

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

MOMBASA

APPEAL NO. E 129 OF 2024

JANET WAKESHO MWASI.....

APPELLANT

VERSUS

NJIMA MOMBASA PHAMACEUTICALS LTD.....

RESPONDENT

*(Being an appeal against the Judgment delivered on 2<sup>nd</sup>  
November 2023 by Hon. J. B. Kalo (C.M) in Mombasa CMELRC  
No. E 0778 of 2021]*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated 10<sup>th</sup> November 2024, the Appellant challenges the Judgment and Decree of the Learned Principal Magistrate in the cause mentioned above, on the principal grounds that he erred in law and fact:

[a] When he entered judgment in favour of the Respondent.

[b] By awarding the Respondent an exorbitantly high award under the head of unfair termination.

[c]. When he concluded that the Respondent was entitled to a house allowance.

[d] When he concluded that the Respondent was unfairly terminated despite the evidence produced by the Appellant.

[e] When he failed to properly scrutinise and evaluate the evidence tendered and correctly relate the same to the case law cited, and thereby failed to arrive at a just and reasonable assessment on the issue of house allowance.

2. The Appellant consequently seeks that: -

1) This Appeal is allowed.

2) That the Judgment of the subordinate Court be set aside, and in place thereof allow the Appellant's Counterclaim against the Respondent.

3) The costs of this Appeal are to be awarded to the Appellant.

3. This appeal was canvassed by way of written submissions.

## **The case before the Trial Court**

4. The Respondent's case was that she first came into the employment of the Appellant on 17th November 2018, and was serving as a Store Assistant at the time of termination.
5. Sometime in March 2021, the Appellant unlawfully terminated her services without any prior notice and without following the laid down procedure. As such, it acted in breach of Articles 41 and 47[1] of the Constitution of Kenya, and ILO Convention 158.
6. After the termination, the Appellant failed and or neglected to pay him his terminal benefits, and issue him with a certificate of service, as required by the law.
7. She asserted that by reason of the premises, she was entitled to;
  - a. One month's salary in lieu of notice, KShs. 12,700.
  - b. Leave pay for 3 years [ 21 days x3yrs x488.46], KShs. 30,773.
  - c. Redundancy [15 days x3 years x488. 46], KShs. 14,654.

- d. Years of service [15 days x 3 years x KShs. 488.46],  
KShs. 21,980
  - e. Unpaid public holidays [10 days x 3 years x 488.46],  
KShs. 14,654.
  - f. House allowance [12,700x15%] 1,905 x 26], KShs. 49,  
530.
  - g. Compensation for unfair termination [KShs. 12,700 x  
12 months], KShs. 152,400.
8. The Appellant resisted the Respondent's claim before the trial Court, contending that the Respondent had no cause of action against them and was not entitled to the reliefs she had sought. By way of a counterclaim, they sought;
- a. A declaration that the Claimant was in breach of the Employment Contract signed by her on 17<sup>th</sup> January 2018.
  - b. An order directing the Respondent to pay one month's salary in lieu of notice.
  - c. General damages as this honourable court may deem fit.
  - d. Costs of this suit.

9. At trial, they presented one witness, Lisper Jumwa, their Branch Manager, to testify on their behalf. The witness testified that the Appellant first employed the Respondent on 17<sup>th</sup> January 2018, in the position of Dispatch.
10. In February 2021, the Appellant noted for the second year, anomalies in stocks, every time variance checks [an exercise done to ensure the stocks tally in both the stores and system] were done. In November 2019, the Respondent was issued a warning letter for dispatching incorrect and excessive medicines, which led to the variance. When questioned, she did not provide an explanation.
11. On noting the anomalies, the Management requested the Respondent to step aside to pave the way for investigations. Before the investigations were concluded, the Appellant received a letter from a lawyer alleging that the Respondent's employment had been terminated unlawfully. The Appellant did not terminate her employment. She decided to discontinue it herself.

