



REPUBLIC OF KENYA



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**Onsanse v Banbros Limited (Employment and Labour Relations Appeal
E085 of 2021) [2025] KEELRC 112 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 112 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL E085 OF 2021
MA ONYANGO, J
JANUARY 23, 2025**

BETWEEN

DENNIS ONSANSE APPELLANT

AND

BANBROS LIMITED RESPONDENT

*(Being an appeal from the Judgment of the Chief Magistrate Court at Mavoko delivered
by Honourable H. Onkwani on 5th day of August, 2021 in Mavoko CMEL No. 21 of 2020)*

JUDGMENT

1. The Appellant herein was the Claimant in Mavoko CMEL No. 21 of 2020 where he had sued the Respondent vide a Memorandum of Claim dated 11th March, 2020 seeking terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 5th August, 2021 dismissing the Claimant's claim against the Respondent.
3. The Appellant being dissatisfied with the said Judgement filed the instant appeal vide the Memorandum of Appeal dated 19th August, 2021 on the following grounds:
 - a. The Learned Magistrate erred in law and facts by making a finding that the Appellant had not proved his case despite on inconsistent evidence by the Respondent.
 - b. The Learned Trial Magistrate erred on all points of fact and law in as far as making a finding that the Claimant had the burden of proof in an employment claim case.
 - c. That the Learned Trial Magistrate proceeded on wrong principles when making a finding that the Claimant was not entitled to house allowance and failed to apply precedents and tenets of the law applicable.



- d. That the Learned Trial Magistrate failed to adequately evaluate the evidence and provisions of the CBA on the issue of Leave Travel Allowance and thereby arrived at an erroneous decision.
 - e. The Learned trial Magistrate erred in law and fact when she misdirected herself in making a finding that the Claimant had absconded from his place of work despite no evidence being led to support such a finding.
4. The Appellants prayed for the following reliefs:
- a. That the appeal be allowed.
 - b. That the Honourable Court be pleased to re-asses and re-evaluate the entire evidence on record and arrive at its independent conclusion.
 - c. Any other or further relief the court deems fit to grant.
5. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 31st October, 2022 while the Respondent's submissions are dated 29th November, 2022.

Analysis

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. In his Memorandum of Claim dated 11th March, 2020, the Appellant herein sought the following orders against the Respondent:
- a. A declaration that Claimant's termination of employment was unlawful and unfair.
 - b. The claimant be paid his terminal dues as set out herein below
 - i. Salary in lieu of notice Ksh. 35,506/=
 - ii. Salary for August 2019 Kshs. 35,506/=
 - iii. Housing allowance per month for 5 years (2014 -2018) (4,400 x 12 x 5) Ksh,105,600
 - iv. Paternity leave for 1 year (2016) Ksh.35,506
 - v. Annual leave allowance for 5 years
(4,400 x 5) Ksh.177,530
 - vi. Salary increment annually for 4 years
2015 and 2016 (7%x35,506 x 12 x 2) Ksh. 59,650
2017 and 2018 (7%x37,991x12x2) Ksh.63,824
 - vii. Service pay for 5 years (2014-2018)
(35,506)
26 x 15 x 5) Ksh.102,421
 - viii. Compensation for Unlawful termination for 12 months
(35,506 X 12 Ksh.426,072



