Rotich v Metkei Multi-Purpose Company Limited (Civil Appeal 94 of 2017) [2021] KECA 161 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 161 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 94 OF 2017

AK MURGOR, M NGUGI & JW LESSIT, JJA

NOVEMBER 19, 2021

BETWEEN

WILFRED KIPCHIRCHIR ROTICH ..... APPELLANT

AND

METKEI MULTI-PURPOSE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the judgement and decree of the Employment and Labour Relations Court at Nakuru, (Hon. Justice Radido Stephen) delivered on, 2nd November, 2016 in Nakuru ELR Cause No. 582 of 2014)

JUDGMENT

1. The appeal before us arises from a claim that was lodged in the Employment and Labour Relations Court at Nakuru by Wilfred Kipchirchir Rotich, the appellant herein, against Metkei Multi-Purpose Company Limited, the respondent herein.

2. The appeal is related to Civil Appeal No. 95 of 2017, and the appellants in both appeals were employees of the respondent working as truck drivers. The appeals were not consolidated and so are being considered individually. The brief facts of this case is that the appellant was employed by the respondent as a Milk Tanker Driver on 23rd July, 2012 on a Monthly salary of Kshs. 16,000.00/=. He was dismissed on 10th February, 2014. The circumstances giving rise to the dismissal were that on 9th December 2013 the appellant was on duty driving the respondent's tanker registration number KBQ 645 J. He was transporting milk to the company's milk processor, Sameer Agricultural and Livestock Company when the tanker was involved in an accident and overturned consequently being written off.

3. The appellant's case as set out in his statement of claim dated 11th November 2014 was that he was employed by the respondent as a Milk Tanker Driver on 23rd July, 2012 on a Monthly salary of Kshs.

16,000.00/=. That the appellant was summarily dismissed vide a letter dated 10th February, 2014. The appellant contends that the dismissal was unfair and contrary to law for the following reasons:

a. Procedural fairness as required by the provisions of Section 41 of the *Employment Act*, 2007 (hereinafter the Act) was not followed.

b. The termination was without justification as occurrence of a road traffic accident is not one of the lawful reasons for the effecting of a summary dismissal under the Law.

c. No notice of misconduct was given to the claimant.

d. No opportunity to be heard in the presence of a trade official or an employee of one's choice was accorded.

e. No certificate of service was given as required by law.

f. The respondent carried out collective punishment without according due consideration to individual capability.

4. The appellant prayed for an award against the respondent as hereunder:

a. Declaration that the termination of employment was unfair and unlawful.

b. Salary on account of notice pay @ 16,000 Kshs.16,000/=

c. 12 months'salaryascompensation Kshs.192,000/=

d. 2 years' service pay @ Kshs.16,000/=

e. 2 years leave pay Kshs.32,000/=

Kshs.272,000/=

f. Costs and interest of the claim.

5. In its statement of response dated 16th December, 2014 and lodged in court on 19th December, 2014, the respondent averred that the appellant absconded duty after causing a bad accident due to his own negligence, that he deserted the work station after being asked to appear before the board and submit a written accident report to the respondent, and that he declined to perform other duties as assigned and therefor, his services were lawfully, fairly and procedurally terminated after he was found to have been guilty of misconduct. For those reasons, the respondent denied that the appellant was entitled to any compensation and urged the court to dismiss the claim.

6. The learned trial judge (Radido, J.) delivered a judgement on 2nd November, 2016 where he found no merit in the appellant's claim and dismissed it with costs to the respondent. In his judgment the learned judge stated that the issue for determination in the claim was whether the summary dismissal of Wilfred Rotich on 10th February 2014 was unfair and if so, appropriate remedies. The court found that the appellant did not discharge the burden placed on him by Section 47(5) of the *Employment Act*, (hereinafter referred to as the Act), which requires that the employee discharges the burden of proving that an unfair termination of employment or wrongful dismissal has occurred. The court found that the appellant failed to respond to a notice to show cause dated 10th December, 2013 sent by the respondent to him which required the appellant to offer an explanation on the accident which occurred on 9th December, 2013. The court also found that the appellant failed to attend a disciplinary hearing on the 31st January 2014 to which he had been invited.

7. Being aggrieved by the judgment, the appellant lodged this appeal. In his memorandum of appeal, the appellant raises the following six (6) grounds:

    1. That the learned judge erred in law and fact in failing to find that the appellant's termination from employment was unfair and unlawful as the right to be accorded a hearing prior to termination of employment in the presence of a fellow employee of the appellant's choice or a trade union representative was not observed by the respondent as provided for in section 41(1) of the *Employment Act* 2007.

    2. That the learned judge erred in law and fact in failing to find that the respondent failed to comply with section 41(2) of the *Employment Act* 2007 as no evidence of issuance of postage, or service of the notice to show cause why dismissal should not be effected and the reasons for which the employer was contemplating to terminate employment was given by the respondent and no evidence of postage or service of any letter inviting the appellant to a hearing prior to employment sic existed.

    3. That the learned judge erred in law and fact in finding that the appellant had not discharged his onus of proof under section 47(5) of the *Employment Act* 2007 while the appellant had tendered evidence of the dismissal letter, and explained that he had not been given alternative work but was informed by the respondent to await a new vehicle to be brought for him to be given work.

    4. That the learned judge erred in law and fact in failing to find that the respondent had not discharged the onus of proof provided for an employer under section 47 of the *Employment Act* 2007.

    5. That the learned judge erred in law and fact in failing to analyze the pleadings, the oral testimonies of the parties and the documentary evidence and failing to be guided by section 45 of the *Employment Act* 2007 in arriving at the decision rendered.

    6. That the learned judge erred in law and fact in failing to award the relief sought in favour of the appellant and or quantifying the amount of compensation that was or would have been due to the appellant and in failing to comply with rule 28(2) of the Employment and Labour Relations Court (procedure) Rules, 2016 in preparing the judgement.

8. The appeal was heard virtually. Mr. Mugambi appeared for the appellant and informed the court that he had filed and served written submissions dated 15th October, 2020 which he wished to highlight. Mr. Chepkonga for the respondent did not appear for the hearing of this appeal despite service with the hearing notice. He did not file any submissions either. Mr. Mugambi relied on his written submissions and urged that the appellant proposed to argue grounds 1 to 5 of the appeal together. The appellant's position is that he was not given a fair hearing prior to dismissal, that the letter to show cause why summary dismissal should not be effected contained a different address from the one in the appellant's letter of employment, and that he did not receive the letter. The appellant further submitted that he did not desert duty but was denied access based on the orders of the Manager who told him to wait at home until the vehicle was repaired. The court was urged to allow the appeal with costs plus the costs in the superior court.

9. As we stated above the respondent did not file written submissions. However, from its pleadings, the evidence of their witness and their written submissions filed in the ELR Court, the employment of the appellant is not disputed.

10. Under The Statute Law (Misc.) Amendments Act No. 18 of 2014, an appeal to this court from the Employment and Labour Relations Court, lies on matters of fact and law. From the memorandum of appeal, it is evident that the appeal is properly before us as it raises both issues of fact and law. However, in determining the appeal, we have an obligation to consider and re-evaluate the evidence and arrive at our own conclusion, giving allowance to the fact that we did not have the benefit of seeing and assessing the demeanor of the witnesses. (See *Selle V Associated Motor Boat Company (1968) EA 123*).

11. In the case of *Ramji Ratna and Company Limited V Wood Products (Kenya Limited), Civil Appeal No. 117 of 2001,* this court stated that in a first appeal it will interfere with the decision of the trial judge only where it is based on no evidence or on a misapprehension of the evidence or the judge is shown obviously to have acted on wrong principles in reaching the findings he did.

