



**MAS Intimates Kenya (EPZ) Limited v Mwikali (Civil Appeal  
E006 of 2024) [2025] KEELRC 401 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 401 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
CIVIL APPEAL E006 OF 2024**

**JW KELI, J**

**FEBRUARY 12, 2025**

**BETWEEN**

**MAS INTIMATES KENYA (EPZ) LIMITED ..... APPELLANT**

**AND**

**MERCY MWIKALI ..... RESPONDENT**

**JUDGMENT**

1. Mas Intimates Kenya (EPZ) Limited, the appellant, dissatisfied with the Judgment delivered by the Honourable Derrick K. Kuto (SPM) on 31<sup>st</sup> January 2024 in Chief Magistrates' Court at Mavoko MCELRC No. E070 of 2021 filed a memorandum of appeal dated 27<sup>th</sup> February 2024 seeking for the following orders:-
  - a. That this Appeal be allowed;
  - b. That Judgment delivered by the Honourable Derrick K. Kuto (SPM) on 31<sup>st</sup> January, 2024 against the Appellant be set aside, with orders substituted thereof, dismissing the Respondent's suit with costs.
  - c. That the Appellant be granted costs of this Appeal and costs in the superior court.

**Grounds of the appeal**

2. The learned Magistrate erred in Law and in fact in failing to appreciate the proper effect and purport of the pleadings and evidence before it and in arriving at a decision which is not supported by or is manifestly against the weight of the evidence.
3. The Honourable Magistrate erred in Law and in fact by disregarding the totality of the Appellant's pleadings, documents and cited authorities and as a result arrived at a decision materially unsupported by the Law quite contrary to established jurisprudence.



4. The learned Magistrate erred in Law and in fact in finding in favour of the Respondent and directing that termination of the Respondent was unfair.
5. The learned Magistrate erred in law in finding in favour of the Respondent having found that that the Respondent absconded duty.
6. The learned Magistrate erred in law and fact by failing to appreciate that refusal to go to work by the Respondent amounted to repudiation of her contract.
7. The learned Magistrate erred in law and in fact in awarding the maximum remedy being twelve months' salary to the Respondent having found that the Respondent absconded and abandoned duty.
8. The learned Magistrate erred in law and fact in awarding the maximum remedy, being twelve months' salary to the Respondent yet the Respondent's fixed term contract was set to terminate on 24th June, 2021.
9. That the learned Magistrate erred in law and in fact in directing the Appellant to pay the Respondent one month's salary in lieu of notice together with twelve months' salary having established that the Respondent voluntarily vacated her post.

### **Background to the Appeal**

10. The Claimant/ Respondent on the 30<sup>th</sup> of July 2021 filed a statement of claim before the Magistrates Court dated 14<sup>th</sup> July 2021 seeking judgment against the appellant as follows:-
  - a. A declaration that the claimant's termination was unfair, unprocedural and therefore unlawful;
  - b. The claimant be paid her full terminal dues as set out in paragraph 12 hereinabove totalling to Kshs. 300,662.12/-
  - c. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
  - d. The Respondent to pay the costs of this claim.
  - e. Interest on the above at court rates.
  - f. The respondent be ordered to issue the claimant with a certificate of service as required by the provisions of section 51 of the Employment Act, 2007. (pages 3-5 of ROA was the statement of claim)
11. In support of the claim, the Respondent had filed a verifying affidavit, her witness statement dated 14<sup>th</sup> July 2021, a list of documents being a contract letter dated 12<sup>th</sup> February 2020, and the demand letter by her advocates dated 12<sup>th</sup> May 2021. (see pages 7-24 of ROA)
12. The claim was opposed by the Respondent /Appellant who entered appearance through the law firm of Robson Harris Advocates LLP and filed a memorandum of response dated 14<sup>th</sup> October 2021, filed witness statements by Terezy Mwakulomba dated 12<sup>th</sup> October 2022 and of Salome Wairimu Kiama dated 2<sup>nd</sup> May 2023. The appellant filed list and bundle of documents dated 19<sup>th</sup> May 2023 being fixed Contract dated 17<sup>th</sup> February 2020, fixed term contract renewals dated 15<sup>th</sup> May 2020, 15<sup>th</sup> August 2020, and 24<sup>th</sup> December 2020, 2 letters of General Manager – Admiration to the claimant dated 15<sup>th</sup> April 2021 and 21<sup>st</sup> April 2021 respectively, the HR policies and Procedure, attendance sheets from 21<sup>st</sup> March 2021 to 22<sup>nd</sup> April 2021 ad payslips from the month of February 2020 to April 2021 including



payment advice for leave encashment for the year 2020.(pages 26-77 of ROA was the Respondent's case)