Total Ksh.1,063,615

- c. This Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - d. The Respondent to issue the Claimant with Certificate of Service in accordance with Section 51 of the *Employment Act*, 2007.
 - e. The Respondent to pay the costs of this Claim.
 - f. Interest on the above at court rates
8. It was the Appellants case that he was employed by the Respondent on 2nd February, 2014 as a factory worker earning a monthly salary of Kshs. 13,400. On 1st January, 2019 he was confirmed as permanent and his monthly salary revised to Kshs. 37,162.
 9. The Appellant averred that he performed his duties diligently until 23rd August, 2019 when he requested for a salary increment from the Plant Manager but his request was not taken kindly. The Plant Manager then insisted that the Appellant hands over the Company overall that he was wearing. When the Appellant demanded to know what he had done to deserve such treatment he was unlawfully terminated on allegations of theft.
 10. The Claimant reported the incident to Mlolongo Police Station for fear of his life and when the Respondent was called to write a statement it made allegations of theft against the Appellant.
 11. The Appellant was released on a cash bail of Kshs. 5000 which he was refunded when the Respondent failed to follow up the case. When the Appellant reported back to work he was denied access and informed orally that his services had been terminated.
 12. It was thus the Appellants case that the termination of his employment was untimely, unlawful and unjustified hence his claim against the Respondent.
 13. The Respondent on its part filed a Memorandum of Response dated 20th August, 2020 in which it contended that the Appellant was engaged as a factory worker on casual basis on 2nd July, 2014 earning Kshs 524 per day. His terms of engagement were changed to permanent basis on 1st January, 2019 at a gross salary of Kshs. 22,598 per month following the signing of a Collective Bargaining Agreement with Kenya Long Distance Truck Drivers and Allied Workers Union.
 14. The Respondent averred that on 23rd August, 2019 during a search for contraband as was customary when employees were breaking for lunch, one of the Respondent's Managers noticed that the Appellant's pockets were bulging unusually and asked him to remove his overall. The Appellant refused to comply and ran away.
 15. Another employee by the name Raphael Oduor Owino upon seeing the Appellant run away, stepped out of the queue and ran to one of the workshops. A manager and some supervisors followed him to the workshop and found some fiber materials under a table. Upon questioning Raphael confessed that the material was for sale to an acquaintance of the Appellant.
 16. The Respondent reported the incident at Mlolongo Police Station under O.B. No. 34/23/8/2019 and Mr. Raphael Oduor recorded a statement. The Respondent also notified the Appellant's union of the events of that day.
 17. The Respondent averred that the Appellant did not go back to the Respondent's premises after that date and it did not have his contacts to invite him for disciplinary proceedings.



18. The Respondent stated that the Appellant was not entitled to any leave allowance or pro-rata leave as he had taken all his leave or had been paid in lieu while in employment of the Respondent as acknowledged by the Appellant at page 58 of Record of Appeal.
19. It was further the Respondent's averment that the Appellant was not entitled to service pay as he was a member of NSSF and was not qualified for the same.
20. The Respondent stated that it was willing to compute the Appellant's terminal dues owed to him if any.

The Evidence adduced

21. At trial the Appellant testified as PW1 and adopted his witness statement as his evidence in chief. He testified that he was targeted because he asked for a salary increment as he was doing work for 2 employees who had resigned. He was accused of inciting other employees. That he returned to work and a person he named as Abi went to the gate and told him not to enter the premises. That he tried to return to work but was told there was no work.
22. On being cross examined by Counsel for the Respondent Mr. Mbeche the Appellant stated that his employment was terminated but he was not issued with a letter of termination.
23. The Respondents called 2 witnesses in furtherance of its case. DW1, Hapreet Singh adopted his witness statement dated 20th August, 2020 as his evidence in chief. He stated that while workers were going for lunch he saw the Appellant walking and his pockets were bulging. That the Appellant ran out of the compound and did not stop. He returned after 20 minutes. That Raphael was hiding under a table
24. Under cross examination DW1 stated that he did no search the Appellant. He stated it was his responsibility to search workers. He stated that the Claimant had been searched by the guards and he doubted and wanted to do a search again. That when the Appellant came back DW1 reported the incident at the police station and left the Appellant there.
25. DW2 Ruth Ogone the Respondent's Human Resource Manager adopted her witness statement dated 1st December, 2020 in which she reiterated the averments in the Memorandum of Response.
26. On cross examination, RW2 stated that she was called to the gate and RW1 explained to her what had transpired. That by then the Appellant had left the premises and later presented himself to the Police Station.

The Appeal

The Appellant's Submissions

27. In the submissions dated 31st October, 2022 filed on behalf of the Appellant he sets out 2 issues for determination being:
 1. Whether the Appellant was lawfully terminated; and,
 2. Whether the Appellant is entitled to the reliefs sought in his Memorandum of Claim.
28. On the first issue it is submitted that the Appellant was unlawfully terminated as the Respondent's witnesses conceded that he was not taken through disciplinary process. That the letter alleged to have been written to the Appellant as a notice to show cause which is alleged he failed to respond to was never produced in court.



