



**Ima Hauliers Limited v Shibanda (Civil Appeal 273 of 2019)
[2025] KECA 325 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 325 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 273 OF 2019
HM OKWENGU, SG KAIRU & HA OMONDI, JJA
FEBRUARY 21, 2025**

BETWEEN

IMA HAULIERS LIMITED APPELLANT

AND

HASSAN MUSOLO SHIBANDA RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Kisumu written by (Maureen A. Onyango, J.) dated 18th January 2019 and delivered by (M. N. Nduma, J.) on 7th February 2019 in Cause No. 319 of 2013)

JUDGMENT

1. The respondent was employed by the appellant in October 1996 as a mechanic and at the time of the claim, he had been promoted to driving a Fuso Mitsubishi Lorry. The respondent was dismissed vide letter dated 10th May 2013 on the grounds that he had been backlisted by Mumias Sugar Company where he transported sugar cane on behalf of the appellant. At the time of termination, the respondent's salary was Kshs.25,702/- as supported by pay slips produced.
2. The respondent claimed that his termination was without notice and was without compliance of the Collective Bargain Agreement (CBA). He sought amongst other reliefs, a declaration that his termination was unlawful, illegal, and unfair, together with exemplary damages as he could have worked until the age of 55 years, a declaration that he was entitled to terminal dues for the period worked up to 10th May 2013 and payment of 2 month's salary in lieu.
3. The respondent in his testimony informed the trial court that he worked until 10th May, 2013 when he was given a letter of termination after being told that Mumias Sugar Company did not want him on for grounds of theft, yet he had not been charged with the offence of theft or disciplined on grounds of theft nor was he issued with a letter to show cause or to give his defence. Upon cross examination,



the respondent admitted being issued with several warning letters, and that he wrote several letters of apology, albeit upon instruction by the appellant.

4. The appellant admitted summarily dismissing the respondent due to what it termed as consistent and persistent transgressions which had been documented and produced in the form of 14 warning letters to the respondent spanning the years 2005 to June 2012. that the dismissal was on reasonable ground and they adhered to procedural fairness and rules of natural justice.
5. The appellant's witness Peter Nyota informed the trial court that the respondent's services were terminated due to misconduct on 10th May 2013 as he was involved in stealing from Mumias Sugar company, as a result of which he was blacklisted by Mumias Sugar and had also been found with other past cases of gross misconduct, which had resulted in several warning letters being issued to him. This witness confirmed that although the CBA provided for suspension, the appellant was not suspended.
6. In its judgment, the trial court (M. Onyango, J.) noted that the circumstances of the respondents were not disputed and what was left for the court to determine was whether the termination was unfair and the remedies available to the respondent.
7. On the issue of termination and as per the letter for summary dismissal dated 10th May 2013, the learned judge noted that the letter did not state what the respondent had taken from Mumias sugar and who 'these others' were. Further, that there was no evidence that Mumias Sugar carried out investigations nor raised complaints against the respondent. The learned judge also noted that the warning letters produced were never mentioned in the termination letters, as such there was no basis for termination. The learned judge observed that:

“ the grounds for termination. In this case the ground for termination is set out in the letter of summary dismissal as follows:

"To: Date: May 10, 2013

Mr. Hassan Musolo Shibanda Employee No. 024 Re: Summary Dismissal

Investigations by Mumias Sugar Company Limited point to you participating in ferrying, with the help of others; various kinds of to property belonging to Mumias Sugar Company Limited out of their premises without authority. Take note that this constitutes theft.

The management has been left with no: other alternative other than summarily dismiss your services immediate effect. Please arrange to collect your dues, if any, and vacate the company premises with immediate effect.

Signed

Director

Cc The Branch Secretary

Kenya Union of Sugar Plantation Workers, Transporters Branch Shibale

The District Labour Officer Kakamega"1

8. The trial court found that the appellant had failed to prove the reasons for dismissal as required under Section 43 of the [Employment Act](#) which places a burden on the employer to prove that the dismissal was justified.
9. The trial court also found that the appellant as the employer failed to give the employee a hearing as required under section 41 of the Act, thus holding that the respondent was condemned unheard.