13. The claimant's case was heard on the 25<sup>th</sup> May 2023 with the respondent testifying on oath as PW1 and was cross-examined by counsel for the Appellant, Kiprotich. The appellant's case was heard on even date with Salome Wairimu Kiama testifying on oath as DW1. She adopted her witness statement as evidence in chief for appellant and produced the documents under the list of documents for the respondent(supra). She was cross-examined by the counsel for the claimant, Wavinya.(proceedings at pages 103-113 of ROA). The parties filed written submissions after the hearing(pages 79-102 of ROA)
14. The Trial court delivered judgment in the suit in favour of the claimant /Respondent on the 31<sup>st</sup> of January 2024 as follows:-
  1. A declaration do issue that the claimant's termination was unfair, unprocedural, and therefore unlawful.
  2. The prayer for salary in lieu of notice at Kshs. 16,905/- is allowed.
  3. The claimant be paid 12 months salary compensation totalling Kshs. 202,860/-.
  4. The claimant be issued with a certificate of service.
  5. Costs be paid by the Respondent
  6. Interest shall accrue at court rates from the date of judgment.
  7. For the avoidance of doubt, all other prayers are declined.

### **Determination**

15. The appeal was canvassed by way of written submissions. Both parties complied.
16. This being a 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**

17. The appellant identified the following issues for determination:-
  - a. Whether the Respondent was unfairly terminated from employment or she absconded work
  - b. Whether the Trial Court erred in fact and law by delivering judgment in favour of the claimant and awarding the maximum compensation equivalent to thirteen months' salary
  - c. What is the appropriate relief
  - d. Who bears the costs of the appeal and the suit at the trial court.
18. The Respondent on the other hand identified the following issues for determination in the appeal:-



- a. Whether the respondent absconded duty or was unfairly terminated from employment (Grounds iii,iv and v)
  - b. Whether the trial magistrate erred in law by awarding the Respondent maximum remedy of twelve months (Ground vi and viii)
  - c. Whether the trial magistrate erred in law by awarding the Respondent one month salary in lieu of notice(Ground viii)
19. The court summarized the issues addressed by the parties as:-
- a. Whether the Honourable Trial Magistrate erred in fact and law in finding the termination of the claimant's employment was unlawful and unfair
  - b. Whether the trial magistrate erred in law by awarding the Respondent the maximum remedy of twelve months and notice pay.

**Whether the Honourable Trial Magistrate erred in fact and law in finding the termination of the claimant's employment was unlawful and unfair**

20. The test of whether a termination of employment is lawful and fair is according to the provisions of section 45(2) of the *Employment Act* to wit:- "45(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."
21. The Court discerned from the foregoing provisions(section 45(2) of the *Employment Act*) that there are two components of termination fairness, (1)fair reasons related to the employee's conduct, capacity or compatibility or based on the operations requirements of the employer( section 43 of the *Employment Act* on prove of reasons) and procedural fairness(section 41 on procedural fairness of the *Employment Act*). The court(Justice Linnet Ndolo) in Walter Ogal Anuro v Teachers Service Commission (2013)e KLR held that :- "22.In light of the foregoing, I find that Respondent had a genuine reason for terminating the Claimant's employment as required under Section 43 of the *Employment Act*. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness." The position was consistent with the provisions of section 45(2) of the *employment Act* and was upheld to apply in the instant appeal.
22. The burden of prove of the reasons for the termination lies with employer according to section 43 of the *Employment Act* to wit:- "43. Proof of reason for termination
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.



- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

23. The Appellant/ employer stated the reason for the termination was unauthorized absence of the respondent from duty from 12<sup>th</sup> April 2021. The Respondent produced the letter dated 21<sup>st</sup> April 2021 which terminated the services as follows:-

Dear Mercy

Unauthorized Absence

We write with reference to our letter to you dated 15<sup>th</sup> April 2021.

We hereby inform you that, as we have not received a valid explanation in writing from you by 20<sup>th</sup> April 2021, we consider you to have vacated post on your own accord & volition with effect from 21<sup>st</sup> April 2021.,

Your sincerely

Mas Intimates Kenya(EPZ) Ltd

Nuwan Ratnayake

General Manager- Administration”

24. The Appellant produced the letter dated 15<sup>th</sup> April 2021 addressed to the Respondent stating she was on unauthorised leave from 12<sup>th</sup> April 2021 and asking he to make written explanation about the absence on or before 20<sup>th</sup> April 2021.

(pages 52-53 of ROA were two letters on the termination )

25. At the hearing the claimant/Respondent denied receipt of letters and stated that on the 13<sup>th</sup> April 2021 she reported to work and was denied entry to work by Human Resource officer called Sharon.

26. The appellant’s witness relied on the attendance sheets record as proof of absence from duty by the Respondent. She told the court that she had no evidence of postage of the letters dated 15<sup>th</sup> April and 21<sup>st</sup> April 2021 respectively (supra).

### **Decision on issue 1**

27. The trial court stated in its judgment, that electronic evidence of clock-in was produced. The court on evaluation of evidence before trial court found the clock-in extract recoding absence of the Claimant from 12<sup>th</sup> April 2021 to 21<sup>st</sup> April 2021 when her services were terminated (pages 60-61 of ROA). The claimant told the court she used to sign attendance sheets not clocking.

28. The Trial court held the evidence before it was of absconding. The trial court further found no evidence the purported letters including of termination were posted. Later in the decision, the trial court held the termination was unlawful. The Court established that in the judgment the trial court, flip-flopped in its finding on the lawfulness of the termination. The court established that the said clock-in extracts were challenged as the claimant stated she signed attendance sheets. There was no certificate of electronic evidence produced with respect to the clock-in extracts before the lower court as required under section 65(8) of the *Evidence Act* to wit:- “(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-



- (a) identifying a document containing a print-out or statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.” In its list of documents, the Appellant stated attendance sheets but filed what it called clock-in extracts. The Court on re-evaluation of evidence did not find a certificate of electronic evidence. The Court on appeal held that the lack of a certificate of electronic evidence under section 65(8) of the *Evidence Act* disqualified the said clock-in extracts as evidence of absence from duty by the Claimant. The trial court held there was no evidence of postage of the two letters (15<sup>th</sup> April and 21<sup>st</sup> April 2021 on the alleged absconding) The court on appeal for the foregoing reasons found in favour of the respondent that the reasons for the termination were not proved. The Court upheld the trial court’s decision on unlawful termination.

### **Procedural fairness**

29. The second limb on employment termination fairness is procedural fairness. It was not in dispute there was no procedural fairness and even from reading of the letter of termination dated 21<sup>st</sup> April 2021. The procedural fairness is according to the provision of section 41 of the *Employment Act* to wit:- “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.” The Appellant produced the letter dated 15<sup>th</sup> April 2021 as the notice. There was no evidence the letter was served on the Respondent. There was no compliance with the fairness required under section 41 of the *Employment Act*. The court on appeal found no basis to disturb the finding of the decision of the trial court that there was no procedural fairness.

### **Whether the trial magistrate erred in law by awarding the Respondent the maximum remedy of twelve months and notice pay.**

30. The grounds of appeal on this issue were as follows:-

- a. The learned Magistrate erred in law and in fact in awarding the maximum remedy being twelve months' salary to the Respondent having found that the Respondent absconded and abandoned duty.
- b. The learned Magistrate erred in law and fact in awarding the maximum remedy, being twelve months' salary to the Respondent yet the Respondent's fixed term contract was set to terminate on 24th June, 2021.



- c. That the learned Magistrate erred in law and in fact in directing the Appellant to pay the Respondent one month's salary in lieu of notice together with twelve months' salary having established that the Respondent voluntarily vacated her post.

### Notice pay

31. The court on appeal having upheld the decision of the trial court that the termination was unlawful and unfair, it upholds the award of Notice pay in lieu.

### On compensation awarded for 12 months' salary.

32. The Respondent was awarded compensation the equivalence of 12 months gross salary on the unlawful termination. The Respondent's contract in question was ending on 24<sup>th</sup> June 2021.(page 51 of ROA). During cross-examination the Respondent told the trial court that, "on 24/6/21 was when my contract was to end"(page 107 of ROA) In *Transparency International - Kenya v Omondi* [2023] KECA 174 (KLR) where the Court of Appeal held there was no obligation on employer beyond a fixed term contract. It was stated at paragraph 27 :- "The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived." The Respondent was dismissed in 21<sup>st</sup> April 2021 shy of approximately 2 months to expiry. The remedy for unlawful and unfair termination is under section 49 (1) *Employment Act* to wit:- "Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
- (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
- (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

33. Pursuant to the provisions of section 50 of the *Employment Act*, the trial court is guided in the award by factors stated in section (49)4 of the Act to wit:-

- a. the wishes of the employee;
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- (c) the practicability of recommending reinstatement or re-engagement;
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;



- (e) the employee's length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonable incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

34. The Court held that lower court erred in law for failure not state the factors under section 49(4) of the *Employment Act* that it applied to arrive at the maximum compensation. The Respondent had approximately two months left in the fixed term contract thus 21<sup>st</sup> April 2021 to 24<sup>th</sup> June 2021. The court on appeal held it was unreasonable to award compensation of 12 months' salary way beyond the remaining period of the contract. Having upheld the 1 month notice pay, the court set aside the 12 months' salary compensation and substituted the same with award of equivalent of 1 month's salary compensation of total sum of Kshs.16,905.

### **Conclusion**

35. In conclusion the appeal was held as merited on appeal. The Judgment delivered by the Honourable Derrick K. Kuto (SPM) on 31<sup>st</sup> January,2024 against the Appellant is set aside and in its place substituted as follows:-

Judgment is hereby entered in favour of the claimant against the Respondent as follows:-

- a. A declaration that the termination of employment of the claimant was unlawful and unfair.
- b. Notice pay of Kshs. 16,905
- c. Compensation award equivalent of 1 month's gross salary Kshs. 16,905
- d. Certificate of service to be issued under section 51 of the *Employment Act*.
- e. Cost to the claimant and interest at court rates from the date of judgment

36. The Respondent is awarded costs in the appeal.

37. It is so Ordered.



**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Appellant Kiprono h/b Ndogo

Respondent: Wavinya