29. The Appellant relied on the decision of the Supreme Court in the case of Kenfreight (E.A) Limited v Benson K. Nguti where the court stated:

“Had the Appellant complied with the requirements of section 41 and 45 of the *Employment Act*, the summary dismissal would have been a fair one. But to the extent that the Appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree... it is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. That the employer must also prove that the termination was in accordance with fair procedure.”

30. The Appellant further relied on the decision in the case of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR where the court stated:

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

31. It was submitted that the Learned Trial Magistrate in her judgment while analysing whether the Appellant had been unlawfully terminated noted as follows:

- a. The Appellant upon presenting demand letter he was informed that he had not been terminated but he lodged the employment claim instead of going back to work and explain his whereabouts.
- b. The evidence on record points to the fact that the Appellant was suspected of theft and that as per the Respondent’s witnesses, the Claimant went out of the compound as it was lunch hour and that the Appellant had refused to be searched and ran away.
- c. The evidence does not show he was dismissed and that the Appellant terminated his own relationship with the Respondent and not entitled to one month’s salary in lieu of notice.

32. It was submitted that the Appellant did not agree with the Learned Magistrate’s findings for the reasons that:

- a. RWI never brought any documentation to prove who he was and the trial court proceeded to not only accept his testimony but also placed heavy reliance on the same much to the detriment of the Appellant.
- b. The Learned trial Magistrate placed heavy reliance on the Respondent’s witnesses despite them giving contradicting testimonies surrounding the termination of the Appellant, for instance:
 - i. RWI testified during cross-examination that he saw the Appellant’s pockets bulging and that he did not search him as he alleged that he ran away. That he stated he was alone conducting the search as it was his responsibility but later on changed his testimony claiming the Appellant had been searched by the security guards and that he wanted to search him as he suspected that he had fibre materials.
 - ii. RWI despite having alleged that the Appellant had ran away and that the guards who were present and also his colleagues who were heading out for lunch seeing him, none



of these persons were ever called to corroborate RW1's version and as such all the Learned Trial Magistrate had was RW1's word and nothing more to substantiate her finding that the Appellant refused to be searched and ran away.

- iii. RW2 in her testimony made reference to attendance records, documentation for all employees who went for paternity leave and in re-exam she claimed that the Respondent's employees would apply for paternity leave and the Learned Trial Magistrate in rendering her judgment made a finding that the Appellant was not entitled to the reliefs sought despite RW2 not adducing any evidence in support of her testimony in court.
- c. The Learned trial Magistrate in making a finding that the Appellant had terminated his relationship with the Respondent disregarded the fact that the Appellant had testified that he was denied access to the Respondent's premises after he had returned from the police station.
- d. The Learned Trial Magistrate in making a finding that the Appellant had not been unfairly terminated placed heavy reliance on the provisions of section 47(5) of the *Employment Act* in which she noted that the burden of proof of unfair termination rests on the Appellant and the justification for such termination rests on the Respondent. That the Learned Trial Magistrate failed to analyse any of the grounds raised by the Appellant in his submissions as to why the conduct of the Respondent amounted to unfair termination. That the Appellant proved that he was unfairly terminated and as such the burden shifted to the Respondent to justify why it terminated the Appellant's employment as was held in the case of *Jane Achieng & another v University of Nairobi [2015] eKLR* where it was held as follows:

“...one of the unique features of employment and labour law where the burden of proof shifts from the employee to the employer. The reason for this is that in an employment arrangement, the employer possesses information that would not ordinarily be within the reach of the employee. The employer is therefore under a duty to produce all information within its possession that would aid the Court to arrive at a just and fair determination of the dispute before it.”

33. It was submitted that the Respondent's conduct as juxtaposed with the provisions of section 45 of the *Employment Act* reveals that the Appellant was indeed not only terminated but unlawfully so for the reasons that as noted by the Learned Trial Magistrate, the Appellant had been suspected of theft which was never proved.
34. On the remedies sought it was submitted for the Appellant that he was entitled to salary in lieu of notice, salary for August, 2019, house allowance, salary annual increment, leave transport allowance and compensation.

Respondent's submissions

35. The Respondent on its part submitted on grounds 1, 2 and 5 of appeal together and grounds 3 and 4.
36. According to the Respondent, the Appellant faulted the Learned Trial Magistrate for making a finding that the Appellant had failed to discharge his burden of proof. That section 47(5) requires an employee to prove that an unfair termination of employment or wrongful dismissal had occurred.
37. The Respondent submitted that the Appellant's employment was never terminated as held by the Trial Court. That the correct position was that the Appellant fled after being asked to reveal what was in



his bulging pockets. That after the Appellant fled a colleague confessed that he was an accomplice of the Appellant.

38. It was further submitted that the Appellant testified that he fled fearing for his life and did not rebut the evidence that he left the Respondent's premises in haste. That the Respondent went to the extent of informing the Appellant's union of the incident in a bid to mitigate the circumstances.
39. The Respondent placed reliance on the case of *Idd Salim Mwadele & 19 others v Kwale International Sugar Company Limited* where the Court of Appeal determined that where the burden of proof as assigned by Section 47(5) of the *Employment Act* has not been discharged by a Claimant, the said onus does not shift to the employer.
40. It was submitted that the Appellant faulted the trial court on an apparent reliance on inconsistent evidence on the part of the Respondent in rendering its decision on the issues between parties.
41. The Respondent submitted that the Appellant's evidence had several discrepancies which the Respondent highlighted as follows:
 - i. The Appellant on the one hand stated that his salary was Kshs. 17,447/= while at the same time he claimed that he was earning Kshs. 37,162 as his monthly salary.
 - ii. The Appellant in his testimony stated that he was never charged but later admitted to have been released on cash bail.
 - iii. The Appellant stated that his employment was terminated by a plant manager who asked him to hand over his overalls while in the same breath he stated that he left the Respondent's premises in fear of his life and came back soon after his 'release' from the Police Station only to be denied access.
 - iv. The Appellant stated that he went to the Police Station to report a threat to his life and at the same time he stated that he was arrested and ended up paying a cash bail to secure his release.
42. The Respondent submitted that the said discrepancies show a pattern that the Appellant was only giving answers to suit his narrative as opposed to aiding the trial court on the true facts of the matter.
43. On grounds 3 and 4 the Respondent submitted that the Appellant is not entitled to salary in lieu of notice as he was not terminated from employment, that he is not entitled to salary for August, 2019 as he was paid advance salary on 15th August, 2019 as provided in the CBA. Further that his salary was Kshs. 22,598 and not 37,162 as alleged.
44. It was the Respondent's further submission that the Appellant was not entitled to house allowance as he was paid a daily wage inclusive of house allowance while he was a casual and paid a gross salary after confirmation to permanent employment.
45. It was submitted that the Appellant was paid annual leave and leave travelling allowance, that paternity leave was not proved and that annual salary increment for 5 years was also not proved.
46. It was submitted that the Appellant having not been terminated is not entitled to compensation.

Determination

47. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that fall for determination are whether the trial court erred in holding that the Appellant did not prove unfair termination of his employment and whether the trial court erred in dismissing his claim.



48. Unfair termination is provided for in section 45 as follows:
1. No employer shall terminate the employment of an employee unfairly.
 2. A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
49. In the instant case, the Appellant’s position is that his employment was terminated by the Respondent after he reported back from the police where he had been accused of theft. He stated that he was not allowed to gain access to the work premises.
50. The Respondent on the other hand insists that the Appellant did not report back to work after being released from the police station.
51. Section 44(4)(a) provides that an employee is liable for summary dismissal if the employee fails to report to work. The exact wording of the section is that an employee is liable for summary dismissal if without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work.
52. The Appellant did not report for work from 23rd August 2019. Going by the Respondent’s position that he absconded duty, it was incumbent upon the Respondent to inquire why the Appellant was not at work and if he failed not explain, to summarily dismiss him.
53. The Respondent avers that it could not discipline the Appellant because he was unavailable. It did not state any steps it took to get in touch with him.
54. An employer cannot claim not to have the contacts of an employee. This is because section 10 of the [Employment Act](#) requires an employer to keep records of an employee which include the contacts of the employee. Section 10 provides as follows:
- 1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.
 - (2) A written contract of service shall state—
 - (a) the name, age, permanent address and sex of the employee;
 - (b) the name of the employer;
 - (c) the job description of the employment;
 - (d) the date of commencement of the employment;
 - (e) the form and duration of the contract;
 - (f) the place of work;
 - (g) the hours of work;



- (h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;
- (i) the intervals at which remuneration is paid;
- (j) and the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and
- (k) any other prescribed matter.

55. It is therefore not an excuse for the Respondent to plead that it could not hold a disciplinary hearing for the Appellant because it did not have his contacts. These are employment records that an employer is under legal obligation to keep in respect of every employee.
56. An employer is also not allowed to keep the employment status of an employee in an indeterminate state. If the employment is to be terminated it must be done in the manner provided in sections 41, 43 and 45(2) of the *Employment Act*.
57. An employer must communicate with the employee and require the employee to report back to work failing which the employment would be terminated on ground of absenteeism. If a decision is made to terminate employment, the employer must communicate such decision to the employee.
58. An employer who fails to follow this process and who decides to keep silent in such a situation would be deemed to have unfairly dismissed the employee as has been held in many decisions of this court and the Court of Appeal. In the case *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR, the court observed as follows:
- “An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
59. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that
- “Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”
60. In the instant case, the Respondent having failed to subject the Appellant to a disciplinary hearing, the termination of the Appellant's employment was unfair.
61. I therefore find that the Learned Trial Magistrate erred in holding that the Appellant had failed to prove that his employment was unfairly terminated.
62. The next issue for determination is whether the Appellant is entitled to the remedies sought in his Memorandum of Claim.
63. The Appellant prayed for pay in lieu of notice which he is entitled to under section 49(1)(a) of the Act as read with section 35(1)(c) and 36 of the Act. I award him Kshs. 22,596 being his gross salary per month.
64. The Claimant further prayed for salary for August 2019 which he is entitled to up to the date of termination being 23rd August, 2019 at Kshs. 19,989. The Respondent's averment that the Appellant



had been paid salary advance was not supported by any proof of payment. The Appellant denied that he had applied for salary advance for the month.

65. The Appellant is not entitled to housing allowance as he was paid a daily wage which is inclusive of house allowance for the years before his terms were converted to permanent. He was paid house allowance of Kshs. 4,400 after conversion to permanent employment as reflected in his payslips.
66. The Appellant's prayer for paternity leave was not supported by any evidence and is declined as for having not been proved. In any event even if there was evidence, the prayer for paternity leave of 2016 would have been time barred by 2020 when the claim was filed.
67. Pay in lieu of annual leave was paid to the Appellant with his January to April, 2019 salaries as reflected in the payslips that he filed. He is however entitled to pro-rata leave for 2019 for 6 months from February to August 2019 (13 days) which I award him at Kshs. 6,812.
68. Leave transport allowance is payable to the Appellant as the Respondent did not prove that the same was paid to him together with the pay in lieu of leave paid in the payslips for January to April, 2019. I award the Appellant the same for the period 2nd February, 2014 to the August, 2018 (4 years) at Kshs. 4,400 per year as per clause 5 of the CBA totalling Kshs. 17,600.
69. The Appellant did not demonstrate that he is entitled to salary increment for the years worked. The prayer is rejected.
70. The Appellant is entitled to service pay for the years 2014 to 2018 when he was not a member of NSSF which I award him at 15 days per year based on his last gross salary in the total sum of Kshs. 45,192.
71. Having found that the Appellant's employment was unfairly terminated, he is entitled to compensation. Taking into account all the circumstances of the case as well as the relevant factors under section 49(4) of the Act I award him 6 months salary as compensation based on his gross pay of Kshs. 22,596 in the sum of Kshs. 135,576.
72. The Appellant shall have costs of appeal as well as costs in the lower court.
73. Interest shall accrue from date of judgement.

Conclusion

74. Having made findings as above, I make the following final orders:
 1. The appeal is allowed in terms of the findings above.
 2. The judgment of the trial court is set aside and judgment entered for the Appellant against the Respondent as follows:
 - i. Pay in lieu of notice Kshs. 22,596
 - ii. Salary for 23 days worked in August, 2019 Kshs. 19,989.
 - iii. Pro rata leave Kshs. 6,812.
 - iv. Leave transport allowance Kshs. 17,600.
 - v. Service pay Kshs. 45,192.
 - vi. Compensation Kshs. 135,576.
 - vii. Costs both in the lower court and in the appeal.



viii. Interest from date of this judgment.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 23RD DAY OF JANUARY, 2025.

M. ONYANGO

JUDGE

