

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

APPEAL NUMBER E011 OF 2023

MARY MWIKALI NZOMO.....APPELLANT

VERSUS

LUKENYA GATEWAY LIMITED.....1ST RESPONDENT

THE LUKENYA GATEWAY2ND RESPONDENT

ANTHONY FUCHAKA.....3RD RESPONDENT

JOHN NJOROGE.....4TH RESPONDENT

EVERLYNE ATIENO OGUNA.....5TH RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. D.Kuto (SPM)
delivered on 11th October 2023 in Mavoko CMEL Suit No. E585 of 2019)*

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. D.Kuto (M) delivered on 11th October 2023 in Mavoko CMEL Suit No. E585 of 2019

between the parties filed a Memorandum of Appeal dated the 18th of October, 2023 seeking the following orders: -

- a) **The appeal be allowed with costs.**
- b) **The entire Judgment and Decree of Mr. D. Kuto (Magistrate) delivered on 11th October 2023 be set aside and the court do make such orders as it may deem appropriate.**
- c) **The costs of this Appeal be awarded to the Appellant.**

GROUND OF THE APPEAL

2. The Honourable Magistrate erred in law and fact by disregarding the Plaintiffs evidence as regards procedure for purchase of goods without any evidence to the contrary by the Defendant.
3. The Honourable Magistrate erred in law and fact by disregarding the Defendants' witness evidence and testimony that the search on staff had been for interns unspecified stolen properties as opposed to bread, bread rolls and tea leaves; thereby failing to reach the finding that there was no allegation or proof of stolen bread, bread rolls or tea leaves.
4. The Honourable Magistrate erred in law and fact by disregarding the Plaintiff's evidence that her job performance for over a decade had been without any disciplinary incident.

5. The Honourable Magistrate erred in law and fact by disregarding the Plaintiff's evidence that the Defendant had not established any allegation or evidence of prior reported loss, unaccounting of, or shortages of bread, bread rolls or tea leaves by the Defendant and thus there could be no allegation of theft against the Plaintiff without proof of loss on the part of the Defendant.
6. The Honourable Magistrate erred in law and fact by finding that the Defendant had followed the procedure for dismissal.
7. The Honourable Magistrate erred in law and fact by finding that the Plaintiff had been issued with notice to show cause.
8. The Honourable Magistrate erred in law and fact by finding that the Plaintiff had been issued with notice to attend a disciplinary hearing.
9. The Honourable Magistrate erred in law and fact by finding that the Defendant had convened a disciplinary hearing which was attended by the Plaintiff and an employee representative.
10. The Honourable Magistrate erred in law and fact by finding that the Defendant had undertaken Plaintiff's dismissal after convening disciplinary meeting and deliberating on the proceedings of the meeting.

11. The Honourable Magistrate erred in law and fact by finding that the Defendant had properly calculated and fully paid the Plaintiff her terminal dues.
12. The Honourable Magistrate erred in law and fact by failing to find that the allegations of theft against the Plaintiff which were maintained up to the time of hearing without any proof thereof were defamatory
13. The Honourable Magistrate erred in law and fact by failing to analyse and/or consider the evidence, testimony and submissions by the Plaintiff.
14. The Honourable Magistrate erred in law and fact by failing to uphold and apply the binding authorities supplied by the Plaintiff and or distinguish them.
15. The Honourable Magistrate erred in law to fault the prayers as pleaded by the Plaintiff despite them being clear, concise and precise as the relief of terminal dues sought are governed by mandatory provisions of the Employment Act.

BACKGROUND TO THE APPEAL

16. The Appellant filed a suit against the Respondents vide a plaint dated 21st August 2019 seeking the following orders: -

- a. A declaration that 1st and 2nd Defendants decision to ask the Plaintiff to keep off work and/or issue letters impliedly and nonspecifically terminating the Plaintiff's employment wrongful, callous, unlawful, arbitrary, illegal, un-procedural, unconscionable, wrongful and uncontractual.
 - b. Reinstatement and payment of accrued salaries from 30th May 2019 till the date of judgment.
 - c. In the alternative to (b) above, full unpaid salary for 11 years until retirement age of 60 years.
 - d. 12 months damages for unlawful, unfair and illegal termination of her employment.
 - e. Accurate calculation and payment of her gratuity payment for 15 years of service.
 - f. Correct calculation and payment of her service payment for 15 years of service.
 - g. General damages for defamatory statements.
 - h. Issuance of service letter.
 - i. Costs of this suit and interest.
 - j. Any further relief as the Court may deem fit.
14. The Appellant filed his verifying affidavit sworn on 21st August 2019, witness statement of even date, list of documents dated 1st August 2019 with the bundle of documents attached, and a list of witnesses dated 21st August 2019.
15. The claim was opposed by the Respondents who entered appearance and filed a statement of defence dated 25th September 2019. They also filed a list of witnesses, list of documents with the bundle of documents attached, and witness statements.

16. In response to the Respondent's statement of defence, the Appellant filed a Reply dated 3rd March 2020.
17. The Appellant's case was heard on the 19th of January 2023 with the Appellant testifying. She relied on her witness statement as her evidence in chief, produced the documents attached to her list of documents, and was cross-examined by counsel for the Respondents Mrs. Wangui.
18. The Respondents' case was heard on 8th June 2023 when DW1 Anthony Fuchaka and DW2 Evelyne Atieno Oguna testified on behalf of the Respondents. They relied on their filed witness statements as their evidence in chief. They were cross-examined by counsel for the Appellant Mr. Odawa.
19. The parties took directions on filing of written submissions after the hearing. The parties complied.
20. The Trial Magistrate Court delivered its judgment on the 11th of October 2023 dismissing the Claimant/Appellant's claim, with an order that each party bears their own costs.

DETERMINATION

21. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

22. In her submissions dated 28th August 2025, the Appellant submitted on the appeal generally.

23. The Respondents identified the following issues for determination in their submissions dated 3rd October 2025:

- i. Whether the Appeal is competent in the absence of a certified copy of the decree.
- ii. Whether the learned Magistrate erred in law and facts by disregarding the Plaintiff's evidence as regards procedure for purchase of goods without any evidence to the contrary by the Defendant.
- iii. Whether the learned Magistrate erred in law and in fact by disregarding the Defendant's witness evidence and testimony that the search on staff had been for interns unspecified stolen properties as opposed to bread, bread rolls and tea leaves, thereby failing to reach a finding that there was no allegation or proof of stolen bread, bread rolls or tea leaves.
- iv. Whether the learned Magistrate erred in law and fact by finding that the Defendant had followed the procedure for dismissal.
- v. Whether the learned Magistrate erred in law and fact by finding that the Defendant had properly calculated and fully paid the Plaintiff her terminal dues.
- vi. Whether the learned Magistrate erred in law and fact by failing to find that the allegations of theft against the Plaintiff which were maintained up to the time of the hearing without any proof thereof were defamatory.

- vii. Whether the learned Magistrate erred in law and in fact by failing to analyse and/or consider the evidence, testimony and submissions by the Plaintiff.
 - viii. Whether the learned Magistrate erred in law to fault the prayers as pleaded by the Plaintiff despite them being clear, concise and precise as the relief of terminal dues sought are governed by mandatory provisions of the Employment Act.
 - ix. Who should bear costs of the Appeal.
24. The court established the issues placed by the parties before it for determination in the appeal to be –
- i. Whether the Appeal is competent in the absence of a certified copy of the Decree.
 - ii. whether the trial court erred fact and law in its finding on the fairness of the termination.
 - iii. whether the trial court erred fact and law in relief sought.

Whether the Appeal is competent in the absence of a certified copy of the decree.

25. On the Decree- it is true it was not filed. Rule 15 of the Employment Labour Relations Court (procedural) Rules provides-“ A memorandum of appeal shall be accompanied by a record of appeal comprising a certified copy of pleadings, the proceedings, any documentary evidence relied on, and the judgment, ruling, decision, order, decree or award appealed against” section 20 Employment Labour Relations Court Act prohibits the court from deciding cases on technicality. The court, while appreciating the authorities cited, finds that the judgment was sufficient to disclose the issues for the appeal.

Whether the trial court erred fact and law in its finding on the fairness of the termination.

26. The grounds of appeal were as follows –

- a) The Honourable Magistrate erred in law and fact by disregarding the Plaintiffs evidence as regards procedure for purchase of goods without any evidence to the contrary by the Defendant.
- b) The Honourable Magistrate erred in law and fact by disregarding the Defendants’ witness evidence and testimony that the search on staff had been for interns unspecified stolen properties as opposed to bread, bread rolls and tea leaves; thereby failing to reach the finding that there was no allegation or proof of stolen bread, bread rolls or tea leaves.
- c) The Honourable Magistrate erred in law and fact by disregarding the Plaintiff’s evidence that her job performance for over a decade had been without any disciplinary incident.
- d) The Honourable Magistrate erred in law and fact by disregarding the Plaintiff’s evidence that the Defendant had not established any allegation or evidence of prior reported loss, unaccounting of, or shortages of bread, bread rolls or tea leaves by the Defendant and thus there could be no allegation of theft against the Plaintiff without proof of loss on the part of the Defendant.

- e) The Honourable Magistrate erred in law and fact by finding that the Defendant had followed the procedure for dismissal.
- f) The Honourable Magistrate erred in law and fact by finding that the Plaintiff had been issued with notice to show cause.
- g) The Honourable Magistrate erred in law and fact by finding that the Plaintiff had been issued with notice to attend a disciplinary hearing.
- h) The Honourable Magistrate erred in law and fact by finding that the Defendant had convened a disciplinary hearing which was attended by the Plaintiff and an employee representative.
- i) The Honourable Magistrate erred in law and fact by finding that the Defendant had undertaken Plaintiff's dismissal after convening disciplinary meeting and deliberating on the proceedings of the meeting.

27. On re-evaluation of the pleadings and evidence before the lower court, and the submissions of the parties, I established that the procedure under section 41 of the Employment Act was not completed to wit- "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.’’The respondent witness, Lilian Wairimu Muriuki in statement at paragraph 21 stated-‘‘21. THAT basing on the defence raised by the Plaintiff, the 1st Defendant suspended the Plaintiff in writing for a period of one week starting 23rd May 2019 and directed that she be back to the 1st Defendant's offices on 30th May 2019 to enable the 1st Defendant investigate further on the issue of tealeaves and also make a final decision on the fate of the Plaintiff's employment.’’ Suspension is a right of employer and its purpose is elucidated by the Supreme Court in Dzila v Kwale County Assembly Service Board & 6 others [2025] KESC 33 (KLR) that - ‘‘Suspension was a preliminary step that may or may not end up with removal. It did not necessitate a full disciplinary hearing entailing presentation of evidence, and the hearing of the Clerk on the allegations. The main purpose of a suspension was merely to pave the way for investigations. Upon conclusion of the inquiry, there could be two outcomes: the allegations may be found to be without basis and at that point the clerk may be exonerated; or if sufficient evidence disclosing facts constituting grounds for removal under section 22, was presented, the Clerk may be removed.’’ There was no hearing of the appellant after the suspension. The court found the ground of misconduct was established at the cross-examination of the appellant, who admitted to possessing

goods of the respondent without receipts. The reason for termination was proved as valid (section 43 of the Employment Act). Fairness is not complete without procedural fairness, according to Section 41 of the Employment Act. There was no procedural hearing after the preliminary step of suspension, hence a lack of procedural unfairness in the termination, for which a 1-month notice is awarded.

Whether the trial court erred fact and law in relief sought.

28. The court perused the submissions of the parties. The grounds of appeal were-
- A. The Honourable Magistrate erred in law and fact by finding that the Defendant had properly calculated and fully paid the Plaintiff her terminal dues.
 - B. The Honourable Magistrate erred in law and fact by failing to find that the allegations of theft against the Plaintiff which were maintained up to the time of hearing without any proof thereof were defamatory
 - C. The Honourable Magistrate erred in law and fact by failing to analyse and/or consider the evidence, testimony and submissions by the Plaintiff.
 - D. The Honourable Magistrate erred in law and fact by failing to uphold and apply the binding authorities supplied by the Plaintiff and or distinguish them.

E. The Honourable Magistrate erred in law to fault the prayers as pleaded by the Plaintiff despite them being clear, concise and precise as the relief of terminal dues sought are governed by mandatory provisions of the Employment Act.

29. The appellant sought for the following reliefs before the lower court-

- a) A declaration that 1st and 2nd Defendants decision to ask the Plaintiff to keep off work and/or issue letters impliedly and nonspecifically terminating the Plaintiff's employment wrongful, callous, unlawful, arbitrary, illegal, un-procedural, unconscionable, wrongful and uncontractual.
- b) Reinstatement and payment of accrued salaries from 30th May 2019 till the date of judgment.
- c) In the alternative to (b) above, full unpaid salary for 11 years until retirement age of 60 years.
- d) 12 months damages for unlawful, unfair and illegal termination of her employment.
- e) Accurate calculation and payment of her gratuity payment for 15 years of service.
- f) Correct calculation and payment of her service payment for 15 years of service.
- g) General damages for defamatory statements.
- h) Issuance of service letter.
- i) Costs of this suit and interest.
- j) Any further relief as the Court may deem fit.

30. Compensation for unfair termination – The court upheld the finding of the trial court on substantive fairness and disturbed the finding to hold there was no procedural fairness.

The court awarded 1 month's notice pay for lack of procedural fairness.

31. On the allegation of defamation- the court upheld the trial court's position that there was no proof of defamation for lack of a third-party witness, and further, it was true that the appellant was caught with stolen goods. The court upheld the finding on the validity of the reason for termination. The court upheld the findings on lack of proof of defamation, and the decision of the trial court was grounded on case law hence no basis to disturb the decision of the trial court.

32. On gratuity -it was established the appellant was paid gratuity after termination. The appellant did not provide evidence of any due gratuity.

33. On service pay- the trial court rightly held it was not due to the appellant as she was under NSSF(section 35(6) of the Employment Act).

Conclusion

34. The appeal is allowed. The court holds the termination was tainted for lack of procedural fairness. The Judgment and Decree of the Hon. D.Kuto (SPM) delivered on 11th October 2023 in Mavoko CMEL Suit No. E585 of 2019 is set aside and substituted as follows-

- a. Judgment is entered for the claimant against the respondent for award of compensation equivalent of 1 month notice pay Kshs. 18,975 with interest at court rate from date of judgment.

- b. Certificate of service to issue under section 51 of the Employment Act
- c. Costs of the suit

35. The appellant is awarded costs of the appeal.

36. 30 day stay granted

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH
DAY OF DECEMBER, 2025.**

**J. W. KELL,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – absent

Respondents – Ms. Wangui