

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

APPEAL NO. E221 OF 2024

(Before Hon. Justice Ocharo Kebira)

MEHTA ELECTRICALS LIMITED.....APPELLANT

VERSUS

JUMAA MOHAMED.....RESPONDENT

*(Being an Appeal from the Judgement and Decree of the
Chief Magistrates Court at Mombasa in CMELRC E634 of
2023 by Hon. Rose Ombata, delivered on 9th October
2024.)*

JUDGMENT

Background

1. Alleging that he was at all material times an employee of the Appellant whose employment they terminated summarily without regard to procedural

and substantive fairness, and justice and equity, the Respondent sued them in the above-mentioned suit seeking the following reliefs;

- a) A declaration that termination of the Respondent's employment was unfair and unlawful.
- b) That the Appellant be ordered to pay the Respondent KShs.1,312,776.00
- c) Costs of the claim plus interest thereon at Court rates.

2. The sum forestated was particularised as hereunder;

- a) 12 months' gross salary compensation for unfair and unlawful dismissal.....KShs.367,524.00
- b) Compensation for underpaid salary for 36 months worked (Kshs.30,627 - Kshs.17,982) (Kshs.12,645 x 36 months).....`Kshs.455,220.00
- c) Notice pay in lieu.....Kshs.30,627.00

d) Service pay (15,313.50 x 10 years)
.....Kshs.153,135.00

e) Accrued Annual leave for 10 years
(Kshs.30,627.00 x 10 years).....Kshs.306,270.00

Total.....Kshs.1,312,776.00

3. The Appellant resisted the Respondent's claim through the Memorandum of Response dated 17th November 2023. The Appellant stated that the Respondent was employed on 5th April 2013. They contended that the dismissal of the Respondent was substantively justified and procedurally fair, and asserted that the Respondent was not entitled to the reliefs he had sought.

4. After considering the parties' cases, evidence, and submissions, the learned trial Magistrate issued judgment in favour of the Respondent, mostly

granting the reliefs he sought in his pleadings. The judgment is the subject matter of the instant appeal.

Respondent's case before the trial court

5. The Respondent claimed he worked for the Appellant as a trained electrician and general labourer from March 2013 to September 1, 2023. During this approximately ten-year period, he stated that he performed his duties diligently, maintained a cordial relationship with the Appellant, and had no disciplinary issues.
6. On 26th August 2023, while off duty, he was falsely implicated in an alleged theft after being mentioned by one Delis Juma as an accomplice. Upon reporting back to duty on 29th August 2023, he was directed by his supervisor to report to the office regarding the allegation.

7. The purported theft incident was reported at Nyali Police Station. Subsequently, the Appellant withdrew the complaint against the Respondent; consequently, he was never formally arraigned or charged in any court of law. Nonetheless, his employment was terminated verbally on 1st September 2023 on the same unproven allegation.
8. He asserted that his dismissal was effected without any disciplinary hearing, without being supplied with supporting documents, without being allowed to appear with a witness of his choice for a hearing and without the Labour Officer. The dismissal contravened the provisions of Sections 41, 43, and 44 of the Employment Act, 2007.
9. The Respondent further asserted that his initial and terminal salary was KShs.17,982 per month, which amounted to an underpayment for a trained

electrician who ought to have earned KShs.30,627 under the applicable Regulation of Minimum Wages.

10. He contended that his termination was abrupt, unjust, unlawful, and devoid of substantive and procedural fairness.

Appellant's case in the trial court

11. The Appellant asserted that the Respondent was employed on 5th April 2013 as a General Labourer and that as of August 2023, he earned a consolidated salary of Kshs.17,982. His duty station was Mombasa, where he worked from Monday to Saturday, in accordance with the stipulations of his contract, which also provided for termination upon one month's notice by either party.

12. On 26th August 2023, one Delvis Rumbika was apprehended for theft by Texas Alarms Limited, the firm responsible for site security. Upon admitting to

the misconduct, he named the Respondent as his accomplice.

13. On the same day, the Respondent reported to the office to submit a sick sheet, contrary to internal procedure, which required sick sheets to be submitted at the site. He subsequently informed the site engineer via text that he had been bereaved and would not report to work. He was advised to submit a burial permit and a chief's letter confirming that the deceased was a relative when reporting to work on 28th August 2023.
14. The Respondent instead reported on 29th August 2023 and submitted only a letter from the chief, without providing a burial permit or explaining why he failed to report as earlier instructed.

15. The Appellant maintained that the Respondent's allegation that he was falsely accused was misleading. After the Respondent was implicated in the theft, it was prudent for them to conduct investigations, given the Respondent's adverse mention in connection with the theft.
16. The Appellant further stated that the theft incident was reported to the police by Texas Alarms Limited and not by the Appellant itself.
17. The Appellant contended that the Respondent was not summarily dismissed; rather, he refused to participate in a properly initiated disciplinary procedure after he declined to acknowledge receipt of a show cause letter dated 11th September 2023, and subsequently deserted his duties without providing any explanation.

18. The Appellant stated that the disciplinary hearing was rescheduled to 9th October 2023 and subsequently to 21st October 2023 in good faith, but the Respondent failed to attend on both occasions.
19. The Appellant contended that, at the time of filing the suit, the Respondent remained an employee because the disciplinary proceedings had not been concluded, making the allegation of summary dismissal unfounded.
20. The Appellant further maintained that the Respondent was lawfully engaged at all material times as a General Labourer and was paid in accordance with the applicable minimum wage regulations throughout his employment.
21. It was also the Appellant's case that, upon receipt of demand letters from the Respondent's advocates, their advocates reiterated that the Respondent had

not been terminated and that subsequent fresh demands did not demonstrate good faith on the Respondent's part.

22. The Appellant challenged all monetary claims made by the Respondent on the grounds that there was no termination, that underpayment did not arise, that NSSF contributions were duly remitted, and that no accrued leave is outstanding.

Judgment by the trial court

23. The trial Court distilled three issues for determination, thus: *whether the Respondent was unlawfully and or unfairly terminated from employment; whether the Respondent is entitled to the reliefs sought; and who should bear the cost of the suit.*

24. On the first issue, the trial Court found that the Appellant did not prove the reason for termination

and that the dictates of procedural fairness were adhered to. As such, the termination was unfair.

25. On the reliefs sought, the learned trial Magistrate found that

the Respondent was entitled to notice pay [KShs. 17,982.00]; compensation for earned but unused leave days [KShs.179,820.00]; issuance of a certificate of service in favour of the Respondent; costs and interest.

The Appeal

26. Dissatisfied with the judgment of the lower court, the Appellant filed the instant appeal, setting out the following grounds:

- (i) *The Learned Trial Magistrate erred in law and in fact by finding that the Respondent's employment had been unlawfully and unfairly terminated, despite the Appellant's clear*

averment that the Respondent remained an employee by virtue of the pending disciplinary hearing, which was not concluded owing to the Respondent's deliberate non-attendance at the scheduled disciplinary hearings.

- (ii) The Learned Trial Magistrate erred in law and in fact by failing to appreciate that there was no evidence presented to support the finding that the Respondent's employment had been terminated.*
- (iii) The Learned Trial Magistrate erred in law and in fact by failing to note that the Respondent had been served with a Notice to Show Cause why disciplinary action should not be taken against him, which he received but failed to respond to.*
- (iv) The Learned Trial Magistrate erred in both law and fact by failing to recognise that at the time*

the matter was filed in Court on 13th October 2023, there was still a pending opportunity for the Respondent to appear at a Disciplinary Hearing scheduled for 19th October 2023. The Respondent, however, chose to ignore the invitation and instead proceeded to Court prematurely, rather than addressing the matter through the available internal disciplinary process.