12. The Appellant absconded from duty, never to report back to work. As a result of her hideous and nefarious acts, the Respondent suffered grievous loss. She committed acts of theft and fraud by removing stock from the system without authority and failing to account for missing stock.

### **The Judgment by the Lower Court.**

13. After hearing the parties on their respective cases, the Learned Trial Magistrate held that the Appellant terminated the Respondent's employment, and unfairly. Further, the Appellant had not sufficiently or at all resisted the reliefs that the Respondent sought. He granted notice pay, compensation for earned but untaken leave days, service pay, unpaid house allowance, and eight months' gross salary as compensation for unfair termination. He dismissed the Appellant's Counterclaim, as in his view, it was unproven.

### **The Appeal.**

14. The Appellant, aggrieved by the decision of the Trial Court, filed the present Appeal on the grounds set out hereinabove.

## **Analysis and Determination**

15. It is now trite that the role of a first Appellate Court is to subject the evidence and material that were placed before the trial Court to fresh scrutiny, allowing it to come to its own independent findings and conclusions. This position was aptly elaborated in the case of **Selle -vs- Associated Motor Boat Co. [1968] EA 123) where** the Court held: -

**“An 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 allowance in this respect. In particular, this court is not necessarily bound to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to**

**estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

16. In **the German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment)** the Court of Appeal held that: -

**“A first appeal is a valuable right of the parties and, unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court’s conscious application of its mind and record findings supported by reasons, on all the issues arising, along with the contentions put forth, and pressed by the parties for the decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact, the**

**appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact, ordinarily, and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."**

17. Bearing in mind its mandate as aforesaid, this Court has carefully considered and analysed the material that was placed before the Learned trial Magistrate, the submissions filed and authorities relied on by the parties, and hold that the grounds can be condensed and justly interrogated and determined under three broad issues, thus, whether the Respondent's employment was unfairly terminated, whether the Respondent was entitled to the

reliefs as granted by lower court, whether the Appellant's Counterclaim was correctly dismissed.

18. Section 47[5] of the Employment Act, 2007, provides for a reverse burden of proof. The employee alleging unfair termination of employment or wrongful dismissal must prove, prima facie, that an unfair termination or wrongful dismissal occurred. It is then that the burden of proof shifts to the employer to demonstrate the reason[s] for the termination or dismissal, and that the termination or dismissal was justified. As will emerge shortly hereunder, the material before the Learned trial Magistrate was ample for a conclusion that the Respondent discharged the burden.
19. It isn't in dispute that at all material times the parties herein were in an employer-employee relationship, and that they separated on or about March 2021. However, there is a dispute as to how the separation occurred. The Appellant asserted that the Respondent deserted duty, whilst the Respondent contended that the Appellant terminated her employment.

20. Having held as I have hereinabove, that the Respondent did discharge his duty under Section 47[5] of the Employment Act, I now turn to consider whether the Appellant did discharge theirs as contemplated under the provision and as was aptly elaborated by the Court of Appeal in the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017]eKLR**, proving the reason for the termination[section 43 of the Employment Act], proving that the reason[s] was fair and valid [ section 45 of the Act], proving that the termination was justified [section 47[5], and that there was conformity with the procedural edicts set out in section 41of the Act.

21. The Appellant asserted in their pleadings before the trial Court that the Respondent absconded from duty. Her employment was not terminated at their initiative. I have evaluated their pleadings, and the evidence adduced before the trial Court, and conclude that the evidence did not establish desertion as the reason why the Respondent's employment came to an end. To be clear, the witness didn't in her evidence allude to absconding

from duty. She testified that the Appellant was asked to step aside, to allow investigations to be conducted against her, only for her to turn and allege through a demand letter by her counsel that she had been unfairly terminated, and as such, she “terminated herself.”

