



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E064 OF 2024

ANNA

AKINYI

OKELLO.....**APPELLANT**

VERSUS

KEDA CERAMICS INTERNATIONAL CO. LTD.....**RESPONDENT**

(Being an appeal from the judgment of Hon. V. Adhiambo delivered on 4th October 2024 in Kisumu CMCELRC No. E001 of 2024)

JUDGMENT

1. Aggrieved by the entire judgment of Hon. V. Adhiambo delivered on **4th October 2024 in Kisumu CMCELRC No. E001 of 2024: Anna Akinyi Okello v Keda Ceramics International Company Limited**, the Appellant filed a

Memorandum of Appeal dated 30th October 2024 raising the following grounds:

- a. That the Learned Magistrate erred in law and fact in treating the evidence and submissions superficially, consequently coming to a wrong conclusion.
- b. That the Trial Magistrate erred in law and fact in arriving at the conclusion that the Respondent had valid reasons to terminate the Appellant's employment.
- c. That the Trial Magistrate erred in law and fact in holding that she had been afforded an opportunity to be heard before the decision to terminate her contract of service.
- d. That the Trial Magistrate erred in law and fact in arriving at the conclusion that she was undeserving of the reliefs sought.
- e. That the Trial Magistrate erred in fact and law in ignoring the principles applicable in awarding damages and the relevant authorities cited in her written submissions.
- f. That the Trial Magistrate erred in fact and law in finding that the Respondent had proved his case on a balance of probability.

g. That the Trial Magistrate erred in law and fact in failing to appreciate sufficiently or at all that the evidence tendered in her favour controverted and rebutted the Respondent's evidence thus lowering the Respondent's probative evidentiary value.

h. That the Trial Magistrate erred in law and fact by awarding the Respondent costs of the suit.

2. On the strength of these grounds the Appellant prayed that the appeal be allowed, the judgment of the trial court be set aside and substituted with an order dismissing it. She also sought costs of the appeal.

3. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant identified the following issues for determination:

- i. Whether her employment was unlawfully terminated, and whether the reasons for termination were fair;
- ii. Whether she was entitled to the reliefs sought;

iii. Who should pay costs and interest of the suit.

5. On the first issue the Appellant submitted that her dismissal from employment was both substantively and procedurally unfair. Regarding the procedure she asserted that it contravened section 41 of the Employment Act and the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**, which stated:

“And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

6. She asserted that the Respondent did not produce any evidence to demonstrate that she was subjected to a disciplinary hearing, neither was there evidence that the concerned suppliers were summoned to the hearing. She also maintained that there was no evidence that she was summoned to a hearing and failed to attend. She relied on the decision in the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR**, which emphasized that even in serious breaches warranting summary dismissal an employer still had to be accorded a hearing under section 41 of the Employment Act. On

substantive justification, she submitted that there was no proof that she received Kshs. 9,500/- from the Respondent's suppliers. She insisted that any money received was on a personal friendship basis unrelated to her employment. In view of the foregoing, she avowed that her termination of employment was unilateral and without any reason hence she was entitled to the Kshs. 480,000/- compensation sought.

7. On the second issue, the Appellant submitted that she is entitled to Kshs. 48,656.50 pay in lieu of notice as no notice was issued prior to termination. She relied on section 35(1) (c) and 36 of the Employment Act. Regarding the Kshs. 611,446/- in underpayments the Appellant submitted that the Respondent had not rebutted them. She cited the (Regulation of wages (General)(Amendment) Order 2018). Concerning compensation for unfair termination she maintained that she was entitled to the maximum 12 months' salary in view of her unlawful termination of employment. She emphasized that the callous manner in which she was dismissed justified the maximum award,

urging the court to be guided by section 45 of the Employment Act.

8. On unpaid public holidays, she submitted that she worked for 12 public holidays between 2022 and 2023 without compensation, entitling her to Kshs. 78,328/- at the rate of Kshs 1,621.88 per day. Equally, for off days she submitted that 53 were pending, and with the daily rate being Kshs. 1,621.88/- she was entitled to a total of Kshs. 85,959.64/-. With respect to leave she maintained that she never proceeded on leave during her employment and was therefore entitled to leave pay for 2022 and 2023 totalling Kshs. 89,656/-. In conclusion, she urged the Court to allow the appeal with costs.

Respondent's Submissions

9. The Respondent submitted at the outset that this being a first appeal, the Court is bound to re-evaluate the evidence afresh in accordance with **Selle & another v Associated Motor Boat Co. Ltd. & others [1968] EA 123 at 126, Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212** and **Peters v Sunday Post Ltd [1958]**

EA 424, while bearing in mind the trial court's advantage of having seen and heard the witnesses. With respect to the issues for determination the Respondent adopted the ones identified by the Appellant. On whether the termination was lawful, it maintained that the dismissal was both substantively and procedurally fair. Concerning substantive justification, the Respondent submitted that the Appellant's conduct of receiving money from suppliers contravened the company's Code of Conduct and constituted gross misconduct under section 44(4)(g) of the Employment Act. It drew attention to the Appellant's own statement in which she acknowledged receiving money from suppliers and even pledging to refund, produced in evidence and found at page 53 and 54 of the record of appeal. For the foregoing reasons it asserted that the trial court correctly held that the Appellant's conduct constituted gross misconduct warranting summary dismissal. Additionally, the Respondent submitted that it had met the burden of proving the reason for termination under section 43 of the Employment Act. It also asserted that the Appellant's conduct went to the core of the employment relationship hence satisfying the test of

reasonableness of the decision to terminate recognised in **CFC Stanbic Bank Ltd v Danson Mwakuwona [2015] eKLR**, **Cooperative Bank of Kenya v Banking Insurance Finance Union (K) [2017] eKLR**, **Thomas Sila Nzivo v Bamburi Cement [2014] eKLR**, and **Francis Nyongesa Kweyu v Eldoret Water & Sanitation Co. Ltd [2017] eKLR**.

10. On procedural fairness, the Respondent submitted that section 41 was fully complied with. It stated that the Appellant was issued with a notice to show cause, responded through her letter dated 2nd August 2023, was invited to and attended a disciplinary hearing where she admitted receiving money, and was thereafter issued with a termination letter dated 8th August 2023 informing her of her right of appeal. The Appellant lodged an appeal, which was dismissed, and subsequently served her notice period until 9th September 2023. It cited **Nicholus Muasya v Framchem Ltd [2012] eKLR**. Regarding the remedies, the Respondent submitted that the Claimant was not entitled to notice pay as she had been issued a notice dated 8th August 2023 and served

during the notice period. It cited section 35 of the Employment Act.

11. On underpayments, it was submitted that the Claimant's role as Purchasing Officer was not among those covered under the Regulation of Wages (General) Order 2021. As for the prayer for compensation for unlawful termination, the Respondent maintained it was not awardable as the termination was lawful. On the claims for unpaid public holidays and off days, the Respondent submitted that the Appellant had not particularized the dates worked. It added that it had produced leave and overtime records signed by the Appellant, and noted that "off days" are not recognized in law. With regard to leave days the Respondent submitted that all leave days due for 2022 and 2023 had been paid, referencing the leave records and bank remittance statements submitted in evidence. In conclusion, the Respondent submitted that the Trial Magistrate correctly applied the law, and therefore prayed that the appeal be dismissed with costs.

Disposition

12. This being a first appeal, I am enjoined to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at my own conclusion. This principle of law was enunciated 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:

"I accept counsel for the respondent's proposition that this court 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."

[Emphasis supplied]

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

14. The termination of an employee must accord with section 41 of the Employment Act. It matters not what the employee is charged with. The Respondent was issued a notice to show cause and she responded by her handwritten letter of 2nd August 2023. In the 2 pages she indicates why the parties she was accused of receiving money from, sent her the money. In the letter she undertook to be a better employee having noted her lack of good judgment may have harmed the reputation of the employer. She was summoned to a hearing on 4th August vide the Respondent's letter of 3rd August 2023 which she acknowledged receipt. She signed the minutes for the disciplinary meeting held and as such cannot be heard to say she was not given a hearing by the Respondent. She therefore was terminated for cause and

with the Respondent having demonstrated she was given the full benefit of the law, the termination is *ipso facto* fair and within the law. As such this appeal is misplaced and is accordingly dismissed. As the Appellant was condemned to costs in the lower court, she will not be saddled with additional costs despite her foolhardy attempt to appeal the decision. Appeal dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Kisumu this 15th day of

December 2025

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