Kenya Revenue Authority v Mwongela (Civil Appeal E268 of 2022)
[2025] KECA 262 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 262 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E268 OF 2022

SG KAIRU, P NYAMWEYA & LA ACHODE, JJA

FEBRUARY 21, 2025

BETWEEN

KENYA REVENUE AUTHORITY ..... APPELLANT

AND

DAVID MWONGELA ..... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Nairobi delivered by Mbaru J on 31st March 2022 in ELRC Cause No. 719 of 2019)

JUDGMENT

1. This is a first appeal by the Appellant, Kenya Revenue Authority, against the judgment dated 31st March, 2022 delivered by Mbaru J. in the Employment and Labour Relations Court (ELRC) at Nairobi. David Mwongela is the Respondent.

2. The backdrop of the appeal is a Memorandum of Claim dated 29th October, 2019 which the respondent filed claiming that he was in the employment of the Appellant until 8th February, 2016, when he received a letter of suspension attributed to various unfounded allegations. He defended himself against those allegations but on 18th July, 2019 he received a letter unlawfully terminating his employment from 20th June, 2019, without prior communication. He claimed that the suspension lasted over six years, exceeding the 6 months limit allowed by law and the disciplinary process was flawed and discriminatory.

3. The Respondent's claim was for:

    a. A declaration that the Respondent (Appellant) acted illegally.

    b. An order for reinstatement.

    c. An order for compensation for time lost out of employment.

d. General damages, and

e. Costs of the suit.

4. In opposition the Appellant filed a Statement of Response to the Claim and denied the allegations of discrimination raised by the Respondent. The Appellant cited a report that implicated the Respondent in fake customs transit bonds and that following recommendations for disciplinary action, the Appellant issued him with a show cause letter dated 8th February, 2016, and suspended him. The Respondent acknowledged the suspension on 17th February, 2016 and on 25th February 2016, he requested for documents to enable him respond to the accusations. On 26th February, 2016, the Human Resource department began compiling the necessary investigation report.

5. he Respondent requested for reinstatement vide letters dated 8th August, 2016, and 19th September, 2016 respectively, after the court ruled in his favour in CM CR Case No. 268 of 2016 in which he had been charged. Thereafter his advocate wrote a letter dated 8th November, 2016, threatening legal action if the suspension was not lifted. By a letter dated 17th November, 2016, the Appellant replied that the case was under review and meanwhile, they filed appeal No. HCCR Case No. 140 of 2016 in the High Court seeking a retrial. By order of the High Court the Respondent was tried before another magistrate on reduced charges and was acquitted in CM CR Case No. 1125 of 2017.

6. On 31st August, 2018, the internal investigation report was submitted and on 25th March, 2019, the Appellant issued a new "show cause" letter to the Respondent's last known address. The Respondent did not respond. On 21st May, 2019 the Respondent was invited vide the Appellant's internal email system to present oral arguments but he failed to attend. The panel recommended termination of his employment for gross misconduct, citing the *Employment Act*, 2007, and the Appellant's Code of Conduct.

7. The Appellant denied claims of improper investigation and argued that adequate opportunity for defence was provided. They argued that the court lacked jurisdiction to determine the claims of malicious prosecution and demanded strict proof thereof. They asserted that they had lost trust in the Respondent due to the misconduct that led to termination.

8. Upon considering the evidence before her, Mbaru J. entered judgment for the Respondent against the Appellant in the following terms:

a. A declaration that the Claimant’s employment was terminated unlawfully and unfairly.

b. An order for reinstatement back to employment with the Respondent (Appellant), to report to the Commissioner Custom and Border Control and/or Deputy Commissioner HR for deployment.

c. Payment of back salaries owing from 8th February 2016 to date within 30 days if such salaries have not been paid.

d. Cost of the suit.

e. To report back to his position on 4th April 2022 at 8:30 am.

9. Dissatisfied with the ruling, the Appellant filed this appeal alleging that the learned Judge erred in law on several grounds as follows:

i. By failing to consider both factual and legal considerations for reinstatement of an employee,

ii. By failing to appreciate that the remedy of the reinstatement should only be allowed in exceptional circumstances and in particular failed to take into account inter alia the practicability of re-engagement and the circumstance leading to the termination of the respondent's employment.

iii. By failing to appreciate that there was sufficient evidence to prove misconduct on the part of the respondent.

iv. By failing to take into account the principles of making an award of compensation as set out under sections 49 and 50 of the *Employment Act*.

v. By awarding compensation that was excessive without laying a legal basis for awarding back salaries from 8th February 2016 to the date of judgment i.e. 31st March 2022.

vi. By failing to consider the reasons for the termination of the respondent from employment.

vii. By arriving at a decision which was contrary to law, facts, submissions, and authorities tendered before her.

10. The firm of M/s Patricia Leparashao Advocates filed written submissions dated 6th June, 2024, on behalf of the Appellant challenging the decision of the learned judge on three primary grounds. First, that the Judge failed to consider the exceptional circumstances that rendered the reinstatement of the Respondent inappropriate, there being overwhelming evidence of misconduct. Relying on the Court of Appeal decision in Kenya Power & Lighting Co. Ltd v Aggrey Lukorito Wasike [2017] eKLR, counsel contended that reinstatement should only be granted in rare circumstances and that alternative remedies under Section 49 of the *Employment Act* should have been explored. She also cited the case of Kenya Airways Limited v Alex Wainaina Mbugua [2019] eKLR, where this Court set aside an order for reinstatement, emphasizing the need for proportionality in such remedies.

11. Secondly, counsel submitted that the Respondent failed to attend a disciplinary hearing scheduled on 21st May, 2019, without providing proof of efforts to access his work email, thereby undermining his defence.

12. hirdly, counsel contested the award of back salaries amounting to six years for work not done, arguing that this contravenes Section 49(1) of the *Employment Act*, which limits compensation to a maximum of 12 months gross salary. Further that awarding back salaries for such a prolonged period is imprudent and an improper use of public funds.

13. Counsel contended that the Respondent's termination was justified due to gross misconduct, negligence, and a criminal case being brought against him. She referred to the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others [2019] eKLR, where the Court upheld termination in the public interest. She urged the Court to find that the learned Judge's decision was unjust and unfair. That it ought to be set aside and replaced with an order that the Respondent's termination was lawful and the appeal be allowed with costs.

14. The firm of M/s Mutisya & Co. Advocates filed written submissions dated 12th April, 2023 on behalf of the Respondent. They highlighted the unlawful termination by the Appellant and the Respondent's subsequent acquittal on all charges in the criminal case.

15. Counsel argued that the Respondent's employment was terminated because he failed to appear before the KRA disciplinary committee which he was not aware was sitting and that the KRA Human Resource department did not deny this.

He posited that the Respondent was wrongfully arrested and detained following investigations that were not properly conducted to establish whether he was responsible for the alleged crimes. That the entire process was a scheme designed to frustrate and do away with the Respondent from the Appellant's employment.

16. Counsel asserted that the Respondent's case was maliciously instigated, that he was unfairly dismissed from employment and that he was victimized. He stated that the ratio decidendi in their case aligns with that of the case of Parliamentary Service Commission v Christine Mwambua [2008] eKLR, where this Court stated that, while the PSC argued against reinstatement due to operational challenges and suggested damages as an alternative remedy, the Court concluded that reinstatement was the appropriate remedy given the unique circumstances of the case. He urged us to uphold the decision of the trial court and dismiss the appeal with costs.

17. The appeal came before us for plenary hearing on 8th October 2024. Ms. Leparashao learned counsel, appeared for the Appellant and reiterated the filed submissions. She added that the Appellant had obtained a stay and was therefore, not in disobedience of the orders of the court. Further that the Respondent was on half salary, medical care and other allowances while on suspension and in the end he was paid three months' salary in lieu of notice.

18. Mr. Odhiambo Othim appeared for the Respondent and also reiterated the filed submissions. He submitted further that the genesis of this fall out was the bad blood that existed between the Respondent and one Mr. Githii Mburu who was his boss at the time. That Mr. Mburu had since left the job and there was no problem with the Respondent being reinstated to his old position.

19. This being the first appeal, our duty is to consider the submissions of the parties, and to analyze and re-assess the evidence on record and arrive at an independent conclusion as was stated in the case of Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others (2015) eKLR where the Court cited the case of Selle vs. Associated Motor Boat Co. (1968) EA 123 and held as follows; -

> " 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. We have considered the pleadings before us, the rival submissions by the parties, the case law cited and the law and have distilled the following issues for our determination:

    i. Whether the termination of the respondent's employment by the appellant was unfair and unlawful,

    ii. Whether the learned judge erred in reinstating the Respondent, and

    iii. Whether the compensation awarded was excessive.

21. The first issue is whether the termination of the Respondent's employment by the Appellant was unlawful and unfair. Section 45 (1) and (2) of the *Employment Act* bars any employer from terminating the employment of an employee unfairly, and defines unfair termination as follows:

> "(2) A termination of employment by an employer is unfair if the employer fails to prove —
>
> a. 'that the reason for the termination is valid;
>
> b. that the reason for the termination is a fair reason—
>
> i. related to the employee's conduct, capacity, or compatibility; or as follows
>
> ii. based on the operational requirements of the employer; and
>
> c. that the employment was terminated in accordance with fair procedure."
>
> Fair termination must therefore, be justifiable on two fronts. First, that the reason(s) therefor were valid and fair in relation to the employee's conduct, capacity or compatibility based on the operational requirements of the employer. Secondly, that the termination followed fair procedure.

22. By a letter dated 8th February 2016 the Respondent herein received a notice to show cause, why disciplinary action should not be taken against him. The Appellant advised him that it was contemplating taking appropriate disciplinary action against him on grounds of gross misconduct which may lead to dismissal under sections 6.2.2.2., and 6.2.5.9. of the KRA Code of Conduct which provide as follows:

> "6.2.2.2. To directly or indirectly solicit or accept any gift gratuity or consideration or any pecuniary advantage as an inducement or reward from members of the public for any act or omission to do anything in the employee's official capacity or for showing favour or disfavour to any person. And
>
> 6.2.5.9. Failure to comply with statutory requirements, departmental instructions, and court directives within the stipulated timeline without justifiable reasons."

23. In Mombasa C.A.C.A. No. 3 of 2014: CFC Stanbic Bank v. Danson Mwashako Mwakuona [2015] eKLR, the Court of Appeal emphasized the importance of considering an employee's duties and responsibilities when assessing the fairness of their termination. This is particularly relevant in the present case, where the Appellant stated that the Respondent's role involved approving bonds and that it was a critical function with direct implications on the revenue authority.

24. The reasons advanced for the contemplated disciplinary action against the Respondent were that: he had approved a substantial amount of fake customs bonds: the bonds were not entered in the customs bonds movement register: and, he received a sum amounting to Kshs180,000 from one Alex Mutende Nandwa. Consequently, the Appellant argued, it was necessary to act decisively, genuinely believing that there were valid reasons to terminate the Respondent's employment.

25. The employer believed these reasons to be true and we are satisfied that they were valid and related to the employee's conduct, capacity and compatibility based on the operational requirements of the employer. Termination based on these reasons was therefore, justifiable and fair.

26. The more irksome question is whether the termination of the Respondent followed fair procedure. Section 41 (2) of the *Employment Act* provides for notification and hearing before termination on the grounds of misconduct as follows:

> "(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."

27. In the case of Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR, the Court of Appeal stated that:

> ' before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity, or before summarily dismissing an employee, the employer is required to explain to the employee the reason for the intended action in the presence of another employee or a union official'.

28. Similarly, in the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR, this Court stated that:

> 'Even assuming for once that the appellant had a valid and fair reason for terminating the respondent's services, we must go further and interrogate whether the right procedure was followed to determine whether the termination was fair and by the Act. The termination can be held to be unfair if it is proved that the termination procedure was unfair.

29. The import of the foregoing case law is that even if the employer proves the reason(s) for dismissal to be valid and fair and that there was misconduct, failure to prove that the procedure was fair would result in an unfair dismissal.

30. We examined the process leading to the termination of the Respondent for fairness. We note that upon being served with the notice to show cause in the letter dated 8th February 2016 and being suspended, the Respondent, in a letter dated 17th February 2016, requested for copies of: the alleged fake bonds, the bonds movement register for the relevant period, the Mpesa transaction statements, the investigation report and the specimen signature of the signatory for Occidental Insurance for the year 2012. There was no response from the Appellant. The respondent answered the show cause notice without the supporting documents.

31. On 31st August, 2018, the internal investigation report was submitted to the appellant. On 23rd March, 2019, the Appellant issued a new "show cause" letter to the Respondent's last known address but it elicited no response. The Respondent later contended that such a notice issued by the Appellant never reached him for the reason that it was addressed to P. O. box 2611- 00100 Nairobi, located at General Post Office (GPO). His address was P.O box 2611 – 00200 Nairobi, located at the City Square Post Office. The Appellant's own witness testified that the letter was later returned undelivered.

32. The Appellant also sent a letter dated 20th June 2019 to the Respondent, reminding him that he did not submit his written presentation, or appear before the disciplinary committee on 31st May 2019 despite the communication sent to him. The Respondent was eventually terminated from

employment after he failed to appear before the disciplinary committee. There was no mention of a representative that was present for the Respondent during his disciplinary hearing.

33. On the fairness of the procedure leading to the Respondent's termination from employment, the learned Judge rendered herself thus:

> " Even where the employer has a reason(s) found necessary to discipline the employee, the due process must apply, the employer cannot simply be found to state that the employee was of misconduct (sic). The due process demands fair procedure as contemplated under section 41 *Employment Act*.
>
> The matter that the claimant did not receive the show cause notice dated 23rd March 2019 and the invitation to attend disciplinary hearing was addressed but the Respondent opted to go all out to demonstrate that the EMS posting the letter was correct save, the address of posting is clear to the court that it went to a different address other than the one that belongs to the claimant.
>
> The Respondent noting that error ought to have appreciated such fact and retreated to address. To adamantly go all out to defend an erroneous posting of a very crucial notice leading to termination of employment is simply unacceptable."

34. In the end we conclude that the Respondent's termination had procedural lapses and did not pass muster on the procedural fairness, making it an unfair dismissal by the Appellant.

35. Next, we consider whether the learned judge erred in reinstating the Respondent in the Appellant's employment, even as she was right in deciding that the Respondent's dismissal was procedurally unjust in view of statutory provisions.

36. Section 49 of the *Employment Act* provides for the remedies available for wrongful dismissal and unfair termination as follows:

> 1). Where in the opinion of a Labour Officer summary dismissal or termination of a contract of an employee is unjustified, the Labour Officer may recommend to the employer to pay to the employee any or all of the following—
>
> a) .....
>
> b). 'where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of the notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract'

37. Counsel for the Appellant referred to the Court of Appeal decision in Kenya Airways Limited v Aviation & Allied Workers Union Kenya [2014] eKLR, where the Court stated that when trust has irretrievably broken down due to the omission of the claimant, the court would be ill advised to force them to stay together. The Court stated that:

> " ....as correctly observed by the Counsel for the Appeal, KRA is a public body bestowed with the important duty of collecting revenue for running government service which activity must attract public scrutiny. As such, employees of KRA must have the utmost trust and integrity. When trust has irretrievably broken down due to the omission of the

> Respondents, it would be foolhardy to force the employer and employee to stick together. We are in no doubt that the Respondents contributed to the acts leading to their termination as envisaged under Section 49 (4) (b) c, and (k) which leads us to the determination that the termination though flawed due to procedural lapses was lawful and justified "

38. We agree with the foregoing decision that reinstatement is not always the best, or most appropriate remedy for unfair termination, especially when trust between the parties has broken down beyond repair. The Appellant herein genuinely believed that trust between them and Respondent had irretrievably broken down due to the actions of the Respondent and he could not be trusted with the role of revenue collection.

39. In the Court of Appeal case of NYR C.A.C.A. No. 79 of 2016 Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR, the Court rendered itself thus:

> "A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied, or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not commonplace and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute".

40. Reinstatement of an employee is not an automatic remedy in wrongful dismissal cases. It is a rarity to be ordered in exceptional circumstances rather than a common place pronouncement. The appropriateness of reinstatement depends on the specific circumstances of the case. It is a possible remedy but not always the best one. The learned judge did not express herself on the exceptional circumstances that moved her to order for the reinstatement of the Respondent.

41. We find that the learned judge fell into error in reinstating the Respondent and failing to consider other remedies available, or to consider that the relationship between the Appellant and the Respondent was strained.

42. Lastly, we address the question whether the compensation awarded to the Respondent for the unfair termination was excessive. The learned Judge ordered the Respondent to be paid salary owing from 8th February 2016 to date, within 30 days from the date of the judgment if such salaries had not been paid.

43. It was contended for the Appellant that the award of back salaries amounting to six years for work not done, contravenes Section 49(1) of the *Employment Act*, which limits compensation to a maximum of 12 months gross salary. The Respondent on the other hand felt entitled, for the reason that he had been discriminated against by being arrested while other employees accused of signing similar fake bonds were not. That his reputation was damaged in the electronic media.

44. Section 49 provides for remedies for wrongful dismissal and unfair termination as follows:

> 1). Where in the opinion of a Labour Officer summary dismissal or termination of a contract of an employee is unjustified, the Labour Officer may recommend to the employer to pay to the employee any or all of the following—
>
> a .....

b) .....

c) 'the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

45. The Court in The German School Society & another v Ohany & another [2023] KECA 894 (KLR), succinctly set out what the courts ought to consider in determining compensation in suits involving wrongful dismissal thus:

> " Section 50 of the *Employment Act* obliges courts to apply the factors in Section 49 of the Act in determining a complaint or suit involving for wrongful dismissal or unfair termination. Section 49(1) provides as follows:
>
> a. The wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service.
>
> b. Where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the
>
> c. proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; Or
>
> d. The equivalent of a number of months' wages or salary no exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal

46. The discretion of the Court must be exercised judicially in consideration of all relevant factors and in fairness to all parties. Section 50 of the *Employment Act* obliges courFts to take into account the factors in Section 49 (4) of the Act, in determining quantum in a claim for wrongful dismissal or unfair termination, set out in as follows:

> " a) the wishes of the employee.
>
> b. the circumstances in which the termination took place including the extent , if any, to which the employee caused or contributed to the termination; and he practicability of recommending reinstatement or re-engagement.
>
> c. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
>
> d. the employee's length of service with the employer;
>
> b. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
>
> c. the opportunities available to the employee for securing comparable or suitable employment with another employer;
>
> d. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. any expenses reasonably incurred by the employee as a consequence of the termination;

k. any conduct of the employee which to any extent caused or contributed to the termination;

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

m. any compensation including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

47. In The German School Society (supra), and G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR, the Court of Appeal ruled that the compensation of 24 months awarded to the claimants was excessive and contrary to the statutory provisions and reduced it to 12 months' salary, in line with the legal cap established by the *Employment Act*.

48. After a careful analysis of the arguments in this appeal we find that the award of 6 years' salary to the Respondent, who had not worked in all that period was excessive and unjustified. The compensation applicable in the circumstances of this appeal is prescribed under section 49 (1) (c), of the *Employment Act*, being the equivalent of a number of months' wages, or salary not exceeding twelve months, based on the gross monthly wage, or salary of the respondent at the time of dismissal.

49. In conclusion, arising from of the determination of the issues discussed above we find that this appeal partially succeeds to the extent stated in each issue found above. Accordingly we set aside the judgment and decree of the trial court and substitute it with the following orders:

a. A declaration that the Respondent's employment was terminated unlawfully and unfairly.

b. Payment of equivalent of twelve months' salary based on the gross monthly salary of the respondent at the time of dismissal within 90 days if such salaries have not been paid.

c. Parties shall bear their own costs.

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

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

.. JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR