



**Board of Management, Isovyva Secondary School v Salia (Appeal E016 of 2024) [2025] KEELRC 345 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 345 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
APPEAL E016 OF 2024  
B ONGAYA, J  
FEBRUARY 13, 2025**

**BETWEEN  
BOARD OF MANAGEMENT, ISOVYA SECONDARY SCHOOL ..... APPELLANT  
AND  
JOSHUA MBOYA SALIA ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree delivered on 6th September, 2024 by Hon. Okwengu Godfrey Lui, Senior Resident Magistrate in the Magistrate's Court at Kilungu ELR Cause No. E005 of 2023)*

**JUDGMENT**

1. The appellant, a public school, filed a memorandum of appeal dated 10.09.2024 through Mercy Mumo, State Counsel in the Office of the Attorney General, upon the following grounds:
  - i. That the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to one month's pay in lieu of notice despite the fact that the respondent did not prove the same.
  - ii. That the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to pay in lieu of accrued leave despite the fact that the respondent did not prove the same.
  - iii. That the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to compensation for unfair termination despite the evidence on record.
  - iv. That the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to pay for public holidays worked despite the fact that the respondent did not prove the same.
  - v. That the Learned Magistrate erred in law and in fact in finding that the respondent was entitled to damages for overtime despite the fact that the respondent did not prove the same.



- vi. That the Learned Magistrate erred in law and in fact in failing to consider that the appellant followed due procedure in summarily dismissing the respondent.
  - vii. That the Learned Magistrate erred in law and in fact in awarding Kshs. 921,570/= under unfair termination which was excessive and an erroneous estimate of awardable damages.
  - viii. That consequently the Learned Magistrate's decision occasioned a miscarriage of justice.
2. The appellant prayed for Orders that:
- a. This appeal be allowed.
  - b. The Judgment and Decree delivered on on 6<sup>th</sup> September 2024 by Hon. Okwengu Godfrey Lui, Senior Resident Magistrate in the Chief Magistrate's Court at Kilungu ELRC Cause No. E005 of 2023, be set aside and instead be substituted with a decree dismissing the claim.
  - c. The costs of this appeal be awarded to the appellant.
3. The respondent's case before the trial Court was per the memorandum of claim dated 07.11.2023 as follows:
- i. He was employed by the appellant as a Cook for 11 years from 2011 to 2022 at a monthly salary of Kshs. 11,700/=.
  - ii. Sometimes in May 2022, the appellant illegally and irregularly terminated his employment without a justifiable cause and reasonable notice.
  - iii. Upon terminating his contract of employment, the appellant refused and/or ignored to pay balance of salary for May 2022. It also failed to pay his dues including one month's salary notice pay, damages for unfair termination of employment, service pay for 11 years worked, pay in lieu of accrued leave, public holidays, and damages for overtime, all totalling Kshs. 1,178,970/=.
  - iv. Despite being devoted at work, the appellant provided him with unfavourable working conditions against the law. The particulars of the appellant's acts of breach, neglect and default included: the refusal to pay and withholding his final benefits; the refusal to give him leave days and forcing him to work on public holidays; failure to pay him overtime; and failure to issue him with a certificate of service.
  - v. He thus prayed for judgment against the appellant for: a declaration that the termination of his employment was unfair, unlawful, invalid and null and void; an order directing the appellant to issue a certificate of service to the respondent; general damages as pleaded; costs of the suit; and interest on the general damages and costs.
4. The appellant's case was made in the response to memorandum of claim dated 11.03.2024 that the respondent was involved in gross misconduct and theft of foodstuff. It averred that the respondent was employed on 04.04.2011 at a starting basic pay of Kshs. 4,270/= and net pay of Kshs. 5,250/=, which amount was gradually increased over the years to Kshs. 11,700/=. It noted that when the respondent was issued a letter to appear before the Board of Management for disciplinary action, he totally ignored the said letter. That the respondent acted in negligence of duty and without reasonable cause by absconding duty on 15.05.2022 causing his summary dismissal as per the law. The appellant denied that there was an outstanding salary for May 2022 and refuted that the respondent is entitled to benefits as claimed.



5. In the Judgment dated 06.09.2024, the Hon. G. Okwengu (SRM) made a determination that the respondent was unfairly terminated as he was never given an opportunity for a hearing as required by law. The Learned Magistrate went on to award the respondent one month's pay in lieu of notice, pay in lieu of accrued leave for 11 years, public holidays, damages for unfair termination at six (6) months' pay with reason that the respondent failed to attend a court hearing on 21.05.2024, and overtime.
6. The appellant filed a record of appeal and submissions on the appeal. However, the respondent on his part filed submissions in opposition to the appellant's application for stay of execution pending appeal.
7. The Court has considered the material on record. The two issues for determination appear to be whether the termination was unfair and whether the trial Court erred in awarding the reliefs as challenged in the memorandum of appeal.
8. On the 1<sup>st</sup> issue, the trial Court found that the respondent was employed by the respondent as a Cook effective April 2011. Further, the respondent alleged he was stopped from going to work on 15.05.2022 without notice while the appellant "admitted" that the respondent absconded work while he was due to report. The trial Court found that the respondent failed to summon the claimant to show cause why he failed to report on duty effective 15.05.2022. The trial Court stated that for want of a notice to show cause, the termination was unfair within provisions of Sections 45 and 46 (h) of the Employment Act.
9. What was the flow of the events leading to the separation per evidence on record? The respondent testified that on 15.05.2022 he did not go to work because it was a Sunday and in a contradictory manner stated thus, "I was stopped on 15.05.2022. There was no witness who witnessed the threats." He also testified that he left work on 16.05.2022 – and not that he was asked not to work. In view of that contradictory testimony by the respondent, there is no shown reason to doubt the testimony by the school principal Benjamin Kimiti DW1 that an allegation of stealing was made against the respondent and thereafter the respondent absconded duty instead of attending the disciplinary process. The allegation of theft of 20 kilograms of cabbage, maize and beans was made on 14.05.2022 and per Minutes of the appellant's meeting of 21.05.2022, 20 students missed lunch. It was not true that the respondent was not required to attend duty on 15.05.2022, being a Sunday - considering that he was a Cook and by his own testimony and case he worked over weekends. The Court finds that there is no reason to doubt the minutes that on 15.05.2022 the respondent failed to attend duty on 15.05.2022 in view of the events of 14.05.2022. Further, on 16.05.2022 he reported on duty and was summoned to the Principal's office and in presence of Deputy Principal and two cooks – one Paul Kilungu and Joseph Maliu, the respondent admitted that he had stolen the items as was alleged. Further, there is no reason to doubt the minutes that after the admission, the respondent was asked to report back on 23.05.2022 to get the feedback of the appellant after the meeting of 21.05.2022. The evidence is that on 15.05.2022 the respondent indeed absconded duty and the evidence is that the respondent did not deny the theft as was alleged. Despite the pleading in the memorandum of response about the theft in issue, the respondent made no replying pleadings and did not deny the theft or admission of the theft as per appellant's account. The Court finds that the appellant has established the reason for termination, absconding duty or theft in issue really existed as at the time of termination per section 43 of the Employment Act and were fair reasons per section 45 of the Act as it related to the misconduct of the respondent and the appellant's operational requirements. The trial Court erred in failing to consider the evidence that on 16.05.2022 the respondent was heard and he had admitted the alleged theft and absence from duty on 15.05.2022 and there was no need for a notice to show cause thereafter. The Court returns that the respondent fully contributed to his termination of employment at 100% and with respect the trial Court erred, upon the evidence on record, in returning a finding of unfair termination. The appellant's submissions are upheld in that regard.



10. On the 2<sup>nd</sup> issue on reliefs the Court returns as follows:
- a. The separation was upon gross misconduct which issued with no or lesser notice as envisaged in section 44 of the Act and the award by trial Court is set aside.
  - b. Damages for unfair termination cannot issue and award by trial Court is set aside.
  - c. Trial Court's award on headings of accrued leave, public holidays and overtime are found speculative and without supporting evidence as urged for the appellant. There appears to have been no grievance about outstanding claims or grievances in that respect throughout the service. The respondent offered no evidence of particulars of the claims establishing that indeed he worked as claimed and was not paid and no evidence was provided on the claimed accrued leave. The claims remained empty allegations. The appellant's case is upheld in that regard.
  - d. The Court has considered that the trial Court did not award the unpaid salary for May 2022 up to the date of separation and did not award certificate of service which the respondent would otherwise be entitled to. There was no cross-appeal in that respect. Nevertheless the Court finds that in that consideration, each party to bear own costs of the appeal and proceedings in the lower court.
11. In conclusion the appeal is hereby allowed with orders as follows:
- a. Judgment and decree given herein by the trial Court on 06.09.2024 is hereby set aside.
  - b. Each party to bear own costs of the appeal and suit in the trial Court.
  - c. The Deputy Registrar to return the case file to the Machakos Registry forthwith within three days from today.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 13<sup>TH</sup> FEBRUARY, 2025.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

