



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISUMU**

**APPEAL NO. E063 OF 2024**

THE MAYFAIR HOLDINGS LTD.....

.....**APPELLANT**

**VERSUS**

CONNY NAMALWA SIMIYU.....

.....**RESPONDENT**

***(Being an appeal from the judgment of Hon. Ezekiel Obina (SPM) in KISUMU ELRC No. E004 of 2024 delivered on 4<sup>th</sup> October 2024)***

**JUDGMENT**

1. Through a statement of claim dated 16<sup>th</sup> January 2024 the Respondent sued the Appellant before the Magistrate's Court alleging unfair termination of employment. In response to

the Claim, the Appellant filed an amended response to memorandum of claim and counterclaim dated 12<sup>th</sup> April 2024. It contended that the Respondent was lawfully summarily dismissed after voluntarily absconding duty in breach of her contract. The Appellant maintained that the dismissal was both substantively and procedurally fair. It further counterclaimed for Kshs. 113,936/- allegedly lost during the course of the Respondent's employment.

2. Upon hearing the matter, the Learned Magistrate delivered judgment on 4<sup>th</sup> October 2024, finding that the Respondent had been unfairly dismissed. He awarded her a total of Kshs. 350,000/-, comprising: six (6) months' salary at Kshs. 210,000/- as compensation, two (2) months' unpaid leave at Kshs. 70,000/-, and unpaid salary for October and November 2023 at Kshs. 70,000/-. The Learned Magistrate further directed that the Respondent be issued with a certificate of service within thirty (30) days and awarded her costs and interest from the date of judgment until payment in full. The Appellant's counterclaim was dismissed with costs.

Dissatisfied with this outcome, the Appellant lodged the present appeal, faulting the Learned Magistrate for:

- a. Finding that the Appellant did not follow due procedure in terminating the service of the Respondent.
- b. Awarding the Respondent the sum of Kshs. 350,000/- plus costs and interest.
- c. Totally ignoring the oral and documentary evidence by the Appellant.
- d. Finding that the Respondent was not accompanied at the disciplinary hearing yet a union member was present at the hearing.
- e. Finding that the Respondent had not been given Notice of the disciplinary hearing.
- f. Dismissing the counterclaim contrary to the evidence adduced.

3. On the basis of the above grounds, the Appellant prayed that this court allows the appeal, sets aside the judgment of the trial court, dismisses the Respondent's suit, and allows the counterclaim. On 16<sup>th</sup> June 2025, directions were issued that

the appeal be canvassed by way of written submissions, which were duly filed and exchanged.

#### Appellant's Submissions

4. The Appellant reiterated that the dismissal was both substantively and procedurally fair. On procedural fairness, it asserted that the requirements of section 41 of the Employment Act were strictly complied with. In support, it pointed to the disciplinary hearing minutes, which it contended demonstrated that the Respondent was accorded an opportunity to be heard. Regarding substantive fairness, the Appellant maintained that the Respondent was dismissed for manipulating sales records, which resulted in financial loss. It drew attention to the Respondent's acknowledgment at the disciplinary hearing of altering records to show that 277 loaves of bread had been sold instead of 177. It emphasised that such conduct amounted to fraud, constituting gross misconduct and warranting summary dismissal under the law. To support its position the Appellant relied on **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, which mandated that

substantive and procedural fairness had to be satisfied for termination of employment to be considered fair.

5. On the counterclaim, the Appellant urged that the same ought to have been allowed, given the Respondent's admission regarding the manipulation of records. It asserted that the attempt to shift blame to a co-worker was immaterial, as the Respondent bore ultimate responsibility. It further highlighted the audit report which revealed inflated market returns. In conclusion, the Appellant urged this court to allow the appeal, set aside the trial court's judgment, and enter judgment on the counterclaim.

#### Respondent's Submissions

6. The Respondent, on her part, insisted that her dismissal contravened section 41 of the Employment Act. She maintained that she was not issued with a notice to show cause, thus denying her an opportunity to respond to the allegations levelled against her. To support this position, she relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco**

**Limited [2014] KEELRC 813 (KLR)**, where the court held that the mandatory process under section 41 had to be observed irrespective of the grounds for dismissal. She further cited the decision in the case of **Elizabeth Washeke & 62 others v Airtel Networks (K) Limited & another [2013] KEELRC 572 (KLR)**, where the court held that non-compliance with section 41 not only rendered termination unfair but also violated Article 41 of the Constitution, which guarantees the right to fair labour practices.

7. With respect to the counterclaim, the Respondent submitted that the Appellant failed to adduce sufficient evidence to prove the sums claimed. She therefore urged the court to uphold the trial court's decision in its entirety and dismiss the appeal with costs.

#### Determination

8. Being a first appeal, the Court is enjoined to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was settled in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where the

Court of Appeal outlined the duties of a first appellate court as follows:

*...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...*

9. Having warned myself that I neither saw nor heard the Appellant and the Respondent testify, I come to the following determination having evaluated the evidence they presented in the trial court and which evidence and documents in support thereof are before this Court.

10. The issue that was before the trial court was a dismissal of the Respondent herein. She asserted she was dismissed without adherence to the law and was as a result compensated by the Trial Court. From the record before the

Court at pages 41-49 of the Record of Appeal, there is evidence the Respondent was given a notice to show cause, a reply was made and she was subsequently heard. She was accused of altering the reconciliation reports of the Appellant. It is the result of the disciplinary proceedings that she was found culpable in losses of the sums contained in her summary dismissal letter.

11. Under the Employment Act under section 41 makes provision 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.*

12. The requirement is that the Respondent herein was to be given a hearing. This combines the notice to show cause and the disciplinary hearing. In her statement, the Respondent said that she had received the letter asking her to show cause. In it she noted she was accused of making several mistakes and that she was required to respond. She said in her defence that as a supervisor she used to record only what she had witnessed physically and there was no way stock would have balanced if the figures were not correct. She said after the suspension she was called for a disciplinary hearing on 15<sup>th</sup> November 2023 after which she was dismissed on 1<sup>st</sup> December 2023, ostensibly without notice.

13. The Court returns that the process undertaken per the foregoing narration including the hearing conducted by the Appellant shows the Respondent was accorded all the rights under section 41 of the Employment Act. The Learned Magistrate thus fell in error in holding that the disciplinary proceeding was a sham. The proceedings were procedural and were not a sham. The Court returns that the sums of

Kshs. 210,000/- awarded as compensation for unfair or unlawful and unprocedural dismissal were misplaced. The Claimant is therefore only entitled to the following:-

- a. Unpaid leave for 2 months Kshs. 70,000/-
- b. Salary for October and November 2023 - Kshs. 70,000/-

14. Regarding the Counterclaim in the suit, the Appellant attached documents that had the names of sales representatives who are not the Respondent. I would uphold the finding of the Learned Magistrate dismissing the counterclaim in the suit.

15. The result is that the decision of the Hon. Mr. E. Obina SPM is vacated and replaced with a judgment awarding the Respondent

- a. Unpaid leave for 2 months Kshs. 70,000/-
- b. Salary for October and November 2023 - Kshs. 70,000/-
- c. Costs of the suit before the Magistrate's Court limited to the sum of Kshs. 140,000/-

16. A certificate of service be issued if not already issued in terms of section 51 of the Employment Act.

17. The parties to each bear their own costs for this Appeal.

Orders accordingly.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of October**

**2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**

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