



REPUBLIC OF KENYA



**Gichora v Mater Misericordiae Hospital (Employment and Labour Relations Appeal E115 of 2023) [2025] KEELRC 211 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 211 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E115 OF 2023**

**JW KELI, J  
JANUARY 31, 2025**

**BETWEEN**

**ANNE WANJIRU GICHORA ..... APPELLANT**

**AND**

**MATER MISERICORDIAE HOSPITAL ..... RESPONDENT**

*(Being an Appeal against the Judgment and Orders of the Chief Magistrate's Court (Hon. B. M. Cheloti, P.M.) delivered on 29th May 2023 in Nairobi Chief Magistrate's Employment & Labour Relations Cause No. E799 of 2020)*

**JUDGMENT**

Representations

C/A Otieno

For Appellant:- A.K. Ndumu Advocates

For Respondent:- Chiuri Kirui & Rugo Advocates

1. Anne Wanjiru Gichora, the Appellant herein, being dissatisfied with the entire Judgment of the Chief Magistrate's Court (Honourable B.M. Cheloti, P.M.) delivered on 29<sup>th</sup> May 2023 in Nairobi Chief Magistrate's Employment & Labour Relations Cause No. E799 of 2020, filed a memorandum of appeal dated 29<sup>th</sup> June 2023 seeking for the following Orders:-
  - i. That this Appeal be allowed;
  - ii. That the entire Judgment delivered on 29<sup>th</sup> May 2023 be set aside in its entirety and substituted with an order for dismissal of the said award with costs awarded to the Appellant.



- iii. That the entire Judgment delivered on 29<sup>th</sup> May 2023 be set aside in its entirety and substituted with an order allowing the Appellant's claim as prayed in the Amended Memorandum of Claim filed before the trial court;
- iv. That the Judgment delivered on 29<sup>th</sup> May 2023 granting costs of the suit before the trial court to the Respondent herein be set aside in its entirety and substituted with an order for the award of the costs of the suit before the trial court plus interest at court rates to the Appellant herein; and
- v. That the costs of the Appeal be borne by the Respondent.

### **Grounds of the appeal**

2. That the learned trial magistrate erred in law by failing to award the Appellant a certificate of service, in breach of section 51 of the *Employment Act*;
3. That the learned trial magistrate erred in law by failing to grant the Appellant's prayer for unpaid leave days;
4. That the learned trial magistrate erred in law by failing to find that the Respondent's unilateral amendment of the Appellant's employment particulars without firstly consulting the Appellant and revising her written contract of employment was unfair, a contravention of the provisions of section 10(5) of the *Employment Act* and a breach of her written contract of employment;
5. That the learned trial magistrate erred in fact and in law in failing to find from the evidence on record that there was a written contract of employment that regulated the terms and conditions of service between the Appellant and the Respondent. The learned trial Magistrate erred in law by totally ignoring the effect of the contract of employment as the substantive document to give effect to in construing the terms and conditions of the Appellant's service to the Respondent;
6. That the learned trial magistrate erred in fact and in law by failing to find that the Respondent's reassignment of the Appellant to a new and much less junior position without prior consultation and in disregard of the Appellant's consistently positive work performance appraisals, was a clear breach of her right to fair administrative action as enshrined under Article 47(1) of *the Constitution*;
7. That the learned trial magistrate erred in fact and in law by failing to find that the Respondent's unilateral demotion of the Appellant from a senior managerial role to a significantly junior position which did not match her professional training, skills and competence, without giving justifiable reasons for the demotion, was unreasonable and an unfair labour practice in contravention of Article 41(1) of *the Constitution*;
8. That the learned trial magistrate erred in fact and in law by failing to consider whether the Respondent complied with the provisions of section 41(2) of the *Employment Act* when it disregarded the Appellant's grievances and written representations with regard to the fundamental unilateral change of the Appellant's terms of service contrary to her written contract of employment;
9. That the learned trial magistrate erred in fact and in law by making a finding that the Appellant was accorded a fair hearing whereas no Minutes or other evidence whatsoever was tendered to prove that the Respondent indeed held a disciplinary hearing in respect of the Appellant;
10. That the trial court erred in fact and misdirected itself on the evidence tendered before it in making a finding that the Appellant declined and had no intention of attending the Respondent's



