



**Abdulla & another v Ngome (Employment and Labour Relations Appeal
E135 of 2023) [2025] KEELRC 651 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 651 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E135 OF 2023**

K OCHARO, J

FEBRUARY 27, 2025

BETWEEN

EBRAHIM ABDULLA 1ST APPELLANT

ABDALLA SHAKIR T/A ANJUMAN E BURHANI 2ND APPELLANT

AND

MATARI NGOME RESPONDENT

*(An appeal from the Judgment of Honourable D. O. Mbeja
(PM) delivered on 9th November 2023 at Mombasa)*

JUDGMENT

Background

1. By Memorandum of Claim dated 7th July 2020, the Respondent instituted the foretasted suit against the Appellants, contending that at all material times, he was in their employment as a general worker from January 2015 to 8th February 2020, when his employment was verbally terminated. He claimed 12 months' compensation for unfair and unlawful termination, notice pay in lieu, salary arrears for 8 days worked in February 2020, severance pay, compensation for leave days earned but not utilized in 5 years worked, public holidays allowance, overtime for the 5 years worked, underpayment (January 2015 to December 2018) and (January 2019 to January 2020) and a certificate of service.
2. The Appellants resisted the claim through a Statement of Response dated 6th August 2020. They denied the Respondent's cause of action and entitlement to the reliefs and orders he had sought. The termination of his employment was fair.
3. Upon hearing the parties on their respective cases, the Learned Trial Magistrate rendered himself on the dispute by his Judgment delivered on 24th November 2023. He held that the termination of the



employment of the Respondent was wrongful, unfair, and unlawful, and availed to him all the reliefs that were set out in his Statement of Claim, wholly.

4. Aggrieved by the Judgment of the Lower Court, the Appellants filed the instant appeal, setting forth twenty [20] grounds, which can be condensed into three grounds;
 - a. Whether the Learned Trial Magistrate erred in law and fact in holding that the Claimant was an employee of the Appellants.
 - (b) Whether the Learned Trial Magistrate erred in law and fact in holding that the termination of the Respondent's employment was unfair and unlawful.
 - (c) Whether the Learned Trial Magistrate erred in Law and fact when he held that the Respondent was entitled to the reliefs sought in his Statement of Claim.

The Respondent's case before the trial court

5. It was the Respondent's case before the Lower Court that he was employed on a permanent basis by the Appellants as a general worker from January 2015 to 8th February 2020, when his employment was verbally terminated unfairly.
6. The Respondent's duties entailed digging graves in the graveyard and guarding the said graveyard for 24 hours a day, from Monday to Sunday, and even during public holidays without any overtime paid.
7. His initial salary was Kshs. 8,000.00 per month, which increased to Kshs. 12,000.00 per month from January 2019 to January 2020. He contended that at all material times, he was underpaid.
8. There was no justifiable reason for termination. The Respondents did not conform with the tenets of fair procedure in deciding to terminate his employment.

Appellants' case before the trial court

9. The 1st and 2nd Appellants are volunteers at the registered society Anjuman E Burhani and do not run any business trading as Anjuman E Burhani nor are they registered trustees or representatives of Anjuman E Burhani society.
10. The Appellants' witness Ebrahim Abdulla (RW1) testified that the Respondent was employed by Anjuman E Burhani, a registered society established under the *Societies Act*, CAP 108, in January 2015 as a caretaker at the Nyali cemetery (Kabrastan) and earned a monthly salary of Kshs.. 12,000.
11. The Respondent's work did not entail guarding the cemetery, and he only dug graves and carried out general caretaking duties. Contrary to his assertion, he worked from Monday to Saturday.
12. The Respondent received several warning letters on account of indiscipline during the course of duty, including working for other people during working hours, failure to follow instructions from superiors, and lateness in completing tasks, among others.
13. On 1st February 2020, the Respondent was terminated on account of gross misconduct. His termination was procedurally fair. At separation, he was paid all his dues.



Analysis and determination

14. The duty of a first appellate court was elaborately set out by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123 in the following terms:
- “An appeal to this court from a trial by the High Court is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not necessarily bound to follow the trial judge’s findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
15. This Court shall consider this appeal using the lens above.
16. The Respondents denied that at all material times, they were the employers of the Respondent. This Court notes that by a Chamber Summons application dated 31st March 2021 filed in the lower court, the Appellants sought:
- i. That the Claimant’s Memorandum dated 7th July 2020 and filed on 9th July 2020 be struck out with costs to the 1st and 2nd Respondents.
 - ii. That the Costs of this application and the suit be provided for.
17. That application was based on the following prime grounds:
- i. That the memorandum of claim dated 7th July 2020 is fatally defective as the persons sued therein are not representatives of Anjuman E. Burhani, nor are they its trustees or employees.
 - ii. That the Respondents thereon have not been appointed as officers of Anjuman E. Burhani, and they do not have any representative capacity thereof.
 - iii. That the Respondents thereon do not carry business trading under the name Anjuma E Burhani.
 - iv. That there existed no relationship, legal or otherwise, between the Claimant and the above-named respondent.
 - v. That the suit herein is incompetent, fatally and incurably defective for failing to comply with the mandatory provisions of Section 41[2] of the *Societies Act*.
 - vi.”
18. This Court notes further that the Respondent resisted the application through a replying affidavit that was sworn on the 6th April 2021.
19. The Learned Trial Magistrate rendered himself on the application by his ruling dated 18th February 2022, finding it devoid of any merit and dismissing it with costs. From the ruling, I do not get the sense that the determination of the pivotal issues the application raised was deferred to anytime in the future or to the time of the Judgment in the suit. In my view, the ruling didn’t merge into the final judgment, at which point it became reviewable on appeal after the Judgment.



20. The Appellants didn't appeal against the Learned Trial Magistrate's ruling within time or at all. It will be offensive to the doctrine of finality of decisions to open a discussion in this appeal on a matter that ought to have been made a subject of an appeal after the interlocutory decision but which wasn't.
21. I have carefully considered the Statement of Response filed in the lower court by the Appellants, the finer details thereon, the tone thereof, and in fact, the contents of some paragraphs, and conclude that they give a clear signal that the persons [pleaders] speaking were the employers of the Respondent. For instance, paragraph 13 of the Statement of Response to me is an admission of their status as the employers. This Court is left with an unmistakable impression that generally the Appellants' pleadings were evasive. Considering the purpose for which precise pleadings are insisted on in civil litigations, evasive pleadings and denials should be treated as admissions of the truth of the allegations in the adversary's pleadings.
22. The Appellants alleged that they were mere volunteers in the Society. While they presented a couple of documents to fortify this allegation, they did not present two vital documents, which I hold any reasonable and candid person asserting as they were, could produce. They didn't tender in evidence any record from the Registrar of Societies to show the office bearers of the organization that they claimed was a registered society and or any document to demonstrate that indeed they were volunteers.
23. By reason of the premises, I find that the Appellants were employers of the Respondent. The Learned Magistrate didn't err in seeing it as such.
24. I now turn to consider whether the learned trial magistrate erred in law and fact in finding that the termination of the Respondent's employment was unfair. Confronted with a task to determine whether or not termination of an employee's employment was fair, the Court is enjoined to consider two statutory aspects. Procedural and substantive fairness. I am of the view, that this, the Trial Court appreciated.
25. In the oft cited case of *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR* the Court aptly captured it: "... 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 to effect the termination."
26. In *Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR*, the Court held that:

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the



type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.”

27. Section 41 of the [Employment Act](#) provides a mandatory procedure that any employer contemplating terminating an employee’s employment must conform with. Whether the employee affected is a manager or a grave digger, the procedure must be complied with. Noncompliance will attract the deeming effect of Section 45[2] of the Act. That is to say, the termination shall be deemed unfair.
28. The procedure provided for embodies three components. The employer shall inform the employee of the grounds and the basis for their intention, accord the employee adequate opportunity to prepare, and make a representation on the grounds in the company of a colleague of his choice or a trade union representative if he or she is a member of a trade union. Lastly, the employer shall consider the representation[s] made before taking a final decision.
29. The employer has to show that the procedure was followed. I have keenly considered the material presented before the trial Court and hold that the Appellants didn’t prove that there was compliance with the tenets of procedural fairness.
30. Section 43 (1) of the [Employment Act](#) places upon the employer the legal burden to prove the reason[s] for the termination of an employee’s employment in a dispute regarding the termination. Blurred by the position they took, that they weren’t the employers of the Respondent, the Appellants, in my view, didn’t lay sufficient evidence before the trial Court to show the reason[s] for the termination and that the reason[s] was valid and fair.
31. Did the Learned Trial Magistrate err in granting the Respondent the reliefs he did? The Learned Trial Magistrate concluded his judgment thus:

“..... Having all the above into consideration, the court finds a case of wrongful, unfair, and unlawful termination of the employment of the Claimant by the respondent and that the claimant is entitled to the reliefs sought in the memorandum of claim. In the result, judgment is entered in favour of the claimant against the respondent as sought in the memorandum of claim with all circumstances considered. The above award shall carry the costs of the suit plus interest at court rates from the date of filing suit.”
32. The conclusion wrongfully assumed that all the reliefs that were sought in the Statement of Claim were strictly tied to the claim for wrongful and unfair termination. It is important to point out that the approach of the Learned Trial Magistrate was totally incorrect. Awards cannot be granted in the generalised manner he did. Where various reliefs are sought, it behoves the Court to consider the merits or demerits of granting them individually. I say this considering that the remedies normally sought in claims like the instant could require different factors and legal provisions to be considered before availing the same to the claimant or declining to.
33. Having said as I have hereinabove, I now turn to consider the various reliefs that the Respondent claimed to determine whether they were merited to be availed.
34. The Respondent claimed in the lower Court 12 months gross salary as compensation for the unfair and unlawful termination. Section 49[1][c] of the [Employment Act](#) bestows Courts with the authority to grant a compensatory relief to an employee who has successfully impugned his or her employer’s decision to terminate his or her employment as being wrongful or unfair. However, it is important to point out that the authority is exercised discretionarily, depending on the circumstances of each case. For this reason, it would not be proper for a Court to grant the relief in a generalised way, as did the Learned Trial Magistrate.



35. I have carefully considered how the Respondent's employment was terminated, the Respondent's inexplicable nonadherence to the requirements of the law and, more specifically on matters of procedural and substantive fairness, the length of service that the Respondent rendered to the Appellants, the kind of employment he was in [grave digger], and the likelihood that he couldn't get another job immediately, and the Appellants' uncandid conduct, and conclude that he is entitled to the compensatory relief, six [6] months' gross salary, KShs. 77, 556. Therefore, the Learned Trial Magistrate's award is reduced.
36. The Claimant's employment could be terminated with a twenty eight days' notice under section 35 of the Employment Act. It isn't in dispute that the notice was not issued. Consequently, he was entitled to pay in lieu of notice under section 36 of the Act.
37. The Appellants didn't place before the Learned Trial Magistrate any evidence to show that the Respondent was paid for the eight days he worked in February 2020. The trial Court rightly awarded the relief.
38. The Respondent, in his pleadings, sought severance pay. Following the generalised manner in which the Learned Magistrate dealt with the reliefs, the claim under this head was granted. In my view, it was unmerited. Section 35 of the Act provides for service pay, whereas section 40 provides for the benefit of severance pay in situations where employment has been terminated on account of redundancy. Under section 35, the Claimant couldn't qualify for service pay, as apparently, he was a member of NSSF. He couldn't be entitled to severance pay under section 40 of the Act, as his employment wasn't terminated on grounds of redundancy.
39. The Respondent sought compensation for leave days earned but not utilised. He contended that throughout the time he was in the service of the Appellants, he was not allowed an opportunity to proceed for his annual leave. Annual leave for an employee is a statutory right to enjoy, with a reciprocal obligation on the employer to allow its enjoyment. The Appellant's witness admitted that the Respondent did not proceed for leave at any point. Under this head, he was rightfully entitled to the KShs. 64, 632,75.
40. The Respondent further sought Public holiday allowances @13 holidays per a year for five years, KShs. 1,123,378, and overtime worked for five years [76. 94 per extra hour worked], KShs. 2,246,648.00. I have carefully considered the material presented by the Respondent before the trial Court, and I hold without hesitation that there wasn't any that was geared to establish these two claims. All that was done was to throw figures to the court without supporting evidence.
41. The Respondent also laid a claim for underpaid salary, KShs. 236,474. 40 plus KShs. 11, 118.60. Under Section 48 of the Labour Institutions Act, any employee to whom wage Orders apply and who has been paid below the minimum wage set for a particular time[s] can found a claim for underpayments. He will have a right to recover the difference between what he earned during the period and what he could have earned had the employer paid him per the Wage Order[s]. The Wage Orders are varied from time to time for the various sectors to which they apply. In a claim under Section 48 of the Labour Institutions Act, mathematical evidence is required to establish the figures claimed. The Claimant must show that the Wage Orders relate to him. The evidence before the trial Magistrate was deficient of these. Consequently, the Learned Magistrate erred in awarding the relief.
42. In the upshot, the Appellants' appeal succeeds partially. The Learned Trial Magistrate's Judgment is disturbed to an extent. Thus, his holding that the Respondent was entitled to all the reliefs he had sought is set aside, and in place thereof, I make the following awards:



- i. The Appellants to pay the Respondent's six [6] months gross salary, as compensation for unfair termination, pursuant to section 49[1][c] of the *Employment Act*.KShs. 77, 556.00
- ii. Notice Pay..... KShs. 12, 9626.55.
- iii. Salary for 8 days worked in February 2020.....KShs. 4, 924.00.
- iv. Compensation for earned but untaken leave days.... KShs. 45, 242.925.
- v. The Appellants to issue the Respondent with a certificate of service within 30 days of this Judgment.
- vi. Interest on the sums awarded above, at court rates from the date of this Judgment till full payment.
- vii. Each party is to bear its costs.

READ SIGNED AND DELIVERED THIS 27TH DAY OF FEBRUARY 2025.

OCHARO KEBIRA

JUDGE.