12. We have considered this appeal, the evidence of the parties, and their submissions in the ELRC, the appellant's submissions herein and the authorities cited. Before we delve into the appeal let us set out the brief facts of this case. The appellant was employed by the respondent with effect from the 1st March 2012, in a letter of appointment that was dated 23rd July 2012. He was hired as a Milk Truck Driver with a gross salary of Kshs. 16,000/= per month. He had a clean record until the events of 9th December, 2013 when, as he drove the respondent's truck, registration no. KBQ 645J, to deliver milk to the respondent's milk processor the vehicle was involved in an accident as a result of which it overturned. The vehicle was eventually written off.

13. We are of the view that the following issues fall for our determination:

    1. Whether the appellant's dismissal from employment was unfair and unlawful;

    2. Whether the respondent's decision to dismiss the appellant was justified;

    3. Whether the reliefs sought by the appellant are available to him in the circumstances herein;

    4. Who bears the costs of the appeal?

14. As the learned judge observed in his judgment, the burden of proof in a claim for unfair termination is spelt out under Section 47(5) of the Act which provides:

    > "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

15. Regarding the issue whether the appellant's dismissal from employment was unfair and unlawful, the respondent's contention at the trial was that after the accident of 9th December, 2013 involving the appellant, his fellow driver and the respondent's motor vehicle, its Manager, who was the respondent's sole witness, sought a written report from the appellant, through a letter dated 10th December 2013 but there was no response. He then informed the Board which directed him to summon the appellant to appear before it on 6th February 2014, which he did vide a letter dated 31st January 2014. Both letters were produced in court as the respondent's Exhibit 1 and 2, respectively.

16. According to the respondent, the appellant did not provide the report on the accident and also failed to appear before the disciplinary committee after which the Board resolved that he be dismissed. The Minutes of the Board's Meeting were produced as respondent's Exhibit 3.

17. In his evidence, the appellant stated that one day after the accident, he was called to the scene of the accident by the police where, in the presence of the respondent's Manager he explained how the accident occurred. He said that he continued to go to the work place but was told to wait for a tanker to be brought. That he was then served with a dismissal letter dated 10th February, 2014, his Exhibit 2. He said he was never informed of the reasons for the termination.

18. Mr. Mugambi for the appellant submitted that the appellant was challenging his summary dismissal by the respondent on substantive and procedural fairness. He argued that the respondent failed to comply with procedural fairness embodied in Section 41 of the Act, falling short of a fair hearing by failing to give the appellant an opportunity to show cause. Mr. Mugambi took issue with the letter inviting the appellant to the disciplinary meeting as being devoid of important information; for omitting to inform the appellant of his right to be accompanied by a fellow employee of his choice during the disciplinary hearing; further it failed to bring to the appellant's attention that it was contemplating to summarily dismiss him. The counsel submitted that the letter to show cause only indicated that the appellant was required to show cause why disciplinary action should not be taken against him devoid of any specifications.

19. Mr. Mugambi relied on the case of *Bernard Ngugi V G4S Security Services Kenya Limited (2013) eKLR* for the proposition that disciplinary proceedings on an employee have serious consequences and an employer must convey to the employee that the proceedings may result in imposition of serious punishment such as termination.He also relied on the case of Janet *Nyandiko V Kenya Commercial Bank Limited, (2017) eKLR* for the proposition that the employee is enjoined in mandatory terms under Section 41 of the Act to ensure that before terminating an employee on grounds of misconduct, poor performance or physical incapacity he/it explains to the employee in a language he understands the reasons for which the employer is considering to terminate him.

20. The service of the two letters mentioned by the respondent are contested. It was the appellant's evidence that he did not receive any other letter from the respondent except his dismissal letter. Mr. Mugambi submitted that on the issue of service of the letters to show cause and invitation to disciplinary proceedings, the respondent's witness, Kenneth Kibyego Kibiwott, in cross examination stated that the letter inviting the appellant was sent to his last known postal address.

21. The *Employment Act*, 2007 is the law applicable to this case. From the preamble to the Act, its purpose was 'to repeal the *Employment Act*, declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.'

