



**Ngaruiya v Chairman Board of Management, Toll Model Primary School (Employment and Labour Relations Appeal E265 of 2023) [2025] KEELRC 857 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 857 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E265 OF 2023**

**JW KELI, J  
MARCH 14, 2025**

**BETWEEN**

**NELLY NYAMBURA NGARUIYA ..... APPELLANT**

**AND**

**THE CHAIRMAN BOARD OF MANAGEMENT, TOLL MODEL PRIMARY  
SCHOOL ..... RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the Honourable Joseph Were (SPM)  
delivered at Nairobi on the 7th December, 2023 in Nairobi MCELRC E003 of 2023)*

**JUDGMENT**

1. The Appellant, dissatisfied with the Judgment and Orders of the Honourable Joseph Were (SPM) delivered at Nairobi on the 7<sup>th</sup> December 2023 in Nairobi MCELRC No. E003 of 2023 between the parties filed a Memorandum of Appeal dated 20<sup>th</sup> December, 2023 seeking the following orders:-
  - a. The Appeal herein be allowed;
  - b. The Judgment, decree and Orders made and delivered on 7<sup>th</sup> December, 2023 in MC. ELRC No. E003 of 2023 Nelly Nyambura Ngaruiya vs Chairman Board of Management, Toll Model Primary School be set aside.
  - c. The Prayers sought in MC. ELRC No. E003 of 2023 Nelly Nyambura Ngaruiya vs Chairman Board Management, Toll Model Primary School by the Claimant be allowed.
  - d. The costs in MC. ELRC No. E003 of 2023 and the Appeal herein be awarded to the Appellant.
  - e. Such other order as Court deems fit and just to grant.



## Grounds Of The Appeal

2. The Trial Learned Magistrate erred in fact and law in dismissing the Appellant's claim in its entirety.
3. The Trial Learned Magistrate erred in fact and law in finding and holding that the Appellant was not unfairly terminated and/or dismissed from employment as the reasons for the termination/dismissal were well and clearly explained to the Appellant.
4. The Learned Trial Magistrate erred in his finding that the termination and/or dismissal of the Appellant by the Respondent was not unlawful, unfair, unprocedural, wrongful and/or unfair.
5. The Learned Trial Magistrate erred in fact and in law in failing to find, note and hold that the Appellant was, and continued to be an employee of the Respondent even after the alleged termination/dismissal of her employment in that she was asked to 'hand-over' long after the alleged decision had been made.
6. The Learned Trial Magistrate erred in fact and law by holding that the Respondent had proved that it had transitioned from a private school to a public school and that as such, the Appellant's termination/dismissal was not unfair, illegal or irregular.
7. The Learned Trial Magistrate erred in fact and in law in failing to find and hold that the termination/dismissal of the Appellant in the circumstances of the case was based on invalid reasons and/or that the reasons advanced, and the procedure employed by the Respondent, was substantially and procedurally unlawful, unfair and unjust.
8. The Learned Trial Magistrate erred in fact and in law in failing to find and hold that no notice was issued to the Appellant prior to termination/dismissal of her employment contract.
9. The Learned Trial Magistrate erred in fact and in law in failing to find and hold that the Appellant was not afforded an opportunity to be heard prior to the alleged termination/dismissal by the Respondent.
10. The Learned Trial Magistrate erred in fact and in law in failing to find and hold that the grounds for summary dismissal had not been substantiated against the Appellant as required under Section 44 of the *Employment Act*.
11. The Learned Trial Magistrate erred in fact and in law in failing to find and hold that the Appellant's termination/dismissal from the Respondent's employment did not comply with the provisions of Section 45 of the *Employment Act* on fairness of procedure in termination.
12. The Learned Trial Magistrate erred in fact and law by failing to find and hold that the Appellant was not furnished with reasons for her termination/dismissal and therefore, no valid reason was cited for the Appellant's termination/dismissal.
13. The Learned Trial Magistrate erred in fact and law by failing to find and hold that the Appellant had factually and legally established the key ingredients and/or components of unfair termination/dismissal in accordance with the law as against the Respondent.
14. The Learned Trial Magistrate erred in fact in finding and holding that the Appellant was paid one month salary in lieu of notice.
15. The Learned Trial Magistrate erred in fact and in law in failing to find and hold that the Respondent had not deducted and/or remitted NSSF and NHIF contributions from the Appellant's salary for the entire period she worked with the Respondent.
16. The Learned Trial Magistrate erred in fact and in law if failing to find that the Appellant was entitled to salary in lieu of notice, and to payment of NSSF and NHIF contributions.



17. The Learned Trial Magistrate misdirected himself in entering judgment against the Appellant despite the legal and procedural flaws that led to the Appellant's termination from employment.

### **Background To The Appeal**

18. The Claimant/Appellant filed a claim against the Respondent vide a Statement of Claim dated 24<sup>th</sup> February 2023 seeking the following orders:-
- i. A declaration that the summary dismissal/termination of the Claimant's employment by the Respondent was unlawful, unfair and unprocedural;
  - ii. Kshs. 240,000/- in lieu of notice;
  - iii. Kshs. 58,840/- NSSF contributions;
  - iv. Kshs. 19,200 NHIF Contributions;
  - v. General damages;
  - vi. Costs of this claim.
19. The Claimant filed with the claim, her verifying affidavit, witness statement and list of documents all of even date together with the bundle of documents (see pages 10-22 of ROA).
20. The claim was opposed by the Respondent who entered appearance and filed Respondent's reply to the Claimant's Statement of Claim dated 28<sup>th</sup> April, 2023 (pages 25-27 of ROA), Respondent's Witness statement of Eng. G. Munuku (undated), Emily Njambi Njoroge (undated) (Pages 32-34 of ROA), Dominic Oketch (undated) (Pages 32-39 of ROA) and the Respondent's list and bundle of documents (Pages 40-53 of ROA).
21. The Claimant filed a reply to the Respondent's Reply to the Statement of Claim dated 19<sup>th</sup> May 2023 (Pages 28-30 of ROA).
22. The claimant's case was heard on the 4<sup>th</sup> of October, 2023 where the claimant testified in the case, produced her documents, and was cross-examined by counsel for the Respondent Ms. Muchoge (pages 110-113 of the ROA). The Respondent's case was heard on even date where RW1 Ms. Emily Njoroge Njambi testified on behalf of the Respondent. She relied on her filed witness statement. She was cross-examined by counsel for the claimant, Ndambiri (pages 113-115 of the ROA).
23. The parties took directions on filing of written submissions after the hearing. The parties complied.
24. The Trial Magistrate Court delivered its Judgment on the 7<sup>th</sup> December, 2023 dismissing the Claimant's suit and requiring each party to bear their own costs (Judgment at pages 116-120 of the ROA).

### **Determination**

25. The appeal was canvassed by way of written submissions. Both parties complied.
26. 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."

27. 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**

28. The Appellant condensed the grounds of appeal into two(2) issues for the court's determination namely:-
- i. Whether the summary dismissal and/or termination of the Appellant's employment was wrongful, unfair, irregular and unlawful; and
  - ii. Whether the Appellant is entitled to the reliefs sought.
29. The Respondent submitted on six (6) issues for determination namely:-
- i. Whether the Appellant's contract of employment was fairly terminated;
  - ii. Whether the Respondent's transition justified the termination;
  - iii. Whether the Appellant was issued with a notice prior to termination;
  - iv. Whether the Respondent failed to remit NSSF and NHIF contribution from the Appellant's salary;
  - v. General damages for unfair termination; and
  - vi. Who bears costs.
30. The court having perused the grounds of appeal was of the considered opinion that the issues placed before the court on appeal for termination were as follows:-
- a. Whether the trial court erred in its findings on the termination of the Appellant's employment.
  - b. Whether the trial court erred in its findings on the reliefs sought.

### **Whether the trial court erred in its findings on the termination of the Appellant's employment.**

31. The issue before the trial court was whether the summary dismissal and/or termination of the Appellant's employment was wrongful, unfair, irregular, and unlawful. 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:-<sup>9</sup>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.”
32. Fairness as per section 45(2) (supra) has two components, substantive fairness of valid reasons related to the employees conduct, capacity or compatibility; or(ii) based on the operational requirements of the employer and procedural fairness according to section 41 of the *Employment Act*. The germane of the grounds for appeal under substantive fairness was the challenge on validity of the reasons for the termination.
33. The prove of fair termination of employment as according to section 47(5) of the *Employment Act* to wit:- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’ The appellant in statement of claim stated that she received WhatsApp message on or about 23<sup>rd</sup> January 2024 from the school, when the schools were set to open for first term, telling her not to report to school for duty. That no reason was given but later following correspondence of 1<sup>st</sup> and 8<sup>th</sup> February 2023 she learnt and concluded she was summarily dismissed from her employment with respondent. In her witness statement she stated that on 23<sup>rd</sup> January 2023 she received WhatsApp message to report to school to handover. She worked in a public school.
34. The respondent in paragraph 4 of the respondent’s response to the claim admitted the employment of the claimant as teacher of Toll Model Primary school vide offer letter dated 28 January 2019 with a salary of Kshs. 15000. She worked with the school committee before the school was taken over by the Government of Kenya in 2021. After the Government took over the board of management appointed under the *Basic Education Act* continued to engage with the claimant and her gross monthly salary was later increased to Kshs. 20,000. The respondent stated that the school committee that existed at that time under which the claimant worked was more of private with the MP Local arrangement which is not the case now. Currently, the school is under the Executive Board of Management appointed under the Education Act (pages 25-27 of ROA).
35. The Respondent contended that having received assurance by the County Government of the allocation of Early Childhood and Development Education(ECDE) Teachers and having acquired teachers posted by the Teachers Service Commission the Board of Management therefore had to terminate the employment of contracts of ECDE teachers that had been working under the Board of Management(PAGE 33 of ROA).
36. On 8<sup>th</sup> November 2022 in bid to communicate and give notice of the same to the ECDE teachers a meeting was held with the ECDE teachers present. The school paid the teachers salary for month of December in lieu of notice (pages 25-26 of ROA). ENG. Munuku stated in witness statement that on 16<sup>th</sup> January 2023 the Board met and having not been allocated teachers by the County Government, agreed to place an advertisement for vacancies calling for application for the post of ECDE teachers. On 18<sup>th</sup> January 2023, the claimant among others applied for the position. They called for interviews and the claimant did not qualify. All the teachers were to hand over any school property on the 30<sup>th</sup> of November 2022 and the three teachers handed over except the Claimant who had never handed over the PP2 ICT gadget. The claimant was not summarily dismissed as she was issued with one month’s notice.



37. The Claimant denied the above and stated her employment remained with the board of management and that the school was not private as stated. That the school always had a board of management under the Education Act and the irregular termination was by the chairman of the Board. That the salary for month of December was her normal pay and not notice pay in lieu (Reply to response at pages 28-30).

38. The trial court on the issue at paragraphs 6 to 14 of the judgment stated as follows:-

“Several facts are uncontested. That the claimant was a teacher at the school from 2019 and worked until December, 2022 when she was requested to leave as the school had been taken over by the government and the previous boards mandate thus expired upon the takeover. She was at the school on 18th January, 2023 to inquire on the status of her employment and was reminded of the new status of the school and advised to await any indication from the County on whether they would absorb the teachers previously at the school. Unfortunately, she was not lucky.

7. I have considered the submissions made by the Respondents herein. I also note that as at the time of the judgment, the Claimant had not filed any submissions as directed on the 4th October, 2023. I however consider the main question to be whether the claim is sustainable against the Respondent. It is admitted that the school was taken over by the government and the government posted TSC teachers to cover the upper classes except the ECDE classes. The Board of Management upon the school being taken over by the government lost its employment mandate as the same was now within the ambit of the TSC who employ and post teachers.

8. Article 237 of *the Constitution* provides as follows:

1. There is established the Teachers Service Commission.

2. The functions of the Commission are-

- a. to register trained teachers;
- b. to recruit and employ registered teachers;
- c. to assign teachers employed by the Commission for service in any public school or institution;
- d. to promote and transfer teachers;
- e. to exercise disciplinary control over teachers; and
- f. to terminate the employment of teachers.

8. In addition, section 13 of the *Teachers Service Commission Act* provides the Commission with the following mandate at section 13(b):

13.

- (1) The Commission may from time to time establish such committees as may be necessary for the better carrying out of its functions and the exercise of its powers.



- (2) Without prejudice to the generality of subsection (1), the committees may deal with issues relating to recruitment, promotion, dispute resolution and discipline of registered teachers.
9. It is therefore clear in my mind that the mandate of the Respondent as an employer determined after the takeover by the TSC and the County, for ECDE section. That responsibility transited to the TSC by operation of *the Constitution* and statute and therefore, by suing the Respondent, questions arise on whether any residual duty remained that the Respondent could act in the manner proposed by the Claimant to either take on board the Claimant, a mandate they no longer had or to compensate the Claimant, a mandate that was not conferred on them.
10. The above is critical for me as it then would seek to answer the questions of whether the termination of the Claimants employment was lawful or not and further whether the termination was by the Respondent or by operation of law. And if the termination was by operation of law and not directly by the Respondent, then is the Respondent the proper party to this claim or suit?
11. In answering the above issues, I am therefore hard pressed to ask the question as to whether the Respondent had a duty beyond informing the Claimant of the take-over of the institution by the government. The Claimant then had a duty to engage with the new employer to retain her position. Indeed, the Claimant should have also enjoined the County Government of Kiambu as the entity in charge of the recruitment and deployment of ECDE teachers, where the Claimant had interest and experience.
12. I am also guided by the Constitutional provisions of Fourth Schedule, Part 2 (9) which expressly places pre-primary education under the ambit of the County Governments. Again, upon transiting to the government, then the mandate of the Respondents as previously constituted ceased to include the recruitment and deployment of teachers in the public institutions, such as the Respondent. That mandate was now within the ambit of the TSC, constitutionally and statutorily.
13. I am therefore not persuaded that the claim against the Respondents is not sustainable in its present form. It would be a miscarriage of the justice process to therefore make any adverse orders against the Respondent in the current circumstances and would lead to a situation un contemplated. The Respondents, in my consideration would be hard pressed to be condemned to provide any of the reliefs sought by the Claimant.



14. I am thus inclined to reject the suit by the Claimant. This is not to acknowledge however that the Claimant may not have been aggrieved by the decision to transform the Respondent from a private to a public school as it led to her loss of employment with the Respondent. I am indeed persuaded that by the termination, the Claimant has suffered a measure of loss for which she ought to be compensated. It is however to acknowledge that the current Respondents are, in my consideration, not the proper party to shoulder that liability.”(pages 117-119 of ROA)
39. The Respondent was a public school. The claimant had been engaged by the school committee as a teacher (page 42 of ROA ). The letter was an offer of employment.it read in part:- ‘On behalf of Toll Model Primary School Committee, I wish to inform you that you have been offered employment as a teacher with effect from 2<sup>nd</sup> January 2019. You are supposed to adhere to all rules governing the TSC Code of Conduct for teachers and other laws in accordance with Ethics and Integrity Commission and *the Constitution* of Kenya. The current remuneration will be Kshs. 15000 gross per month. Please sign below as commitment to adhere and accept above terms and ad readiness to work with current management committee.” The Appellant signed the letter on the 28<sup>th</sup> January 2019.(page 42 of ROA). The court from the letter concluded the appellant had been employed by the school committee as a primary school teacher.
40. It was not in dispute the government took over the school and the Teachers Service Commission supplied teachers. The Respondent stated that on 8<sup>th</sup> November 2022 it released the teachers with notice pay as salary was for November and December. The schools had closed in December to reopen on 23<sup>rd</sup> January 2023 the next year. TSC has a constitutional mandate to recruit teachers for public schools as it did in the instant case. It was not in dispute that in January 2023 the TSC had already availed enough teachers as the employer. The appellant did not produce evidence of having been a teacher registered with TSC. She even applied for ECDE position unsuccessfully. The court returns that this was not a normal termination but a consequence of employer takeover by the government. The employer had foreseen that coming and issued notice and paid on the 8<sup>th</sup> of November 2022. The employer also produced a letter dated 7<sup>th</sup> November to the Kiambu County Government requesting for the deployment of ECDE teachers(page 45 of ROA). The Respondent was not at fault as to the fate of the Appellant. The court returns that employment can be terminated under section 35 of the *Employment Act* by issuance of notice for such circumstances to wit :- ‘(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.’ The notice was issued in a meeting of 8<sup>th</sup> November 2022 as per evidence laid before the trial court and salary paid for extra month in December. The Board of Management under the government could not take responsibility over the Appellant’s employment. In the upshot the court agreed with the trial court it would be a miscarriage of justice to hold the respondent responsible for the unfair termination in the circumstances of the takeover.
41. On the appeal the court was guided by the decision in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation on 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.” The court found no basis to interfere with the decision of the Learned Magistrate court.



42. The Judgment and Orders of the Honourable Joseph Were (SPM) delivered at Nairobi on the 7<sup>th</sup> December 2023 in Nairobi MCELRC E003 of 2023 is upheld and the appeal dismissed.
43. To temper justice with mercy, each party is to bear its own costs in the appeal.
44. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Appellant : -Mavisi h/b Ndambiri

Respondent: -absent

