



**Ngwara v Brookside Dairy Limited (Employment and Labour Relations Appeal
E181 of 2024) [2025] KEELRC 298 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 298 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E181 OF 2024**

**K OCHARO, J
JANUARY 30, 2025**

BETWEEN

RICHARD NYACHIENGA NGWARA APPELLANT

AND

BROOKSIDE DAIRY LIMITED RESPONDENT

JUDGMENT

Background

1. By a Memorandum of Claim dated 4th May 2021, the Appellant instituted the foretasted suit, against the Respondent, contending that at all material times, he was an employee of the Respondent as a route Salesman from 1st November 2009 to 6th May 2018, when the Respondent unfairly and unlawfully dismissed him summarily. He claimed one month's salary in lieu of notice, compensation for earned but unutilized leave days, leave travelling allowance, pro rata leave, unpaid public holidays, unpaid Sundays worked, unpaid salary for the days worked in May 2018, unpaid house allowance, gratuity pay, compensation for unfair termination, and issuance of a certificate of service.
2. The Respondent resisted the claim through a Response dated 16th July 2021. It denied the Appellant's cause of action against it and his entitlement to the reliefs sought. The Respondent Counterclaimed against Appellant KShs. 2, 495, 523.00, asserting that it suffered a financial loss to the extent of the sum as a result of his infractions.
3. Upon hearing the parties on their respective cases, the Learned Trial Magistrate rendered himself on the dispute by his Judgment dated 9th August 2024. He held that the termination of the Appellant's employment was lawful and fair and thus dismissed his case. Equally, he found the Respondent's counterclaim unmerited and dismissed the same.
4. Aggrieved by the Judgment of the Lower Court, the Appellant filed the instant appeal setting forth fifteen [15] grounds which can be safely condensed into two grounds;



- a. Whether the Learned Trial Magistrate erred in law and fact in holding that the termination of the Appellant's employment was fair and lawful.
- b. Whether the Learned Trial Magistrate erred in Law and fact when he held that the Appellant was not entitled to the reliefs sought in his Statement of Claim.

The Appellant's case before the Trial Court.

5. It was the Appellant's case before the Lower Court that he first came into the employment of the Respondent as a Salesman on or about 1st November 2009. His services were terminated on 6th May 2018 when the Respondent was summarily dismissed.
6. On 6th May 2018, he reported to work as usual and at around noon the Respondent's Security officer summoned him and his colleague to his office and informed them that an issue had arisen regarding reconciliation and inventory journals. As they were in that office, police officers walked in, arrested him and his colleague, and took them to Nyali Police Station.
7. Later, they were arraigned in court and charged with stealing by servant contrary to section 268[1] as read with section 281 of the Penal Code. When got admitted to bail, he visited the Respondent's premises to follow up on the status of his relationship with the Respondent in light of the happenings. He was not let in.
8. The Appellant asserted that he didn't have access to the Respondent's Computer System and therefore the allegation that he manipulated documents was unfounded.
9. He was eventually acquitted in the criminal case under Section 210 of the Criminal Procedure Code. The trial Court found that he couldn't have manipulated the documents as he didn't have access to the Respondent's Computer System.
10. He further stated that the Respondent didn't allow him an opportunity to be heard before terminating his employment. Further, he was not served with any notice to show cause. The Respondent didn't give him the reason why it was terminating his employment.

Respondent's case

11. The Respondent presented one witness, its Human Resource Manager to testify on its behalf. The witness stated that at all material times, the Appellant was an employee of the Respondent as a Salesman. His duties included doing daily sales reconciliation and communicating competitive information to the Management.
12. At all material times during the Appellant's employment with the Respondent, the Appellant was work hours and earnings were in line with statutory requirements. Whenever he worked overtime, he was compensated.
13. The witness testified that on various dates, acting contrary to his Job description and the terms of his contract of service, manipulated original and reconciling journals to the detriment of the Respondent.
14. Upon receiving reports on the Appellant's infractions, the Respondent ordered an investigation. The investigation revealed that indeed the Appellant was culpable, and through his actions, he had caused the Respondent a financial loss of KShs. 2,482,041.00. Consequently, he was issued with a show cause letter dated 11th May 2018. The show cause letter was served through his email address as well as the postal address contained in his employment file as he was unreachable on phone. The incident report form speaks to the service of the documents.



