Kisindu v Everflora Limited (Employment and Labour Relations Appeal E051 of 2023) [2025] KEELRC 1036 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1036 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E051 OF 2023

JW KELI, J

MARCH 28, 2025

BETWEEN

MAUREEN ADISA KISINDU ..... APPELLANT

AND

EVERFLORA LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment of the Honourable Wangeci Ngumi (SPM) delivered at Gatundu on the 13th March, 2023 in Gatundu Employment Cause No. E007 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of the Honourable Wangeci Ngumi (SPM) delivered at Gatundu on the 13th March, 2023 in Gatundu Employment Cause No. E007of 2021) between the parties filed a Memorandum of Appeal dated 13th April, 2023 seeking the following orders:
    a. That this Appeal be allowed.
    b. That the judgment of Honourable Wangeci Ngumbi (SPM) in Employment Cause No.E007 of 2021 delivered at Gatunda on 13th March, 2023 be set aside in entirety.
    c. That the judgment be entered for the Appellant in terms of the claim filed in lower Court in Employment Cause No. E007of 2021.
    d. That the costs of this Appeal and of the claim in the Labour Court be borne by the Respondent.
    e. This Honourable Court makes such further or other orders that will meet the ends of justice.

The Grounds Of The Appeal

2. That the learned trial Magistrate erred in law and fact in finding that the Appellant's termination from employment was justified, lawful and procedural.

3. That the learned Magistrate erred in law and in fact in relying on the Respondent submissions on the issue of strike which was not pleaded in their Response/Defence filed.

4. That the learned Magistrate erred in law and in fact in failing to consider, sufficiently or at all the evidence that was adduced to support the Appellant's claim.

5. That the learned Magistrate erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.

6. That the learned Magistrate erred in law and in fact in relying on Section 80 of the *Labour relations Act* of 2007 which was not pleaded in the Respondent's Response/Defence;

7. That the learned Magistrate erred in law and in fact in dismissing the Appellant's claim under Section 80 of the *Labour Relations Act* of 2007 whereas no evidence of an illegal strike had been provided before it.

Background Of Appeal

8. The Claimant/Appellant filed claim against the Respondent vide a Statement of Claim dated 11th June, 2021 seeking the following orders:-

    a. The Respondent do pay the Claimant dues as tabulated below:-

        i. One month salary in lieu of notice Kshs. 11,671.55/=;

        ii. Compensation for wrongful, unlawful and/or unfair termination;

        iii. House allowance at 15% of the Claimant's monthly salary for 8 months (Kshs. 11,671.55 X 15% x 8) = Kshs. 14,000.86/=;

        iv. Public Holidays worked from the year 2015 to 2021 @600 Kshs. 32400

        v. Interest on (a) above from the date the same became due until payment in full; and

        vi. Costs of the suit

    b. Any other relief this Honourable Court may deem fit to award under the circumstances TOTAL Kshs. 198,136.01/-

9. The Claimant filed her verifying affidavit, Witness statements of the Claimant dated 11th June, 2021 and of Everlyne Kwamboka Keya dated 3rd March, 2022 and list of documents dated 11th June, 2021 together with the bundle of documents (see pages 8-16 of ROA).

10. The claim was opposed by the Respondent who filed a Statement of Defence dated 5th July, 2021 (Pages 20-21 of ROA), Respondent's list of witnesses, Respondent's Witness Statement of Moses Ndeda Azele and list and bundle of documents dated 21st September, 2021 (Pages 22-28 of ROA).

11. The Claimant responded to the Respondent's Defence by filing a Reply to Defence dated 19th October, 2021(Page 29 of ROA).

12. The Claimant filed a Statement of Agreed issues dated 19th October, 2021 (Page 30 of ROA)

13. The claimant's case was heard on the 14th November, 2022 and further on 30th January, 2023 where the claimant and Everlyne Kwamboka Keya testified in the case, they produced their documents and were cross-examined by Counsel for the Respondent Mr. Mbuthia(see pages 51-55 of ROA)

14. The Respondent's case was heard on 30th January, 2023 where the Respondent's witness Mr. Moses Ndeda Azera testified on behalf of the Respondent and was cross-examined by counsel for the Claimant Mr. Matunda.(pages 54-55 of ROA)

15. The parties took directions on filing of written submissions after the hearing. The parties complied.

16. The Trial Magistrate Court delivered Judgment on the 13th March, 2023 holding that the termination of the Claimant was lawful and that the Claimant is not entitled to the relief sought thus dismissing the Claimant's claim and that each party to bear their own costs. (Judgment at pages 58-66 of ROA).

Determination

17. The appeal was canvassed by way of written submissions. Both parties complied.

18. 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."

19. The court is further guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation 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."

Issues For Determination

20. The Appellant summarized the main grounds of appeal into three issues for determination namely:

    a. Failure of the Trial Court to consider sufficiently and evaluate the evidence presented by the Appellant.

    b. Over reliance on the Respondent's unpleaded facts, evidence and submissions.

    c. Trial Court reliance of Section 80 of the *Labour Relations Act* which was irrelevant and/or remote in the circumstances of the case.

21. The Respondent submitted on the grounds of the Appeal.

22. The court adopted the issues at trial court and framed them as appeal as follows:-

    1. Whether the Trial court erred on its findings on the lawfulness and fairness of the termination

    2. Whether the trial court erred on the reliefs sought.

23. The court noted that the facts in the lower court were similar to fact in E006 OF 2021 under appeal No, E50 OF 2021. The letter of dismissal was the same save for the name of the employee(see page 24 of RoA). The employee testified for each other. The court found it would be a waste of judicial time to re-evaluate the evidence in the instant appeal and adopted the findings in E50 OF 2025 to apply in the instant case as follows:-

> 'Whether the Trial court erred on its findings on the lawfulness and fairness of the termination

24. The threshold for fair termination of employment against which the Court determines claims for unfair termination is according to the provision of section 45(2) of the *Employment Act* to wit:-''45. Unfair termination

(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.''

25. Fairness as per section 45(2) (supra)has two components, (a)substantive fairness of valid reasons related to the employees conduct, capacity or compatibility; or(ii) based on the operational requirements of the employer; and

(b) procedural fairness under section 41 of the *Employment Act*.

26. On substantive fairness, the Trial Magistrate Court delivered Judgment on the 13th March, 2023 holding that the termination of the Claimant's employment was lawful. The grounds of appeal were-

a. That the learned trial Magistrate erred in law and fact in finding that the Appellant's termination from employment was justified, lawful and procedural.

b. That the learned Magistrate erred in law and in fact in relying on the Respondent submissions on the issue of strike which was not pleaded in their Response/Defence filed.

c. That the learned Magistrate erred in law and in fact in failing to consider, sufficiently or at all the evidence that was adduced to support the Appellant's claim.

d. That the learned Magistrate erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.

e. That the learned Magistrate erred in law and in fact in relying on Section 80 of the *Labour relations Act* of 2007 which was not pleaded in the Respondent's Response/Defence;

f. That the learned Magistrate erred in law and in fact in dismissing the Appellant's claim under Section 80 of the *Labour Relations Act* of 2007 whereas no evidence of an illegal strike had been provided before it.

Appellant's submissions

27. The appellant submitted that the trial court erred in finding an illegal strike, yet the appellant refused extra work. On page 29(of RoA), there was a letter to the labour officer. The appellant submitted that she told the trial court that on the material date, after completing her duty, the supervisor demanded she does an extra 50 bunches to make a total of 225, which extra work was not provided for under the employee-employer contract of employment. The appellant treated the demand by the supervisor as gross violation of her rights as an employee, exploitation and unfair labour practice and declined the extra assignment unless an agreement for extra work was made but the trial court ignored her evidence finding illegal strike.

28. The appellant submitted that the issue of illegal strike was not pleaded and only came up at the hearing through the respondent's witness. That the letter on the strike to labour office was received at the labour office on 28th April 2021 a day after the dismissal of the appellant (letter at page 29 of ROA)

29. That the notice to show cause dated 26th April 2021 (page 27 of ROA) was not received by the appellant and this was corroborated by the Appellant's witness Maureem Adisa Kiundu (page 54 of ROA). The appellant contended that the issue of existence of strike and notice to show cause ought to have been pleaded in the response and relied on the decision in Dakianga Distributors(K) v Kenya Seed Company imited (2005)e KLR where the court cited Sir Jack Jacob in an article entitled "The Present Importance of Pleadings" published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3 on the importance of pleadings:-

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves.It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

30. The appellant further submitted that a report of the full list of all the employees who took part in the alleged strike ought to have been tabled in court for the trial court to find the illegal strike as a basis to dismiss the appellant's claim. The appellant submitted that the trial court erred on reliance on section 80 of the *Labour Relations Act* which states:- '80(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and—

    (a) is liable to disciplinary action; and

(b) is not entitled to any payment or any other benefit under the *Employment Act* during the period the employee participated in the Strike'' The appellant asserted that there was no evidence of the appellant having incited other employees on cessation of work nor was there evidence of cessation of work. The appellant contended she just declined extra work after completion of her lawful duty.

The respondent's submissions

31. The respondent submitted that the refusal to work by a number of employees is a defence of strike. All the workers before the court refused to work, they denied the respondent labour and that was unprotected strike under the *Labour Relations Act*. (The Court noted that the affected workers filed independent claims) The appellant was a member of the union which never issued a notice to strike in writing. The Respondent relied on the definition of the term strike under the *Employment Act* to wit:- "strike" means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, for the purpose of compelling their employer or an employers' organization of which their employer is a member, to accede to any demand in respect of a trade dispute;''

32. The respondent submitted that the appellant and other workers before the trial court used plural terms to say she and other workers were protesting an increase in duties. That during cross-examination the appellant used terms as 'we were protesting''. The respondent submitted that the use of plural language means the workers were acting in concert and relied on the decision in Joash Alubale Jacob v Mega Pack Limited (2019)e KLR in finding that there was an illegal strike the court held that the use of plural terms indicated the actions taken by an individual employee were in furtherance of a combined effort which in the final element is the definition of a strike. That failure to follow the process of calling a strike under section 76 and 78 of the *Labour Relations Act* meant the strike was illegal. That section 80 applied to the appellant as held in Joash Alubale Jacob v Mega Pack Limited (2019)e KLR that such an employee was subject to disciplinary action of summary dismissal.

33. On the claim of unpleaded issue of strike, the respondent relied on the witness statement of Moses Ndeda azere dated 21st September 2021 and asserted it pleaded that appellant was dismissed for participating in illegal strike. That the invitation for hearing meeting of 26th April 2021, the strike notice to the labour office and summary dismissal letter all referred to the issue of illegal strike. That in statement of defence dated 2nd July 2021 the respondent denied the averment in the statement of claim. That it was trite law the respondent was not required to plead specific section of the law. That the law was submitted on in the submissions.

Decision

Substantive fairness

34. The trial court relied on paragraph 2 of the appellant's witness statement which she adopted as her evidence in chief. The appellant had stated she was sacked for participating in an illegal strike and that she was protesting extra work without increment of salary. The trial court further stated that the appellant and her witness told the court they were protesting the increase of their target without increment of salary. That from their evidence, they did not go back to work despite being ordered to do so. The trial court found that the appellant and other workers, including the witness (CW2) were in concert in refusal to work and their action amounted to strike as defined under the *Employment Act*(supra). The trial court held that from her witness statement the appellant knew of the reason for termination.

35. The court on first appeal is obliged to re-evaluate the evidence before the trial court and make own conclusion(Selle v Associated Motor Boat Co. Ltd [1968] EA 123)The summary dismissal letter was dated 27th April 2021. The letter by the Respondent was as follows:-

> 'Dear Everline,
>
> RE: Summary dismissal-gross misconduct
>
> Following the illegal strike action by members of the grading staff that occurred at around 2pm on 22 April 2021, and investigations on the same done on 23rd April till 25th April 2021.
>
> The company has gained solid evidence that you -:
>
> 1. Took lead and incited other workers in the grading to boycott duties and take part in an unlawful strike action and cause disturbance within the company premises.
> 2. You further declined to report for duty on the same day evening when called upon to do so and went round the residential camp inciting your fellow colleagues not to report back on Friday morning.
> 3. You also threatened workers who chose to come back to work on Thursday evening with violence and intimidation.
> 4. You also in the company of several others were seen having grouped together and heard planning on how to burn down greenhouses, and destroy company property.
> 5. You were called to the HRM office on 26th April 2021 morning and given a chance to defend yourself through a show cause which you clearly refused to accept and even threatened the Hrm to terminate you as witnessed by the Hr Assistant.
>
> Please note that your behaviour is a contravention of the section 44(4) (e) of the *Employment Act* of 2007 laws of Kenya.
>
> Consequently this letter serves to advise that you have been dismissed from Company employment with effect from 27th April 2021.
>
> Your final dues will be calculated and paid to you as follows:
>
> 1. Days worked up and including 27th April 2021.
> 2. Leave Earned but not taken-14 days.
>
> Sincerely,
>
> For: Everflora Limited
>
> Bernice Matiri.
>
> Human Resources Manager."(page 13 of ROA)

36. The burden to prove the reason for termination lies with the 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."

37. The appellant in her claim pleaded in paragraph *8* that no reason was given for the termination. At same time in her witness statement dated 11th June 2021 the appellant stated she was sacked for participation in an illegal strike. She denied having participated in illegal strike stating she asking for increment for the extra work. The appellant stated that they had a meeting with the human resources, one Matiri and management who refused to listen to their issues and ordered her and others to continue with the 175 bundles but they do sorting and punching which was impossible to do. That she refused to do extra work of sorting and punching. (page10 of ROA)

38. The appellant filed a witness statement of Maureen Adisa Kisindu(CW2) dated 3rd March 2022 who stated as follows:- 'I was previously employed by the Respondent herein from 27th July, 2015 to 27th April, 2021 as a puncher. That I know the claimant herein and we were working together at the Respondent's company. That on the 27th April, 2021 the company terminated our services on the allegation that we had participated in unlawful strike. What we were protesting is on the issue of the company increasing our target bunches from 175 to 225 without pay which we had agreed earlier.That we were summoned to the Human Resource Manager's office one Mrs Bernice Matiri who ordered us to sort and punch the branches but on informing her that it is not possible for one person to do the work, she informed us that our services have been terminated for gross misconduct. She refused to hear us.That my colleague and I never participated in any unlawful strike we were only raising our issues of extra work with no pay but never refused to work nor incite fellow workers as alleged. That we were never called for any hearing only summoned to the Human Resource Manager's office and given orders." (page 16 of ROA)

39. The respondent entered appearance and filed statement of defence and denied having unlawfully terminated the claimant's employment and put her to strict proof (page 20 of ROA). The respondent filed witness statement of Moses Ndeda Azere(RW1) dated 21st September 2021 adopted as evidence in chief as follows:-

> 'I am Moses Ndeda Azere the Administration Manager of Evertloka Liimited and I am well versed with the affairs of the respondent.
>
> The claimant was an employee of the Respondent until her sunmary dismissal via a letter dated 27th April 2021. This was resulted by the claimant engaging in an unlawful strike on 22nd April 2021 and also inciting other employees not to report to work the next day.
>
> On 26th April 2021, a Show Cause Letter was issued to the claimant to show why disciplinary action should not be taken against her. After the claimant failed to respond to the show cause letter, a meeting was held at the HRM in the presence of the claimant.
>
> On the 27th day of April 2021, the respondent notified the County Labour Officer about the unlawful strike that took place in the company's premises and the same was received by the Sub-County Labour Officer.
>
> Another hearing meeting was held on 27th April 2021 where the Claimant was present and it was resolved that the claimant be dismissed which was actualized by a dismissal letter dated

27th April 2021 where the claimant indicated his intention to pay the claimant for the days worked including 27th April 2021 and for leaved earned but not taken amounting to 14 days."

40. During the hearing the appellant adopted her witness statement as her evidence in chief and produced the letter of dismissal dated 27th April 2021. During cross-examination by defence counsel the appellant told the court as follows:- '1 refuse to do extra work. We had been allocated by my seniors. We were the whole grading about 60(sixty) people. We did not go on strike. We were discussing. On the day the work was done by other employees. We did not do the task. We did not have a meeting with the human resource. Page 3 of the claimant statement. We had a meeting with the human resource. She refused to listen to us and told us to go and continue punching with the punching we were doing before. She also said we do the job we said it could not be done. I was not given a letter to attend a meeting at the human resource. I was not given a letter I was only given a dismissal letter. I wanted salary increase for extra work. I said that if the target was being increased to be paid together with the basic salary which should be increased. I have not said the public holidays were not being paid. I have never complained about the public holidays. We have never been paid for public holidays. I never wrote a letter. I raised the issue in 2016. I was told they would sleep over the holiday and we were not to be paid. I did not complain. If I complained I would be dismissed. I was not being paid house allowances. My salary was not considered. I was employed as a puncher. We were dealing with flowers horticulture. I know some of my colleagues who refused to do the work. They were all the employees. I recall Maureen Adisa, Alice Nyakundi. We were not the ring leaders of the strike."In re-examination the appellant told the court they were not on strike, that they were discussing. She did not see an investigation report but only the dismissal letter.

41. CW2 adopted her statement(supra) as evidence in chief and was cross-examined. She told the court as follows:- 'I was not involved in a protest. In my statement paragraph I indicated that I was protesting. We were told a bunch 225 from 175. We said the human resource to increase the salary for us to increase the bunches. I did not do anything. I refused to do extra work. I engaged my employee. I did not defy him. We did not have a meeting with human resource. The human resources come to the grading hall and at the grading hall is where the meeting was. We did not leave the meeting. Paragraph *3* 1 indicated that we had a meeting with the human resources. I recorded that in my statement. We had a meeting at the grading hall with the human resource not in her office. The management refused to listen to our issue. we were to be paid with the 175 bunches but do punching and grading which we said wa simpossible to work extra work. It was not wrong but extra work. Our employer is not supposed to do extra work. We told her if she would increase our salaries, we all left. we did not do the work. We did not strike. We were protesting being given more work without more money. we were paid at the end of the month. We did not want to be paid at the dot. We wanted our end month salary to have been increased. We were not given a letter to invite us at the meeting at the human resource. I was not given a show cause letter. I was given a dismissal letter. I was not asked to give an explanation as to why. I did not work and told the reason I was dismissed"

42. RW 1 was Moses Ndeda Azere who adopted his witness statement as evidence in chief. He was cross-examined by counsel for the appellant and told the court as follows:- 'My statement indicates we were in the same department with the human resource. I am also involved in the role of disciplinary process. The show cause letter was given in 26th. Everlyne was called in the office on 26th and given a notice to show cause letter. She refused to take it and hence did not sign for it. There was an attendance list I saw it and the work representative and Evelyn were there. There is an attendance list not included in the people present. She refused to sign the show cause letter. I did not call the witness to proof that the letter was given. It was not on the same day we wrote the dismissal letter. It was written on 27/4/2021.Exhibit 4 is the invitation to the hearing meeting. It was dated 26/4/2022.She went to the

office on the same day for hearing meeting and when she went there she was given a notice to show cause. The minutes of the day are available. We did not deliberately refuse to file the minutes as there was no meetings. There is an attendance list for the meeting. When the employees were told that they would be changes they boycotted their duties. Everlyne was called to the office to show cause why he was leading on the boycott. There was an increase in the target. The bunches were increased and other duties were reducing. Reference to p-exh 2 has a basic salary. If they had extra, they were given overtime as bonus. We had not paid overtime as they had not worked. For those who worked they were given bonus.

> Everlyne was given a summary dismissal as she boycotted her duties and was involved in an illegal strike."

43. The court from the foregoing finds that the reason for the termination was known o the appellant all along as participation in illegal strike, the letter of summary dismissal dated 27th April 2017 alluded to illegal strike , and as evidenced in her witness statement and that of CW2 and that of RW1. The issue of an illegal strike was pleaded by both parties in their witness statement and was cross-examined on. The respondent denied the allegation of unlawful termination. The court finds that the defence of illegal strike was proper as it was the reason for termination/the summary dismissal. The claimant having denied the participation in illegal strike and the respondent having denied the unlawful termination allegation and reiterated the illegal strike in witness statement of Azera the court found the grounds of appeal that illegal strike was not pleaded not true.

44. Secondly, the court agreed with the trial magistrate that the appellant and CW2 spoke in plural terms on the issue of refusal to do extra work. The appellant at cross-examination stated: 'I refuse to do extra work. We had been allocated by my seniors. We were the whole grading about 60(sixty) people. We did not go on strike. We were discussing. On the day the work was done by other employees. We did not do the task. We did not have a meeting with the human resource." The trial court correctly applied the law to find the acts of the appellant and her co-workers amounted to strike as defined under the *Employment Act* that :- "strike" means the cessation of work by employees acting in combination, or a concerted refusal or a refusal under a common understanding of employees to continue to work, to compel their employer or an employers' organization of which their employer is a member, to accede to any demand in respect of a trade dispute."

45. The Court agreed with the trial court that the acts of the appellant and her co-workers fitted the definition of illegal strike. Section 80 of the *Labour Relations Act* was correctly applied by the Trial Court to wit :- ''(1) An employee who takes part in, calls, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and—

    (a) a) is liable to disciplinary action; and

    (b) is not entitled to any payment or any other benefit under the *Employment Act* during the period the employee participated in the strike."

46. In the upshot that court upheld the finding of lawful reasons for the termination.

47. The court on procedural fairness finds that there was admission of the appellant and her witness of having met the Human Resources on the issue of the illegal strike. RW1 during cross-examination demonstrated that the appellant was heard with others before the dismissal. The court found no basis to disturb the findings of the Trial Court on the fairness of the termination.

Whether the trial court erred on the reliefs sought.

48. The appellant submitted that the Trial Court erred in fact and in law when it found that the Appellant did not prove to Court that House allowance was not paid and public holiday as per paragraph 5 of page 66 of the Record of Appeal whereas the Appellant had testified as per Paragraph *2* at page 54 of the record of Appeal that she was not being paid House Allowance and worked on public holidays and she was never paid. Further the Respondent never rebutted the evidence of the Appellant that she was never paid house allowance and public holidays worked for the year 2013 to 2021 as pleaded in the claim paragraph *12* (see page 6 of the Record of Appeal).

49. The respondent submitted that in the judgement (page 258 from line 17) the court laid out the contents of the claim, the exhibits relied on by the appellant and the testimonial evidence she and her witnesses gave during hearing. The learned magistrate considered the written submissions made by both parties and set out 3 issues for determination (page 63 line 17). She considered the law applicable to the 3 issues and finally made a determination on each of the issues. The judgment was procedural and forthright. There is no basis for the allegation that the learned magistrate did not consider the appellant's evidence of reaching the wrong conclusion.

50. The trial court held that the appellant did not prove house allowance was not paid. She did not comment on house allowance in pleading as well as in evidence in chief. She was also silent on public holidays.

51. In the claim the appellant sought for terminal dues in paragraph *12* which included house allowance for 8 months, and public holidays worked from year 2015 to 2021. In the demand letter dated 25th May 2021 the appellant further sought for the same prayers.

52. The respondent in defence stated that it did owe the respondent any monies.

53. The court on perusal of the proceedings found that the claimant adopted her witness statement. The witness statement did not plead the public holidays. At cross-examination the claimant reiterated she was not paid on public holidays and house allowance. The defence in witness statement was silent on the issue.

54. The court finds that the appellant's claim for public holidays was not proven. It was not an issue at the time of strike. The court found that it was more probable than not that the public holiday payment was not an issue and probably why the appellant never raised it in her witness statement adopted as her evidence in chief. On the house allowance the court found the evidence of the appellant was unshaken. The appellant produced payslip as acknowledged by the trial court (page 12 of ROA). There was no item for house allowance and the basic pay was the minimum wage. Section 31 of the *employment act* provides for housing as a basic condition of employment to wit:- '31. Housing

    (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation." The payslip was not in dispute. The payslip is a statutory document as per section 20 of the *Employment Act* to wit:-' 20. Itemised pay statement

        (1) An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

        (2) The statement specified in subsection (1) shall contain particulars of—

(a) the gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

(3) This section shall not apply to a casual employee or an employee engaged on piece rate or task rate terms or for any period not exceeding six months.'' The payslip produced before the trial court was conclusive evidence of the salary paid to the appellant. The trial court needed no other evidence to find that the house allowance was not paid. The respondent did not plead it provided housing. The claims were of continuing injury under section 89 of the *Employment Act*. The appellant was terminated on the 30th April 2021 and the claim was filed on the 15th June 2021 hence on time. Consequently, the court sets aside the finding of the trial court on the housing and the claims for housing are allowed as prayed in the claim.''

Conclusion

55. The court found that the appeal was partially successful having adopted the judgment in appeal No E50 FO 2023 in determination of the instant appeal. . The Judgment of the Honourable Wangeci Ngumi (SPM) delivered at Gatundu on the 13th March, 2023 in Gatundu Employment Cause No. E007 of 2021 is set aside and substituted as follows:-

Judgment is entered for claimant against the respondent as follows:

a. The termination is held as lawful and fair

b. House allowance Kshs. 14,005.86

c. Costs and interest at court rate from date of filing of the suit until payment in full.

56. The appellant is awarded costs of the appeal.

57. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant : - Ms. Matunda

Respondent: Ndinga h/b Mbuthia