



Royal Clothing EPZ Limited v Muomo (Employment and Labour Relations Appeal E024 of 2023) [2025] KEELRC 464 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 464 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E024 OF 2023**

JW KELI, J

FEBRUARY 20, 2025

BETWEEN

ROYAL CLOTHING EPZ LIMITED APPELLANT

AND

LAWRENCE MUTUA MUOMO RESPONDENT

JUDGMENT

1. The Appellant herein dissatisfied with the judgment delivered by the Principal Magistrate at Mavoko, Honourable E.K Suter, on 17th February 2023 filed a memorandum of appeal dated 8th March 2024 and received in court on the 13th March 2023 seeking the following Orders:-
 1. The Appellant's appeal be allowed.
 2. The Judgment and decree delivered on 17th February 2023 by the Principal Magistrate's Court at Mavoko issued therein be set aside entirely.
 3. Judgment be entered for the Appellant against the Respondent as prayed for in the Appeal before this Court.
 4. Costs be in the cause.

Grounds of the appeal

2. The Learned magistrate erred in law and in fact by finding that the termination from employment terms and conditions stipulated thereof was unlawful and thereby awarding judgment in favour of the Respondent.
3. The Learned Magistrate erred in law and in fact by finding that the Appellant did not follow due process by not holding a disciplinary meeting to explain the dismissal to the Respondent despite the



Appellant expressly providing a disciplinary report highlighting all the reasons for his termination and offering the Respondent an opportunity to be heard.

4. The Learned Magistrate erred in law and in fact by awarding the three months salary as compensation together with the other reliefs without any justifiable ground despite evidence of lawful and just termination by the Appellant.
5. The trial Court erred in law and in fact by finding that the Respondent was unprocedurally terminated from employment.

Background to the appeal

6. The Respondent filed a memorandum of claim dated 24th November 2021 before the Magistrate Court at Mavoko alleging unlawful and unfair termination of employment and seeking for the following reliefs:-
 - a. The Respondent pays the claimant dues as tabulated below:
 - i. compensation for wrongful, unlawful and/or unfair termination of employment Kshs, 211608.00(12 months x Kshs. 17,634.00)
 - ii. one month's pay in lieu of Notice Kshs 17634.00
 - iii. pay in lieu of annual leave Kshs 17634.00
Total Kshs 246,876.00
 - iv. interest on i, ii and iii above from the date the same became due until payment in full and
 - v. cost of the suit.
 - vi. Any other relief this Honourable court may deem fit to award under the circumstances.
7. The claim was filed together with a verifying affidavit by the claimant of even date, the claimant's witness statement of even date, and the claimant's list and bundle of documents of even date(pages 3-21 of ROA was the claimant's case).
8. The claim was opposed. The Appellant entered appearance through the law firm of Naikuni Ngaah and Miencha Co. Advocates and filed a memorandum of response dated 9th March 2022, The Respondent's witness statement of Samuel Omboga of even date, Respondent list and bundle of documents of even date. (pages -23-62 of ROA was the appellant's case)
9. The Claimant's was heard on the 10th November 2022 where the claimant adopted his witness testament and produced his documents as C-Exb 1-5 and was cross-examined by counsel for the respondent/appellant, Gichuki. The Respondent/ appellant case was heard on even date. The Appellant called Samuel Ombogi as RW1 who testified on oath, adopted his witness statement as his evidence in chief , produced Respondent's documents as R-Exb 1-21 and was cross-examined by counsel for the claimant, Maina.(Trial proceedings at pages 66-68 of ROA)
10. The Parties filed Written submissions after the closure of response case.
11. The trial court delivered its judgment on the 17th of February 2024 in favour of the claimant/ Respondent as follows:-
 - a. A declaration is hereby issued that the termination of the claimant by the respondent is unlawful and unfair.



- b. The claimant shall be paid one month's salary in lieu of notice at Kshs. 17634/-
- c. The claimant will have three months' salary as compensation for unlawful termination at Kshs. 52,902/-
Total award Kshs. 70,536/-
- d. The claimant shall have the costs and interest from the date of judgment.

