



**Munyua v Aruasa & 3 others (Civil Appeal 212 of 2019)  
[2024] KECA 1696 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1696 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 212 OF 2019  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
NOVEMBER 22, 2024**

**BETWEEN**

**EDITH KATHURE MUNYUA ..... APPELLANT**

**AND**

**DR WILSON ARUASA ..... 1<sup>ST</sup> RESPONDENT**

**MOI TEACHING & REFERRAL HOSPITAL ..... 2<sup>ND</sup> RESPONDENT**

**MRS ANN CHEMWOSIO ..... 3<sup>RD</sup> RESPONDENT**

**MR THOMAS NGETICH ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kisumu (M. N. Nduma, J.) dated 18th July, 2019 in ELRC Cause No. 359 of 2016)*

**JUDGMENT**

1. The appellant filed a Memorandum of Claim in the Employment and Labour Relations Court against the respondents for;
  - a. A declaration that her dismissal from employment was unlawful, unprocedural and unfair and thus she was entitled to compensation in terms of;
    - i. One month pay in lieu of notice = Ksh.18,403.00
    - ii. Salaries and allowances not paid while on suspension = Ksh.1,264,441.00
    - iii. 12 months compensation for wrongful termination  
= Ksh.1,776,000.00
    - iv. What she would have earned in grade M10 =



Ksh.2,055,686.00

- v. What she would have earned in grade M9 after promotion = Ksh.65,333.30
  - vi. Leave she could have earned when on employment in grade M10 and M9 =Ksh.232,000
  - vii. Loss of earnings prior to retirement at the age of 60 years = Ksh.26,577,600.00
  - viii. Leave earning for years remaining to retirement = Ksh.1,175,200.00
  - ix. Severance pay for years worked = Ksh.468,000.00
- Total= Ksh.33,605,923.10

b. A claim for;

- i. Expenses incurred as follows; legal fees in the lower court = Ksh.150,000, legal fees in the High Court = Ksh.300,000, Transport, Accommodation, meals = Ksh.94,500
- ii. Benefits that accrued following the lapse of her insurance policy as follows; 15% partial maturity on the sum assured for 4 consecutive years from 2020 to 2024 = Ksh.131,036.25, 50 percent of the sum assured on 1<sup>st</sup> October, 2025 = Ksh.87,357.50
- iii. General and punitive damages for being locked up in the police cell for one day without an option for cash bail.
- iv. Certificate of Service.
  - a. Cost of the suit and interests on (a) and (b) at court rates from the time of filing the suit until payment in full and
  - b. Any other further relief that the court may deem just and fit to grant.

2. The facts leading to the suit were that the appellant was employed by the 1<sup>st</sup> respondent as an accounts clerk from 4<sup>th</sup> June 2007 on permanent terms. On 14<sup>th</sup> August 2012, the 1<sup>st</sup> respondent allegedly unfairly, unprocedurally and unlawfully temporarily suspended the appellant's services, on accusation of the appellant having sent an offending text message to the 3<sup>rd</sup> and 4<sup>th</sup> respondents, employees of the 1<sup>st</sup> respondent. The appellant complained that despite the High Court exonerating her of committing the said offence, the 2<sup>nd</sup> respondent who was the Chief Executive Officer of the 1<sup>st</sup> respondent, went ahead and fully terminated her employment on 20<sup>th</sup> July 2016. She contended that the termination was unprocedural, unlawful, and/or illegal for reasons that, the procedure stipulated in the *Employment Act* was not followed; she was not given termination notice; the court had found her innocent; she was not given her terminal dues and neither was she issued with a warning notice.

3. The respondents filed a Response to Claim and denied the allegations of unfair termination. They claimed that the appellant was summarily dismissed for gross misconduct and as such, her dismissal was fair, justified, procedural and lawful. Particulars of gross misconduct were pleaded to include;

- a. Using abusive or insulting language towards her employers or a person placed in authority over her by her employers.
- b. Behaving in a manner that is insulting to her employer, bosses and colleagues.
- c. Failing to obey a lawful and proper command issued by her employer.



- d. Committing or being suspected of having committed a criminal offence against or to the substantial detriment of her employer.
4. Further, the appellant was in breach of section 44(4) of the Employment Act and, sections 16.5.1 (m) and 16.5.3(d) and (e) of the Hospital's terms and conditions of service which entitled an employer to suspend an employee without pay. The respondents explained that the appellant was granted a fair hearing in accordance with Articles 47 and 50 of the Constitution and section 41 of the Employment Act. She was invited, vide letters dated 21<sup>st</sup> July 2015 and 6<sup>th</sup> May 2016, to appear before the Hospital Staff Disciplinary Advisory Committee for meetings held on 28<sup>th</sup> July 2015 and 16<sup>th</sup> May 2016, to show cause why her services as an employee of the Hospital should not be terminated. Prior to her dismissal, she was issued with a suspension/show cause letter dated 10<sup>th</sup> August 2012 on 13<sup>th</sup> August 2012.
5. The respondents denied the averment that a court of law had exonerated the appellant of sending offensive text messages to the 3<sup>rd</sup> and 4<sup>th</sup> respondents. They insisted that they genuinely believed that the appellant sent the offensive messages. Further, the respondents contested being in contempt of court orders, asserting that no orders were issued by a court restraining the 1<sup>st</sup> respondent from terminating the appellant's employment. It was pleaded that the appellant is not entitled to any benefits since she was summarily dismissed for a lawful cause. She was also paid her salary and allowances while on suspension and no arrears were due. The respondents also rejected the appellant's claims for compensation, terming them misconceived and without basis. They stated that the appellant's certificate of employment was available upon her clearance with the 1<sup>st</sup> respondent. Moreover, the dismissal was in accordance with sections 44(4), 45(2) and 45(4) of the Employment Act. In the end the respondents urged the court to dismiss the appellant's claim with costs for disclosing no cause of action.
6. In reply to the respondents' arguments, the appellant denied having committed any misconduct and reiterated that her dismissal was illegal, unfair, unprocedural and unlawful. She gave testimony during the hearing where she restated her claim. Mr. Felix Kimeli Kosgei (RW1), the Senior Human Resource Officer of the 1<sup>st</sup> respondent testified on behalf of the respondents and maintained that the appellant had been dismissed for gross misconduct. He claimed that the appellant had sent distasteful messages to the 3<sup>rd</sup> and 4<sup>th</sup> respondent because she was bitter about her deployment from the finance department to the housekeeping department.
7. At the end of the trial, the learned Judge (M. N. Nduma, J.) delivered a judgment on 18<sup>th</sup> July 2019 and held that placing the appellant on a four-year suspension, from 16<sup>th</sup> August 2012 to the date of termination, on 20<sup>th</sup> July 2016, without pay, was oppressive to her in the extreme. The learned Judge also found that RW1 did not provide any evidence to prove, on a balance of probabilities, that the appellant had sent the alleged offensive text messages to her two seniors. In the circumstances, there was no valid reason in terms of section 43 of the Employment Act, to terminate the employment of the appellant. The court awarded the appellant;
- a. Arrear salary from 10<sup>th</sup> August 2012 to 20<sup>th</sup> July 2016 in the sum of Ksh.1,264,441.
  - b. One month salary in lieu of notice of Ksh.18,403.
  - c. Twelve months salary in compensation of Ksh.220,836.
  - d. Interest at court rates from the date the amount was due and payable in respect of (a) above and from the date of judgment with respect to (b) and (c) above till payment in full.
  - e. Costs of the suit.



8. The appellant was aggrieved by the judgment of the trial court and filed this appeal on 4 grounds. However, during the hearing, counsel for the appellant indicated that he was only going to argue the question of quantum.
9. The respondents also lodged a cross-appeal on 2 grounds contending that the learned Judge erred by;
  - a. Ignoring and/or misapprehending the evidence of the respondents to the effect that valid reasons existed for terminating the appellant's employment.
  - b. Awarding the appellant salary arrears in the sum of Ksh.1,264,441, twelve months' salary compensation in the sum of Ksh.220,836, and salary in lieu of notice in the sum of Ksh.18,403, together with interest and costs.
10. When the appeal came up for hearing, learned Counsel Mr. Bett appeared for the appellant while Mr. Kiplangat appeared for the respondents. Both highlighted their written submissions which they had filed prior together with bundle of authorities.
11. Mr. Bett contended that during the appellant's employment, she was underpaid when she was placed under Job Group M12 and therefore she lost earnings during that period. He urged that in accordance with section 10(7) of the *Employment Act*, the respondents should have produced the appellant's written contract of employment, which would have confirmed whether she was actually placed in the right job group. Counsel stated that the appellant lost earnings due to non - promotion. He argued that barring the termination, the appellant had a legitimate expectation that she would have been promoted, considering that she had never encountered any disciplinary issue or complaint from her employer. Counsel submitted that the suspension period in issue was from 16<sup>th</sup> August 2012 to 20<sup>th</sup> July 2016, which is made up of 47 months and 5 days. The trial court, however, awarded the appellant salary arrears for the 47 months only, failing to award for 5 days. Relying on the High Court decision in *Grace Gacheri Muriithi Vs. Kenya Literature Bureau [2012] eKLR*, counsel argued that the appellant was entitled to full payment for the period when he was suspended up to the date when the decision in her disciplinary case was delivered. The respondents' cross-appeal challenging the sum awarded to the appellant as salary arrears for the period when she was on suspension was disputed by counsel, for the reason that the respondents admitted during trial that they had not paid her dues from the date of suspension.
12. In further response to the cross-appeal, Mr. Bett submitted that since the appellant had proved that her termination was wrongful, unlawful and procedurally unfair, she was entitled to maximum compensation equivalent to 12 months salary, a remedy that is available under section 49(1)(c) of the *Employment Act*. For that contention he relied on the decision in *Benjamin Langwen Vs. National Environment Management Authority [2014] eKLR*. It was urged that since the respondents did not contest the fact that they did not issue the appellant with any notice prior to her termination, she was entitled to payment of salary in lieu of the notice pursuant to section 36 of the *Employment Act*. On whether there were valid reasons for terminating her employment, counsel submitted that bearing in mind that the appellant had discharged her burden of proof towards showing that the termination was not in accord with the *Employment Act*, it was upon the respondents to challenge that finding by proving that the termination was lawful. In conclusion,
13. Mr. Bett urged us to find the cross-appeal to be without merit and dismiss it with costs.
14. In opposition to the appeal, Mr. Kiplangat submitted that loss of future earnings is not one of the remedies prescribed under section 49 of the *Employment Act*. To buttress that point, counsel cited this Court's decision in *D. K. Njagi Marete Vs. Teachers Service Commission [2020] eKLR*. On the issue of underpayment, Mr. Kiplangat contended that the remedy provided for upon termination of



employment is based on the actual gross pay at the time and not what an employee would consider to be their rightful remuneration. Moreover, the claim for loss of future earnings due to non-promotion and unpaid future leave is speculative and one cannot be paid for work not done. For this assertion, counsel cited this Court's decision in Justice Kalpana H. Rawal Vs. Judicial Service Commission & 3 Others [2016] eKLR.

15. Addressing us on the cross-appeal, counsel faulted the learned Judge for failing to interrogate the evidence that was presented by the respondents on whether there were valid reasons for terminating the appellant's employment. To counsel, the record shows that sufficient evidence was adduced connecting the appellant to the offensive messages. The evidence was to the effect that No. 4566 Corporal Patrick Wandera testified that he was able to get the serial number of the mobile phone that hosted the mobile number through which the offensive text messages were sent. With the serial number he contacted Safaricom and Airtel service providers and he established that the mobile phone with the said serial number hosted among others the appellant's mobile number. Further, the appellant was traced and found in possession of the mobile phone. On the authority of Hon. The Attorney General And Another Vs. Maina Githinji & Another Nyeri Civil Appeal No. 21 of 2015 (UR) as cited by this Court in JACOB Oriando Ochanda Vs. Kenya Hospital Association Ltd T/a Nairobi Hospital [2019] eKLR. Mr. Kiplangat contended that the mere acquittal of the appellant in the criminal case did not automatically mean that there was no valid reason for her termination. In reference to section 43(2) of the *Employment Act* and this Court's decision in Kenya Power & Lighting Company Limited Vs. Aggrey Lukorito Wasike [2017] eKLR, counsel argued that the test that the 1<sup>st</sup> respondent was required to meet as an employer, before dismissing the appellant, was one of 'genuine belief' that the reasons for dismissal, did exist, and it did actually satisfy that test. Consequently, Mr. Kiplangat asserted that the finding that the dismissal was wrongful was erroneous in fact and in law.
16. It was submitted that since the 1<sup>st</sup> respondent established that there was a valid reason for dismissing the appellant, besides being accorded a fair hearing before termination, the salary in lieu of notice and the compensation in the equivalent of 12 months' pay had no basis and should be upset. Citing the decision in Patrick Nyakonu Ombati Vs. Credit Bank Limited [2016] eKLR, counsel contended that the award for salary arrears during the suspension was erroneous because the suspension was upheld. In the end. Mr. Kiplangat urged that the appeal was without merit and should be dismissed, while the cross appeal was merited and should be allowed.
17. We have given due consideration to the record of appeal, the submissions for and against both it and the cross-appeal together with the authorities cited by counsel, cognizant that as a first appellate court, we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions, see *Selle Vs. Associated Motor Boat CO.* [1968] EA 123 and *ABok James Odera T/A A. J. Odera & Associates Vs. John Patrick Machira T/a Machira & Co. Advocates* eKLR.
18. Starting with the appeal, we think the sole issue for our determination is whether the award granted to the appellant was satisfactory. The appellant claims that she lost earnings due to being underpaid and denial of promotions. Additionally, that she was awarded salary arrears for a period that was 5 days less than what she was entitled to. The respondents reject those claims urging that what an employee is entitled to get upon termination is based on his actual gross pay at the time and not what they consider to be their rightful remuneration. Further, the claim for loss of future earnings due to non-promotion was speculative, besides, one cannot be paid for work not done. The learned Judge in dealing with the issue was of the view that there was no evidence that the appellant would have been entitled to a salary increment during the period in question. He thus dismissed the claim. We agree with the reasoning of the learned Judge and adopt the sentiments of this Court in Justice Kalpana H. Rawal Vs. Judicial



Service Commission & 3 Others (supra), that one has no right to a salary for a period not served and for services not rendered. The Court held as follows;

“In *Butler v. Pennsylvania*, 10 How. 402: 13L. ed. 472 the US Supreme Court rejected the argument that an official is entitled to pay for a period he expects to work, but has not in fact worked. The Court expressed itself thus:

“...promised compensation for services actually performed and accepted during the continuance of the particular agency my undoubtedly be claimed, both upon principles of compact and of equity, but to insist beyond this on the perpetuation a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government, or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures.”

19. Accordingly, we are satisfied that the High Court did not err; that there is no property right to hold the office of judge under *the Constitution*; and that a judge has no right to a salary for a period not served and for services not rendered.”
20. Turning to the cross-appeal, the first issue raised is that the learned Judge ignored the evidence of the respondents which showed that the appellant’s employment was validly terminated. In a nutshell, the evidence is that the mobile phone through which the insulting text messages were sent was traced to, and found in possession of, the appellant. The respondents thus contend that they genuinely believed that the appellant was the one who sent the offensive text messages to her seniors, the 3<sup>rd</sup> and 4<sup>th</sup> respondents. In evaluating this issue, the learned Judge observed that the High Court made a substantive finding to the effect that the prosecution did not produce any evidence whatsoever linking the appellant to the sending of the offending text messages. The learned Judge also noted that RW1, the respondents’ witness, did not provide any evidence before court to prove on a balance of probabilities, that the appellant had sent the alleged insulting text messages. In the end, the court was not persuaded that the respondents had proved that they had valid reason in terms of section 43 of the *Employment Act* to terminate the employment of the appellant. Our consideration of the record leads us to a similar finding: that the High Court made a substantive finding on the issue, a finding that was never appealed against. We are thus satisfied that the learned Judge did not err in his conclusion. On whether the appellant was entitled to the award in terms of salary arrears, twelve months’ salary compensation and salary in lieu of notice, together with interest and costs, we find that the same was justified by the learned Judge and nothing turns on it. In affirming the decision of the trial court, we are mindful that the maximum compensation of twelve months is reserved for instances where the conduct of the employer has been callous, actuated by ulterior motives, malicious or in bad faith. In this case, the employer proceeded to terminate the contract of employment in the face of exoneration of the employee by the High Court, and when the employer itself was unable to justify that, notwithstanding the acquittal, it held a genuine belief that the employee had misconducted herself. In the circumstances, we have no reason to interfere with the manner in which the learned Judge exercised his discretion in awarding damages.
21. Ultimately, we come to the conclusion that the learned Judge did not misdirect himself in his findings and as such we have no basis for interfering with his judgment. Both the appeal and the cross-appeal are therefore devoid of merit and we would dismiss them.
22. We order that each party bears its own costs.



23. We apologize for the delay in rendering this judgment which was occasioned by an inadvertent belief that it has long been delivered.

**DATED AND DELIVERED AT KISUMU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