15. The Appellant failed to respond to the show cause letter. As such, he refused to seize the opportunity to be heard. As a result, he was summarily dismissed for gross misconduct. The Respondent had a lawful, valid and just cause to warrant the summary dismissal of the Appellant. The dismissal was communicated to him via a letter dated 15th May 2018.
16. The Appellant's acquittal came long after the termination of employment. Mere acquittal of the Appellant did not negate the reasonable grounds and beliefs of the Respondent that there was a valid reason for the termination of the Appellant's employment.
17. Besides communicating the Respondent's decision to terminate his employment, the dismissal letter contained tabulated terminal dues. The dues were used to offset the loss that he had occasioned on the Respondent. The dues were not sufficient to fully offset the loss, hence the counterclaim herein.
18. At separation, the Appellant had only 33.3 leave days earned but not utilised. Their value was computed and included in the figures on the dismissal letter. To award the sought for pro rata shall be a duplication of the leave amounts already computed and paid in the manner forestated.
19. He could be entitled to the days worked in the month of May. Gratuity was not contractually provided and, therefore unavailable to the Appellant.

Analysis and Determination

20. It is pertinent to point out at this point that the role of this Court as a first Appellate Court is to consider the material that was placed before the Trial Court, re-evaluate the same afresh, and come up with its own conclusions without being bound by the Trial Court's findings. However, sight shouldn't be lost on the fact that this Court neither saw nor heard the witnesses.
21. Inarguably, the Learned Trial Magistrate was faced with inter alia, the task of determining whether or otherwise, the summary dismissal was unfair. It is now trite that the Court faced with such a task, must consider two statutory aspects, procedural fairness, and substantive justification. Under section 45 of the *Employment Act*, a fair termination of an employee's employment or summary dismissal of an employee embodies fair procedure [the process leading up to the decision to terminate or dismiss] and substantive fairness [existence of a reason[s] for the dismissal/termination, the reason endowed with validity and fairness]. Where the termination lacks both the components or any of them, the termination of dismissal shall be unfair.
22. Section 41 of the *Employment Act* provides a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee from employment shall adhere to. Non-conformity with the Procedure will by operation of the law render the termination or summary dismissal, unfair. The procedure encompasses three ingredients, the notification- the employer must inform the employee of its intention and the grounds spurring it, the hearing – the employer must allow the affected employee an adequate opportunity to prepare and make a representation on the grounds. Conjoined with this right is the right to be accompanied by a colleague of his choice or a trade union representative [if the employee is a member of a trade union] at the hearing, and consideration- the employer must consider the employee's and or that of the accompanying person, before making the final decision.
23. The Appellant asserted that fair procedure was totally absent in the process leading up to the termination of his employment. Ordinarily, the employer would inform the affected employee through a show cause letter and or a document inviting the employee to a disciplinary hearing of their contemplation and the grounds the basis thereof. The Appellant contended that he wasn't served with any of these documents.



24. The Respondent alleged that it served the show cause letter through the Appellant's email and postal address. Service of the letter, therefore, became a contested issue. The Respondent bore the legal duty to prove the service. I am not persuaded by the Respondent's assertion that the letter was served through the Appellant's postal address. The Respondent didn't tender a certificate of postage to demonstrate the alleged postage. Secondly, in a contested issue as was this issue of service of the notice, reasonably it would be expected that the person who posted the letter testifies or swears an affidavit deposing to the fact of service, otherwise, evidence by any other person on it will just but remain hearsay.
25. I have carefully considered the document at page 100, of the record of appeal, that the Respondent tendered in evidence before the Trial Magistrate to prove the alleged service through email, and hold that the document was the most unsatisfactory to prove the service. First, it does bear the email address of the sender, second, it doesn't bear any message from which one can discern the document that was being sent under its cover, it doesn't show that the letter was an attachment, lastly, it bears content that diminishes its reliability as a document sent via email, it isn't a confirmation of receipt of a sent email. To me, the document was fabricated for the suit.
26. By reason of the premises, the Learned Trial Magistrate erred in law and fact when he held that the show cause letter was duly served upon the Appellant.
27. Undoubtedly, the Appellant was not invited for any disciplinary hearing. Therefore, he wasn't heard in his defence against the accusations that had been levelled against him.
28. In conclusion, the Learned Trial Magistrate erred in law and fact when he failed to hold that the termination of the Appellant's employment was procedurally unfair.
29. I now turn to consider the Appellant's assertion that the decision to terminate his employment was substantively unfair. In a dispute regarding the termination of an employee's employment, section 43 of the *Employment Act* places a legal burden on the employer to prove, the reason[s] for the termination.
30. Section 45 of the Act imposes a further burden on the employer to prove that the reason[s] for the termination was valid and fair. If there is a failure to prove the termination shall be deemed unfair.
31. Procedural and substantive fairness are often interwoven. Where an employer purports to terminate an employee's employment on a reason [s] that they haven't invited him or her to defend himself or herself, against, in my view, such a reason[s] cannot be held to be a valid and fair reason for termination of the employee's employment. The employer cannot in this situation be held to have acted with equity and justice. Courts will readily hold as such, where the employer has deliberately not notified the employee of the charges but continues to dismiss him, hoping that the court will only hold the dismissal to be procedurally unfair, but considering the reason[s] to be substantively fair.
32. Courts should be alert. If allowed to thrive, such conduct by employers will fully diminish the statutory requirement of substantive fairness, erode the statutory rights and protections for employees that set in with the post-2007, labour relations legal regime, and render nonsense the objective the statutes intended to achieve, neuter the unchecked Common law authority that employers possessed.
33. By reason of these premises, I do not hesitate to find that the Respondent didn't prove that the dismissal of the Appellant was substantively fair. The Learned Trial Magistrate, erred when he didn't see the matter as such, and resultantly find that the dismissal was unfair.
34. In his or her claim, against his or her employer, a dismissed employee, may seek reliefs that are tightly connected to the claim for wrongful or unfair termination and those that can be independently granted with or without the upholding of the claim for wrongful or unfair termination. Such reliefs that



