Gogni Rajope Construction Company Limited & another v Omondi (Civil Appeal 321 of 2019) [2025] KECA 161 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 161 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 321 OF 2019

S OLE KANTAI, A ALI-ARONI & LA ACHODE, JJA

FEBRUARY 7, 2025

BETWEEN

GOGNI RAJOPE CONSTRUCTION COMPANY LIMITED ..... 1ST APPELLANT

CEBAUD ENGINEERING SERVICES LIMITED ..... 2ND APPELLANT

AND

CORNEL OTIENO OMONDI ..... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) delivered on 5th October 2018 in ELRC Case No. 865 of 2013)

JUDGMENT

1. To contextualize the dispute, a brief history will suffice. The respondent was engaged as an Assistant Projects Engineer at a gross salary of Kshs. 200,000 per month by a contract of service executed between him and the 1st appellant on 9th January 2012. The contract was for a renewable period of two years, and the payment of his salary and other emoluments were effected through the 2nd appellant, a sister company to the 1st appellant.

   By a letter dated 24th July 2012, the 1st appellant sent him on compulsory leave without purportedly to allow investigations. He contended further that no investigations were conducted, nor was the respondent accorded a hearing before the 1st appellant terminated his services by a letter dated 30th August 2012, claiming that his contract had expired.

2. In a memorandum of claim dated 18th February 2013, the respondent claimed that his contract was unlawfully terminated in breach of contract and against the dictates of the *Employment Act*; he sought to be awarded Kshs. 3,420,790.50 comprising net pay for July 2012 at Kshs. 152,967, net pay for August to 13th February 2013 at Kshs. 2,829,889.50, leave pay for two months at Kshs.

305,934, communication allowance arrears for February, May, June, and July at Kshs. 21,000 and communication allowance for August 2012 to February 2013 at Kshs. 111,000.

3. The appellants, in response, contended that there was a misjoinder of the 2nd respondent in the pleadings in the absence of any privity of contract between it and the respondent. The appellants also pleaded that the respondent was dismissed for lawful and proper reasons, including serious failures, incompetence, negligence, and/or fraudulent acts or omissions causing the appellants' loss; that the acts and omissions constituted gross misconduct; and that before dismissal, the respondent was accorded a chance to defend himself but his response was not satisfactory leading to him being sent on compulsory leave under the 1st appellant's employment policy to pave way for investigations.

4. The appellants further contended that a notice to show cause dated 30th July 2012 was delivered to the respondent asking him to respond to the charges against him within 14 days, but he failed to do so, and hence he was dismissed; that before his dismissal, Eng. Raburu from the appellant's office called the respondent to inquire whether a formal reply had been made when the respondent replied that he was no longer interested in the said employment, having secured alternative employment; further, the 1st appellant admitted retaining dues which would have otherwise been paid to the respondent claiming that the respondent's misconduct and breach of contract led to a massive loss to the 1st appellant.

5. In its determination the trial court was of the view that there existed reasonable grounds to terminate the respondent's services. For instance, the respondent did not deny his absence from the site when the appellant's director made an impromptu visit, failing to inform the director, who was his supervisor, of his unscheduled absence from the site, nor the allegations against him of unauthorized hire of project equipment and failure to compile and file site reports, which all constituted misconduct that would justify termination of the contract.

6. The trial court noted that the respondent was sent on indefinite compulsory leave to allow for investigation and was informed that the outcome of the inquiry would be made known to him in reasonable time. A letter was addressed to the respondent through his postal address number, which he did not deny receiving.

7. The court also noted that the appellants alleged that on 30th July 2012, a letter was issued to the 1st respondent asking him to show cause by 15th August 2012 why his services should not be terminated, listing the charges against him and calling upon him to respond to the allegations. The court further observed that the appellant claimed the letter was delivered to the respondent personally but did not have available proof that it was delivered. More so, the court noted that the respondent denied receiving the same.

8. The trial court found it curious that, by a letter dated 30th August 2012, the 1st appellant purported to terminate the respondent's services with effect from 24 July 2012. The court wondered how the respondent was to show cause why his services should not have been terminated by 15th August 2012, yet his services were terminated on 24th July 2012.

9. The trial court also found that even if the appellant had valid and justifiable reasons for terminating the respondent's contract, the process of termination was flawed, leading to the conclusion that the termination offended the provision of section 41(2) as read together with section 45(2)(c) of the *Employment Act* ("the Act"). The court, therefore, awarded the respondent Kshs. 1,222,146.

10. Aggrieved by the judgment, the appellants in their memorandum of appeal dated 8th July 2019 raised 11 grounds of appeal as follows: that the learned judge misinterpreted the provisions of section 41(2) and section 45(2)(c) of the Act to the detriment of the appellants; failed to make a finding that the provisions of Section 45(3) of the Act barred the respondent from making any claim for unfair

termination against the appellants; failed to make a finding that the respondent was properly issued with sufficient notice by the 1st appellant, which notice was deliberately ignored by the respondent; made a finding condemning the appellants to pay the respondent one month's salary in lieu of notice and 4 months' salary for unfair termination without any basis in law; failed to dismiss the claim by the respondent against the 2nd appellant for mis-joinder; failed to exercise his discretion correctly; failed to find in favour of the appellants and awarded costs of the suit to the respondent as against the appellants without any basis in law.

11. The appellants filed submissions dated 28th March 2024. They distilled the issues for determination to be;

    (a) whether the trial judge misinterpreted and misapplied the provisions of Section 41(2) of the Act and whether the respondent was given a hearing before termination;

    (b) whether the trial judge misinterpreted Section 45(2) of the Act in making the award of Kshs. 800,000 for unfair termination and whether the provisions of Section 45(3) of the Act bars the respondent from claiming unfair termination;

    (c) whether the respondent was entitled to notice pay of Kshs. 200,0 00, leave allowance in the sum of Kshs. 67,307.69, salary days worked in July 2012, and costs.

12. On the first issue, the appellants submit that in their memorandum of defense, they averred that the respondent was given a hearing and that failure by the respondent to file a reply to the defense, the respondent joined issue with the appellant, and the onus shifted to the respondent to prove that the meeting of 23rd July 2012, where he was given a letter sending him on compulsory leave did not take place; that during the trial the respondent admitted that a meeting took place on 23rd July 2012. That, indeed, the respondent was given a full and fair hearing in full compliance with the law.

13. On the second issue, the appellants cited the case of *Kenfreight E. A. Limited vs. Benson K. Nguti, Civil Appeal No. 31 of 2015*, where the court held that an employee who has served for a continuous period of 13 months could not make a claim for unfair termination. They submit further that the respondent was disqualified by law from claiming unfair termination, having worked for only 6 months, yet the court irregularly awarded Kshs. 800,000 as compensation for unfair termination.

14. On whether the respondent was entitled to one month's pay in lieu of notice, the appellants submit that the respondent was issued with a notice to show cause letter dated 30th July 2012, and no rejoinder was made as a reply to the defence to deny that averment that the notice to show cause accorded the respondent 14 days to respond. Since he did not use the opportunity, the appellants had to dismiss him summarily.

15. The appellants further submitted that before the dismissal of the respondent, it was established that the respondent had been employed by Katarsan Construction Company Limited, a fact which the respondent did not deny, which was in breach of the subsisting employment contract with the appellant; that the respondent had failed to respond to the notice to show cause and having secured employment elsewhere when his employment contract was still subsisting with the appellant, he was not entitled to the one month pay.

16. The appellants concede to the relief of Kshs. 154,838.73, the net of one month's salary in lieu of notice, and Kshs. 67,307.69, the salary for days worked and leave allowance, respectively.

17. The respondent did not file written submissions. His counsel made brief oral submissions at the plenary hearing, stating that the termination was unlawful as the procedure for termination was not followed. Secondly, the meeting between the parties with some members of staff present, which

culminated in the respondent being sent on leave, was not properly convened. Further, the respondent never received the alleged show cause letter; no proof of service was provided.

18. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and arrive at an independent conclusion as enunciated 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."

19. Having considered the pleadings before us, the submissions by rival parties, the case law cited, and the law, we discern the issues for our determination to be:

    i. Whether the termination of the respondent by the 1st appellant was unfair and unlawful?

    ii. Whether section 45(3) of the Act is applicable?

    iii. If the answer to (i) above is affirmative, what award should be given to the respondent?

20. The 1st appellant and the respondent entered into a two-year employment contract on the 9th of January 2012, which was to commence on the 13th of February 2012. The respondent was employed as an Assistant Project Engineer and reported to the Project Engineer. Some of the terms of the contract included termination of the contract by giving a one (1) months' notice in writing or payment of one-month salary in lieu; termination by the employer without notice if one is guilty of serious misconduct such as theft or in breach of a provision of the contract, including confidentiality undertakings. The 2nd appellant is described as a sister company to the 1st appellant, and it was confirmed in evidence by RW1 that the two appellants interchanged staff in the execution of the projects and that the respondent was the overall supervisor.

21. In his memorandum of claim dated the 18th of February 2013, filed at the defunct Industrial Court on the 7th June 2013, the respondent's case was that his services were terminated by a letter dated 24th July 2012 without any reasonable or justifiable cause by the 1st appellant. He was initially sent on compulsory leave purportedly to allow investigations on allegations that were ambiguous and unclear and which investigations were never carried out; on the 30th of August 2012, his services were terminated without him being accorded an opportunity to be heard in his defense. He claimed that the appellants' action was unlawful, in breach of the employment contract, and against the dictates of the *Employment Act*. He claimed for:

    i. Net salary for July 2012 Kshs. 152,967

    ii. Net pay for August to February 2013 Kshs. 2,829,889.5

    iii. Leave for 2 months Kshs. 305,934

iv. Communication allowance Kshs. 21,000

v. Communication allowance August to February 2013 Kshs. 111,000

Total Kshs. 3,420,790.5

22. RW1, Hannington Juma, the 1st appellant's managing director, informed the court in his witness statement dated the 28th of October 2015 that the 1st appellant had engaged the respondent as an Assistant Supervisor from the 13th of February 2013 and he was to work under his supervision. That issues arose on the conduct of the respondent for example, the disappearance of a black hoe excavator from the site, which the respondent admitted to having hired out without authority and, on being confronted, was ready to account for the amount he had hired it out for, and on investigation it was discovered that the hoe had been hired out variously, without authority; giving out of the vehicle assigned to him to another employee without permission, which vehicle was stolen in the process; obtaining money from the company on misrepresentation; and absconding from duty.

23. In its judgment, the trial court determined that although the 1st appellant had valid and justifiable reasons for terminating the respondent's contract, it had failed to follow due process. As a result, the court found in favor of the respondent, awarding him damages. In Paragraphs 22-23 of the determination, the judge stated:

> "25. From the foregoing it is evidently clear that even if as noted earlier in the judgement the respondent had a valid and justifiable reasons for terminating the claimant's contract, the process followed in doing so was flawed hence leading to the conclusion that the termination offended the provision of section 41(2) as read with section 45(2) (c) of the *Employment Act*.

26. The court therefore awards the claimant as follows:

a. One month's salary in lieu of notice 200,000.00

b. Salary for days worked in July 2012 (admitted) 154, 838.72

c. Leave allowance(admitted) 67,307.6

d. Four months' salary for unfair termination 800,000.00 Total 1,222,146.42."

24. Section 41 (1) & (2) of the Act, which applies in this instance, provides that:

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).

25. Section 45 of the Act provides that:

(1) No employer shall terminate the employment of an employee unfairly.

3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

4. A termination of employment shall be unfair for the purposes of this Part where—

    a. the termination is for one of the reasons specified in section 46; or

    b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Employment and Labour Relations Court shall consider—

    a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

    b. the conduct and capability of the employee up to the date of termination;

    c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41.

26. The behavior and conduct of the respondent, as enumerated by the RW1 and which the respondent did not deny, of absconding duty to deal with his private construction; engaging in unauthorized conduct of hiring out the excavator hoe without permission, and pocketing the proceeds; releasing the vehicle to a fellow employee without authorization and the vehicle being stolen; and misrepresenting facts leading to him obtaining Ksh. 120,000, and failing to account amounts to gross misconduct under the Act and the contract signed between the parties. The 1st appellant is covered by section 43 of the Act as it proved reasons for dismissing the respondent. The section states as follows:

    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.

27. However, reasons by an employer per se are insufficient for the termination to be deemed fair. Employment has to be terminated following fair procedures as set out in sections 45(1), (2), & (4) of the Act provide:

    1. No employer shall terminate the employment of an employee unfairly.

    2. A termination of employment by an employer 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) (ii) related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

(3) ...

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46, or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labor Officer or the Employment and Labour Relations Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination.

28. According to RW1, he summoned the respondent on July 23rd, 2012, after failing to find him on site. The respondent arrived within 45 minutes and was questioned in the presence of other staff about the Kshs. 120,000 he obtained by misrepresentation. In our view, the impromptu meeting cannot be the meeting envisaged by Section 41 of the Act. The law requires the employer to explain to the employee the alleged misconduct in a language he understands in the presence of another party, and the employee's defense or representation be heard and considered. Proper notice would be necessary to enable the employee to prepare for such a hearing; it should not be an impromptu and casual session, as was the case.

RW1 further stated that after investigations, a notice to show cause was sent to the respondent, followed by a phone call, after which a termination letter was issued. The respondent disputes that any investigations were carried out and that the notice to show cause was ever sent to him. Indeed, the 1st appellant did not prove service of the same.

29. The trial court, in its determination, observed that the alleged show cause letter dated 30th July 2012 required the respondent to show cause why his services should not be terminated by 15th August 2012, yet the termination letter dated 30th August terminated the respondent's services with effect from 24th July 2012. The trial court found the two scenarios curious. So do we. The dates do not add up. We agree with the respondent that the said show cause letter was an afterthought. Secondly, the purported investigations were instituted after the meeting on 23rd July 2012. How could the services have been terminated a day after the respondent was sent on compulsory leave? The notice dated 30th August terminating service from 24th July was not a month's notice in accordance with section 44(2) of the Act, which stipulates the need to terminate a contract upon issuance of a notice.

30. Having noted the steps the 1st appellant took, we find that the same fell short of the requirements of section 41 as read with section 45(2)(c) of the Act, despite the reasons stated for termination having been valid and justifiable based on the various acts of misconduct. More was required: a notice of one month or payment in lieu; in addition the respondent ought to have been informed of the alleged

misconduct and allowed to defend himself or make representation. This Court, in the case of Ken Freight (E.A.) vs. Benson K. Nguti (supra), had this to say:

> " The next and more critical question is whether the termination was unfair. It is considered unfair to terminate the contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that the reason is related to the employee's conduct, capacity, compatibility, or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure. Section 43 specifically places the burden to prove that the termination was fair on the employer".

31. The appellants relied on the case of Ken Freight (E.A.) vs. Benson K. Nguti (supra) to support their contention that section 45(3) bars the respondent from claiming unfair termination of his services as he had worked for the 1st appellant for only 6 months. It does not support the argument. The court's reference to the said section was obiter dictum. The court did not address itself to the application of the said section as the matter did not arise in that case. The second complaint related to this ground is that the trial court did not address the same. Indeed, the trial court did not address the issue at all.

32. Section 45(3) of the Act remains a live issue at the Employment and Labour Relations Court (ELRC), and seems not to have received consensus fully. The issue has also not been seriously canvassed before this Court. The High Court extensively discussed the application of the section in the much-cited case of Samuel G. Momanyi vs. Attorney General & Another [2012] eKLR (Momanyi case), where the High Court declared section 45(3) of the Act unconstitutional. The section states as follows:

> An employee who has been continuously employed by his employer for a period less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

33. While holding the section unconstitutional in the Momanyi case (supra), the High Court (Lenaola J. (as he then was)) had this to say; -

> "19. In my view, there is clear merit in the arguments by the Petitioner. I say so because when the *Employment Act* was enacted in 2007, *the Constitution* 2010 had not been promulgated and there was necessarily a need to align the provisions of all statutes enacted prior to it, with the said Constitution. This is what happened for example in South African where upon the post- apartheid Constitution being enacted, the Basic conditions of *Employment Act*, 2007 was subsequently passed and its objects were to;
>
> > "... give effect to the right to fair labour practices referred to in Section 23(1) of *the Constitution* by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of eh International Labour organization ..."
> >
> > ....
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> 22. I have held as above because I am in agreement with the Petitioner that there is no explanation offered by either the 2nd Respondent and the Attorney General why a person who has worked for one (1) year and one 1. month is the only one who can claim that his employment has been unfairly terminated and that one who has worked for less than that period cannot have the benefit of that claim. I have attempted on my own and without assistance from counsel to get the justification for such a provision but my efforts have come to naught. I have elsewhere above reproduced Section 36 of the South African Act and it is easy to see that a person who works for

less than 24 hours a month may genuinely have no claim for unfair termination but how can one explain that a person who has worked for a full year and more can be unfairly terminated and have no recourse to the protection of the Law? Why discriminate in such a blatant manner, and why close the doors of justice to an otherwise deserving litigant on account of the period served, which is not legitimately too short to have any lawful meaning?"

34. The *Employment Act* is seen as a reformist document that moved away from the common law position that deemed the employer/employee relationship to be on an equal pedestal, to a more realistic position, where one party (the employer) would set the terms and conditions. The Act embraced good labour practices. Therefore, section 45(3) of the Act does appear misplaced and not in tandem with other sections of the Act. It is also not in consonance with the current legal regime in Kenya today. We also recognize that the *Employment Act* 2007 came into being 3 years before *the Constitution* 2010 and may not be entirely in line with *the Constitution*. Article 2(4) of *the Constitution* stipulates that any Law, including customary law, inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

35. Section 45(3) of the Act is not in tandem with several other Articles of *the Constitution*:

22.

(1) Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

24.

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a. the nature of the right or fundamental freedom;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(d) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

27

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social

origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

6. To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

36. In the end, we agree with the finding of the trial court that the reasons explained by the 1st appellant, though valid, it failed to follow the necessary steps in fairly and lawfully terminating the respondent's contract and equally failed to issue a proper notice of termination. We have also found that the appellants cannot find recourse in section 45(3) of the Act. The same is not aligned with best labor practices and is against various Articles of *the Constitution* and was declared so by the High Court.

37. The appeal is therefore dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

S. OLE KANTAI

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR