



**Tile and Carpet Centre Limited v Mogaka (Appeal E014 of 2023)
[2025] KEELRC 815 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 815 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E014 OF 2023
DKN MARETE, J
FEBRUARY 26, 2025**

BETWEEN

TILE AND CARPET CENTRE LIMITED APPELLANT

AND

ERICK NYAKUNDI MOGAKA RESPONDENT

JUDGMENT

1. This matter came to court vide a Memorandum of Appeal dated 21st November, 2023. It comes out thus;
 1. That the Learned Magistrate erred in law and fact by awarding figures that were not pleaded by the Respondent.
 2. That the Learned Magistrate erred in law and fact by failing to find that there were substantive reasons to summarily dismiss the Respondent.
 3. That the Learned Magistrate erred in law and fact by failing to appreciate the evidence on record thus arriving at a wrong decision.
 4. That the Learned Magistrate erred in law and fact by failing to take into account that the Appellant followed the due as stipulated within the confined of the law.
 5. That the Learned Magistrate erred in law and fact by awarding Twelve (12) months in lieu of notice which is highly excessive.
 6. That the Learned Magistrate erred in law and fact by awarding the Respondent gratuity while no such provision or benefit was provided for in his contract of employment.
 7. That the Learned Magistrate erred in law and fact by failing to find that the Respondent was given a Fair hearing as required under Section 41 of the *Employment Act*.



8. That the Learned Magistrate erred in law and fact in failing to find that the Appellant issued reasons for termination to the Respondent.
9. That the Learned Magistrate erred in law and fact by failing to find that the Respondent was in clear violation on the terms of clause 10 of his contract of employment on the procedure of objection with respect to a warning letter.
2. The Appellant's case is that the Respondent filed a statement of claim dated 7th September, 2021 citing unfair, wrongful and unlawful dismissal from employment and sought compensation for the sum of Kshs.1,111,278.00. Judgment was entered for Kshs.1,164,445.00.
3. It is the Appellant's case that the Respondent was issued with a termination letter dated 3rd April, 2019. This was done after the Respondent had been walked through disciplinary proceedings thus justifying termination.
4. The Appellant further faults the exercise of the lower court in the award of twelve (12) months compensation for unlawful termination. She argues and submits that this does not satiate the criteria set out in section 49(1) of the *Employment Act*, 2007. This should be reduced for the following reasons.
 - i. The Respondent did not demonstrate any wish to continue serving the respondent, this was due to the fact that the Respondent continuously told the Management of the Appellant that if the Management wanted to terminate him from employment they should do so but they should pay him his service pay.
 - ii. The Respondent did contribute to the termination of employment. The Respondent was given an opportunity to improve his work performance but he was adamant to change his ways and kept pushing in hopes of being awarded service pay
 - iii. The Respondent did not serve the Appellant dutifully and diligently and had previous record of misconduct. It is not in dispute that the Respondent had prior being invited for a disciplinary hearing on 18th October 2018 after complaints were raised by the Respondent's Manager. The Respondent was issued with a warning letter in order for him to improve his performance. Further, the Respondent's delivery shifted and he was put on a three (3) months monitoring period so as to improve his overall performance and towards his colleague's failure to which the Respondent's employment would be terminated
 - iv. The Respondent did not appeal the decision of the Appellant.
5. The Appellant's in further rubbishing the learned magistrate's award seeks to rely on authority of *United States International University vs Eric Roding Outa* (2016) eKLR where the Court of Appeal observed thus;

“In the instant appeal the learned trial judge gave a maximum award of 12 months' salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made



6. Again, reliance is also made on the case of *Ol Pejeta Ranching Limited vs David Waniau Muhoro*[2017] eKLR where the Court held as follows:-

“The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention (Emphasis added)”.

7. The Appellant also moves out to faults the award of gratuity by the lower court as follows;

... it is our humble submission that the Appellant has demonstrated that the Respondent was not entitled to the award of gratuity by the Trial Court as the contract of employment between the Appellant and the Respondent did not provide for gratuity and the Respondent was not a member of any Collective Bargaining Agreement. Further, the Respondent was registered with the National Social Security Fund and contributions were duly make by the Employer and therefore we humbly submit that the Respondent was not Act 2007.

8. The Respondents submits a myriad of issues that support a case of upholding a case of upholding the learned magistrate’s decision and award. This is to the extent that the Appellant in course of employment did not provide the Respondent with written contract contrary to section 9(2) of the *Employment Act*, 2007. This is as follows;

The appellant’s failure to provide the respondent with a written employment contract is a violation of the respondent’s labour rights as per Section 9(2) of the *Employment Act* which provides that:

- “(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).
- (3) For the purpose of signifying his consent to a written contract of service an employee may –
- a. sign his name thereof, or
 - b. Imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.”

9. It is also the Respondent’s submission that the Appellant did not issue the Respondents with a notice to show cause for the disciplinary hearing held on 2nd April, 2019. The invitation letter to the disciplinary meeting did not constitute to show cause letter. This comes out thus;

18. It is clear that the appellant’s invitation to the disciplinary meeting as produced above, is not a notice to show cause letter. It did not inform the respondent of the offences that he was being charged with nor did it inform him that he had the right to defend himself by responding to the specific offences in writing prior to the disciplinary hearing.



22. The minutes of the disciplinary hearing are not signed by the respondent. Further, they show that aside from the respondent, there was only one officer, a facilitator named Lorraine Namasaka, present on behalf of the appellant. On page 62 of the record of appeal, Ms Namasaka raises issues or concerns that have nothing to do with the allegation of refusing to sign the letter of concerns that have nothing to do with a allegation of refusing to sign the letter of concern dated 29th March, 2024. The respondent is accused of tearing a picking list and being rude to his colleagues. The appellant ambushed the respondent by not affording the respondent an opportunity to defend himself against the allegations in writing prior to the hearing.

The Respondent in finality submits a case of unfair and unlawful dismissal.

10. A scrutiny of respective cases of the parties paints a sad case on the award. From the on set, one agrees with the Appellant that the award of twelve(12) months as compensation for unlawful termination of employment was excessive and unexplained and unjustified by the lower court. What comes out clear is that the Respondent won the case due to some technical flaw-the issue of procedure in the disciplinary process. He was nonetheless a defaulter in so far as his conduct as an employee was concerned. This is a matter critical in determining the amount and extend of an award in the circumstances.
11. Secondly, the award on gratuity was not justified because the parties employment's contract did not provide for it. The Respondent was not a member of the collective bargaining agreement and was registered with the National Social Security Fund to which contributions were made. Even in the absence of the foregoing, the Respondent was not a deserving case for an award for gratuity.
12. I am therefore inclined to partially allow the appeal and interfere with the award as follows;
 - i. One(1) month salary in lieu of noticeKshs 52,918.00
 - ii. Six(6) months compensation for unlawful termination of employment.....Kshs317,508.00
Total of awardKshs.370,426.00
 - iii. The Appellant is ordered to issue the Respondent with a certificate of service in thirty(30) days.
 - iv. Each party shall bear its costs of the claim and this appeal.
 - v. All other awards crumble and fall by the way side.

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF FEBRUARY 2025.

D. K. NJAGI MARETE

JUDGE

Appearances :

Mr. Gakungu instructed by Macharis Mwangi & Njeru Advocates for the Appellant.

Miss Kamau instructed by MAW Advocates LLP for the Respondent.