- (v) The Learned Trial Magistrate erred in law and in fact by finding that there was no evidence regarding the Respondent's apprehension by guards from Texas Alarms Limited, and by further finding that there was no evidence regarding the outcome of the police report, whereas;*

- a. *The Respondent, during the hearing, explicitly confirmed that he was apprehended by guards from Texas Alarms Limited, not by any representative of the Appellant Company.*
- b. *Additionally, the Respondent testified that the police report related to the incident was later withdrawn.*
- (vi) *The Learned Trial Magistrate erred in law and in fact by failing to acknowledge that the Appellant's initiation of an internal disciplinary process was independent of any criminal proceedings initiated by the police. The Appellant's decision to commence the disciplinary process was not contingent upon whether the police chose to prosecute or not*

prosecute the report made against the Respondent.

(vii) The Learned Trial Magistrate erred in law and in fact by failing to note that the Respondent was served with a Notice to Show Cause dated 4th September 2023, resulting from the report that had been made to the police, which he received but refused to sign.

(viii) The Learned Magistrate erred in law and in fact in failing to appreciate the evidence tendered by the Appellant during the trial to the effect that the Respondent herein was invited for a disciplinary hearing severally, which he failed to attend.

(ix) The Learned Trial Magistrate erred in law and fact by failing to recognise that the invitations to the disciplinary hearings were adequately

communicated to the Respondent through his advocates, demonstrating the Appellant's clear effort to notify him.

- (x) The Learned Trial Magistrate erred in law and principle in failing to analyse evidence tendered and give reasons for the decision arrived at on each of the items/prayers allowed in the Judgment.*
- (xi) The Learned Trial Magistrate erred in law and in fact by awarding a month's pay in lieu of notice of termination of employment, notwithstanding that the Respondent's employment had not been terminated.*
- (xii) The learned magistrate erred in law and in fact in awarding excessive compensation of 4 months salary when it is clear that the Respondent*

herein had not been terminated from his employment.

(xiii) The Learned Trial Magistrate erred in law and in fact in awarding leave allowance of Kshs 85,754.30 to the Respondent and disregarding and failing to consider the documentary evidence tendered by the Appellant confirming that the Respondent utilized all his leave days while in employment with the Appellant.

(xiv) The Learned Trial Magistrate erred in both law and in fact by disregarding the Appellant's oral and documentary evidence to favour the Appellant.

Appellant's submissions

27. The Appellant submits that the Trial Court erred in finding that the Respondent's employment had been unfairly and unlawfully terminated. The Respondent

prematurely filed the suit before the lower court while disciplinary proceedings against him were ongoing, concerning allegations of theft. A notice to show cause had been issued against him, which he deliberately declined to respond to. Accordingly, he prematurely approached the court without first exhausting internal disciplinary procedures.

28. It is further submitted that, under section 47[5] of the Employment Act, the Respondent was enjoined to prove that his employment was terminated. He did not discharge this burden before the trial Court. Having failed to discharge the burden of proof, the learned trial Magistrate erred in law in holding that his employment was terminated. Further, the Court did not appreciate that the failure to exhaust internal mechanisms before coming to court was fatal to the Respondent's case. To support this point, reliance is

placed on **Idd Salim Mwadele & 19 Others v Kwale International Sugar Company Limited, Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR and Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR.**

29. On the awards, the Appellant submits that the Trial Court erred in granting notice pay. The Respondent did not prove that his employment was terminated; the awards for notice pay and compensation for unfair termination should be set aside.
30. On leave, the Appellant submits that the grant of compensation for earned but unused leave days was unjustified as the material presented before the trial court did not support the same. The leave tendered as evidence clearly indicates that, at separation, the Respondent had no untaken leave days.

