vital ingredients. In my view, the ingredients can be summarised as [a]. The notification- the employer must inform the affected employee[s], the grounds, the basis of the intention, [b]. The hearing- the employer must allow the employee adequate opportunity to prepare and make a representation on the grounds. Conjoined with this right is the right of accompaniment [the employee should be allowed to be accompanied by a colleague or trade union representative, when making the representation], [c]. The consideration: before reaching a final decision, the employer must consider the employee's representations.
23. The Respondent's Counsel submitted that the summary dismissal was procedurally fair, as it is clear from the material that was presented before the trial court that the Appellant was heard on the accusations against him in a meeting on 12th January 2023. Further, he wrote a statement on the issue on the 21st January 2023.
24. Counsel for the Appellant on his part argued that there was no conformity with the mandatory procedure provided for under the said provision of the law. He contended that the Appellant was not served with any notice to show cause. There was no disciplinary hearing; the fact that there were no minutes of any disciplinary hearing placed before the trial Magistrate is a testament to this.
25. In his evidence in chief, the Respondent's witness testified that they did not issue the Appellant with a show cause letter. Further, there were no disciplinary proceedings against the Appellant, except for the one in the meeting with the HR team.
26. There was no evidence tendered to demonstrate that the meeting at the Human Resources Offices was intended to be, and was a disciplinary hearing, as not every meeting should be classified as a disciplinary hearing. The Respondent did not present any evidence that the Appellant was summoned to the meeting for a disciplinary hearing, nor that he was informed of the charges he was expected to defend himself against during that meeting.
27. By reason of the foregoing, I am persuaded that the summary dismissal was procedurally unfair. The learned trial Magistrate erred in law and fact when he failed to examine the evidence before him critically and conclude that the dismissal was procedurally unfair.
28. I now address the matter of the reliefs. Section 49[1] of the *Employment Act* grants the Courts the authority to award compensation for wrongful and/or unfair summary dismissal. However, it is important to emphasise that this authority is discretionary and is exercised based on the specific circumstances of each case. I have carefully considered the circumstances leading to the summary dismissal, including the cause thereof, which pointed to the Appellant's negligence, the fact that the Respondent lost property courtesy of the negligence, and the fact that the Respondent is only liable to



compensate because of procedural missteps, and hold that one month's gross salary as compensation for the procedurally unfair dismissal shall suffice.

29. The claims pertaining to Rest Day Pay, Overtime Pay, and Holiday Pay were merely thrown to the court. No evidence was submitted to the trial court to substantiate the Appellant's entitlement to these benefits. The learned trial Magistrate correctly rejected the same.
30. The Appellant did not dispute the Respondent's claim before the trial Court that they properly paid him his terminal dues, including salary for days worked, earned but unused leave days, and service pay. He neither contested nor proved that the amounts paid, for which he signed a voucher, were less than expected. Therefore, the learned trial Magistrate did not err in failing to grant the reliefs.
31. In the upshot, the Appellant's appeal herein succeeds to the limited extent brought out hereinabove. He is consequently awarded one month's gross salary pursuant to the provisions of Section 49[1][c] of the *Employment Act*, KShs. 16,800. Each party shall bear its own costs of this appeal.

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

OCHARO KEBIRA

JUDGE