- disciplinary hearing, whereas the Appellant tendered sufficient evidence proving that she was unwell and recuperating at the material time due to a persistent medical condition that she suffers from;
11. That the learned trial magistrate erred in fact and misdirected herself on the evidence tendered before the trial court by failing to appreciate that the notice period of only one working day given by the Respondent to the Appellant to attend the disciplinary hearing was insufficient due to the stringent Covid-19 restrictions on movement that had been imposed by the Government in October 2020 and the notice therefore fell short of the rules of natural justice;
  12. That the learned trial magistrate erred in fact by failing to find that the Respondent did not make any efforts to hold a virtual disciplinary hearing in lieu of a physical one due to the Government's stringent restrictions on movement at the peak of the Covid-19 pandemic in 2020, which would have guaranteed the Appellant's right to a fair hearing under Article 50(1) of *the Constitution* and granted her a reasonable opportunity to defend herself;
  13. That the learned trial magistrate erred in fact and in law by failing to find that the Respondent's refusal to allow the Appellant's request to reconvene the disciplinary hearing on a subsequent date to enable her recover from her illness and grant her an opportunity to defend herself, was a violation of the Appellant's right to fair administrative action as enshrined under Article 47(1) of *the Constitution*;
  14. That the learned trial magistrate erred in fact and in law by failing to find that the Respondent did not comply with the provisions of section 41(1) of the *Employment Act* when convening the disciplinary hearing and not allowing the Appellant sufficient time to procure a fellow employee to accompany her to the disciplinary hearing.
  15. That the learned trial magistrate erred in fact and in law by making a finding that the institution of legal proceedings by the Appellant defeated the purpose of the Respondent's disciplinary hearing, thereby disregarding the Appellant's right under Article 22(1) of *the Constitution* which guarantees her the right to institute court proceedings in order to safeguard her labour rights, which were being threatened and violated by the Respondent's continued refusal and/or failure to substantively address the Appellant's written grievances regarding the Respondent's unilateral change of the terms of her written contract of service;
  16. That the learned trial magistrate erred in fact and misdirected herself on the evidence tendered before the trial court by failing to find that the Respondent's refusal and/or failure to respond to the Appellant's written grievances regarding her unilateral redeployment to an unsuitable new role amounted to an unfair labour practice, contrary to Article 41(1) of *the Constitution*;
  17. That the learned trial magistrate erred in law and in fact in holding that the Appellant absconded duties and absented herself from work, and particularly failed to give any consideration at all to the Appellant's evidence on record which demonstrates that the Appellant had no work station and did not have any defined duties following the unilateral amendment of her written contract of employment by the Respondent;
  18. That the learned trial magistrate erred in law and in fact in holding that the Appellant's dismissal was fair and procedurally sound in accordance with the law, considering that no evidence of Minutes was tendered to prove that a disciplinary hearing against the Appellant actually took place and who was in attendance at the purported hearing, in order to support the trial court's finding;
  19. That the learned trial magistrate erred in law and in fact in failing to consider and properly analyze the Appellant's evidence on record, submissions and legal authorities relied in support thereof, thus arriving at an erroneous decision and a resultant miscarriage of justice to the Appellant;



20. That the learned trial magistrate erred in fact and in law by failing to find that the Respondent's termination of the Appellant's employment was procedurally and substantively unfair for failure to comply with the relevant provisions of the *Employment Act*; and
21. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant had proved her case for wrongful termination and was therefore entitled to the reliefs that she had sought.

### **Background to the appeal**

22. By amended memorandum of claim dated 15<sup>th</sup> February 2021 the appellant sought the following prayers before the subordinate court:-

- '40. A declaration that the respondent's unilateral decision to reassign her to a new position was contrary to the contract of employment between the claimant and the respondent and was a violation of the claimant's constitutional right to fair labour practices.
41. A declaration that the respondent's purported disciplinary hearing against the claimant in her absence was a violation of the claimant's constitutional right to fair administrative action.
42. An order directing the respondent to issue the claimant with a certificate of service.
43. An order directing the payment to the claimant by the respondent of the following:-
  - a. Claimant's monthly salary for the unexpired term of the employment contract between the claimant and the respondent from 1<sup>st</sup> September 2020 to 18<sup>th</sup> April 2023 amounting to Kshs. 13,272,000/-
  - b. In the alternative to prayer (a) above, special damages at 12 months 'salary as compensation for wrongful , unlawful and unfair termination of the employment contract. 12 months x 470000=5,040,000/=
  - c. 21 days unpaid leave amounting to Kshs. 294,000/-
  - d. Interest on a)b) and c) above at court rates
  - e. Aggravated and exemplary damages due to t the respondent's arbitrariness, highhandedness and malicious actions against the claimant.
  - f. Costs of this claim
  - g. Any other or further relief as this Honourable Court may deem appropriate." (page 83 of RoA).

23. In support of the claim the appellant filed her witness statement dated 14<sup>th</sup> April 2021(91-100 of RoA), produced documents under a list of documents dated 15<sup>th</sup> September 2020 (pages 158-233 of RoA were the claimant's list of documents and the bundle before the subordinate court)



24. The Respondent entered appearance and filed response dated 27<sup>th</sup> July 2021(pages 103-105of RoA) and witness statement of Everline Maina dated 3<sup>rd</sup> November 2021(pages 108-109 of RoA)
25. The claimant's case was heard on the 23<sup>rd</sup> of November 2022 where she testified as CW1 and was cross-examined by Counsel for the respondent (pages 147-148 of RoA).
26. The defence case was heard on the same day with Everline Maina testifying on oath as RW1. (Pages 149-150 of RoA)
27. The parties filed written submissions and judgment was delivered on the 29<sup>th</sup> May 2023 by Hon B.M Cheloti where the claim was dismissed for lack of merit with costs(page 156 of RoA)

### **Determination**

28. The appeal was canvassed by way of written submissions. Both parties filed.
29. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-  
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."

### **Issues for determination.**

30. The appellant in written submissions identified issues under the grounds of appeal for determination in the appeal as follows:-
  - a. Failure by the trial court to grant the Appellant's uncontested prayers
  - b. Failure by the trial court to find that there was a breach of the appellant's employment on the part of the respondent.
  - c. Failure by the trial court to find that the appellant's termination of employment was unlawful.
31. The respondent in written submissions identified the following issues for determination in the appeal:-
  - a. Whether the trial court adequately appraised the adduced evidence
  - b. Whether the trial court's finding that institution of suit defeated the purpose of disciplinary hearing
  - c. Whether the trial court's verdict on claim not proved was misguided
  - d. Whether there was miscarriage of justice leading to denial of awards prayed.
32. The court having perused the issues addressed by the parties was of the considered opinion that the issues for determination in the appeal were as follows:-
  - a. Whether the termination of the Appellant's employment was unlawful and unfair.
  - b. Whether the trial court erred in failing to award reliefs sought.



### **Whether the termination of the Appellant's employment was unlawful and unfair**

33. The appellant submitted that the trial court erred in holding there was a disciplinary hearing without sight of the minutes and relied on the decision in *Njuguna v VFS(Kenya) limited (2023)e KLR* where the court observed that the minutes of the disciplinary proceedings are a pivotal instruments to gauge procedural fairness.
34. The appellant contended that she produced evidence of being unwell on the date she was summoned to appear for a disciplinary hearing and produced an uncontested doctor's note dated 1<sup>st</sup> October 2020. She contended to have been discriminated against on account of her health status. That her intention to attend the disciplinary hearing could be discerned from her complaints on the change of her terms of employment which she deemed to be a demotion vide letters of 28<sup>th</sup> August 2020 and 21<sup>st</sup> September 2020. The hearing invitation was sent vide email on Friday 2<sup>nd</sup> October 2020 at 4.16 pm to attend on Tuesday 6<sup>th</sup> October 0220 at 10.00am. That she had only one working day to prepare for the hearing which she deemed to be insufficient. That she could not secure a fellow employee in a short time. That the short time denied her opportunity to be heard under section 41 of the *Employment Act* and relied on the decision in *Rotich v Jirani Cultural Organisation (2023)e KLR* where the court held the notice was insufficient considering the gravity of the allegations and that no internal investigations had been done. She further stated that the trial court erred in chastising her for having instituted proceedings before the trial court. She had unsuccessfully scheduled a meeting with the respondent to address her grievances and thus exercised her right of access to justice.

### **Respondent's submissions**

35. On the reasons for the termination, the respondent submitted that the trial court was not misguided in its verdict of claim not proved. That the reasons for the termination of the appellant's employment were as per the dismissal letter namely; absenteeism and absconding duty from 1<sup>st</sup> September to 6<sup>th</sup> October 2020. The appellant did not justify her absenteeism. The medical notes were neither produced by a doctor nor accounted for the time she was absent. She did not prove unfair termination whose basis was absenteeism and absconding duty.
36. On procedural fairness the Respondent submitted that the trial court never misdirected itself in holding the appellant had no intention of attending the disciplinary hearing. The appellant filed two applications to restrain the disciplinary hearing and referred to the appellant's letter dated 6<sup>th</sup> October 2020(page 200) to the effect that the appellant wanted to teach the respondent a lesson. The Respondent submitted that the notice period to secure a representative at the hearing was not an issue. That the allegations on the virtual disciplinary hearing, short notice and ill health were all a second bite of the cherry having failed to obtain order of stay of the disciplinary hearing. That the appellant ought to be estopped from approbating and reprobating having elected to choose court highway instead of the administrative avenue. That the trial court was correct to hold the institution of legal proceedings defeated the purpose of disciplinary hearing and relied on the principles set out in *Royal Ngao Holdings Limited v N.K Brothers Limited and another (2021) e KLR* to effect that having made a choice between two courses of conduct , is to be treated as having made an election from which one cannot recede and that he will not be regarded , in general at any rate , as having so elected unless he has taken the benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.



## Decision

37. The trial court held that the appellant had no intention of attending the disciplinary proceedings scheduled for 6<sup>th</sup> October 2020 having instituted the suit vide memorandum of claim dated 15<sup>th</sup> September 2020 three days before she received a letter to show cause dated 18<sup>th</sup> September 2020 (page 226 of the RoA) of which responded vide letter dated 21<sup>st</sup> September 2021. The court held that the appellant failed to show that the reassignment was unprocedural. The appellant was issued with a show cause letter which stated the reasons for intended termination being the appellant had absconded duty and absented herself from work and these were the grounds of termination (page 156).
38. The court from the proceedings noted that the appellant admitted that she was invited for disciplinary hearing and did not attend claiming she was unwell. The appellant also stated she was not given ample time to prepare. The trial court did not stop the disciplinary hearing. During re-examination she told the trial court that she sought legal redress before she was served with the show cause letter. The show cause letter dated 18<sup>th</sup> September 2020 stated that the appellant failed to report on duty after the unpaid leave on 1<sup>st</sup> September 2020 and had not given valid reasons for the absenteeism. The court perused the response to the notice to show cause. The court discerned from the response that the appellant was not pleased with the reassignment of her role with the respondent stating she was seeking clarifications before she resumed duty. The court found that the appellant in her response to the show cause admitted having failed to take up her new role as reassigned. The court held that the acts of the appellant amounted to absconding duty and a valid reason for termination of contract.
39. Section 41 provides for the procedural fairness where the employer contemplates termination of employment. The Court opined that the right to hearing is met once a party is granted a reasonable opportunity to be heard. The appellant was issued with notice to attend the hearing of 2<sup>nd</sup> October 2020 which she stated to have received at 4pm. The disciplinary hearing was on 6<sup>th</sup> October 2020. The appellant's reasons for non-attendance, appeared to the court to be a case of approbating and reprobating, was short notice and being unwell. Which was which? If unwell even if the notice was sufficient she could still not have attended. Even if the notice was short she had time to attend the notice having been issued during working hours the week before on Friday and the hearing being the next week on a Tuesday at 10.00am. The appellant stated that the learned trial magistrate erred in fact and in law by making a finding that the Appellant was accorded a fair hearing whereas no Minutes or other evidence whatsoever was tendered to prove that the Respondent indeed held a disciplinary hearing in respect of the Appellant. The court held that the challenge of procedural fairness for lack of minutes was a moot point as the appellant admitted to having failed to attend the disciplinary hearing. The minutes are not robotic. They are for the purpose of demonstrating hearing. She did not attend despite invitation.
40. The Court was satisfied that the notice was sufficient to secure the appellant opportunity to be heard. The notice was sufficient to enable the appellant to get a fellow employee to accompany her at the hearing. The appellant did not demonstrate any difficulty she faced in securing a fellow employee. The court noted that even then could have appeared and requested more time. The court agreed with the trial court's conclusion that the appellant had no intention of attending the hearing taking into consideration the application's pending in court to stop the disciplinary process and further this court adds she absconded intentionally in defiance to the respondent's decision of reassignment of role.
41. The court held the grounds on the alleged demotion were not relevant to the termination which was based on the sole ground of absconding. The court on perusal of the proceedings found that there was nothing unprocedural with the reassignment as the appellant had been reassigned roles before. The



court cannot micromanage the reorganization of the organization for operational requirements nor can it encourage misconduct of employees like absconding duty like in the instant case.

42. The court upholds the trial court decision that the termination was lawful and fair.

### **Whether the trial court erred in failing to award reliefs sought**

43. The appellant had sought the following reliefs before the trial court:-

- 40). A declaration that the respondent's unilateral decision to reassign her to a new position was contrary to the contract of employment between the claimant and the respondent and was a violation of the claimant's constitutional right to fair labour practices.
- 41). A declaration that the respondent's purported disciplinary hearing against the claimant in her absence was a violation of the claimant's constitutional right to fair administrative action.
- 42). An order directing the respondent to issue the claimant with a certificate of service.
- 43). An order directing the payment to the claimant by the respondent of the following:-
  - a. Claimant's monthly salary for the unexpired term of the employment contract between the claimant and the respondent from 1<sup>st</sup> September 2020 to 18<sup>th</sup> April 2023 amounting to Kshs. 13,272,000/-
  - b. In the alternative to prayer (a) above, special damages at 12 months 'salary as compensation for wrongful, unlawful and unfair termination of the employment contract. 12 months x 470000=5,040,000/=
  - c. 21 days unpaid leave amounting to Kshs. 294,000/-
  - d. Interest on a) b) and c) above at court rates
  - e. Aggravated and exemplary damages due to the respondent's arbitrariness, highhandedness and malicious actions against the claimant.
  - f. Costs of this claim
  - g. Any other or further relief as this Honourable Court may deem appropriate." (page 83 of RoA).

44. The appellant raised the following grounds on the appeal:- That the learned trial magistrate erred in law by failing to award the Appellant a certificate of service, in breach of section 51 of the Employment Act; THAT the learned trial magistrate erred in law by failing to grant the Appellant's prayer for unpaid leave days; The appellant submitted that these prayers were uncontested. The appellant submitted that the unpaid leave was also in the summary dismissal letter.

45. The dismissal letter stated that the final dues were to be salary upto and including 7<sup>th</sup> October 2020. Deduction of days not worked upto 7<sup>th</sup> October 2020 and accrued leave days as of 7<sup>th</sup> October 2020 (letter at page 233 of RoA). The dismissal letter was written while this matter was pending in court. In the amended claim, the appellant sought for 21 days unpaid leave (page 83). The court perused the trial court proceedings and found no evidence was led on the claim for leave days. (pages 141-152 of RoA). The court further perused the claimant's written submissions on reliefs sought. There was no submission on the said unpaid leave. The court then held that the claim for unpaid leave was not proved guided by section 109 of the Evidence Act to wit:- "108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."



46. On the issue of certificate of service, the court held that the issuance of the same was is a statutory right of every employee. There was no evidence before the trial court the appellant asked for it and was denied. The respondent stated that the appellant had delayed to clear to get the certificate. The certificate of service is a statutory right of an employee under section 51 of the *Employment Act*. The employment relationship having terminated while the suit was pending in court. the respondent ought to issue the certificate unconditionally. The court could not penalise the respondent for this as the appellant filed suit in court while still in employment hence the certificate was not due at institution of the suit.
47. Following the finding of the court that the terminating was lawful and fair all other prayers failed consequently.
48. The appeal is held to be without merit and is dismissed. The Judgment of the Chief Magistrate's Court (Honourable B.M. Cheloti, PM.) delivered on May 29, 2023 in Nairobi Chief Magistrate's Employment & Labour Relations Cause No. E799 of 2020 is upheld. The Respondent to issue the appellant Certificate of Service under section 51 of the *Employment Act*.
49. To temper justice with mercy the Court, noting the suit arose from an employment dispute, Orders each party to bear own costs om the appeal.
50. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**J.W. KELI,**

**JUDGE.**

**In the presence of:**

Court Assistant: Otieno

Appellant: - Kung'u

Respondent: Mbugua