31. Further, section 28[4] provides that after 18 months from the date leave days became due, the employee loses any entitlement to them. By dint of this subsection, the Respondent became disentitled to any earned but unutilised leave days or compensation in lieu. To buttress this submission, the Appellant places reliance on the case of **Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR**.

32. While the Appellant does not oppose the issuance of a certificate of service under section 51 of the Employment Act, they challenge the award of costs and interest under section 27(1) of the Civil Procedure Act on the ground that the suit was prematurely filed.

Respondent's submissions

33. The Respondent argues that the Appellant's claim that there was no termination is unfounded. The notice to show cause and the disciplinary hearing invitation were issued only after the Appellant received a demand letter dated September 15, 2023, and after his employment had already been terminated. Additionally, the Appellant's own witness confirmed that the show cause letter was sent after receiving the demand.
34. The Respondent argues that no disciplinary hearing was ever conducted against him. The Appellant had no just and reasonable reason to terminate his employment. As such, the Appellant failed to discharge the legal burden under sections 41, 43 and 45 of the Employment Act.
35. The Respondent relies on the decisions in **Matsesho v Newton (2022)**, **Galgalo Jarso Jillo v**

Agricultural Finance Corporation (2021), Naqvi Syed Qmar v Paramount Bank Limited (2015), Ronald Ongori Gwako v Styroplast Limited (2022), Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014), Kenfreight EA Ltd v Benson K. Nguti (2015), and Janet Nyandiko v Kenya Commercial Bank Limited (2017) to support the position that termination must be justified by a valid reason and flow from a fair process, and that the burden of proof lies with the employer.

36. Regarding remedies, the Respondent asserts that Section 49 of the Employment Act provides for notice pay and compensation for unfair dismissal. It further contends that the trial court correctly exercised its discretion in granting the reliefs it did. Consequently, this Court should uphold the judgment of the trial

Court in its entirety and dismiss the appeal with costs.

Analysis and determination

37. The role of this Court as a first Appellate Court, as it is in this matter, is to reconsider the evidence, evaluate it itself and draw its own conclusions, as though it has reheard the dispute between the parties. However, in so doing, it must be cognizant of the fact that it did not hear or see the parties testify and make due allowance in that regard. See also **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

38. I have thoroughly examined the grounds of appeal, the parties' pleadings, the oral and documentary evidence before the trial court, and the written submissions by Counsel. In my view, this appeal

mainly hinges on two critical issues: (a) whether the Respondent was unfairly dismissed, and (b) whether the Respondent was entitled to the reliefs awarded by the trial magistrate.

Whether the Respondent was wrongfully dismissed

39. It was agreed before the trial Court that the Respondent was employed by the Appellant, earning a gross monthly salary of KShs 17,982 from April 2013 until the separation date mentioned above. However, the circumstances of the separation were highly disputed and are currently before this Court. The Appellant argues that, contrary to the Respondent's claims and the trial Court's findings, they did not dismiss the Respondent; rather, the Respondent's employment was terminated by his own initiative when he abandoned his duties.

40. Before I delve further into the issue, I must first address whether there was indeed a termination of the Respondent's employment in the manner the Respondent explained. I note the Appellant's firm contention that they initiated disciplinary proceedings against the Respondent, but the Respondent deliberately refused to participate in them and seize the opportunity to defend himself against the accusations against him.

41. At this point, it is important to note that where it is apparent that the employer, in a bid to adhere to the statutory dictates of fair termination, genuinely afforded the employee an opportunity to participate in the disciplinary proceedings, but the affected employee deliberately failed to seize the opportunity to in the proceedings, the employee will not be heard

to assert that the termination of his employment, a product of the proceedings, was unfair.

42. The Appellant contended that, through its correspondence dated 6th September 2023, which was served on the Respondent on 11th September 2023, it requested the Respondent to provide an explanation as to why disciplinary action should not be pursued against him on the grounds of theft. Despite the issuance of the said letter and the instruction therein to submit an explanation on or before 9th September 2023, the Respondent failed to do so. His evidence under cross-examination, in my view, clearly admits service of the letter, and that he did not respond to the same.

43. If indeed there had been a verbal termination of his employment prior to the issuance of the letter by the Appellant and its receipt by him, as appears, nothing

could have been easier for him than to respond to the letter and inquire why disciplinary proceedings were being initiated against him when he was no longer their employee. I see no material on record upon which any court would reasonably conclude that the issuance of the show -cause letter was a knee-jerk reaction.

44. Counsel for the Respondent wrote a demand letter dated 15th September, 2023. The letter deliberately failed to mention or question the disciplinary proceedings that had been initiated vide the show cause letter mentioned above, yet, as indicated hereinabove, the same had been received by the Respondent. To this Court, this speaks to a lack of candidness on the part of the Respondent at the material time, which, of course, would have had a prejudicial impact on his case before the trial

Magistrate, had she critically evaluated the documents before her.

45. The fact that there were formally initiated disciplinary proceedings, which I have hereinabove held were not reactionary, duly discounts, and the learned trial Magistrate ought to have seen it as such, the Respondent's bald assertion that he was verbally dismissed on 29th August 2023.

46. In a letter dated 3rd October 2023 from their Counsel, the Appellant clearly denied the claim that the Respondent's employment was terminated and invited him to a disciplinary hearing scheduled for 9th October 2023. During the trial, the Respondent admitted to receiving the letter and that he nevertheless failed to attend the hearing.

47. The Respondent did not deny that, subsequently, he was invited to a disciplinary hearing scheduled for 19th October 2023, which he also failed to attend.

48. From the premises, it should have been obvious to the trial Magistrate that, surprisingly but deliberately, the Respondent avoided pleading these material facts and also chose not to participate in the disciplinary process initiated by the Appellant. Consequently, I am convinced that the Appellant did not terminate the Respondent's employment. There was no valid basis for the claim of wrongful dismissal or unfair termination. The Respondent's case was one fit for dismissal on the ground that he had failed to discharge his burden of proof under section 47[5] of the Employment Act, 2007.

49. Having found as I have hereinabove, I, without hesitation, hold that the learned trial Magistrate did

not have any solid ground to hold that the Respondent's employment was terminated at the initiative of the Appellant and unfairly so.

Whether the Respondent was entitled to the reliefs granted

50. Undoubtedly, the remedial relief pursuant to Section 49[1][c]

of the Employment Act is contingent upon a claim of unfair termination or wrongful summary dismissal. In instances where an employee's claim of unfair termination is unsuccessful, the employee cannot avail themselves of the relief. Accordingly, this Court, having determined that no unfair termination occurred, concludes that the award of compensation for unfair termination was unwarranted.

51. Equally, as the relief for notice pay was hinged on the claim for unfair termination, the award of one month's salary in lieu of notice is hereby set aside.
52. The Respondent asserts that the learned trial Magistrate appropriately awarded him compensation for accrued but unused leave days, given that he did not take any annual leave during his employment with the Appellant. It is crucial to note that the persistent failure to compensate for earned but untaken leave days may constitute a cause of action against the employer, as it may be considered a continuing injury.
53. However, I have carefully considered the Appellant's leave form that was placed before the trial Magistrate and, apparently, neither challenged by the Respondent nor considered by the trial Court. I note that, as of 26th August 2023, the Respondent had nil

unused leave days. The award of compensation for the unutilised leave days was therefore unmerited.

Conclusion

54. In the upshot, the Appellant’s appeal herein succeeds. The learned trial Magistrate’s Judgment is set aside. The Respondent’s suit in the lower court is dismissed. The Respondent shall bear the costs of this appeal.

**READ, SIGNED AND DELIVERED THIS 29TH DAY OF
JANUARY 2026**

**OCHARO KEBIRA
JUDGE**

In the presence of:

Appellant:

Respondent:

ORIGINAL