- can be considered and granted independently include salary underpayments, unpaid house allowance, compensation for earned but untaken leave days, overtime compensation, and unpaid contractual allowances. The Learned Trial Magistrate didn't consider this, thus denying the Appellant relief [s] that he could have availed to him.
35. Section 49[1][c] of the *Employment Act*, bestows upon this Court the authority to grant a compensatory remedy for an employee who has through litigation, as is in this matter, successfully assailed his or her employer's decision to terminate his or her employment. However, it should be pointed out that the relief is discretionarily granted depending on the circumstances of each case. Further, the relief is only awardable, where the employee's claim for unfair termination has succeeded.
 36. I have carefully considered the circumstances of this matter, including the fact that the Respondent deliberately ignored to conform with the statutory dictates of procedural fairness but attempted to mislead all that it did. An act which easily passes for an unfair labour practice, and a breach of the implied duty of trust, and the length of service that the Appellant was in the service of the Respondent, approximately nine years, and find that the Appellant is entitled to the relief, to an extent of seven [7] months.
 37. Having found the Respondent's counterclaim unproven and unmerited, the Learned Trial Magistrate could have gone further to find that, therefore, its action of withholding the Appellant's dues, as it did, was unjustified.
 38. Having found that the termination of the Appellant's employment in the manner it was, was unfair, and considering that his employment was terminable by one month's notice under his contract of employment, which was not issued, I am inclined to and hereby, award the Appellant one month's salary in lieu of notice.
 39. The Respondent admitted that at separation, the Appellant had 33.3 earned but untaken leave days, and that dues for this were indicated on the dismissal letter as payable to the Appellant. As the same wasn't paid but withheld following the Respondent's misguided action hereinabove mentioned, I direct that the same be paid to him.
 40. That he was entitled to salary for the days worked in May 2018, was admitted by the Respondent. I see no good reason why the Learned Trial Magistrate didn't grant the relief related to this.
 41. Through its letter dated 27th April 2011, the Respondent consolidated the Appellant's house allowance and monthly bonuses with basic salary. Based on this letter, one could mistakenly think that from the onset of the contract of employment, up to that date [27th April 2011], he hadn't been earning a house allowance, and award him unpaid allowance for the period 21st October 2009- 27th April 2011, therefore seventeen months.
 42. The award of unpaid house allowance is unavailable to the Appellant, and the Learned Trial Magistrate was right in not granting the same, though I must say he didn't give any reason for his decision. Clause 3 of the letter of appointment dated 21st October 2009. The Appellant was and is wrong to argue that his salary wasn't a consolidated salary that included a house allowance.
 43. As the Trial Court, I am equally unpersuaded that the Appellant was entitled to the other reliefs sought. Most of them were just thrown to Court, with no evidence, in support. Others were duplicates.
 44. In the upshot I find the Appellant's appeal with merit. it is hereby allowed in the following terms;
 - a. The Learned Trial Magistrate's Judgment is hereby set aside, and in place thereof, Judgment entered for the Appellant in the following terms;



- I. A declaration that the summary dismissal against the Appellant was unfair.
 - II. Compensation pursuant to the provisions of Section 49[1][c] of the *Employment Act*, seven [7] months' gross salary KShs. 366, 793.63.
 - III. Notice Pay.....KShs. 52, 399.09.
 - IV. Admitted earned but unutilized leave days.... KShs. 58, 162.98.
 - V. Salary for the days worked in May 2018.....KShs. 10,479.818.
- b. Interest on the sum awarded in [ii] and [iii] above at court rates from the date of this Judgment till full payment.
 - c. Interest on the sums awarded in [iv], and [v], above at court rates from filing of this suit till full payment.
 - d. Costs of the suit in the lower court and this appeal.

READ SIGNED AND DELIVERED THIS 30TH OF JANUARY 2025.

OCHARO KEBIRA

JUDGE

In the Presence of: -

Ms. Kerubo for the Appellant.

Mr. Furah for the Respondent.

