



**S & I Secured Assured v Pamba (Employment and Labour Relations Appeal 11 of 2020) [2025] KEELRC 115 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 115 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 11 OF 2020  
MA ONYANGO, J  
JANUARY 23, 2025**

**BETWEEN**

**S & I SECURED ASSURED ..... APPELLANT**

**AND**

**VINCENT ONG'ARIA PAMBA ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Hon. S. Wewa - Senior Principal Magistrate delivered on 29th September 2020 in Eldoret CMELRC No. 179 of 2019)*

**JUDGMENT**

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 179 of 2019 where the Respondent had sued the Appellant vide a Memorandum of Claim dated 13<sup>th</sup> June 2019 seeking compensation and terminal dues for the alleged unfair termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 29<sup>th</sup> September 2020 and held that due process was not followed by the Appellant in the termination of the Respondent's employment. Judgment was entered in favour of the Respondent and he was awarded the reliefs as sought in his Memorandum of Claim.
3. The Appellant being dissatisfied with the said Judgement instituted the instant appeal vide the Memorandum of Appeal dated 27<sup>th</sup> October 2020 and filed in court on 29<sup>th</sup> October 2022. It raised the following grounds of appeal:
  - i. The learned trial magistrate erred in law and in fact in making a finding that the respondent's termination was unprocedural and substantively unfair.
  - ii. The learned trial magistrate erred in fact and law in finding that the procedure used was wrong and lawful.



- iii. The learned trial magistrate erred in law and fact in overlooking the documentary evidence presented by the Appellant and failing to make a reasoned analysis of the materials.
  - iv. The learned trial magistrate erred in law and fact by giving no regard to the faults admitted by the Respondent on his conduct leading to his dismissal.
  - v. The learned magistrate erred in law and fact in failing to take into account the principles of making an award of compensation as set out under section 49 of the *Employment Act*.
  - vi. The learned trial magistrate erred in law and fact in awarding disputed claims on compensation without due regard to documentary evidence.
  - vii. The learned magistrate erred in law and fact in making an award of compensation disregarding the monies paid to the Respondent upon termination.
  - viii. The learned magistrate erred in law and fact in delivering a judgment not supported by the evidence.
4. Consequently, the Appellant seeks the following orders:
- a. The appeal be allowed
  - b. The entire judgment of the subordinate court be set aside
  - c. Costs be awarded to the Appellant.
  - d. Such other or further, incidental, alternative or consequential orders and reliefs as this Honourable Court may deem just and expedient
5. The appeal was disposed of by way of written submissions. The Appellant filed its written submissions on 14<sup>th</sup> November 2023 while the Respondent filed his submissions on 13<sup>th</sup> December 2023.

#### **Appellant's submissions**

6. The Appellant in its submissions addressed the issues for determination from the grounds of appeal as follows:
- i. Whether the termination of the Respondent's employment was un-procedural and substantively unfair?
  - ii. Whether the Respondent's disciplinary process was in line with proper procedure?
  - iii. Whether the trial court magistrate erred in law and fact by overlooking the documentary and oral evidence presented?
  - iv. Whether the Respondent is entitled to the reliefs granted.
7. On the first issue, the Appellant submits that due process was followed in the dismissal of the Respondent from employment. According to the Appellant, the Respondent was summarily dismissed on the grounds of gross misconduct by the Appellant following an incident where he picked a quarrel and attacked a client leading to the damage of said client's mobile device.
8. It is the Appellant's submission that the incident prompted the Respondent's immediate suspension on the 29<sup>th</sup> November 2017 to pave way for further investigations on the incident which found him answerable to said incident consequently leading to disciplinary proceedings against him as a result of which the Respondent was summarily dismissed from employment.



9. On the second ground on whether the disciplinary process was in line with proper procedure, the Appellant submitted that the Respondent was issued with a show cause letter dated the 6<sup>th</sup> December 2017 to show cause why disciplinary action should not be taken against him. That the Respondent was thereafter issued with a disciplinary hearing notice dated the 8<sup>th</sup> December 2017 inviting him to a disciplinary hearing scheduled for 11<sup>th</sup> December 2017. The Appellant contends that the Respondent admitted at the disciplinary hearing to engaging in a fight with a client and was summarily dismissed for gross misconduct.
10. On the issue whether the trial court erred in law and in fact by overlooking the documentary and oral evidence presented, it was submitted that the Respondent, through his admission, openly acknowledged that he insulted the client and engaged in a physical altercation with the client on the 28<sup>th</sup> of November 2017.
11. It is the Appellant's submission that this admission is substantiated by the records of the disciplinary hearing that took place on the 11<sup>th</sup> December 2017. The Appellant submits that the actions of the Respondent constituted severe misconduct, which was unbecoming of his position as a supervisor and was in direct violation of Clause 4.6 of the Appellant's code of conduct. That such misconduct would provide the Company with grounds to summarily terminate the Respondent's employment.
12. Further, the Appellant contended that in the Trial Court's Judgment dated the 29<sup>th</sup> September 2020, the Learned Magistrate made a declaration that the issue of the certificate of service had not been properly addressed rendering the termination of the Respondent as unfair and in violation of proper procedures. The Appellant submitted that throughout the entire course of the case, both in the submissions made and the testimonies provided by the Appellant's witnesses, it was consistently emphasized that the Respondent's certificate of service had been prepared and was readily available.
13. The Appellant submitted that the Respondent had declined or neglected to collect the certificate when it was made available to him upon receipt of his final payment from the company.
14. Lastly, on whether the Respondent is entitled to the reliefs granted, it is the Appellant's submission that the Respondent is not entitled to the same based on the presented arguments that the Respondent's termination was neither unfair nor unlawful.
15. The Appellant submits that the Respondent is not entitled to any of the remedies awarded by the Honourable Lower Court.
16. The Appellant thus prayed that this appeal be allowed, the Judgment dated 29<sup>th</sup> September 2020 and the reliefs granted be set aside and the claim be dismissed with costs to the Appellant.

### **The Respondent's submissions**

17. On his part, the Respondent framed the issues in his submissions to be:
  - i. Whether the summary dismissal of the Claimant was fair or unfair
  - ii. Whether there is a case for grave harm on the Claimant and thus a good basis for payment of damages
  - iii. Whether the remedies sought are available to the Claimant.
18. In his submissions, the Respondent submitted that from the evidence on record, the appellant did not show compliance with section 41 of the [Employment Act](#) since there is no evidence to prove that the



Claimant was represented by a fellow employee and/or legal representative to advance his defense and that the Claimant was not given adequate opportunity to defend himself.

19. According to the Respondent, the alleged offence of fighting a colleague is not a proper ground for summary dismissal under the Employment Act which provides grounds for summary dismissal to include: misconduct, poor performance or physical incapacity. That from the evidence by the Claimant and Appellant, the appellant did not prove to the honorable court that the Claimant was incapable and unwillingly to perform his work. That what can be deduced from the Respondent is a mere excuse to terminate the Claimant's services.
20. It is the Respondent's submission that the trial court in its judgement at page 129 of the record of appeal noted that it considered the evidence of the parties before reaching its decision. The Respondent therefore urged the court to find that the trial court did not make an error in holding that termination of the Claimant by the Appellant was unfair given that there was no genuine, valid and justifiable ground leading to the dismissal of the Claimant as the same lacked substantive justice contrary to section 45(2) of the Employment Act.
21. In response to ground 3 and 4 in the Memorandum of Appeal, the Respondent submitted that the trial court considered submissions of both the Appellant and the Respondent and all documentary evidence in arriving at her conclusion and even gave reasons for her findings. It was submitted that the Appellant has not shown how the court overlooked its documents and which admissions were made by the Claimant and not considered.
22. Regarding the third issue for determination, the Respondent submitted that RW-1 admitted in his testimony that he had no documentary proof to demonstrate that the Respondent was not entitled to the reliefs he sought in his claim. It was therefore the Respondent's submission that the evidence of the Claimant remained uncontroverted and thus the trial court was right in awarding all the reliefs sought by the Claimant as provided by provisions of section 49 of the Employment Act 2007.
23. The Respondent urged the court to dismiss the appeal with costs.

### **Analysis and determination**

24. 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 v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
25. I have considered the Appellant's Record of Appeal and the submissions by both parties. The many grounds of appeal herein, are summarized as follows:
  - i. Whether the Learned Magistrate erred in failing to hold that the summary dismissal of the Respondent was procedurally fair
  - ii. Whether the Learned Magistrate erred in failing to hold that the summary dismissal was substantively fair.
  - iii. Whether the compensatory damages awarded to the Respondent by the trial court should be set aside.



**Whether the learned Magistrate erred in failing to hold that the summary dismissal of the Respondent was procedurally fair**

26. The law relating to fair termination is contained in Sections 41, 43 and 45(2) of the *Employment Act*. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but also ensure compliance with fair procedure.
27. Section 43 of *Employment Act* 2007 provides inter alia:
43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
28. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination are valid and the procedure is fair.
29. Section 45(1) of the *Employment Act* provides that:
- “No employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove: -
- a) That the reason or reasons 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 was that the Employment was terminated in accordance with fair procedure”.
30. In the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR this Court had the following to say on the burden of proof: -
- “There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:
- “...to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees...”



Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.”

31. From the record, the Respondent was issued with a suspension letter dated 29<sup>th</sup> November 2017 which I reproduce hereunder:

Vincent Ongária,

P/F No.518

S&I Security

Date: 29/11/17

Dear Vincent,

REF: Suspension Letter

This is to inform you that you have been suspended from duty for 7 days without pay as from 29<sup>th</sup> November 2017. This decision has been arrived at based on the report that on 28<sup>th</sup> November 2017, you mishandled a client to an extent of engaging on a physical fight. Kindly note that your action or inaction is contrary to the company's regulation and code of conduct.

You are required to see the undersigned after suspension for further advice.

Yours faithfully.

For S & I Security

Signed

Naftali Mengich

Ag. HR

32. Thereafter, the Respondent was issued with a show cause letter which read as follows:

Vincent Ongaria

PfNo.C518

Date: 6<sup>th</sup> December 2017

Dear Ongaria,

REF: Show Cause Letter

This is reference to your suspension of 7 days whereby the details of the incident you were involved in were stated in the suspension letter.

You are hereby required to show cause why disciplinary action should not be taken against you. Kindly submit your response to this letter in writing on or before 7<sup>th</sup> Dec 2017.

For S&J Security

Signed

Naftali Mengich-AG HR/OM

Kindly sign in the spaces provided below to acknowledge receipt of this letter.

Date: 6.12. 2017 Sign: signed



33. After the disciplinary hearing held on 11<sup>th</sup> December 2017, the Respondent was issued with a dismissal letter which reads: -

Mr Vincent Ongária

PE/No: C5IS

Date:11" Dec 2017

Dear Mr. Ongária,

REF: Dismissal Letter

We refer to the disciplinary hearing dated 11" December 2017 when your conduct while assigned as Duty Supervisor at Eldoret Branch was discussed. During the hearing, you pleaded guilty of an offense that you engaged into a fight with a S&I Client's representative Mr. Haron of Peter's residence. A smart phone belonging to the Client was damaged in the process and the company had to incur the cost of repairing the said phone.

In view of the above the company has no otherwise but take a very decisive action on you and by this letter, you have been summarily dismissed for Gross Misconduct.

Please surrender all company items ASAP for processing of your final dues if any. We wish you the best in your future endeavors.

Yours Faithfully,

For S&I Security

Henry Kwena

General Manager

Kindly sign in the spaces provided to acknowledge receipt of this letter.

Date:10/01/2018 Sign: @kmgA

34. From the suspension letter, the show cause letter as well as the dismissal letter, it is clear that the Respondent was summarily dismissed on the grounds of misconduct following an altercation between himself and the Appellant's client.
35. The Respondent in his testimony at the trial court stated that on 28<sup>th</sup> November 2017 while in the course of performing his assigned duty of supplying post orders documents to guards, he met the guard of St Peters residence who informed him that the caretaker of the residence wanted to see him. He stated that he had differed earlier with the said caretaker. When the Respondent went to see him, the caretaker asked the Respondent to either choose to be sued or resign from work. The Respondent chose to leave the premises but the guard refused to open the gate prompting him to forcefully take the key. The Respondent further stated that as he was leaving, he was hit by the caretaker and he raised an alarm through radio. It was the Respondent's evidence that he reported the incident the next morning to his managers. He stated that the director brought a broken phone alleging that the Respondent broke it during the previous day's altercation and that he tried explaining that no phone was broken but he was suspended from duty nevertheless.
36. I have perused the proceedings of the disciplinary hearing held on 11<sup>th</sup> December 2017. It does not capture verbatim what the Respondent stated in the show cause letter or what the guard at the site stated in his statement at page 98 of the Record of Appeal. The Appellant did not bother to take a statement from the client.



37. According to the Respondent, it is the client who attacked him but he did not fight back. He only had a scuffle with the client to retrieve the keys to the motorcycle which the client had grabbed. The Appellants evidence is supported by the statement of the guard who was at the premises found at page of 98 of the record of appeal.
38. The letter of dismissal states that the Respondent pleaded guilty to the offence of fighting with a client, which is not reflected in the evidence adduced by the Appellant or in the evidence adduced on behalf of the Respondent other than the minutes of the disciplinary hearing which as I have pointed out, is not minutes but a report by the person who was recording the proceedings.
39. It is also on record that the Appellant had reported to his superiors about the unbecoming conduct of the caretaker and he had been advised to avoid any contact with the said care taker. It is further material that the caretaker was reported to have been drunk at the time of the incident. All these are factors that the Respondent ought to have taken into account but did not.
40. I find that the Respondent did not prove the grounds for dismissal of the Respondent.

**Whether the Learned Magistrate erred in failing to hold that the summary dismissal was substantively fair.**

41. Section 41 of the *Employment Act* supplies the structure for procedural fairness, it provides:
  - “(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
42. In summary, under section 41 of the *Employment Act*, the mandatory procedure requires notification, a hearing and consideration of the employee’s representations and his co-worker’s before termination.
43. As already set out herein above, the Appellant was first suspended, then issued with a notice to show caus which he responded to and thereafter invited for a disciplinary hearing. The letter inviting him to the hearing did not specifically inform him of his right to be accompanied by either a colleague or shop floor union representative but informed him of his right to attend with his witnesses.
44. A perusal of the disciplinary hearing form at page 92 of the Record of Appeal shows that the Respondent was not represented.
45. It is my considered view that the Respondent substantially complied with fair procedure though the timelines could have been a little more accommodating to the Appellant.
46. Having found that the reason for summary dismissal of the Appellant was not proved by the Respondent, the summary dismissal was unfair in terms of section 45(2) of the *Employment Act*.



**Whether the compensatory damages awarded to the Respondent by the trial court should stand.**

47. In its judgment, the trial court awarded the Respondent the reliefs a sought in his Memorandum of Claim.

48. In his Memorandum of Claim, the Respondent sought the following reliefs:

- i. A declaration that the Claimant's services were procedurally, unlawfully and unfairly terminated and in the circumstances the Claimant is entitled to compensation of his terminal dues
- ii. The sum of Kshs 1,078,422.30 comprised of leave allowance, public holidays dues, overtime dues, unpaid housing, severance pay, exemplary and aggravated damages, one month pay in lieu, unpaid salary for the month of November 2017, unpaid salary for three days in the month of November 2017, unpaid leave days, motorbike deductions for nine months, off duty days, phone repair, rest days, motorbike mileage, paternity leave and 12 months compensation.

49. I will proceed to address the reliefs sought under different heads

- i. Leave allowance

The Respondent had sought for Kshs. 112,000 being the leave allowance on pro-rata basis for the 7 years he worked for the Appellant. From a cursory look at pages 80 and 81 of the Record of appeal, it is clear that the Respondent proceeded on leave. He is therefore not entitled to this award and the trial court's award under this head is thus set aside.

- ii. Public holidays dues

The Respondent sought for payment of Kshs 67,620 being payment for working during public holidays in 4 years. There is on record evidence at pages 76 and 77 that the Respondent was given off days. I find this head not proved and set aside the award of the trial court.

- iii. Overtime dues

RW1 in his evidence stated that the Respondent was entitled to overtime dues but did not tender any evidence to show that the Respondent was paid overtime. I therefore uphold the trial court's award under this head.

- iv. Unpaid housing allowance

The Respondent had sought Kshs. 201,600 as housing allowance. RW1 in cross examination stated that the Claimant was entitled to housing allowance but he did not produce any documentation to prove that he was paid housing allowance. I uphold the court's finding on this award.

- v. Severance pay

Under section 40(1)(g) of the *Employment Act*, 2007, only employees separating with an employer on account of redundancy are entitled to payment of severance pay. On this ground, the award of severance pay is hereby set aside.

- vi. Exemplary and aggravated damages

The circumstances of this case do not satisfy the grounds established in the case of *Rookes v Barnard* (1964) AC 1129 to merit the award of exemplary damages. The award of exemplary damages is set aside



vii. One month pay in lieu of notice.

Having found that the termination of the Respondent was without valid reason and therefore unfair, he is entitled to pay in lieu of notice. I uphold the award by the trial court.

viii. Unpaid salary for the month of November 2017

The Appellant was suspended on 29<sup>th</sup> November, 2017. There is no evidence that he was paid the salary for the month. He is therefore entitled to the same. I uphold the award by the trial court. There is evidence that the Respondent only worked for three days in November 2017.

ix. Unpaid salary for three days in the month of November

This should be days worked in December, 2017. RW1 in cross examination stated that the Respondent was not paid his November salary and salary for the 3 days he worked in December as he was on suspension. He is therefore only entitled to 3 days salary. He is also entitled to pay for the days he was on suspension. I set aside the award by the trial court under this head and substitute the same with an award of salary up to 11th December, 2017 being the date of dismissal. I uphold the award for salary for November and 3 days in December. I further award the salary for days worked in December being

x. The Claim for Off duty

The Claim was not proved. The trial court's award under these head are set aside.

xi. Motorbike deductions

RW1 that there was a deduction for motor bike for 9 months. The award of the trial court on this head is upheld.

xii. Phone repair

The Appellant is entitled to payment under this head as there was no proof that he damaged the phone. The prayer is upheld.

xiii. Rest days

The Appellant did not prove that he was not given off days in lieu of off days or that he did not go for off days. The prayer is declined for lack of proof.

xiv. Paternity leave

The Respondent did not tender any evidence to demonstrate that he was entitled to paternity leave. The award of paternity leave due is set aside.

xv. 12 months' compensation

RW1 in his evidence confirmed that the Respondent was in the service of the Appellant for about 7 years (2012-2017). Other than the issues giving rise to this case, it has not been demonstrated that the Respondent had disciplinary issues in the years he was in the service of the Appellant. I find that an award of 7 months' compensation would be sufficient for the unfair dismissal.

50. I have noted that the Appellant's witness, RW1, in his evidence at the trial court stated that the Respondent was already paid Kshs 83,170. This amount shall be deducted from the final award due to the Respondent.

51. In conclusion, the court makes orders as follows:



- i. The trial court's award on leave allowance, severance pay, exemplary damages, off duty, and Paternity leave are set aside.
- ii. The Trial court's award of 12 months' salary as compensation for unfair and unlawful dismissal is set aside and substituted with an award of compensation of 7 months' salary.
- iii. The other awards by the Trial Court remain undisturbed.
- iv. Kshs 83,170 already paid to the Respondent should be deducted final dues payable to the Respondent.
- v. Each party shall bear their own costs of the appeal.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**M. ONYANGO**

**JUDGE**

