

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT  
ELDORET**

**ELRC APPEAL NO. E001 OF 2024**

*(Before Hon. Lady Justice Maureen Onyango)*

**KEN-KNIT KENYA LIMITED .....**

**APPELLANT**

**VERSUS**

**MARTIN BARASA NYEGENYE .....**

**RESPONDENT**

*(Being an appeal from the Judgment of the Employment and Labour Relations court delivered on 29<sup>th</sup> November, 2023 in Eldoret CMELRC CAUSE NO. No. E111 of 2023 MARTIN BARASA NYEGENYE V KEN KNIT (KENYA) LTD)*

**JUDGMENT**

1. The Appellant herein was the Respondent in Eldoret CMELRC No. E111 of 2023, in which the Respondent (then Claimant) filed suit via a Statement of Claim dated 14<sup>th</sup> September 2022, seeking payment of terminal dues following the termination of his employment which he termed unfair.
2. After hearing the parties, the trial court delivered judgment on 29<sup>th</sup> November 2023 in favour of the Claimant and awarded the Claimant Kshs. 166,551 on account of one

months' salary in lieu of notice and compensation equivalent to 6 months' salary. The Claimant was also awarded costs and interest.

3. Dissatisfied with the judgment, the Appellant filed the instant appeal via a Memorandum of Appeal dated 11<sup>th</sup> January, 2024 on the following grounds:

a. The learned Magistrate erred in fact and in law by declaring that the claimant's termination was unfair despite the fact that the respondent produced all evidence showing that the termination was fair and in accordance with all the applicable laws.

b. The learned Magistrate erred in law and in facts by awarding the claimant Kshs.23,793/= salary in lieu of one month notice despite the respondent producing evidence to show the claimant was paid the said salary in full and the claimant himself admitted to have received the notice pay.

c. The learned Magistrate erred in law and in fact by awarding the claimant Compensation for unfair termination to the tune of Kshs. 142,000/= despite there being no legal basis for the same.

- d. The learned Magistrate erred in law and in fact in failing to appreciate the evidence by the appellant by awarding the Claimant a sum Kshs. 166,551/= having not discharge his burden proof as required in law thereby leading to miscarriage of justice.
  - e. The learned judge erred in law and in fact by failing to consider the Respondent's evidence in deciding the case.
  - f. The learned judge erred in fact and in law by awarding the claimant costs of the suit reason being the claimant's suit ought to have been dismissed.
4. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 8<sup>th</sup> December 2025 while the Respondent's submissions are dated 21<sup>st</sup> January 2026.

### **Analysis**

5. This being a first appeal, this Court is guided by the principles espoused in ***Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123***, namely, to re-evaluate and re-examine the evidence adduced before the trial court

and arrive at its own independent conclusions while bearing in mind that it did not have the opportunity to see or hear the witnesses testify.

6. Vide a Memorandum of Claim dated 14<sup>th</sup> September 2022, the Claimant averred that he was employed by the Respondent as a machine operator in knitting department. That in the year 2016 he was promoted to be in charge of the cutting section, a position he held until he was summarily dismissed on 12<sup>th</sup> July, 2022. His last salary was Kshs. 23,793 per month.
7. The Claimant contended that the termination of his employment was without reason, illegal, unfair and unlawful for offending the provisions of section 45(2) and 43(1) of the Employment Act. He further averred that the Respondent did not act in accordance with the principles and tenets of justice, equity and fair procedure, that the same was tainted by illegality and was in breach of mandatory provisions of the Act.
8. The Claimant identified the particulars of illegality to be:
  - a. The termination was contrary to the rules of natural justice generally.

- b. The reasons for terminating the Claimant's service were never given to him.
  - c. The termination was without due procedure.
  - d. The respondent did not give the claimant the reason for his termination
  - e. No notice of termination was ever given to the claimant.
9. The Claimant further averred that the termination of his employment violated his right to fair labour practice under Article 41 of the Constitution of Kenya 2010.
10. The Claimant prayed for payment of his terminal benefits which he tabulated as hereunder: -
- i. One month pay in lieu of notice      Kshs. 23,793
  - ii. Sum of Kshs 285,516 being compensation of 12 months pursuant to section 49(1)(c) of the Employment Act
  - iii. Gratuity pay at 21 days for every year of service  
(Kshs. 793 x 21 days x 16 years) =266,448
- Total Kshs. 575,757**
11. Consequently, the Claimants prayed for the following reliefs:
- a. A declaration that the Claimant's service were unprocedurally, unlawfully and unfairly terminated and in

the circumstances the claimant is entitle to compensation of his dues for the unfair termination.

b. Payment of the Respondent of the sum of Kshs. Five hundred and seventy five thousand, seven hundred and fifty seven shillings only, (Kshs. 575,757 as pleaded in paragraph 9 herein above.

c. The Respondent be compelled to pay the Claimant for the unpaid travelling allowance.

d. The Responded be compelled to issue a Certificate of Service to the Claimant as per the mandatory Provisions of Section 51 of the Employment Act, 2007.

e. Costs and interest of this suit.

f. Any other relief(s) this Honourable Court my deem jus and fit to grant.