10. The learned judge thus declared the summary dismissal of the respondent as unfair and awarded him 2 months salary in lieu of notice at Kshs.51,404/= and maximum compensation of 12 months' salary at Kshs.308,424/= together with costs and interest. The learned judge however declined to award the respondent exemplary damages, on grounds that this was a simple breach of employment contract claim and what he was entitled to under the *Employment Act* was damages in the form of compensation as provided under Section 49 of *Employment Act*.
11. The appellant aggrieved by the decision of the trial court filed its memorandum of appeal challenging the judgment of the Superior Court on 5 grounds which we reproduce verbatim as follows:
- i. The learned trial Judge erred in fact and in law in failing to find that the respondent was summarily dismissed after being accorded the opportunity to respond to the allegations against him and that all procedures were adhered to as required by law.
 - ii. The learned trial Judge misdirected herself in failing to consider and appreciate the documentary evidence contained in the appellant's Memorandum in response to the respondent's Memorandum of Claim.
 - iii. The learned trial Judge erred when she failed to appreciate and consider the content and import of the submissions filed by the appellant.
 - iv. The learned trial Judge erred in failing to find that the respondent was summarily dismissed from employment hence no notice pay was due in line with Sections 44 (1) (3) and (4) of the *Employment Act*.
 - v. The learned trial Judge erred in failing to find and hold that the respondent was procedurally summarily dismissed for gross misconduct in accordance with the provisions of the *Employment Act*.
12. The appellant thus prays that the Appeal be allowed and the orders made by the learned trial Judge in the trial court finding the appellant to have unfairly and unprocedurally dismissed the respondent be set aside.
13. In the written submissions, the appellant has combined ground 1 ,4 & 5, contending that the respondent admitted to having been served with the warning letters on various disciplinary issues, and that the respondent had written apology letters with regards to the disciplinary issues. The appellants rely on the testimony of their witness who testified that the respondent was terminated after engaging in theft of metal at Mumias Sugar where he was delivering cane. The appellant contended that the respondent's actions having been committed out of its premises and at the risk of loss of business, decided to summarily dismiss the respondent as the respondent did not answer satisfactorily to the theft allegations. The appellant argues that the respondent's actions amounted to gross misconduct which justified summary dismissal. The appeal argues that there was reasonable suspicion that the respondent had committed an offence in the line of duty and as such was not entitled to the relief sought for. The appellant also merged grounds 2 & 3, arguing that the trial court misdirected itself in failing to consider the documentary evidence adduced by the appellant.
14. This being a first appeal and as it has been reiterated in several decisions of this court, it is this court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 31 (1) (a) of the Court of Appeal Rules. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.



15. The main issue in this appeal is whether the respondent's termination was lawful and procedural and in compliance with the *Employment Act*. The appellant submits that the respondent was procedurally and legally dismissed in line with section 44(3) and (4)(a-g) of the *Employment Act* which gives an employer power to dismiss an employee summarily where the employee has by his conduct fundamentally breached his obligations arising under the contract of service.

We are referred to provisions of section 44(4) which states that:

- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if-

(a)

(b)

(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly

.....

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property

To fortify its position that the dismissal was warranted, the appellant draws from the case of Jacob Oriando Ochanda vs. Kenya Hospital Association Ltd t/a Nairobi Hospital [2019] eKLR; and reiterates that from the numerous warning letters, it was clear that the respondent was wanting in character.

16. The respondent did not file any submissions.

17. Looking at the trial court's judgement, it is clear from the record that the basis of the respondent's termination was that the respondent was engaged in theft at Mumias Sugar together with others. The respondent was insistent that he was never charged for theft from Mumias Sugar company, nor was he ever invited for a disciplinary hearing. The respondent stated thus:

"I confirm I am bound by the terms of the CBA. Refer to Clause 8 of CBA. Claimant read clause 8(b). An employee

warned twice is liable to summary dismissal. The letter of termination dated 10th May 2013 stated that the grounds for dismissal are that, I stole from Mumias Sugar Company. I used to transport cane to Mumias Sugar Company. According to CBA theft is gross misconduct and the law allows my employer to discipline me for theft."

18. As the trial court noted, and rightly so, there was no evidence of complaint by Mumias Sugar of the alleged theft, nor were the alleged accomplices of the respondent mentioned. It is worth noting that no criminal charges were preferred, and neither was the respondent given a chance to be heard nor any of the said stolen metal found in possession of the respondent, and further no investigations had been carried out by Mumias Sugar. The question then would be, how was the respondent subjected to due



process without being given a chance to be heard? This court is therefore in agreement with the trial court that due process was not followed.

19. Now that it has been established that due process was not followed, what next? The question of whether or not termination is unfair is dependent on the adherence or lack thereof by an employer of the twin requirements of procedure and substantive justification. Adhering to one and contravening the other renders the dismissal wrongful.

20. Section 41 of the *Employment Act* is instructive and states:

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 and the employee shall be entitled to have another employer or union representative of his choice present during this explanation.

21. Sections 43, 45 and 47(5) of the *Employment Act* also requires that an employer must prove that the reasons for dismissal are valid and fair and prove that the grounds are justified.

22. From the record it is apparent that the respondent's employment was terminated without being accorded a fair hearing. The appellants submissions are mere denials. The appellants have not shown that there was a hearing conducted and the respondents invited to defend the show cause notice.

23. This Court in *Co-operative Bank of Kenya Limited vs. Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment) stated:

“that notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.”

24. The evidence on record is clear that the respondent was summarily, dismissed without being given a chance to be heard. The burden was on the appellant to show that the employment was terminated in accordance with fair procedure. The appellant did not discharge this burden. This court is satisfied that indeed the dismissal was unfair, unprocedural and illegal and unconstitutional. The learned judge was right in concluding that the appellant acted unprocedurally and there is no basis for the court to interfere with the judge's finding to that effect. We uphold the finding that the appellant was liable.

25. Turning to the issue of damages awarded, one of the guiding principles for the remedies under section 49 is that damages are awarded to compensate a claimant, and not as a punishment to the employer, but to make good the employees loss.

26. In the case of *Hema Hospital vs. Wilson Makongo Marwa* [2015] eKLR this court adopted with approval the holding of the Labour Court of South Africa in *Le Monde Luggage cc*

t/a Pakwells Petze vs. Commissioner G Dun & Others, Appeal Case No. JA 65/205 held:

“the compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose



of the compensation is to make good the employee's loss and not to punish the employer.”

27. The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act to constitute salary, allowances, notice and compensation capped at a year's gross pay at the time of dismissal. Section 49(4) however goes further and sets out 14 considerations which should be taken into account in deciding the appropriate remedies under 49(1).

28. This Court with respect to section 49, in *Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union* [CA No. 188 of 2014](#) stated:

“our understanding of the act is that the prescribed remedies are discretionary rather than mandatory to be granted on case by case basis...the 13 considerations the court must take into account before determining what remedy is appropriate include the wishes of the employee, circumstances of termination and the extent to which the employee caused / contributed to it, the practicality of reinstatement , employees length of service...etc the court before exercising discretion to determine what remedy to award, the court must be guided by the above comprehensive list of considerations.”

Such discretion must be however exercised judiciously as per this court's holding in *Kenya Revenue Authority & 2 Others vs. Darasa Investments Limited* [2018] eKLR, Civil Appeal No. 24 of 2018.

29. In the instant appeal the learned judge awarded the respondent 2 months' salary in lieu of notice as well as the maximum compensation of Kshs.308,424, being 12 months' salary together with costs and interest. What was the reason for awarding the maximum amount available? Apart from the Mumias incident which was mishandled in terms of procedure, we take note that the respondent seems to have been a problematic worker, and a maximum award sends the wrong message that the court condoned his past conduct which was on record. Indeed, we cannot shut our eyes to the fact that due to his conduct, the appellant was prejudiced as its business with the sugar company was adversely affected. We therefore consider the said damages to be excessive as there is no proper reason forwarded for the compensation to have been given, and reduce the award to a 4 month's pay.

30. For the reasons given we dismiss the appeal on liability, but allow the appeal on damages for compensation to the limited extent of reducing the award on compensation from 12 months' salary to 4 months' salary. Each party shall bear their own costs. .

31. It is so ordered

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