    That Act is very elaborate and gives specifications on various aspects of employment including procedures to be followed on issues of termination, what constitutes fair and justified termination among others.

22. The respondent's position is that the appellant was dismissed from employment on account of misconduct. Section 41(1) of the Act provides for the procedure to be followed before termination. This section provides for notification and hearing before termination on grounds of misconduct, poor

performance and incapacity. There are clearly two stages set out in mandatory terms. Under sub-section (1) the employer is required to give certain explanation to the employee as follows:

> "(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." (emphasis ours)

23. The second stage is provided under sub-section (2) in mandatory terms which requires the employer to hear the employee, and is 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."
>
> (emphasis ours)

24. The issue is whether the respondent met the requirements of this section. The respondent's view is that the letters he sent to the appellant covers it on these two issues. The explanation contemplated under the Act is an oral one, and should be given to the employee in the presence of another person of his choice. There was no such engagement between the appellant and the respondent. That notwithstanding, we have looked at the 2 letters, which are found at pages 25 and 26 of the record of appeal. They were the appellant's Exhibit 1 and 3. The letter dated 10th December, 2013 was the letter demanding a written explanation of what happened minutes to the accident. The letter dated 13th January, 2014 was an invitation to attend disciplinary meeting.

25. The receipt of these two letters was contested by the appellant at the trial. It is clear from the record of proceedings that the learned judge did not consider this aspect in his judgment. We have looked at the two letters and find that they were sent to P.O. Box 24, Ainabkoi. We have also looked at the appellant's address given in his employment letter, which is at page 21 of the record. It is given as P. O. Box 746 – 30100, Eldoret.

26. The burden of proof that the letters were sent to the appellant lies with the respondent. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies with the person who wishes the court to believe in its existence. In the first place, it is for the respondent to prove that indeed the letters were sent to the appellant. There was no certificate of posting to show the letters were posted, or any other proof of delivery of the letters. There was no allegation made that the appellant was served personally. Secondly, the address used to send the letters, even supposing they were sent, has been shown to be different from the one in the appellant's letter of appointment. No explanation was given why a different address from the one in the appellant's letter of appointment was used. The appellant maintained that he did not get the letters as alleged. On balance of probabilities, we find in favour of the appellant that he did not receive the two letters in question.

27. We have also considered the contents of the first letter, Exhibit 1. Even had we found that the appellant received it, can it be said to have served as a written explanation as required under Section 41(1) of the

Act? In order to meet the legal requirement, the explanation required is one giving the reason for which the employer is considering termination. The only part of the letter that is to the point is where it says:

> " ...be notified the board, through the Plant Manager was not able to receive the said report... The board has also noted that since the request for a written report was made, you have ceased reporting to work...Please be warned that your action amounts to desertion of duty and carries with it attendant consequences... In light of this the board now invites you to a disciplinary meeting..."

28. Going by this letter, it serves two purposes, an invitation to the disciplinary meeting and a notice to show cause, and it gives the reason for both as desertion of duty and failure to provide a report of the accident. Nowhere does the respondent give the appellant notice that it was contemplating termination of his employment and the reason for it. The procedural and substantive requirement envisaged under Section 41(1) were not met.

29. As to whether the appellant was given an opportunity to be heard, the response must be in the negative, and is not disputed. The letter inviting him to a disciplinary meeting was not proved to have been posted or served upon him. The appellant was therefore not given any notice to show cause and his failure to appear at the said meeting was no fault of his. Substantively, it is clear that the appellant was not accorded an opportunity to be heard. We find that in the circumstances, the procedural and substantive requirements of Section 41(2) was also not met.

30. The respondent's Manager testified that the appellant declined to perform other duties allocated to him. He said that the request to the appellant to perform other duties was oral. In regard to the allegation the he refused to carry out other duties, the appellant's evidence was he in fact asked to be given other duties but was advised to wait until another truck was made available. The appellant stated that he continued going to work until the day his termination letter was served upon him, at which point he was denied entry into the respondent's facility.

