



**United Millers Limited v Musimbi (Appeal E018 of 2024)
[2025] KEELRC 105 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 105 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E018 OF 2024
NZIOKI WA MAKAU, J
JANUARY 22, 2025**

BETWEEN

UNITED MILLERS LIMITED APPELLANT

AND

LILIAN MANDU MUSIMBI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Dr D. N
Ogoti in Kisumu CMELRC No. E241 Of 2022 dated 15th May 2024)*

JUDGMENT

1. Lilian Mandu Musimbi as Claimant sued United Millers Limited (the Appellant herein) before the Kisumu Chief Magistrate's Court, alleging unfair termination. She sought general damages, a certificate of service, terminal dues and costs of the suit. In response to the claim the Appellant argued that the termination was justified. In a judgment dated 15th May 2024 the Court found that the Respondent's termination of employment was unlawful and allowed her claim in its entirety. Aggrieved, the Appellant lodged a memorandum of appeal with this Court dated 23rd May 2024 contending that:
 - a. The Learned Magistrate erred in failing to give the Appellant a fair hearing by failing to consider the evidence adduced by the Appellant in the trial court.
 - b. The Learned Magistrate failed to appreciate the submissions of the learned Counsel for the Appellant by finding in favour of the Respondent herein.
 - c. The Learned Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant as a whole and hence the analysis and determination of the trial cause was one sided.



2. Consequently, the Appellant sought that the appeal be allowed and that judgment be entered in its favour. Pursuant to directions of the Court, the appeal was disposed of by way of written submissions.

Appellant's Submissions

3. The Appellant identifies the following issues for determination:
 - a. Whether the Respondent was retained on a salary-based contract or a commission-based contract.
 - b. Whether the Respondent received a salary of Kshs. 80,000/-
 - c. Whether the Respondent was dismissed un-procedurally.
 - d. Whether the Respondent is eligible for damages as pleaded in the Claim.
 - e. Whether the Amended Claim ought to be struck off for not having been verified by an affidavit.
4. On the first issue the Appellant submits that the Respondent's remuneration was commission based. It asserts that nowhere in the contract was there a provision for a Kshs. 80,000/- monthly salary. The Appellant refers to Clause 11 of the agreement, which specifies that sales representatives will be paid on commission, based on set targets and subject to a 5% withholding tax.
5. Additionally, the Appellant cites the case of *Hussamudin Gulambussein Potbiwalla administrator, trustee and executor of the Estate of Gulambussein Ebrahim Potbiwalla v Kidogo Basi Housing Cooperative Society Ltd & 31 others* [2009] eKLR where it was emphasized that a court cannot rewrite a contract between parties, and that it is not the role of equity to allow a party to escape from a bad bargain. Regarding the Respondent's salary, specifically the allegation that it was reduced from Kshs. 80,000/- to Kshs. 63,160/-, the Appellant submits that there is no proof of such a reduction. The Appellant asserts that no pay slips were availed and that the pleadings and evidence did not support that claim. It cites the Court of Appeal decision in *IEBC & another v Pauline Akai Lokuruka & another* [2018] eKLR, where the Court was of the opinion that a court could only make findings in correspondence with the specific allegations pleaded as against the evidence and the law.
6. Regarding the Respondent's eligibility for the damages pleaded in the claim, the Appellant argues that the Respondent's employment was terminated for valid reasons and submits that there was no breach of contract on its part. The Appellant contends that the Respondent failed to meet her targets, thus justifying her termination in accordance with the provisions of sections 43(1) and 45 of the *Employment Act*. In terms of the procedure followed in the Respondent's dismissal, the Appellant asserts that the provisions of sections 43, 44, and 45 of the *Employment Act* were fully adhered to. The Appellant references the letter dated 7th July 2022, informing the Respondent that her contract would not be renewed after 30th June 2022 due to consistent failure to meet targets, and that her commissions would be paid up until 30th June 2022.
7. The Appellant further submits that the Respondent was given ample notice in line with section 41 of the *Employment Act*, and that all contractual provisions were followed accordingly. Finally, with regard to the Amended Claim not being supported by a verifying affidavit, the Appellant submits that this failure is fatal to the claim and urges the court to strike it out, on the basis of section 4(2) of the *Employment and Labour Relations Court Rules*.



Respondent's Submissions

8. From the outset, the Respondent reaffirms her support for the Magistrate's court decision, asserting that the Appellant's submissions deviate from the key issues raised on appeal. Specifically, she highlights the Appellant's failure to provide her a fair hearing and the false claim that her terminal dues were released to her. Regarding her employment by the Appellant, the Respondent submits in the affirmative. She references the testimony of the Appellant's witness, who confirmed that she was initially engaged on a written contract and later on a verbal contract at a salary of Kshs. 80,000/-.
9. On the existence of an oral contract the Respondent submits that the burden was on the Appellant to disprove it. She asserts that the Appellant failed in its duty to reduce the contract to writing and to keep proper employment records as stipulated by sections 10(6) and 10(7) of the Employment Act. Additionally, the Respondent emphasizes that her consistent salary of Kshs. 63,160/- from October 2021 to May 2022 contradicts the Appellant's claim that she was paid on commission. Concerning her termination, the Respondent asserts that the process was unprocedural. She contends that she was not invited to a hearing, nor was she informed of the reasons for her dismissal, in direct violation of sections 41, 43, 45 and 47(5) of the Employment Act. Moreover, the Respondent argues that the claim of poor performance as the reason for her dismissal is unsubstantiated, as the collective target calculation sheet did not specifically assess her individual performance. In conclusion, the Respondent prays for the dismissal of the appeal with costs.

Analysis and Determination

10. An appellate Court has to consider and re-evaluate the evidence and judgment of the inferior court, and make its own independent judgment noting it neither heard nor saw the witnesses testify. In this case, the Respondent was employed by the Appellant. The Appellant was required to keep records and the fact they did not avail the contract does not limit the claim by the Respondent. The evidence before me shows the Respondent was subsequently terminated as expressed in the letter of 7th July 2022.
11. The letter from the Appellant to the Respondent stated that her contract would not be renewed after 30th June 2022 due to consistent failure to meet targets, and that her commissions would be paid up until 30th June 2022. In the Employment Act, there is no provision for termination post facto. The letter terminating the contract was issued 7 days after the termination since the termination letter is dated 7th July 2022 and references terminating the contract on 30th June 2022. This was contrary to sections 43, 44, and 45 of the Employment Act. The termination was ipso facto unfair and unlawful.
12. Under section 41, the termination of employment is deemed unfair if there is no explanation offered before the termination of the contract as provided for. Section 41(1) of the Employment Act provides as follows:-

41(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 this explanation.
13. There was an explanation required to be given prior to termination of the employee for her alleged poor performance. The letter in issue suggests there was poor performance in not meeting her sales targets. In the case before the court, there was no demonstration that a hearing of any sort took place thus placing the termination afoul the law. It was readily conceded by the Respondent that the termination



was as pleaded – pursuant to the letter of 7th July 2022. There was no record of procedure followed in terms of the *Employment Act* thus rendering the dismissal unfair and unlawful. The Learned Magistrate found in favour of the Respondent having had regard to the testimony adduced and in tandem with the law. As such, the finding by the Magistrate cannot be faulted. There is no evidence of partiality in the manner the case was handled and the conclusions reached accord with the evidence and the law. There is evidence the Respondent consistently received the sum used as a multiplicand in calculation of her dues and there was no error in relying on the sum as her monthly dues. This clearly demonstrates the appeal lacks merit and Judgment of the Magistrate’s Court is affirmed and upheld. Appeal is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE

