



REPUBLIC OF KENYA



KENYA LAW
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**Adpack Limited v Nyamasage (Appeal E252 of 2023)
[2025] KEELRC 262 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E252 OF 2023
NJ ABUODHA, J
JANUARY 31, 2025**

BETWEEN

ADPACK LIMITED APPELLANT

AND

RWENJO JOEL NYAMASAGE RESPONDENT

(Being an appeal arising from the Judgment of Honourable Derrick K. Kuto delivered in Mavoko Chief Magistrates Court, ELRC No. 007 of 2019 on 2nd November, 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated 29th December, 2023, the Appellant appeals against the Judgment of Honourable Derrick K. Kuto. (SPM) delivered on 2nd November, 2023.
2. The Appeal was based on the grounds that:
 - i. The trial Court's award of gratuity was an error in law and fact for lacking justification under section 35 of the [Employment Act](#) and a contractual basis, considering the undisputed NSSF contributions.
 - ii. The Trial court erred in law and fact failed to consider the Respondent's admission of possessing stolen items, both in his police statement and in cross-examination. This admission justified the summary dismissal under section 44(4)(g) of the [Employment Act](#) where no notice is payable under the law.
 - iii. The Trial Court erred in law and fact to deem the termination unfair despite due process procedures including notice, hearing, an investigation report and admission at the trial court of possession of stolen items which he refused and neglected to attend.



- iv. The award of leave days was in error in law and fact for lacking evidence and was not specifically pleaded and proven as is standard practice for special damages.
 - v. The Trial Court's award of Maximum 12 Months compensation was excessive, punitive an error of law and fact considering the Respondents admission of possession of stolen items in the statement on record and before court, Appellant's adherence of due process including notice to show cause, invitation to hearing, hearing and investigation report before dismissal.
 - vi. In defiance of employment law and binding ELRC precedents, the trial court crafted a sweeping arbitrary award constituting a clear abuse of judicial discretion.
3. The Appellant prayed that the judgment and decree of Hon. Derrick K. Kuto delivered on 2nd November,2023 be set aside, the entire Claimant's claim be dismissed with the costs at the lower court and of this Appeal.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Okemwa & Co. Advocates filed written submissions dated 12th June 2024. On the award for gratuity despite withdrawal by the Respondent, Counsel submitted that the trial court awarded gratuity of Kshs 26,904.50 despite its explicit withdrawal by the Claimant at the start of hearing when Mr. Odhiambo counsel for the Respondent confirmed that the Claimant dropped claim for gratuity and house allowance.
6. Counsel relied on the case of *G4S Security Services (K) Ltd v Lagat (Appeal E015 of 2021)* [2022] KEELRC 13433(KLR) where this court held that a party registered with NSSF could not be awarded gratuity in the absence of an express provision in the contract of employment.
7. On the 2nd ground of due process counsel submitted that due process was followed; the Respondent admitted to possession of stolen items, establishing a valid and fair reason for termination. That the Respondent was given notice of hearing but failed to attend.
8. Counsel submitted that the Appellant discharged their onus of proof under section 47(5) of the *Employment Act* and due process under section 41 was followed including a notice and hearing which the Respondent neglected to attend knowing he was found with stolen items.
9. Counsel submitted that there was a valid reason to institute disciplinary proceedings as the Respondent admitted in his statement that gunny bags were found in his house. He further state that it was uncontested that a notice to show cause letter was issued on 24th October 2018 which he signed but did not respond to.
10. On the Notice of hearing and nonattendance Counsel submitted that the Respondent refused, failed and neglected to answer and claimed that he attempted to attend but was prevented from entering the premises by security. That as there was no evidence of such attempts or who blocked him not to attend. That the trial court erred in concluding that no reason for dismissal was provided and the burden of proof was not discharged.
11. Counsel submitted that it was incumbent on the Respondent to prove that the gunny bags found in his premises were not related to theft as per the notice to show cause and the Appellant's report at the disciplinary hearing or the trial court.
12. Counsel relied on the case of Jackson Butiya v Eastern Produce Cause 335 of 2011 and submitted that an employee who squanders the internal grievance handling mechanisms provided by an employer



- cannot come and claim he was not heard. That the Respondent was terminated due to gross misconduct of theft under sections 44 and 47(5) of the *Employment Act*.
13. On the issue of whether the court erred in awarding 12 months compensation for unfair termination which was excessive and unexplained counsel submitted that the Respondent was not unfairly terminated and that there were valid and fair reasons and procedure followed in the termination. That the trial court overlooked the *Employment Act*'s section 49(4) which addressed employee conduct affecting termination.
 14. Counsel relied on the case of *Simba Corporation t/a Acacia Premier Hotel v Kirui (Appeal E020 of 2023)*[2024] KEELRC 413 (KLR) and submitted that unexplained maximum award exceeded judicial authority and further on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio*[2019] eKLR and submitted that an award of 12 months must be based on sound judicial principles and the Trial Judge must justify or explain why a claimant is entitled to the maximum award. That no reasons were given in this case for the maximum award of 12 months hence it should be overturned.
 15. On the 4th ground, Counsel submitted that the Respondent was summarily dismissed for theft and Notice pay is not given in summary dismissal. Counsel relied on the case of *Masila Ngengya v Meya Agri Traders Limited* [2018] and *Christopher Komen Chebet v Brinks Security Limited* [2019].
 16. On the 5th ground on award for leave days, Counsel submitted that having pleaded kshs 46,634/=, the Respondent did not provide any evidence to support his claim.
 17. Counsel relied on the case of *Peter Ngunjiri Kariuki v Board of Management Magomano Secondary School* [2022] eKLR and submitted that if the Claimant lacked records at the hearing, the law allows summoning the Respondent to produce evidence via a notice to produce and if the Respondent fails to comply, the court can compel production and infer that the missing evidence would be adverse to the Respondent's case.
 18. Counsel submitted that it was not the Appellant's obligation to support the Claimant's case. That he who alleges must prove under section 107 of the *Evidence Act*. That there was no evidence and no notice to produce documents was issued hence no proof or basis of the award. Counsel placed reliance on the case of *Kalani v East African Growers Limited (Cause 2181 of 2015) (2022) KEELRC 1663(KLR) (26 May 2022) (Judgment)*.
 19. Counsel submitted that the Judgment of the Trial Court be set aside and release of decretal amount jointly held in the name of the advocates.

Respondent's Submissions

20. The Respondent's Advocates Lemmy Regau & Company Advocates filed its submissions dated 21st November 2024. Counsel submitted on the role of the first appellate relying on the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira* eKLR.
21. On the issue of whether the trial court erred in finding the Respondent had been unfairly terminated, counsel submitted that Section 45 of *Employment Act* provides that there must be both a valid reason and due process followed for a termination to be considered fair.
22. Counsel submitted that the Respondent had denied any wrong doing and on procedure, the Appellant issued a show cause letter which the Respondent replied to and which the Appellant confirmed receipt thereof.
23. Counsel submitted that on the day scheduled for disciplinary hearing, the Respondent was denied entry into the Appellant's premises and was therefore unable to attend any meeting. That the



- Appellant's witness confirmed that there were no call records produced showing that they had tried finding out the Respondent's whereabouts before proceeding with the disciplinary hearing.
24. Counsel submitted that the lower court correctly held that in reference to the rules of natural justice, the Claimant's right to be heard could not be taken away by the employer and procedure adopted by the Appellant fell short of the statutory threshold and was procedurally unfair.
 25. Counsel relied on the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* and submitted that for a termination to pass the fairness test, there must be both substantive justification and procedural fairness.
 26. On the issue of whether the Claimant was entitled to reliefs sought, Counsel submitted that the Appellant was aggrieved with gratuity, Notice pay, leave days and compensation for unfair termination.
 27. On gratuity, Counsel submitted that the Respondent agreed that it abandoned the claim during hearing and the same can be dismissed. That the trial court did not err in awarding the Respondent Notice pay.
 28. Counsel submitted that the trial court did not err in awarding the Respondent leave days. Counsel relied on the case of *Trebar Marambe v For You Chinese Restaurant [2021] eKLR* and submitted that an employer is to keep records relating to persons in their service including leave roster or forms filled by employees when requesting to go on leave.
 29. Counsel submitted that the trial court did not err in awarding the Claimant 12 months compensation. That under Section 49(1)(c) of the *Employment Act*, the trial Court had discretion to award compensation up to a maximum of 12 months. That the Appellant had not demonstrated in any way why the Court should disturb the award/ discretion of the lower court.
 30. The Appellant filed a rejoinder to the Respondents submissions dated 22nd November, 2024. Counsel submitted that the Respondent admitted that the award of gratuity had been withdrawn and asked the same to be dismissed. That there was no dispute that an employee was entitled to 21 days leave days but the same was not specifically pleaded and proven. Counsel requested the court to look at the case of *Adpack Limited v Makau (Appeal E223 of 2022)* (2023) KEELRC 2764(KLR) 3 November 2023) Judgment.
 31. Counsel submitted that the Respondent did not contest in the appeal that he was found with stolen items belonging to the employer and his statement to the police was adduced as evidence. That the Respondent refused to respond to show cause letter. That there was no evidence he was prevented from attending the hearing by anyone. Counsel relied on the case of *Kangethe t/a Nakubreeze Travellers Inn v David (Civil Appeal 332 of 2019)* (2024) KECA 932(KLR) 26 July 2024) (Judgment) on this assertion.
 32. Counsel submitted that the Respondent was not entitled to 12 months compensation having not been unfairly terminated and having stolen from his employer. That there was no justification for maximum compensation as per case laws.
 33. Counsel submitted that this Court is bound by the Court of Appeal precedents submitted by the Appellant and that the trial court offended the precedent and the law. Counsel relied on the case of *Dodhia v National & Grindlays Bank Limited and Another (1970) EA 195* on adherence of stare decisis. That the trial court was not vigilant in awarding claims even the Respondent admits it was undeserving.



Determination

34. The court has considered the record of appeal and submissions filed by the both parties herein and states that the principles which guide this court as a first appellate Court have been stated in several cases. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”

35. In this case, the Judgment of the trial court was that judgment was entered in favour of the Respondent against the Appellant while finding that the termination of the respondent’s service was unfair. The trial court thus awarded the claimant notice pay of Kshs 13,716/= , 12 months compensation of Kshs 164,592/=, leave days of Kshs 46,634.40/=, Gratuity of Kshs 26,904.50/= all amounting to Kshs 251,788.80/=

36. The Appellant appealed against the whole of the Judgment. The court finds that the issues placed by the parties for determination in the appeal are two main issues, namely:

- i. Whether the trial court erred by finding that Respondent’s termination of employment was unfair and unlawful
- ii. Whether the trial learned Magistrate erred in making the awards it made in favour of the respondent.

Whether the trial court erred by finding that Respondent’s termination of employment was unfair and unlawful

37. It was not in dispute that the Respondent was an employee of the Appellant from May, 2015 to October 2018 when he was summarily terminated on the basis of a gunny bag found within his premises which was alleged to have been stolen.

38. It was the respondent’s case that he was never invited for any disciplinary hearing while the appellant’s case was that he did not respond to the show cause letter nor attend the disciplinary hearing despite being given notice.

39. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. In this respect the court refers to the holding in *Janet Nyandiko vs Kenya Commercial Bank Limited* (2017) eKLR among others. Further, the court is of the view that in as much as the Respondent had a duty under section 47(5) of the *Employment Act* to prove that unfair termination had occurred, the trial court was right to find that the Respondent had illustrated that a termination had occurred. The burden therefore shifted to the Appellant to illustrate that the reasons for the termination were fair under section 47(5).

40. The requirement for a fair and valid reason is governed by section 43 of the *Employment Act* where it is provided that the termination will be unfair under section 45 if the reasons are not proved. In this case the Respondent was given a show cause letter dated 24th October, 2018 and invited for disciplinary hearing on 2nd November, 2018 on allegations of theft of Appellant’s property. The Appellant further produced an investigation report which linked the Respondent with theft of two bags found at his



house, the property of the Appellant. The Appellant further produced the Respondent's statement made to police during the investigation where he admitted possession of the two bags found in his house.

41. The court notes that the Respondent did not deny the possession of the stolen property belonging to the Appellant in this appeal. Under Section 44(4) (g) of the *Employment Act*, theft of employer's property justifies summary dismissal as it amounts to gross misconduct. In the present case, the Court is satisfied that Appellant had reasonable cause to dismiss the Respondent for gross misconduct. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR the Court stated that-

Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.

42. It is not in doubt that the reasons herein touched on the grounds of misconduct and resulted in breach of trust between the parties herein which therefore justified the dismissal. The finding by the trial court that the termination of the respondent's employment was unfair in this regard and all consequential orders is therefore set aside.
43. On the procedural fairness as provided for under section 41 of the *Employment Act*, the court notes that the Respondent was given a show cause letter which the Appellant alleges he did not respond to but in its documents it alleges he responded and the response was not satisfactory. The Respondent was further invited for disciplinary hearing which he alleged he could not attend as he was denied access to the Appellant's premises. The Appellant maintained that the Respondent refused to attend the hearing. The court also notes that the Respondent did not illustrate how he was denied entry and by who. The Court is therefore satisfied that the respondent out of guilt for having been found with the appellant's stolen property, had reason to avoid attending the disciplinary hearing.
44. In the upshot the Appeal succeeds and the order of the trial court finding that the respondent was unfairly terminated and consequential orders are hereby set aside and substituted with an order dismissing with costs, the suit in the lower court.
45. The appellant will further have the costs of the appeal.
46. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