31. Mr. Mugambi for the appellant submitted that the respondent never gave any details of the alternative work given to the appellant, and that since the employment contract was that the appellant was employed as a driver, any change in his work ought to have been after consultations as provided in Section 10(1), (2) as read with (5) of the Act, which was not done herein. Reliance was placed on the authority of *Board of Governors, Cardinal Otunga High School, Mosocho & 2 others V Elizabeth Kwamboka Khaemba, (2016) eKLR* for the proposition that an employee must be consulted before assignment of new duties.

32. We have considered the appellant's job description as given to him by his employer. This is found at page 24 of the record. It sets out Tasks as:

    1. Transport milk on a regular and timely basis.
    2. Maintaining the vehicle in working order... this includes daily cleaning...
    3. Report all vehicle damages and repairs while in transit...
    4. Maintain the daily transportation logs.
    5. Ensure proper driving documents are maintained at all times.
    6. Maintain the quality of milk in the tank from the source to the point of destination.

7. Follow and obey all the Kenya Traffic laws and regulations.

33. From that list, which was an annexure to his contract of employment, the appellant's job description did not include any job outside of driving and maintaining vehicles. We noted that the respondent's witness was very casual about the alternative job the appellant declined to do because he did not state which job that was. The appellant denied being asked to do any job and denied he declined any.

34. We have set out herein above the appellant's job description and his duties. Section 10 of the Act is very clear that an employee's duties cannot be changed or revised outside of consultation with the employee. The section requires there be consultation before change of duty, and consequently before assignment to such duties, and this is mandatory. In addition, it is the responsibility of the employer to revise the contract to reflect the change, and then notify the employee in writing. What the respondent needed to do is demonstrate that it held consultation with the appellant before assigning him the duties it now alleges he declined to perform. Without proof of consultation, and without proof of the change in the appellant's terms of service having been done in writing and served upon the appellant, the respondent cannot be heard to say that the appellant failed to perform other duties.

35. The other issue for determination is whether the respondent's action was justified. In his evidence, the respondent's witness stated that the reason the appellant was dismissed from service was threefold: one, he deserted duty; two, he refused to carry out other duties; and three, he failed to give a report on the accident.

36. Section 43 of the Act provides for Proof of reason for termination and stipulates 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.

37. It was submitted for the appellant that no valid reason existed for the appellant's dismissal within the scope of Section 44(4) of the Act. Mr. Mugambi urged that the allegations of desertion of duty, failing to give a report and failing to take up alternative duties when the vehicle got the accident were not established by the respondent, and further that it failed to establish a fundamental breach of contract under Section 44(3) of the Act. The appellant cited the South African case of *Seabolo V Belgravia Hotel, (1997) 6 BLLR 829* (CCMA) where the court sought to distinguish desertion from unauthorized absence from duty.

38. It is apparent that the appellant's employment was terminated under Section 44(3) of the Act. That sub-section provides:

> 3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service."

39. The issue is whether the reasons for the appellant's termination for desertion or absconding duty (which the respondent's witness used interchangeably in evidence), failure to make a report of the accident and refusal to perform other duties were proved. Section 43 of the Act provides:

> " 43. Proof of reason for termination
>
> 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."

40. We have already made our findings clear in regard to the allegations of refusal to perform other duties. There was a process to be followed in order to alter the appellant's contract of service to include 'other duties' before requiring him to perform them. This was not done. The respondent did not show that there was a vehicle that was assigned to the appellant with which to continue performing his duties as per contract. In the absence of such evidence, it cannot be justified to claim that the appellant breached his contractual obligations.

41. As for desertion or absconding duty, the respondent's witness relied on the letter his (respondent's) Exhibit 3, which alleged that the appellant absconded duty the day after the accident. He also relied on a register Exhibit 4. The appellant's evidence was that one day after the accident, he was summoned to the scene of accident where he explained to DW1 and the police investigating the accident how the accident occurred. He said that he also went to the police to give his statement. He also took the report of the accident to the Insurer. The appellant's evidence about his involvement in the case with the police was not controverted. Regarding the accident, DW1 said that the police absolved the appellant from blame for the accident. He also said that the respondent was compensated in full for its truck.

42. Looking first at the register, Exhibit 4, it is for 7th, 8th, 9th and 10th December, 2013. That means the register was for a period two days before the accident and one day after. There is no complaint against the appellant in regard to the 7th, 8th and 9th December, 2013. As for 10th the appellant was at the scene of the accident, and so on duty. The register clearly does not aid the respondent.

43. We have considered the evidence and find that the appellant was on duty to his employer when he went to the scene of the accident to explain how the accident occurred on 10th December, 2013. He was also on duty when he went to report to the police to make a statement and also to deliver the accident report to the Insurance. It is an unjustified exaggeration to say that the appellant absconded duty one day after the accident. The threefold allegations against the appellant were in the circumstances not proved.

44. There was a challenge regarding the Board's decision to dismiss the appellant. DW1 produced Minutes of the Board's Meeting of 6th February 2014 when the decision to dismiss was made. The Minutes are not signed in the space provided for the signature of Mr. Stephen Maswai or at all. The conclusion that can be made is that the Minutes were not authenticated and it is doubtful that such a meeting took place. We find that there was no valid reason to terminate the appellant's employment as he did not abscond duty, decline to take up other responsibilities or fail to make a report of the accident. The appellant's dismissal was unfair and unjustified within the provisions of Section 45 of the Act.

45. In regard to the issue whether the appellant was entitled to the reliefs sought. Section 49 (1) as read with of the Act provides for remedies for wrongful dismissal and unfair termination. Section 49(1) prescribes as follows:

> 49 (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. 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 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
>
> 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.

46. We set out the reliefs sought by the appellant at the beginning of this judgment. DW1 in his evidence before the ELRC admitted that the appellant was entitled to severance pay and pay for annual leave. We take it that the respondent appreciated that the appellant deserved to be paid under the two heads. We note that the appellant was not declared redundant and therefore severance pay was not applicable. His employment was unlawfully terminated and all he is entitled to is compensation under Section 49(c) of the Act. At the time of termination, he had worked for one year and nine months. We are of the view that four months' pay as compensation is reasonable in the circumstances. The appellant had not worked for two years and is therefore only entitled to one annual leave. In addition, the appellant is entitled to one month's salary in lieu of notice and his salary for work done in the month of December, 2013. We did not find any evidence to support the appellant's claim for service pay as no evidence was led to establish whether the respondent had had or had not enrolled the appellant with a pension scheme or provident fund. The claim under that head is not proved.

47. The appellant's claim before the trial court included a request for an order directing the respondent to issue a certificate of service. The learned judge did not address this issue in his judgment. Section 51 of the Act provides that an employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. The appellant had served for a period longer that four weeks and clearly he deserved to be issued with the certificate.

48. In the result we find that the learned trial judge erred in law and in fact in failing to find that the appellant's dismissal was unfair and unjustified. We set aside the judgment of the trial court, and in substitution allow the appellant's appeal and order as follows:

> a. Declaration is hereby made that the termination of employment was unfair and unlawful.
>
> b. The respondent does issue the appellant with a certificate of service.

c. The appellant is entitled to the following payments:

i). One month's salary in lieu of notice of Kshs. 16,000/=.

ii). Compensation for unlawful termination in the equivalent sum of 4 month's salary @ Kshs. 16,000/=.

iii). One year's leave pay in the sum of Kshs. 16, 000/=.

iv). One month's salary for work done in the month of December 2013 and not paid in the sum of Kshs. 16, 000/=.

v). Costs of this appeal and of the case before the ELRC

vi). Interest at court rates.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

MUMBI. NGUGI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR