



**Ndugu Transport Company Limited v Sewe (Civil Appeal
23 of 2019) [2024] KECA 127 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 127 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 23 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
FEBRUARY 9, 2024**

BETWEEN

NDUGU TRANSPORT COMPANY LIMITED APPELLANT

AND

FREDERICK SEWE RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Employment & Labour Relations
Court at Kisumu (Onyango, J.) dated 21st June, 2018 in (ELRC Cause No. 336 of 2014)*

JUDGMENT

1. The respondent, Fredrick Sewe, filed suit against Ndugu Transport Company Ltd, the appellant, claiming that his services were unfairly terminated by the appellant without terminal benefits, gratuity and pension; and that the appellant had also withheld accrued dues for leave and overtime. He, thus, prayed for the court to find that:
 - i. His summary dismissal and the withholding of his dues by the appellant was unjustified, unlawful, unfair, wrongful, and illegal.
 - ii. Payment of terminal dues at ksh 1, 234,803.30.
 - iii. Reinstatement.
 - iv. Costs.
2. The appellant denied liability particularly the claims to terminal benefits; and pleaded on a without prejudice basis that the respondent had colluded with two other employees to overload one of the company's motor vehicles so as to illegally benefit from the excess load; that there had been several verbal warnings issued; that the summary dismissal was in accordance with section 44 (3) and (4) (c), (e) and (g) of the [Employment Act](#), after the respondent failed to give a satisfactory explanation for his misconduct. Further, that the respondent had taken all his leave days, and in some instances took pay



in lieu of leave; rest days were not payable as he had Sundays off, nor was he entitled to house allowance as the appellant provided housing; and the claim for underpayment did not lie as he was being paid in excess of the statutory minimum wage. The court was urged to dismiss the claim which was termed as malicious and vexatious

3. The learned trial Judge, upon considering the evidence, entered judgment in favour of the respondent as follows:

“Pay in lieu of Notice - 21,078,60/-

Salary for 10 days worked - 8,107.16/-

Public holiday-46, 528.10/-

House allowance and underpayment - 39,139.40

Accrued Leave for the 7 years worked - 18,328.25.

Rest days - 109,975.50

Compensation - 147,550.20 Costs of the Claim.

Interest on decretal sum from the date of judgement.”

4. The respondent claimed that he was an employee of the respondent as a machine operator from 1st April 2005; and had diligently and faithfully worked without any complaint of misconduct or integrity issues for the past 7 years at a salary of ksh 16,000/• (which he described as an underpayment pointing out that as a machine operator, his pay ought to have been ksh 22,070.65), before his services were terminated by the respondent on the 10th June 2013. He told to the trial court that when he reported for work after being off duty for 3 days, he was verbally dismissed by the appellant’s director who told him to stop working without reason. According to the respondent, his child had fallen ill, and was at the Intensive Care Unit in Siaya, so he took some 3 days off. When he reported to work on 10th June 2013, he was shown the door.
5. The appellant confirmed that the respondent was employed as a loader, but maintained that on 10th June 2013, the respondent, in collusion with two other employees, caused the appellant’s lorry to be overloaded so that they could benefit from the excess load; and that previous verbal warnings had been issued.
6. The appellant’s witness, Atieno Albert Akech, the transport and logistics manager testified that on the date in question the respondent confirmed that the trucks from quarry were being overloaded; that upon being asked to give an explanation, none was forthcoming. The respondent’s position on this is that there was no weigh bridge availed that would help him know the weight loaded; and in any case, the appellant’s own Mr. Sehmi always supervised the loading to ensure there were no excesses.
7. On cross-examination, the appellant’s witness confirmed that there was no letter of dismissal issued, that the respondent worked on Sundays and public holidays; that the respondent did not collect his dues; and that there was no weigh bridge at the quarry.
8. The appellant submits that the respondent’s summary dismissal was lawful and procedural and in line with the *Employment Act*; that the respondent was not entitled to leave as he took all his leave days; and the respondent was housed by the appellant, and was therefore not entitled to the same.
9. The trial court identified the issues for determination as being:



- a) whether the termination was lawful, b) whether the appellant was entitled to the reliefs sought; and c) who ought to bear the costs. The learned judge, in making a finding in favour of the respondent, noted that there was no dispute that the respondent was verbally dismissed without compliance with either section 41 or 43 of the *Employment Act* as there was no demonstration by the appellant that the provisions in section 41 of the Act had been articulated; the learned trial judge held that the process adopted by the appellant herein was unfair both procedurally and substantively. As regards the remedies, the trial court invoked the provisions of section 49 and found that the respondent was entitled to one month's notice or pay in lieu, compensation, salary and allowances.
10. The learned judge was of the view that the confirmation by the appellant's witness that the quarry operated on Sundays and public holidays, was sufficient to confirm the respondent's claim of working overtime; that the respondent being a plant operator at the quarry, held a position equivalent to that of a crawler tractor driver, which position under the Regulations of Wages General Order in June 2013, was in the sum of ksh.18,329.25; and inclusive of house allowance-which was accepted as a proven claim since the appellant's witness did not dispute the respondent's contention that he was not housed, would give a consolidated sum of ksh. 21,078.60/-, and a similar amount being payment in lieu of notice.
11. The sum of ksh. 46,528.10 was awarded to cover overtime comprising eleven public holidays for 3 years at double rate based on the basic pay.
12. The Appellant challenges the ruling of the Superior Court on 9 grounds of appeal that the learned judge erred:
- 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.
 - When she failed to appreciate and consider the content and import of the submissions filed by the Appellant.
 - In failing to find that the Respondent's leave days were taken or that the Respondent would take his pay in lieu of taking his leave hence no leave pay was due.
 - 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*.
 - 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*.
 - In failing to find that the Claim for leave was time-barred in line with section 90 of the *Employment Act*.
 - In awarding compensation for rest days despite the Respondent being off duty every Sunday.
 - In awarding the Respondent house allowance when housing was provided by the Appellant and the Respondent resided in the said housing.
13. The appellant submits that there was no proof that the respondent was employed by the appellant; in which capacity; and the period of any such employment. The appellant also submits that there was no proof that the respondent worked continuously for the appellant for 7 years; that the respondent earned a specific sum; and that the respondent applied for leave.



14. The appellant contends that the respondent took 3 days unauthorized off duty, produced no evidence that the child was unwell as being the reason for missing work, and, after the 3 days, the respondent came back to work as usual with no explanation. The appellant submits that the respondent was only told to stop working.
15. The appellant submits that the respondent was required to prove the ingredients of wrongful termination, which the respondent did not; and that the respondent is not entitled to the reliefs granted.
16. The appellant argues that no notice was required as the offence committed by the respondent amounted to gross misconduct; and summary dismissal would not require issuance of any notice. With regard to the award of ksh. 109,975/- for rest days, the appellant submits that this was irregular and should be set aside.
17. The respondent, on the other hand submits that, he tabled evidence to prove employment including payroll, statement of account for NSSF and NHIF and a letter from the appellant to NHIF introducing the respondent as its employee.
18. The appellant's own witness, Mr. Aketch told the court that the respondent worked as a loader, that the quarry operated on public holidays and Sunday, which according to the respondent that is enough evidence that he worked continuously and consistently for the appellant.
19. The respondent argues that the appellant should have ordered disciplinary process in the event that it felt that the respondent had taken unauthorized leave days, and that summary dismissal is only warranted where there has been a fundamental breach of contract of service.
20. The respondent argues that it was unreasonable for the appellant to summarily dismiss on the grounds of missing 3 days of work.
21. This being a first appeal, as 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 v John Patrick Machira t/a Machira & Company Advocates](#) [2013] eKLR.
22. The issues the Court needs to address are, firstly, whether the respondent's termination was lawful and procedural and, secondly, whether the respondent was entitled to the remedies sought.
23. The question of whether or not a termination is unfair is dependent on whether or not an employer has adhered to the twin requirements of due procedure and substantive justification. Adhering to one and contravening the other renders the dismissal wrongful.
24. 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.”
25. Sections 43, 45 and 47(5) of the [Employment Act](#) also requires that an employer must prove the reasons for dismissal are valid and fair and prove that the grounds are justified.



26. We also draw from the case of *Nicholas Muasya Kyula v Farmchem Ltd* Industrial Case no 1992 of 2011, (2012) LLR 235 which stated that:

“It is not sufficient for the employer to make allegations of gross misconduct against an employee. The employer is required to have internal systems and processes of undertaking administrative investigations, and verifying the occurrence of the misconduct before a decision to terminate is made.”

From the record, it is apparent that the respondent’s employment was terminated without being accorded a fair hearing. The appellant’s submissions are mere denials. The appellant’s evidence in itself confirms that the respondent did work for the appellant, and that he was verbally summarily dismissed on suspicion of overloading trucks. It will be noted that the appellant’s own witness testified that there was no weighbridge at the quarry. How, then, could the appellant prove that the trucks were being overloaded?

27. This Court, in *Co-operative Bank of Kenya Limited v 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.”

28. The evidence on record is clear that the respondent was verbally, summarily, dismissed without being given a chance to be heard. The appellant states that the respondent was absent from work for 3 days and on his return did show proof that his child was in the hospital. Be that as it may, the decision to summarily dismiss the respondent without giving him a chance for whatever reason was drastic. 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.

29. This Court is satisfied that, indeed, the summary dismissal was unfair, unprocedural and illegal and as such there is no basis for the Court to interfere with the judge’s finding to that effect.

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

31. In the case of *Hema Hospital v 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 v 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.”

32. 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 section 49(1). This is what the trial court based its award on. The appellant's own witness confirmed that terminal dues have not been paid. The appellant has, also, not shown that the trial court did not take into account any of the aforesaid considerations in awarding the remedies.

33. This Court, in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union* CA no 188 of 2014, stated the following with respect to section 49 of the *Employment Act*:

“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.”

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

35. In the instant appeal, the learned judge awarded one month's notice in lieu of notice, salary for 10 days worked, public holidays, house allowance and underpayments. The reasoning behind the awards was that the trial judge noted that the appellant's witness admitted the respondent had not been paid his dues. The trial judge also noted that the appellant's witness also admitted that the quarry operated on both public holidays and Sundays and that the respondent was not housed by the appellant.

36. Ultimately, we find no fault with this reasoning as the awards were justified and as there is no basis to interfere with the same. The appeal, for the reasons given, has no merit and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

