



REPUBLIC OF KENYA



KENYA LAW
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**Munyao v Badar Hardware Limited (Appeal E160 of 2024)
[2025] KEELRC 163 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 163 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E160 OF 2024
M MBARŪ, J
JANUARY 30, 2025**

BETWEEN

FRANCIS WAMBUA MUNYAO APPELLANT

AND

BADAR HARDWARE LIMITED RESPONDENT

*(Being an appeal from the judgment delivered on 4 July 2024
by Hon. L. Sindani in Mombasa CMEELRC E499 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 29 March 2021 in Mariakani SRMCC No.289 of 2017. The appellant seeks the judgment to be set aside and his claim to be allowed with costs.
2. The background to the appeal is a claim filed by the appellant because the respondent employed him in September 2011 as a driver earning Ksh 35 000 per month. In May 2021, he was informed by the transport manager that he had a case to answer and should wait for the managing director, but the charges were not disclosed. On 24 May 2021, he was called and directed to attend a meeting with another driver. After the meeting, he was dismissed from employment. He claimed that he had no notice of the allegations made against him to allow him to prepare his responses. This resulted in unfair termination of employment without payment of terminal dues. He claimed the following:
 - a. Notice pay Ksh.35,000;
 - b. Leave for 2021, 2020, 2019 Ksh.105,000;
 - c. Service pay for 10 years Ksh.175,000;
 - d. Salary for May 2021 Ksh.35,000;
 - e. 12 months compensation Ksh.420,000;



- f. Refund of fuel deductions Ksh.14,922;
 - g. Costs of the suit.
3. In reply, the respondent admitted that they employed the appellant as a driver and was discharged on 24 May 2021 for the following reasons of;
 - a. Failure to comply with lawful orders by the employer;
 - b. Diverting from an approved journey plan without permissions on 10 and 18 May 2021;
 - c. Neglecting the safety department's instructions and company policy on the matter of diversions.
 4. On 20 May 2021 the appellant was issued with a notice to show cause inviting him to stay why disciplinary action should not be taken against him. The letter called for a written response and to attend before the human resources manager on 22 May 2021 for a disciplinary hearing on 24 May 2021. The response is that the appellant attended a disciplinary hearing as required and was accompanied by another employee, Emmanuel Kanga. The appellant was given a chance to make his representations on the allegations made against him. The disciplinary committee was not satisfied with the responses and a decision was taken for a summary dismissal through a letter dated 24 May 2021.
 5. The appellant failed to respond to the show cause notice. Upon issuance of notice of summary dismissal, the appellant was paid all his terminal dues. He was paid Ksh.50, 000 as a token of appreciation for long service and the claims made are not justified. The appellant had exhausted all his leave days and claims for 2019 are time barred. All statutory payments were made and due process was applied hence no case of unfair termination of employment.
 6. The learned magistrate heard the parties and held that the termination of employment was done fairly and lawfully and hence dismissed the claim with costs.
 7. Aggrieved by the judgment, the appellant filed this appeal on the grounds that the learned magistrate erred in law and fact in finding that there were valid reasons for termination of employment. The respondent did not provide valid reasons or police abstracts to prove that he had reported to the police for loss of personal items. The notice for a disciplinary hearing was not done under Section 41 of the *Employment Act*, and the trial court failed to appreciate that the alleged disciplinary hearing indicated a date different from the actual date. The appellant was not given adequate notice to prepare for the disciplinary hearing, and hence, there was no substantive justification for the termination of employment.
 8. Both parties attended and agreed to address the appeal through written submissions.
 9. The appellant submitted that his employment was terminated unfairly. He filed a police abstract indicating a report to the police of loss of personal items as noted in the notice to show cause and to attend the hearing on 22 May 2021, but the hearing was held on 24 May 2021. The trial court failed to appreciate that the respondent did not follow the due process under Section 43 of the *Employment Act*.
 10. According to the show cause letter dated 24 May 2021, the reason for the termination of employment is an alleged diversion from the main transit journey without permission. The appellant lost personal items, including a mobile phone, driving license, identity card at Kibwezi. He had to call the police because he could not proceed with the journey without these documents.



11. The appellant submitted that he was not allowed due process under Section 41 of the *Employment Act*. As held in *Wanyara v Central Isiolo Investment Limited* [2024] eKLR, no valid reasons were given for the summary dismissal.
12. The respondent submitted that the appellant's employment was terminated on 24 May 2021 after investigations revealed that, as a driver, he deviated from the journey plan on 11 and 18 May 2021. This was in breach of the policy and safety instructions. The appellant was invited to a disciplinary hearing through a notice dated 20 May 2021, and he attended. He confirmed during the trial that he was allowed to attend the disciplinary hearing. In the case of *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR, the court held that a termination of employment is unfair if the employer fails to prove the reasons given are valid and that the employee was taken through the right procedures.
13. In this case, the appellant was taken through the disciplinary process and allowed to attend with another employee of his choice. As held in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, valid and genuine reasons justified termination of employment.
14. On the claims made, notice pay is not due following summary dismissal under Section 44 of the *Employment Act*. Leave pay for 2021, 2020, and 2019 is not due since these claims are time-barred by the operation of Section 90 of the *Employment Act*. Service pay for 10 years claimed is not due since there were statutory payments and remittances. The appellant was registered with NSSF, and there were remittances.
15. On the claim for salary for May 2022, employment had stopped by this period. Regarding the claim for payment of fuel refund, there were no particulars for this claim.
16. The respondent paid the appellant Ksh.50, 000 in terminal dues and ex gratia for long service despite the summary dismissal. The claims made should be dismissed.

Determination

17. This is a first appeal. The court can review the record, re-assess and evaluate the finding, and conclude. The court should consider that the trial court had the opportunity to hear the witnesses testify.
18. The appellant's case is that in May 2021, the transport manager informed him that he had a case to answer before the director. On 24 May 2024, he was invited to attend a disciplinary hearing with another driver. He attended and, in the end, was issued a notice of summary dismissal.
19. The respondent's case is that on 20 May 2021, the appellant was issued with a notice to show cause, but he failed to respond. He was also issued with a notice dated 22 May 2021 to attend a disciplinary hearing on 24 May 2021, which he did in the company of another employee. He failed to respond to the allegations made satisfactorily, leading to summary dismissal and payment of his dues.
20. The appellant admitted that the transport manager notified him that he had a case to answer. He was issued a notice to show cause and acknowledged receipt, but he did not reply as directed. The allegations were serious and amounted to gross misconduct for failing to take lawful orders from the employer, diverting from an approved journey plan, and neglecting safety instructions and company policy.
21. The failure to respond to the notice to show cause is a grievous error on the part of the appellant. Once initiated by the employer, disciplinary matters should be addressed as required. The rationale is that failure and refusal to take lawful instructions and directions from the employer is gross misconduct, and the employer is allowed under section 44 of the *Employment Act* to issue summary dismissal.



The protection for the employer is that he is issued with notice and allowed to attend disciplinary hearings on short notice as held in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR); *Kenfreight (E.A) Limited v Benson K. Nguti* [2016] KECA 409 (KLR); and *Kenya Revenue Authority v Reuwel Waithaka Gitahi, Ferichina Gathoni Waweru & Gedion Kathila Mutuku* [2019] KECA 300 (KLR) that;

The standard of proof is on a balance of probability, not beyond a reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. ...

22. Once the employer has invited the employee to show cause why employment should not be terminated for gross misconduct and the employee refuses to respond, then there exist valid and genuine reasons to believe that the acts complained of are correct.
23. During the hearing in Court, the appellant explained that he diverted from the journey plan at Kibwezi because he lost documents. He could not proceed with his journey without these crucial documents and hence he obtained a police abstract. However, these responses should have been addressed instantly with the employer when the notice to show cause was issued. To wait until there is summary dismissal and state these responses in court is too late.
24. Upon cross-examination, the appellant admitted that he had a journey plan. No diversion was permitted. He did not raise these matters with the employer or obtain permission before diverting from the journey plan.
25. Summary dismissal is allowed upon short notice subject to the employer demonstrating that the employee was aware of his gross misconduct and was allowed to attend a disciplinary hearing. In this case, the respondent followed the due process.
26. At the time employment was terminated, the respondent genuinely believed that the allegations made against the appellant were valid and related to gross misconduct.
27. The finding by the trial court that employment terminated fairly and lawfully cannot be faulted.
28. Notice pay and compensation are not due in a case where employment is terminated lawfully.
29. On the claim for leave for the year 2021, 2020, 2019 at Ksh.105, 000 annual leave is a right under Section 28 of the *Employment Act*. However, leave should not be accumulated without approval from the employer and beyond 18 months per Section 28(4) of the *Employment Act*.
30. In this case, by 2021, the respondent submitted records that the appellant had taken 63 leave days. This record is not challenged in any material way.
31. Under the provisions of Section 28(4) of the *Employment Act*, the appellant is not entitled to claim leave days.
32. Service pay is due where there is no compliance with Section 35(5) and (6) of the *Employment Act*. The appellant testified that the respondent would make remittances to NSSF and NHIF though not in full. The fact that there was registration and remittances removed the appellant from a claim for service pay. Where there were intermittent remittances. Such a matter cannot be resolved in a claim for service pay.
33. On the claims for fuel refunds, these are specific claims. They should relate to evidence and records by the claiming party, the appellant. There is none.
34. Overall, the findings by the learned magistrate on the facts and the applicable law were sound and hereby affirmed.



35. The court finds the appeal without merit and is hereby dismissed. The appellant is to bear the costs for the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

