



Wesonga v Everflora Limited (Employment and Labour Relations Appeal E052 of 2023) [2025] KEELRC 1032 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1032 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E052 OF 2023**

**JW KELI, J
MARCH 28, 2025**

BETWEEN

WILKISTER AKINYI WESONGA APPELLANT

AND

EVERFLORA LIMITED RESPONDENT

(Being an Appeal from the Judgment of the Honourable W. Ngumi (SPM) delivered at Gatundu on the 13th March, 2023 in Gatundu Employment Cause No. E008 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of the Honourable W. Ngumi (SPM) delivered at Gatundu on the 13th March, 2023 in Gatundu Employment Cause No. E008 of 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.E008 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. E008 of 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 the Respondent's witness statement which had alleged that the Appellant participated in unlawful strike contrary to the dismissal letter with different dates.

Background Of Appeal

7. 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. 8,949.31/=;
 - ii. Compensation for wrongful,unlawful and/or unfair termination of employment 12 months X Kshs. 8,949.31 = Kshs. 107,391.72/=;
 - iii. House allowance at 15% of the Claimant's monthly salary for 8 months (Kshs. 8,949.31 X 15% x 8) = Kshs. 10,739.17/=;
 - iv. Interest on (a) above from the date the same became due until payment in full; and
 - v. Costs of the suit
 - b. Any other relief this Honourable court may deem fit to award under the circumstances
TOTAL Kshs. 127,080.20/=.
8. 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 8-14 of ROA).
9. The claim was opposed by the Respondent who filed a Statement of Defence dated 28th September, 2021 (Pages 18-19 of ROA), Respondent's list of witnesses, Respondent's Witness Statement of Moses Ndeda Azele and list and bundle of documents all of even date (Pages 20-25 of ROA).
10. The Claimant responded to the Respondent's Defence by filing a Reply to Defence dated 19th October, 2021(Page 26 of ROA).
11. The Claimant filed a Statement of Agreed issues dated 19th October, 2021 (Page 27 of ROA).
12. The claimant's case was heard on the 14th November, 2022 and further on 30th January, 2023 where the claimant and Everlyne Kwamboka Keya(CW2) testified in the case, they produced their documents and were cross-examined by Counsel for the Respondent. Mr. Mbutia(see pages 50-54 of ROA).



13. 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.
14. The parties took directions on filing of written submissions after the hearing. The parties complied.
15. The Trial Magistrate Court delivered Judgment on the 13th March, 2023 finding that the termination of the Claimant was lawful thus dismissing the Claimant's claim and that each party to bear their own costs. (Judgment at pages 58-64 of ROA).

Determination

16. The appeal was canvassed by way of written submissions. Both parties complied.
17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [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."
18. 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

19. 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; and
 - c. Was the termination of the Appellant fair and procedural
20. The Respondent submitted on the grounds of the Appeal.
21. The court adopted the issues at trial court and framed them at first appeal as follows:-
 - i. Whether the Trial court erred on its findings on the lawfulness and fairness of the termination
 - ii. Whether the trial court erred on the reliefs sought.



Whether the Trial Court erred on its findings on the lawfulness and fairness of the termination

22. 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.”
23. 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.
24. On substantive fairness, the Trial Magistrate Court delivered Judgment on the 13th March, 2023 holding that the termination of the Claimant was lawful as follows:-“The Claimant was terminated from her employment vide a letter dated 30th April 2021. As per the letter, her termination was on the ground of failing to perform the task allocated to her. I have seen the show cause letter produced in court as evidence. It is clear that the Claimant participated and was accorded an opportunity to be heard. In the said letter She gave her explanation which she indicated on the letter to the effect that she was going back to work but Moses chased her away indicating that she did not work in the grading department. She hence was served and received the show cause letter. On 30th April 2021, a dismissal letter was issued. It was deemed that her dismissal was due to the contravention of section 44(4) e of the Employment Act. It is clear that the Claimant failed to obey a lawful and proper command issued by a person in authority in her place of employment which is a valid reason for dismissal. She was accorded a hearing and the procedure laid down in the act was followed.”(page 63 of RoA)

Appellant’s submissions

25. As per the Respondent’s witness statement dated 28th March 2022 (See page 21 of the Record of Appeal) the Respondent states that the Appellant was dismissed on 27th April for engaging in an unlawful strike and failed to respond to the show cause letter. However, during the trial he adopted his witness statement and produced Exhibits 1-4 (see page 54 of the record of Appeal). During cross-examination of the Respondent’s witness he testified that the Appellant was given a show cause letter which she responded to. She did not defend herself of the offence, and she left (See paragraph 3 of page 55 of the Record of Appeal) and went on Re-examination to state that “We gave Wilkister a hearing and after the hearing we gave her a show cause letter to explain herself.”
26. The Appellant’s evidence was corroborated by her witness (CW2) who adopted her witness statement at page 14 of the Record of Appeal and testimony in court at pages 53 and 54 of the Record of Appeal. The Trial Magistrate overlooked this aspect when it held that the Appellant’s summarily dismissal was procedural in that “she was accorded a hearing and the procedure laid down in the Act was followed”



contrary to the evidence on record that the Appellant was only given Notice to show cause and no hearing took place.

27. The Appellant submitted had the Trial Court evaluated this evidence which was collaborated it would have reached a different verdict. Further it failed to give reasons why the evidence of the Appellant's was not credible having been collaborated compared with the evidence of the Respondent which was full of discrepancies in that on one part the Appellant had participated in an illegal strike and/ on the other part she had refused to obey her superior's orders. The summary dismissal letter is clearly indicated at page 23 of the record of Appeal paragraph *para_1 1* "Refer to the incident whereby you failed to perform your duties when allocated to work at the grading hall and rudely walked out. And a show cause on the same issued to you. The reason given on the same was not sufficient and your behavior is a contravention to section 44(4) (e) of the *Employment Act* of 2007 Laws of Kenya"
28. The Trial Court ignored the fact that from the Appellant's testimony, that of her witness, the Respondent's witness testimony in Cross-Examination and Exhibits produced no evidence was tendered to show that a hearing was conducted as required under section 41 (1) and (2) of the *Employment Act* 2007. That the Trial Court failed to consider sufficiently the circumstances of the case before it, the evidence of the Appellant and submission presented before the court and by so doing the Court arrived at an erroneous decision in the circumstances.
29. The appellant submitted that the trial court over relied on the respondent's unpleaded evidence and submissions. That it is a paramount rule of practice that a party is bound by its own pleadings. A cursory look at the Defence/Response filed by the Respondent herein (See pages 18 and 19 of the Record of Appeal), shows that the Respondent's Defence did not raise any triable issues and the allegation of failure of the part of the Appellant to perform her duties as allocated and/or inciting the entire grafting team by telling not to go to the grading. The Respondent's witness statement filed in the Lower Court at page 21 of the Record of Appeal indicated that the Appellant had participated in an unlawful strike on 22nd April 2021 and also inciting other employees not to report to work the next day. The same was adopted as his evidence in Chief (See paragraph 5 of page 54 of the Record of Appeal. Further in Cross-examination the Respondent's witness confirmed that the Appellant was still working at the grafting section and wanted her to shift to the grading section on the night shift and did not take part in the unlawful strike, evidence which was contrary to his witness statement. However, with this inconsistencies and/or disparities in the oral evidence and documentary evidence of the respondent the lower court still concluded the termination was fair.

Respondent's submissions

30. The respondent's witness, Moses Ndedes Avers, testified that the appellant withdrew her labour on 22.4.2021. Later on, she and other around the labour camp incited other employees and refused to go back to work on the next day. The appellant's actions on that amounted to participating in a strike. The summary dismissal letter dated 30.4.2021 described the appellant's actions of withdrawing her labour and her refusal to work (page 23 of the record of appeal). The invitation for the hearing meeting dated 26.4.2021 and the strike notice to the County Labour Officer referred to the issue of the illegal strike. Furthermore, in the statement of defence dated 2.7.2021 (page 20) the respondent denied the averments in the statement of claim. No more was required of the respondent in the statement of defence. Due to the foregoing, ground 2 of appeal has no merit.
31. In the judgment (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 the 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 or reached the wrong conclusion. There is no merit in these grounds of appeal.

Decision

32. The burden of proof of reasons for termination is on the employer under 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."

33. The letter of summary dismissal dated 30th April 2021 as follows:- 'Dear Wilkister,
RE: Summary Dismissal-gross Misconduct

Refer to the incident whereby you failed to perform your duties when allocated to work at the g hall and rudely walked out. And a show cause on the same issued to you. The reason given on was not sufficient and your behavior is a contravention to section 44(4) (e) of the Employment 2007 laws of Kenya.

Consequently, this letter serves to advise that you have been dismissed from Company employment with effect from 30th April 2021.

Your final dues will be calculated and paid to you as follows:

1. Days worked up and including 30th April 2021.
2. Leave Earned but not taken-14 days.

Sincerely,

For: Everflora Limited

Bernice Matiri.

Human Resources Manager."(page 23 of ROA).

34. The appellant was issued with show cause dated 28th April 2021 which had a place for her to comment as follows:- 'From: The Human Resources Department.

To: Wilkister Akinyi Wesonga- P/No: 593

Section:Grafting

Date:28th April, 2021

REF: Show Cause Letter

This is to ask explanation of the following offence/misconduct that you were involved in as below:



1. On the afternoon of 22nd April 2021 when asked by your immediate supervisor to report to the grading hall for allocation you incited the entire grafting team by telling them not to go to the grading.
2. On the same day when the Hrm and the Hr Assistant (Mr Moses) came to the grafting to address the grafting team and instructed them to move for allocation at the grading hall you were still resisting and later when you reached at the grading hall you refused to bunch the flowers as allocated and walked out of the grading without any permission from the supervisors.

You are hereby required to respond in writing to reach this office immediately, explaining why disciplinary action Should not be taken against you. Failure to respond will be taken to mean that you have no defense and the management should go ahead and take disciplinary action against you. Please note that you will have the right to appeal against any disciplinary action taken against you by the company.

HR Manager Sign:

Date: 28/4/2021.

Give your explanation here:

Mimi nilikuwa narudi kazi, Moses akanifukusa akaniambia mimi ni mtu was Gavalding si grading.”The appellant signed the letter on the 28/4/2021.

35. The appellant and her witness (Everlyne Kwamboka Keya)before the trial court admitted the allegation of having refused to work. The appellant in the show cause never raised the issue of having been tired. It would appear she was in solidarity with the striking workers for she was called with CW2 and others by the human resources on the strike as per the witness statement of CW2(page 14 of ROA). The court upholds the finding of the trial court that the reason for termination was valid as it falls under section 44(4)e of the *Employment Act*.
36. On the fairness of the process, CW2 stated that the HR called them. That Wilkester said she was tired. RW1 told the court that after the response to show cause the appellant refused to work and the HR dealt with the appellant. CW2 confirmed the HR meeting them. The court finds that the provisions of section 41 of the *Employment Act* was substantially complied with by giving notice to the employee and meeting her with other employees to explain why the employer was contemplating the termination. CW2 confirmed the HR met the appellant in her presence. The court did not find misapplication of facts or that the decision of the trial court on the fairness of the termination was clearly wrong for the court to interfere (Mbogo v Shah).
37. The court then finds that a court cannot the prayer sought of public holiday a issues the respondent did not have a chance to respond to. The public holiday payment ought to be pleaded specifically. The respondent in defence stated that it did owe the respondent any monies.

Whether the trial court erred on the reliefs sought.

38. 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 2 of page 50 of the Record of Appeal whereas the Appellant had testified as per Paragraph *para_2_2* 2 at page 51of 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 *para_12 12* (see page 6 of the Record of Appeal).

39. 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 reached the wrong conclusion. There is no merit in these grounds of appeal.
40. The trial court held that the appellant did not prove house allowance was not paid. That she did not comment on house allowance in pleadings as well as in evidence in chief. She was also silent on public holidays.
41. In the claim the appellant sought for terminal dues in paragraph *para_12 12* which included house u allowance for 8 months only . There was no prayer for public holiday and no evidence was led on that. In demand letter dated 25th May 2021 the appellant never sought for a public holiday pay. 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 or house allowance. The defence in witness sttament was silent on the issue. The court then finds that a court cannot the prayer sought of public holiday a issues the respondent did not have a chance to respond to. The public holiday payment ought to be pleaded specifically. The claim for public holiday pay cannot stand.
42. The court finds that the appellant's claim for unpaid house allowance was unshaken. . On the claim house allowance, the appellant produced payslip as acknowledged by trial court (page 12 of ROA). There was no item for house allowance in the payslip and the paid 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 Court holds



that 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 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 employment was terminated on the 27th 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 prayer for housing pay is allowed as prayed.

Conclusion

43. The court found that the appeal was partially successful. The Judgment of the Honourable Wangeci Ngumi (SPM) delivered at Gatundu on the 13th March, 2023 in Gatundu Employment Cause No. E006 of 2021 is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows:

- a. The termination is held as lawful and fair.
- b. House allowance Kshs. 10,739.17
- c. Costs and interest at court rate from the date of filing of the suit until payment in full.

44. The appellant is awarded costs of the appeal.

45. 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 : -Matunda

Respondent: Ndonga h/b Mbuthia

