

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL CAUSE NO. E081 OF 2023

(Before D. K. N. Marete)

JETS BAR AND RESTAURANT.....APPELLANT

AND

MILICENT ASEYO MACHAYO.....RESPONDENT

J U D G M E N T

This matter is originated by way of a Memorandum of Appeal dated 25th May, 2023 in Milimani Chief Magistrate's Court ELRC Cause No. E1031 of 2020. In this, the trial court found that the Respondent, Milicent Aseyo Machayo, had been unfairly terminated from employment and awarded her a total principal sum of Kshs. 235,395.18 together with interest and costs.

The Respondent was employed by the Appellant as a steward, cleaner and general labourer with effect from 1st January 2018 at a consolidated monthly salary of Kshs. 11,500. Her employment was brought to an end on 23rd January 2020. She thereafter filed a claim before the Chief Magistrate's Court seeking, *inter alia* that her dismissal was unfair and unlawful and an award of terminal benefits, notice pay, compensation, public holiday pay, annual leave pay, service pay and salary for January, 2020.

The grounds of appeal come out as follows;

- i) That the trial court erred in law and in fact by finding that the Respondent was unlawfully terminated;
- ii) The trial court erred in law and in fact by failing to acknowledge that the dismissal was a lawful summary dismissal under Section 44 of the Employment Act, 2007;
- iii) That the trial court erred in law and in fact by awarding compensation for unlawful termination.
- iv) The trial court erred in law and in fact by awarding all heads of claim without proper justification.
- v) The trial court erred in law and in fact by proceeding on erroneous calculations in respect of underpayments, annual leave, public holidays, and service pay.
- vi) The trial court erred in law and in fact by accepting the uncorroborated evidence of the Respondent to arrive at the impugned decision.

The Appellant prayed as follows:

- a) *This appeal against the said decisions be allowed.*
- b) *The decision of the Honourable and Learned Magistrate dated 19th May, 2023 be set aside on its entirety.*
- c) *Costs of the lower court and of the appeal be borne by the Respondent.*
- d) *That this Honourable court do issue such orders and directions as it may deem fit and just to grant to meet the ends of justice.*

The Respondent filed a Memorandum of Claim dated 22nd June 2020 before the Chief Magistrate's Court. The claim was accompanied by a verifying affidavit, a list of witnesses, a witness statement, and a list of documents. Upon service of the claim and summons, the Appellant, through Osero & Company Advocates, filed a Memorandum of Appearance and a Response to the Memorandum of Claim, together with a List of Witnesses, a Witness Statement of Patricia Musimba, and a List of Documents with supporting documents. These appear at pages 23 to 68 of the Record of Appeal. In the Response, the Appellant expressly denied all allegations of unfair termination and pleaded that the Respondent had been lawfully summarily dismissed after being issued with warning letters and having persisted in gross misconduct.

The record of proceedings shows that the case was actively conducted through several mention dates. On 17th November 2021, counsel holding brief for Osero & Company Advocates appeared for the Appellant and confirmed compliance with directions. On 15th February 2022, Miss Waswa holding brief for Osero appeared for the Appellant and the matter was adjourned at the Appellant's instance. On 11th October 2022, an advocate holding brief for the Appellant appeared, indicated the matter was for hearing but that the Appellant's advocate had been unable to reach his client, and an adjournment was granted with the hearing fixed by consent for 21st February 2023.

When the matter came up for hearing on 21st February 2023, Mr. Rakoro appeared for the Respondent. No advocate appeared for the Appellant. The court proceeded to hear the Respondent's evidence *ex parte*. The Respondent testified, adopted her witness statement dated 22nd June 2020 as her evidence in chief, and produced her documentary exhibits. The

Respondent's case was then closed, submissions were filed, and judgment was delivered on 19th May, 2023.

At judgment, the trial court noted that the Respondent had testified and produced her documents, and that the Appellant had not attended the hearing and had not availed witnesses to testify. In buttressing their case, the Appellant sought to rely on the authority of **Josephine M. Ndungu & Others v Plan International Inc [2019] eKLR**, where the court observed that the Respondent had established a *prima facie* case of unfair termination which was not rebutted by the Appellant. The magistrate awarded a total of Kshs. 235,395.18 comprising: salary for January 2020 Kshs. 15,608.83 one month's salary in lieu of notice Kshs. 15,608.83, public holidays for 23 days, Kshs. 13,807.59, annual leave for 42 days, Kshs. 25,213.86 service pay at 15 days x 2 years, Kshs. 15,608.83 underpayments Kshs. 102,720.75 and compensation of 3 months' gross salary, Kshs. 46,826.49 together with interest and costs.

This Court sits as the first appellate court as such, the duty of the first appellate court is well settled in **Selle and Another v Associated Motor Boat Company Ltd and Others [1968] EA 123**, where the court restated the applicable principles: the appellate 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 that respect. This Court is guided by those principles.