12. The Appellant, who was the Respondent in the trial court, filed a Memorandum of Response dated 17<sup>th</sup> October 2022 in which it denied the Claimants' averments and maintained that the Claimant was dismissed for committing atrocities against the Appellant as evidenced by the warning letters issued to him, that the Appellant offered him one months' salary in lieu of notice and certificate of service which he refused to take.

13. On the prayer for gratuity, the Appellant averred that the Respondent was a member of its pension scheme and was not entitled to gratuity.
14. The Appellant prayed that the suit be dismissed with costs.

### **Evidence**

15. At trial, the Claimant testified as PW1 and adopted his witness statement dated 14<sup>th</sup> September 2022 as his evidence in chief. He also adopted his bundle of documents dated 14<sup>th</sup> September, 2022 consisting of 2 documents, Ex 1 and 2. He testified that he was sacked without notice, that he worked for 16 years for the Respondent and had no disciplinary issues other than one incident when he had taken his child to school and had called and informed his immediate supervisor. He testified that he was seeking gratuity and notice.
16. Under cross examination the Respondent testified that in his witness statement he stated that he was sacked because of reduced work which was not true.
17. In re-examination he stated he was not paid his retirement package and leave allowance upon retirement. He urged the

Court to grant the reliefs he sought in the Memorandum of Claim.

18. The Respondent called two witnesses. Its Human Resource Manager, Rebecca Cheluget, testified as RW1. She adopted her witness statement dated 28<sup>th</sup> March, 2023 as her evidence in chief, and the bundle of documents filed on behalf of the Respondent.
19. RW1 testified that the Respondent left employment on 12<sup>th</sup> July, 2022. That the Respondent was served with notice but did not sign since he wanted to think about it. She further testified that the Respondent was a habitual absentee and had been issued with several warning letters copies of which had been availed to the court. She testified that the Respondent was served with one-month improvement notice but did not improve. That he was removed after a report was filed.
20. Under cross examination the witness stated that the Respondent was served with 8 warning letters and 3 improvement notices. Further, that the union representative was informed on phone.

21. RW2 Henry Kipngetich testified that he was the Chief Shop Steward of the union and represented employees' interests. He stated that he witnessed the warning letters being issued to the Respondent and the Respondent asked for time to think about it before he could sign.
22. Under cross examination RW2 stated that he was called to witness the service of the termination letter.
23. Upon considering the evidence, the trial court delivered its judgment on 29<sup>th</sup> November, 2023 in which it found that the termination of the Respondent's employment was procedurally flawed and awarded him pay in lieu of notice and compensation of 6 months' salary. The court dismissed the other prayers on the basis that they had not been proved.

### **Appellant's submissions**

24. In the Appellant submissions dated 12<sup>th</sup> November, 2025, the issues for determination in the appeal are identified to be:
  - a. Whether the Appellant satisfied that the reason for the dismissal was valid and fair
  - b. Whether the Appellant followed a fair procedure

c. Whether the Respondent is entitled to the reliefs awarded.

25. The Appellant submitted that the reason for dismissal of the Respondent was that throughout his tenure of employment he absented himself without permission on numerous occasions and was therefore unreliable. Further, that he was given ample opportunity to improve on his performance but failed. That in all the warning letters issued to the Respondent he was informed that the Appellant contemplated taking serious disciplinary action against him including termination of his employment should he not improve his performance.
26. The Appellant submits that before the termination of the Respondent's employment he was put on a 3 month performance improvement plan but did not show any improvement on productivity.
27. The Appellant submitted that the Respondent was paid all his dues including salary for days worked, leave dues, pay in lieu of notice, which was in addition to serving a one-month notice, hence the Respondent is not entitled to any of the prayers sought in his claim or any of the monies awarded by the trial court.

28. The Appellant prayed that the court finds the claim had no merit and should be dismissed with costs.

### **The Respondents' submissions**

29. In the submissions dated 15<sup>th</sup> December, 2025 the Respondent submitted that the Appellant did not seek any reliefs in the appeal and the same ought to be dismissed with costs.

30. The Respondent submitted that the duty of a court on a first appeal was enumerated in **Salle & Another v Associated Motor Boat Co. Limited & others [1968] E.A. 123 and Peter v Sunday (1958) E.A. 424 and Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.**

31. That in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR** the court opined:

*“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 allowances in this respect.”*

It is submitted that the first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions of its own bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. That in a first appeal the whole case is open to rehearing and to reverse or affirm the findings of the trial court on both facts and law.

32. It is submitted for the Respondent that he was not given a hearing as envisaged in section 41 of the Employment Act. That he was advised to collect his dues at the end of a one month notice. It is submitted that there was further no evidence that the Respondent was ever served with the notice letter.
33. It is submitted that section 44(2) provides that *“no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”*

34. The Respondent submits that in the case of **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** the court held that disputes of summary dismissal will always be subjected to the test of section 41 of the Act whenever an employee disputes and claims that the circumstances of the case did not give themselves to reasons of gross misconduct.
35. It was further submitted for the Respondent that the burden of proof in section 47(5) provides that
- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”*
36. It was submitted for the Respondent that the trial court did not err in its findings that was based on the evidence adduced before it and the law. The Respondent prayed that the appeal be dismissed with costs.

## **Determination**

37. Having carefully considered the Record of Appeal and the submissions by both parties, the issue that falls for determination is whether the trial court erred in finding that the Respondent was unfairly dismissed and in awarding him compensation and pay in lieu of notice.
38. According to the Appellant, the summary dismissal of the Respondent was in accordance with the law. The Appellant's case is that the Respondent was issued with several warning letters for absenteeism, placed on a 3-month performance improvement plan but did not show any improvement. He was then issued with one month's notice of termination at the end of which he was dismissed from service.
39. Section 41 of the Employment Act provides for the procedure for termination of employment. The section provides:

*41. Notification and hearing before termination on grounds of misconduct*

*(1) 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.*

40. Further, section 43 provides that:

*43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (*

*2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the*

*contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

41. The Respondent's summary dismissal letter reads as follows:

*Ken-Knit (Kenya) Ltd*

*P.O Box 142 -30100*

*ELDORET*

*12<sup>th</sup> July, 2022*

*Mr. Martin Barasa Nyegenye*

*STAFF,*

*KEN-Knit (Kenya)LTD*

*Eldoret*

*Dear Sir/Madam*

*We regret that inspite of warning you in the past and opportunity allowed to you to improve your efficiency in terms of productivity as well as carrying out management orders, no significant improvement is observed.*

*As a result we have no alternative but to give you one month's notice of termination of your service.*

*Please arrange to collect all your dues at the expiry of the notice.*

*Kindly sign and return to us one copy of this letter so as to signify the receipt of the letter.*

*Your faithfully,*

*For: Ken-Knit (Kenya) Ltd*

*Management.*

42. It was observed by Nzioko wa Makau J in **Otiende v Penda Health (K) Limited (Cause E425 of 2023 [2024] KEELRC 2078 (KLR)** that although poor performance is recognized as a ground for termination of employment, before an employee's employment is terminated for this reason, the employer has an obligation to satisfy the requirements of sections 41, 43 and 45 of the Employment Act.
43. In order for an employer to successfully mount poor performance as a ground for termination of employment, the following should be satisfied: -

- a. The employer bears the overall obligation of establishing poor performance as a ground for terminating an employee's contract of service.
- b. Evaluation of an employee's performance can only be conducted against pre-set goals that had been discussed and agreed upon between the employer and the employee.
- c. The pre-set goals must be capable of objective evaluation using agreed instruments of measurement and the goals must be reasonably attainable.
- d. The employer is only entitled to hold an employee as having underperformed if the employee has failed to meet the pre-set goals.
- e. There must be evidence that before the employer took the decision to terminate the employee, the employer had allowed the employee the opportunity to improve to no avail.
- f. The employee must be notified of the accusation of poor performance levelled against her and given an opportunity to respond to it.

44. In the instant case there was no evidence adduced of the areas the employee was required to improve on. There was further no evidence of assessment before or after the performance improvement plan. There was no evidence that there was such a policy in place and more importantly, there was no evidence that the employee was taken through any disciplinary hearing either before being placed on the performance improvement plan or before termination of employment.
45. Section 41(1) of the Employment Act is categorical that “... *an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity ...*” hear the employee. The wording is in mandatory terms. [Emphasis added]
46. The Appellant having not given a hearing to the Respondent, the termination was procedurally unfair.
47. Further, the Appellant having not produced evidence of an assessment policy or evidence of assessment of the Respondent’s performance, there was no proof of valid reason for termination of the Respondent’s employment.

48. For the foregoing reasons I find that the trial court correctly came to the finding that the termination of the Respondent's employment was unfair.
49. On the remedies, it is trite law that appellate courts can only interfere with a trial court's award if it is found to be inordinately high or low, or if the trial judge applied wrong principles, took into account irrelevant factors, left out relevant ones, or misapprehended evidence. [**see Oceanfreight Shipping Company Limited v Oakdale Commodities Limited [1997] KECA 222 (KLR) and Hamisi v Orodhi (Civil Appeal E1089 of 2023) [2025] KEHC 1802 (KLR)(Civ) (12 February 2025) (Judgment)**]
50. In this appeal the Appellant did not seek any prayers. It further did not demonstrate that the award of the trial court was inordinately high or low, or the trial court applied wrong principles, or took into account irrelevant factors, or left out relevant ones, or misapprehended evidence, to warrant this court interfering with the award of the trial court. I thus find no reason to interfere with the same.

51. In the upshot, I find no merit in the appeal and the same is accordingly dismissed with costs to the Respondent both in the appeal and in the lower court.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON**

**THIS 30<sup>TH</sup> DAY OF APRIL, 2026**

**MAUREEN ONYANGO**

**JUDGE**