22. In my view, this evidence by the witness was at variance with the pleadings on the aspect of how the separation occurred. Being as such, it is a trite principle of law that nothing would turn on it. The consequence being, the reason, absconding from duty was not proved by any evidence put forth. The Appellant did not discharge their legal burden under section 43. As such, the learned trial Magistrate's conclusion that the termination was unfair was not in error.
23. The Appellant's witness contended that the Respondent was told to step aside to allow investigations to take place. She was not specific about when this incident occurred, and she did not provide any documentary evidence to support her claim. Her evidence, in my view, was so sketchy and unreasonable in the circumstances of

the dispute and the Appellant's defence of desertion of duty.

24. Assuming, for the sake of argument, that the Respondent was instructed to step aside, it was therefore unexpected that, contrary to expectations, she engaged in the "unreasonable" act of issuing a demand letter, unjustifiably asserting that her employment had been terminated unfairly. In such circumstances, would a reasonable employer who firmly believed that the allegation was false not respond through Counsel—who had issued the demand—and clarify the record? Presumably, they would. It defeats logic and reason that the Appellant didn't.

25. Blurred by the position they took, the Appellant did not bother to ensure compliance with the stipulations of section 41 of the Employment Act. This provision serves as the statutory foundation of procedural fairness in cases of employment termination or summary dismissal in Kenya. The procedure outlined in the provision comprises three vital components: notification, hearing, and

consideration. The absence of any one or all of these components in the process leading to termination or dismissal renders the action unfair.

26. It isn't difficult to conclude that the learned trial Magistrate correctly held that there was no conformity with the dictates of procedural fairness. As such, the termination of the Respondent's employment was unfair.
27. It will be remiss of this Court if I do not point out that the evidence by the Respondent that her employment was terminated abruptly without justification was not rebutted.
28. In sum, the Respondent's employment was terminated at the initiative of the Appellant. The termination was both procedurally and substantively unfair.
29. I now consider the Learned Trial Magistrate's decision on the reliefs the Respondent had sought.

30. Section 49[1][c] of the Employment Act authorises the court to grant an employee appropriate compensation for unfair termination of employment or wrongful dismissal. Nevertheless, it is important to emphasise that such authority is exercised at the court's discretion, contingent upon the specific circumstances of each case. The Learned Trial Magistrate awarded the Respondent eight months' gross salary. Considering her length of service, approximately three and a half years —a factor that the learned Magistrate seemingly did not consider —I find the award excessive. Consequently, I set aside the award and instead, grant six months' gross salary, amounting to KShs 76,200.

31. The Appellant's Counsel extensively submitted that the learned trial Magistrate erred in law when he allowed the Respondent's claim under the head, "house allowance", that the award amounted to rewriting a contract for the parties. The submissions did not appreciate the fact that the house allowance is a statutory right for an employee under Section 31 of the Employment Act, and that the corresponding obligation on the employer is to provide

reasonable accommodation or a reasonable allowance to facilitate the employee in securing such accommodation.

32. Then, where there is a dispute regarding whether the employer discharged the obligation, it becomes their duty in the proceedings to adequately demonstrate that the salary earned by the employee included house allowance, or that they consistently provided him with accommodation at all material times. The Court of Appeal decision in *Grain Pro Kenya Inc. Ltd v. Andrew Waithaka Kiragi* [2019] KECA 563 [KLR] is instructive. As correctly held by the learned trial Magistrate, the Appellant didn't place forth any evidence on which it would be held that the Appellant demonstrated this.

33. The Appellant's appeal succeeds to a limited extent, in the upshot. The Learned Trial Magistrate's award of eight months' gross salary for unfair termination is hereby disturbed. In place thereof, I award six months' gross salary, KShs. 76, 200 is granted. As the appeal substantially failed, the Appellant shall bear 60% of the costs.

34. Orders accordingly.

Read Signed and Delivered this 23<sup>rd</sup> Day of October 2025.

---

OCHARO KEBIRA.

JUDGE

ORIGINAL