The issues for determination therefore are;

1. Whether the Appellant duly entered appearance in the lower court such that the learned magistrate erred in characterising the proceedings as *ex parte*.
2. Whether the dismissal of the Respondent was substantively justified and procedurally fair within the meaning of the Employment Act 2007.
3. Who bears the costs of this appeal.

The 1st issue for determination is whether the Appellant duly entered appearance in the lower court. The record before this Court reveals, at pages 23 to 68 of the Record of Appeal, that the Appellant filed a Memorandum of Appearance and a substantive Response to the Memorandum of Claim through Osero & Company Advocates. Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires a party served with a statement of claim who intends to respond to enter appearance and file and serve a response within twenty-eight days from the date of service. The Appellant plainly complied with that requirement. Its advocates further appeared through agents at multiple mention dates on 17th November 2021, 15th February 2022, and 11th October 2022, confirming active participation in the proceedings. This Court finds and holds that the Appellant duly entered appearance and filed appropriate pleadings in the lower court. The learned magistrate erred in characterising the proceedings as wholly *ex parte*. The 1st issue is answered in favour of the Appellant.

The 2nd issue for determination is whether the dismissal of the Respondent was substantively justified and procedurally fair. The finding on the 1st issue does not determine the outcome of the appeal because this court must confront a critical evidential question: what weight, if any,

attaches to the documents filed by the Appellant in the lower court, given that the Appellant did not attend the hearing on 21st February 2023 and called no witness to produce those documents.

The Court of Appeal addressed this question in the authority of **Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] KECA 334 (KLR)**, where it held that any document filed and or marked for identification passes through three stages before it is held proved or disproved. At the first stage the document is on file but does not form part of the judicial record. At the second stage the document is tendered or produced as an exhibit by a party and admitted by the court, at which point it becomes part of the judicial record and constitutes evidence. At the third stage the court applies its judicial mind to its relevance and veracity. The Court of Appeal held that a document is not proved merely because it has been filed or marked for identification; it must be produced through a competent witness who tenders it as an exhibit.

This principle was applied in the context of this Court in the authority of **Chepkemoi v Maasai Mara University (Cause E001 of 2020) [2024] KEELRC 774 (KLR)** where the court held that documents filed in court do not become evidence unless produced by consent or through a competent witness and that what becomes evidence is what a witness states in court, subjected to cross-examination.

Applying these principles to the present case, the Appellant filed a bundle of documents in the lower court including warning letters and a termination letter. However, the Appellant failed to attend the hearing on 21st February 2023 and called no witness to produce or tender any of those documents as exhibits. Those documents therefore remained at the first stage in **Mwige v**

Kiguta, they were on the file but never crossed into the judicial record as evidence. They were never produced through a competent witness and were never tendered or admitted as exhibits. They accordingly carry no evidential weight or value.

The Respondent by contrast, testified in person on 21st February 2023, adopted her witness statement, and produced her documents as exhibits. Her testimony was that she was employed from 1st January 2018 and that she worked without a housing allowance, without statutory deductions, and without annual leave. Their further testimony is that on 23rd January 2020 the Manager verbally instructed her not to return to work; that she was never issued a show-cause notice or given a disciplinary hearing and that she proceeded to the Labour Office on 25th January 2020, whereupon conciliation letters were dispatched on 27th January 2020, 3rd February 2020, 12th February 2020, and 19th February 2020, all of which the Appellant ignored.

Section 43(1) of the Employment Act, 2007 requires an employer in any claim arising from termination to prove the reason or reasons for the termination. Section 45(1) provides that a termination is unfair if the employer cannot prove that the reason is valid. Section 47(5) places the burden of proving the fairness of the termination on the employer. The Appellant has adduced no evidence before the lower court or before this Court. The Respondent's *prima facie* case, established by her uncontroverted oral evidence and documentary exhibits, was not rebutted. The learned magistrate's finding of unfair termination was therefore correct and this Court, having re-evaluated the evidence on the full record, reaches the same conclusion. The 2nd issue is answered accordingly, the dismissal of the Respondent was not substantively justified and was not procedurally fair.

On the quantum of the award, the Appellant challenged the calculations in respect of underpayments, annual leave, public holidays, and service pay. However, the Appellant having called no evidence in support of any alternative computation and the Respondent's evidence on the applicable rates and entitlements having gone uncontested, there is no basis upon which this Court can interfere with the trial court's calculations. The award of Kshs. 235,395.18 together with interest and costs stands.

The 3rd issue is one as to costs. The appeal has not succeeded. The Appellant shall bear the costs of this appeal.

I am therefore inclined to dismiss the appeal and order as follows;

- i) The judgment and decree of the Chief Magistrate's Court at Nairobi dated and delivered on 19th May, 2023 in ELRC Cause No. E1031 of 2020 is hereby upheld and affirmed in its entirety.
- ii) The Appellant shall bear the costs at the lower court and of this appeal.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete

JUDGE

Appearances:

1. Mr. Omagwa holding brief for Osoro instructed by Osoro & Co. Advocates for the Appellant
2. Mr. Rakoro instructed by Rakoro & Co. Advocates for the Respondent.