Determination

- 12. The appeal was canvassed by way of written submissions. Both parties complied.
- 13. This being the first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself 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 the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Issues for determination

- 14. The appellant identified the following as issues in the appeal:-
 - a. Whether the Learned Hon Magistrate erred in law and fact by finding that Respondent's summary dismissal was unprocedurally unfair?
 - b. Whether the Learned Magistrate erred in law by awarding three months' salary as compensation to the Respondent?
- 15. The Respondent addressed the merits of the appeal.
- 16. The court discerned from the grounds of appeal and the written submissions the issues placed before the court by the parties for determination in the appeal were as follows:-
 - a. Whether the Learned Hon Magistrate erred in law and fact by finding that Respondent's summary dismissal was unprocedurally unfair?
 - b. Whether the Learned Magistrate erred in law by awarding three months' salary as compensation to the Respondent?

Whether the Learned Hon Magistrate erred in law and fact by finding that Respondent's summary dismissal was unprocedurally unfair?

- 17. The trial court issued a declaration that the termination of the claimant/respondent from employment by the appellant was unfair and unlawful.(page 78 of ROA) The court on perusal of the judgment found that the trial court held that the dismissal was substantively fair, the reasons were found to be valid. (para 12 of the judgment). The court found the process leading to the dismissal was procedurally unfair and applied the decision of the Court of Appeal in *Kenya Union of Commercial , Food & Allied Workers v Kisii Bottlers Limited* 2021 e KLR stating the circumstances were almost similar and



compensation of 3 months was given and in *Joseph Mwaniki Nganga v United Millers Limited (2022) eKLR*. (judgment of the trial court at pages 71-78 of ROA)

Appellant's submissions

18. The Respondent applied for a job with the Applicant as a machinist. The Appellant after conducting an interview engaged the services of the Respondent as a mass production machinist as per the employment contract dated 11th September 2020 to 19th December 2020 with terms and conditions appearing therein. Vide employment contract dated 6th January 2021, the Appellant engaged the Respondent from 6th January 2021 to 18th December 2021 with a gross salary of Ksh 17,634.1 subject to statutory deductions that is basic salary of Ksh 15,334 and house allowance of Ksh 2300. Two months into the contract, the Respondent absconded duty from 9th March 2021 to 22nd March 2021, almost entire month. On 22nd March 2021, the Appellant issued the Respondent with show cause letter why disciplinary action should not be taken against him. The Respondent vide letter dated 22nd March 2021 admitted to have absconded duty and apologized. The Appellant did not find the reasons advanced by the Respondent convincing and proceeded to summarily dismiss the Respondent on 22nd March 2021. Out of good will, the Appellant decided to withdraw all disciplinary action, summarily dismissal and reinstated the Respondent to his position through letter dated 27th March 2021. The Appellant further issued the Respondent with the last warning letter of the even date.
19. The Appellant submitted that on being reinstated to his position, the Respondent started performing his duties poorly by failing to achieve his hourly production targets contrary to the terms of the employment contract. The Respondent also deserted work for more than six hours without seeking leave or notifying his supervisor only to show up later. This conduct was unbecoming and unacceptable considering the role of the Mass Production Machinist. This action was intended to sabotage the Appellant's operations. The Appellant served the Respondent with notice to show cause letter dated 3rd June 2021. The Respondent failed to give a convincing reason and was summarily dismissed on 3rd June 2021 and a certificate of service issued thereof.
20. The Appellant relied on provisions of the Section 44 of the *Employment Act* on summary dismissal which reads:- "(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. (2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:— (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work; (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly; (c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly; (d) an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer; (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey,



issued by his employer or a person placed in authority over him by his employer; (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

21. The Appellant further relied on the provisions of Section 45 of the [Employment Act](#) on unfair termination to wit:- “(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 employees 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. (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. (4) A termination of employment shall be unfair for the purposes of this Part where— (a) the termination is for one of the reasons specified in section 46; or (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Employment and Labour Relations Court shall consider— (a) 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; (b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) The existence of any previous warning letters issued to the employee.”
22. Further in *National Union of Water and Sewerage Employees versus Meru Water & Sewerage Service* ELRC Cause No 44 of 2012 the Appellant submitted that this Court defined gross misconduct as an act of misconduct serious enough to justify the employee's immediate dismissal. That the Respondent was a habitual absentee from his workplace who poorly performed his duties as a production machinist fundamentally breaching his obligations arising under the contract of service amounting to gross misconduct to justify the summary dismissal of the Respondent. The Respondent had a series of gross negligence, poor performance, absenteeism, insubordination and gross misconduct in his work place. At paragraph 12 of the judgement, the Magistrate correctly noted that the Respondent was aware of his targets as a mass production machinist and his actions affected the whole production line. The Learned Magistrate also found that the dismissal was substantively fair.
23. It was the Appellant's submission that for termination of employment to meet the legal threshold, an employer must justify that it had a justifiable reason to terminate the services of the employee. The Respondent's termination from his employment was both substantively and procedurally lawful, fair and just. During the course of employment, the Respondent was a perpetual and habitual absentee and poor performer who lacked even the most basic ounce of respect to his seniors and supervisors. At paragraph 13 to 18 of the judgement, the learned Magistrate erred by finding that the termination was procedurally unfair. The Respondent was issued with notice to show cause letter dated 3rd June 2021 and responded through a handwritten letter erroneously dated 2nd June 2021. Thereafter, the hearing took place. The approach taken by the learned Magistrate that the Respondent was not afforded an opportunity to have his representative does not hold. The Appellant did not preclude the



representative of the Respondent from attending the disciplinary hearing. The Appellant asserts that it complied with the procedural requirements of the law in processing the Respondent's termination. It supplied the Claimant with the formal charge and held a disciplinary session where the Respondent was given a chance to defend himself before a decision to summarily dismiss him was made by the Appellant.

Respondent's submissions

24. Section 41 of the [Employment Act](#), 2007 creates a statutory obligation on an employer who is desirous of terminating the services of an employee on the grounds of misconduct, poor performance, or physical incapacity to first explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present whilst the employee is presenting the explanation. The Respondent urged that the Court has first to determine whether the Claimant's employment was terminated. Secondly, whether the Appellant complied with the requirements of section 41 of the [Employment Act](#) before terminating the Claimant's employment. For that proposition, they relied on decision in Mombasa ELRC Cause No 146 of 2012; Alphonse Maghanga Mwachanya –vs– Operation 680 Limited:-“Section 41 of the [Employment Act](#), 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present. This is what is now referred to in employment law and practice as procedural fairness... 17. ...In my considered view in order for an employer to meet the legal requirements of procedural fairness section 41 of the [Employment Act](#), it should meet or show as a matter of factual evidence that it did the following: (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination. (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons. (iii) Heard and considered any explanations by employee or his representative. (iv) Where the employer has more than 50 employees as required by section 12 of the [Employment Act](#) that it has and complied with its own internal disciplinary rules.”
25. The Respondent submitted that he testified that on 3rd June, 2021, he reported to work and was assigned the duty of sewing jeans trousers using a heavy duty Sewing Machine. He testified that as he continued with his duties, the Sewing Machine broke down. The Respondent testified that he informed his Supervisor, Mr. Allan, that the Sewing Machine had broken down and could not fold the material before sewing, which was a crucial aspect of the finished product. The Respondent testified that after reporting the breakdown of the Sewing Machine, his supervisor accused him of “boycotting work”. The Appellant's supervisor told the Respondent to meet him at the office of the Human Resource Manager. The Respondent went to the said office and was directed to clear with the Appellant. The Respondent testified that he cleared with the Appellant and was issued with a Certificate of service. Thereafter, he was informed that the Appellant had terminated his employment. The Respondent testified that the termination of his employment was baseless, unfair, unilateral, without any prior warning and in complete disregard of the procedure expressly set out in the [Employment Act](#), 2007.
26. That, during cross-examination, the Appellant's Administrator, Samuel Omboga, confirmed that the Respondent reported the problem of the Sewing Machine to his supervisor. He confirmed that he had not produced any attendance register to demonstrate that the Respondent was absent from work at any day and/or time. He also confirmed that the Show Cause letter, disciplinary hearing report and the summary dismissal letter produced in Court are all dated 3rd June, 2021. The Show Cause Letter, disciplinary report and the Summary dismissal letter are at Pages 48, 49 and 51 respectively, of



the Record of Appeal. That prior to terminating the Respondents' employment, the Appellant did not explain to the Respondent, in a language he understood, the reasons why it was considering the termination, and did not allow a representative of the Claimant, being either a fellow employee or a Representative, to be present during the information/explanation of the reasons. The Appellant did not hear and consider any explanations given by the Claimant, including, that the folder machine was defective. No disciplinary hearing was conducted.

27. That at Paragraph 12 the Appellant submitted that the learned Magistrate erred in finding that the termination of the Respondent was procedurally unfair. The Appellant alleges that a disciplinary hearing was conducted. However, no minutes of a disciplinary hearing were tendered as an exhibit before this Court. The Appellant only produced a disciplinary hearing Report as an exhibit(Page 50 of the Record of Appeal). The date at the bottom of the Report is clearly altered to read 3rd June, 2021. That if the Court finds that a Disciplinary hearing was conducted as alleged, there was still no procedural fairness in the termination of the Claimant's employment because the Show Cause Letter, disciplinary hearing and dismissal of the Respondent all took place on the same day. The Respondent relied on decision in Joseph Kinuthia Miguongo -vs- Kenya Kazi Services Limited where the Court stated as follows at Page 5, Paragraph 10:- "The Claimant was taken through a disciplinary hearing the next day and issued with a dismissal letter on the day following the hearing. His notice to show cause was given on the morning of 17 th December 2015 and he was heard later that day before the dismissal letter of 18 th December 2015. Was this in keeping with the dictates of the law. The period between the levelling of accusations and the disciplinary hearing depends mainly on the work done and the allegations at hand. In the case of the Claimant, issuing a show cause letter in the morning and conducting the hearing in the afternoon was not in my view fair in the circumstances. The Claimant would have had no time to prepare a response or even prepare a defence and obtain witnesses. The Respondent seems to have been keen to dismiss as the Claimant was accused of misconduct when he sought to ensure the cash in transit vehicle was safe to ferry the precious cargo.;; [Emphasis added] For the foregoing reasons, the Respondnet urged the court to hold that the Respondent's termination of the Claimant's employment was unlawful and unfair.

Decision

28. On perusal of the impugned judgment the Court found that the trial court applied the correct provisions of the law on procedural fairness being section 41 of the *Employment Act* and cited relevant authorities to guide it. The trial court held the termination process was unfair. The trial court at paragraph 16 to 18 of the judgment stated the decision on procedural fairness. At paragraph 16 the trial court held:- "The respondent has proved that the claimant was issued with a notice to show cause letter and the claimant responded to the claim . I, however, find he was issued the notice to show cause letter but he was not given an option of having his representative when the explanation was given to him. I also find that he was not given sufficient time to respond to the claim since he was expected to receive, consider and respond to the letter on the same date." At paragraph 17 of the judgment the Trial court observed that as regards the disciplinary report , the respondent failed to prove that a disciplinary meeting took place. That the disciplinary repots stamped 6th June 2021 and dated 3rd June 2021 was deliberately altered on the month march to read June to fit the appellant's positon. The report related to absenteeism as from 9th March to 22nd March 2021 and not related to the misdeeds of 3rd June 2021.
29. The appellant faulted the decision of the trial court by submitting that the Respondent was issued with notice to show cause letter dated 3rd June 2021 and the Respondent responded through handwritten letter erroneously dated 2nd June 2021. The appellant stated the response was wrongly dated 2nd June 2021. Thereafter, the hearing took place .



30. The respondent responded by submitting that the Appellant had submitted that the learned Magistrate erred in finding that the termination of the Respondent was procedurally unfair. The Appellant alleges that a disciplinary hearing was conducted. However, no minutes of a disciplinary hearing were tendered as an exhibit before this Court. The Appellant only produced a disciplinary hearing Report as an exhibit. It is at Page 50 of the Record of Appeal. The date at the bottom of the Report is clearly altered to read 3rd June, 2021.
31. During cross-examination the claimant denied having been issued with show cause notice or having attended any disciplinary meeting. During cross-examination of RW1 he admitted the show cause notice, the disciplinary letter and the hearing were all of 3rd June 2021. It is the duty of this court on first appeal to re-evaluate evidence before the trial court and decide on whether the trial court erred in facts and law in holding there was no procedural fairness.
32. The procedural fairness in employment claims is according to the provisions of section 41 of the Employment Act to wit:- "41. Notification and hearing before termination on grounds of misconduct
- (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.
 - (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."The respondent denied having been issued with show cause, invite to hearing or having attended any hearing.
33. The Appellant submitted the Respondent disappeared during working hours on the 3rd of June 2021 following a machine breakdown which was repaired shortly on reporting but he was not there to resume duty. The Respondent was then issued with a show cause letter of even date (page 48 of ROA). The appellant alleged that the Claimant filed response on same date and produced letter written apology letter (page 49 of ROA) which the appellant submitted it was written by mistake 2nd June 2021. The court asked itself what was the alleged mistake with regards to the date in the said response and by whom? The question arose as the letter was alleged to have been authored by the appellant and was dated 2nd June 2021. It was also indicated as received at the bottom by the employer on the 2nd of June 2021. Did both parties make mistakes? That was doubtful.
34. The appellant faulted the finding of the trial court on the hearing stating it took place. The appellant produced a document titled disciplinary hearing report. It was dated at the bottom 3rd June 2021 with alteration of the date. The charge in the report was indicated as long absenteeism from 9th March 2021 to 22nd March 2021 without prior permission, poor performance, always complaining about the machine and rudeness (pages 50 of ROA). The court upheld the decision of the trial court that the report related to earlier issues and not the incident of 3rd June 2021 and the date was altered to suit the appellant's version of case. Indeed it is probable that the letter of 2nd June 2021 by the respondent related to the earlier proceedings where he was accused of always complaining about the machine among others of which he apologised and stated he will work without complaints. The court for the foregoing found that there was no proof of the reasons for termination as the disciplinary report relied on by the



Appellant was not related to the alleged incident of 3rd June 2021. The court on appeal held that the termination was unlawful and unfair.

Whether the Learned Magistrate erred in law by awarding three months' salary as compensation to the Respondent?

Appellant's submissions

35. The appellant cited decision in Kenfreight (EA) Limited versus Benson K. Nguti [2016] eKLR, and submitted that the Supreme Court observed that the Employment Act provides for a number of remedies for unlawful or wrongful termination under Section 49, and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided. In Cooperative Bank of Kenya Limited versus Yator (Civil Appeal 87 of 2018) [2021 eKLR], the Court of appeal (Asike-Makhandia., H. Omondi & Mumbi Ngugi JJA) stated:- "Damages are awarded to compensate the employee and not as punishment to the employer but to make good the employee's loss. In Hema Hospital versus Wilson Makongo Marwa [2015] eKLR the court of appeal adopted with approval the holding of the Labour Court of South Africa in Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G Dun & Others, Appeal Case No JA 65/205 which when applying provisions of the Labor Relations Act of South Africa held that: "The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary inquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."
36. The Appellant submitted that the Court of Appeal has now settled that courts must justify the awards they make by providing reasons for the award. In the case of Ol Pejeta Ranching Limited versus David Wanjau Muhoro Civil Appeal No 42 of 2015, the Court of Appeal expressed itself as follows on compensatory awards:- "...Was the award of Kshs 3,489,084/- representing the Respondent's 12 months gross salary as compensation for unfair termination justifiable" Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such asthe conduct of the employee which to any extent caused or contributed to the termination.....the compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."
37. It was the Appellant's submissions that that the Learned Magistrate failed to consider the applicable law by awarding the Respondent three months' salary as compensation without any basis. At paragraph 24 of the judgement, whereas the Learned Magistrate noted that the Respondent had worked for the Appellant for one year, the fact is that the Applicant employed the Respondent on 6th January 2021 and dismissed him on 3rd June 2021. This was almost six months into the employment. The Magistrate correctly noted that the Respondent substantially contributed to his termination due to absenteeism, insubordination and poor performance. The Appellant submits that the three months' salary as compensation is excessive, punitive to the Appellant for the Respondent's gross behaviour and the Magistrates Court award should be set aside entirely.



38. The Appellant further relied in the case of Ineet Millers Company Limited versus Ombata [2024] KEELRC 2725 (KLR), where the trial court had awarded the respondent 12 months' compensation, the Learned Judge set aside a side the trial court award under this head, and went on to award two (2) months' salary as compensation. From the foregoing, it was the Appellant's submissions that the Learned Magistrate erred in in law, fact and principle in the finding that termination of the Respondent was procedurally unfair. The Learned Magistrate not in failing to analyse evidence tendered and give reasons for the decision arrived particularly awarding the Respondent three months' salary compensation when in fact the circumstances leading to summary dismissal was as a result of the Respondents misconduct.

Respondent's submissions

39. The Respondent invited the court to pay attention to Page 76 of the Record of Appeal. He urged the Court to find that the Learned Magistrate's decision was sound. The learned trial Magistrate took into consideration all the matters which she should have taken into consideration. There was no reason to interfere with the decision.

Decision

40. The court found this was a case of unfair termination and that the disciplinary report had date altered to fix to the reasons for termination while it related to previous issues. The alleged response of 2nd June 2021 was a day before the show cause letter of 3rd June 2021. The appellant challenged the award of 3 months alleging the claimant had only worked for 6 months, had contributed by conduct to the termination and relied on decision of the Court of Appeal in Ol Pejeta Ranching Limited versus David Wanjau Muhoro Civil Appeal No 42 of 2015, where the Court expressed itself as follows on compensatory awards:- “..Was the award of Kshs 3,489,084/- representing the Respondent's 12 months gross salary as compensation for unfair termination justifiable” Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such asthe conduct of the employee which to any extent caused or contributed to the termination.....”
41. The trial court relied on the decision in Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited [2021] KECA 402 (KLR) where the employee who had been alleged to have absconded duty for being drunk but had not been heard to prove of the reasons was awarded an equivalent of 3 months salary.
42. The court upheld the finding by the trial court for the reasons that the alleged disciplinary hearing report leading to the termination was not related to the reasons for the termination and had a date altered to suit the narrative of the appellant. The court taking into consideration the serious attempt to mislead the court by the appellant and the fact of unlawful and unfair termination held that the award of 3 months was not inordinately high. The Respondent contract of 1 year was due to end in December 2021. He had been employed on 14th September 2020. Taking into consideration length of service and remaining period, the court held the compensation of 3 months salary was not inordinately high and there was no basis to interfere with the trial court decision as guided in Mbogo v Shah [1968] EA where De Lestang V.P (as he then was) observed at page 94: “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should



not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”(emphasis given)

Conclusion

43. In the upshot, the Court held that the appeal was without merit and was dismissed with costs to the respondent. The Judgment and Decree of the Principal Magistrate's Court at Mavoko delivered by Honourable E.K Suter(PM) on the 17th February 2023 in Mavoko CMEL No. E115 OF 2020 is upheld.

44. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant Nadia H/B miencha

Respondent: Maina

