



**Kiarie v Board of Management Nguku Secondary School (Employment and Labour Relations Appeal E013 of 2024) [2025] KEELRC 795 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 795 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E013 OF 2024  
ON MAKAU, J  
MARCH 12, 2025**

**BETWEEN**

**ESTHER NJERI KIARIE ..... APPELLANT**

**AND**

**BOARD OF MANAGEMENT NGUKU SECONDARY SCHOOL . RESPONDENT**

*(Being an appeal from the Judgment of the Honourable J.Irura (SPM) delivered on 30th May, 2024 in Kigumo ELRC Cause NO. E001 of 2021)*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated 20<sup>th</sup> June 2024, the appellant seeks the following orders: -
  - a. The appeal be allowed.
  - b. The Judgment delivered on the 30<sup>th</sup> of May 2024 and all consequential orders be set aside in so far as they are against the Appellant.
  - c. Costs of this appeal be awarded to the Appellant.
  - d. Any other further relief that this Honourable court shall deem fit and expedient to grant.
2. The appeal stands on the following grounds: -
  - a. The learned trial Magistrate erred in law and in fact in holding that the Appellant failed to prove her case against the Respondent.
  - b. The learned trial Magistrate erred in law and in fact in holding that the Appellant was called back to school by the Respondent and refused to show up when all evidence on



record show that the Appellant was terminated without notice and the Respondent has never communicated with Appellant.

- c. The learned trial Magistrate erred in law and in fact in holding that the Appellant was never issued with a termination notice while at the same time assuming that if at all the Appellant had showed up in school when she was allegedly summoned by the Respondent, she might have been issued with a termination notice.
- d. The learned trial Magistrate erred in law and in fact in holding that the Appellant was indeed summoned by the Respondent when there is no evidence on record filed by the Respondent to show that the Appellant was summoned.
- e. The learned trial Magistrate erred in law and in fact in solely relying in the unsubstantiated testimony of the Respondent's witness and failing to consider the Appellant's testimony and evidence on record.
- f. The learned trial Magistrate erred in law and in fact in assuming that when the Appellant was summoned, perhaps she was being summoned for a disciplinary hearing while there is no evidence on record to corroborate her assumptions.
- g. The learned trial Magistrate erred in law and in fact in relying on her own assumptions to arrive at the finding that the claimant's termination was fair.
- h. The learned trial Magistrate erred in law and in fact in finding that the Appellant has never been denied her salary in lieu of notice and failing to put into consideration the fact that the Respondent failed to respond to the demand letters issued before the suit was filed in court.

## **Background**

3. The appellant was employed by the respondent as Secretary/Typist on 15<sup>th</sup> January 2001 and worked as such until 31<sup>st</sup> October 2019 when her services were terminated. As at the time of the termination her salary was Kshs.16,000 per month.
4. She filed suit in the lower court alleging that the respondent had unlawfully and unfairly dismissed her without any valid reason and without following a fair procedure contrary to the provisions of the *Employment Act*. Therefore, she prayed for the following reliefs: -
  - a. Declaration that the dismissal was unfair, unlawful and a nullity.
  - b. Compensation for unconstitutional, unfair, unlawful and unprocedural termination equivalent the expected twelve (12) years' salary.
  - c. Two months salary in lieu of notice Kshs.32,000.
  - d. Salary underpayment Kshs.1,033,002
  - e. House allowance Kshs.545,400.
  - f. Medical allowances Kshs.115,500
  - g. Leave allowances Kshs.136,000
  - h. Service gratuity Kshs.288,292
  - i. Certificate of service
  - j. Aggravated compensatory damages and punitive damages.



- k. An order directing the Respondent to issue a certificate of service to the claimant.
  - l. Costs and interest.
5. The respondent filed a Response to the claim dated 16<sup>th</sup> May 2022 in which it admitted that it employed the appellant as a Typist but denied that she served for 18 years. It averred that the appellant was dismissed because she failed to perform her duties, perpetually absented herself from duty and also reported to work late and left earlier than the required time, failed to account for stationery, releasing certificates to former students who had not cleared school fees contrary to the school policy, using fake receipts to clear the debts of former students, failure to deliver a sealed letter to Teacher John Waweru Gituthi, despising the Principal among her colleagues and loss of school property including a printer.
  6. During the hearing, both sides tendered evidence. The appellant testified as PW1 and basically adopted her written statement dated 16<sup>th</sup> February 2022. She also produced 7 documents in her list dated 16<sup>th</sup> February 2022 as exhibits. In brief, her evidence was that she was employed by the respondent as Secretary/Typist for 18 years from 15<sup>th</sup> January 2001 to 31<sup>st</sup> October 2019. Her monthly salary was Kshs.16,000.
  7. She further stated that her employment was terminated without any reasonable cause, without notice and without payment of her terminal dues. Therefore, she prayed for the reliefs sought in the claim.
  8. On cross examination, she stated that her appointment letter was handwritten and not on a letter head. She clarified that the school had no letter heads then.
  9. She admitted that she did not obtain permission from the school before using it as exhibit in court. She contended that she was entitled to house allowance of Kshs.3,000 per month but she had no written proof of the same.
  10. As regard the lost printer, she contended that the former school principal authorised the person repairing the printer to take it away for repairs. She admitted that after the termination she never went back to the school to do clearance.
  11. Mr.Stephen Njoroge Karori, Principal/Secretary of the respondent testified as DW1. He adopted his written statement dated 30<sup>th</sup> August 2022 as his evidence in chief. In brief, his evidence was that he reported to the respondent from 24<sup>th</sup> December 2018 and met the appellant at the door. She then asked him to pay her salary because she had not been paid for two months but he told her that he was yet to receive the tools of work and change bank signatories.
  12. He further testified that the appellant had discipline issues related to performance of her duties, she failed to clean and arrange her office and declared that it was not her business, she refused to take his instruction about keeping written records of stationery (reams of foolscaps), colluded with the Accounts Clerk to issue clearance certificates and to issue fake receipts with different colour and serial numbers.
  13. He further stated that she failed to do clearance and return a machine in order for her dues to be paid to her.
  14. On cross examination he admitted that the appellant was not served with notice before the termination. However, he contended that she was warned and also serves with show cause letter but failed to respond.
  15. He admitted that there was a cleaner who was required to clean the office. He further admitted that failure to pay salary for two months was wrong. He also admitted that the appellant was not a bursar



- or accounts clerk but maintained that she was colluding with the bursar to clear students using fake receipts. She stated that the matter was reported to DCI and investigations were still on going.
16. He further stated that for any property to leave the school it ought to be signed for but in this case the appellant gave out the printer to a person without signing any document and she had his contact.
  17. He stated that the appellant's salary was inclusive of all allowances.
  18. In re-examination, he clarified that the appellant was the custodian of school certificates and she would issue the same to students who cleared their school fees arrears. He contended that the genuine receipts were white.
  19. After considering the evidence and submissions by the parties, the trial court (Hon Irura -SPM) rendered the impugned judgment where she concluded that the appellant had not proved her claim against the respondent and dismissed the suit with costs.

### **Submissions before this court**

20. It was submitted for the appellant that the reason for her dismissal was not valid and fair as it was not sufficient and justifiable. It was submitted that the respondent did not adduce any evidence whatsoever to prove that the appellant was guilty of the allegations made against her. It was argued that for a reason to be valid, the employer must adduce evidence to prove that the allegations are true.
21. To fortify the foregoing submissions, reliance was placed on section 43 and 45 of the *Employment Act*. In addition, the decisions in Kenya Plantation & Agricultural Workers Union (KPAWU) v Finlays Tea (K) Limited [2022] eKLR and Harrison Okallo Alinda v Double Delight Restaurant & Supermarket [2016] eKLR were cited.
22. It was further submitted that the dismissal was not done in accordance with a fair procedure because the appellant was never served with any show cause letter or accorded any disciplinary hearing. Consequently, the court was urged to find that the dismissal was procedurally unfair since the appellant was dismissed without being accorded a fair hearing.
23. For emphasis, reliance was placed on section 45 (4) (b) of the *Employment Act* plus the case of Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR.
24. In view of the foregoing matters, it was submitted that the appellant had proved that she was unfairly dismissed and therefore entitled to the reliefs sought plus costs.
25. On the other hand, it was submitted for the respondent that the trial court was right in finding that the appellant did not prove her case against the respondent. It was submitted that there was a valid reason for termination and a fair procedure was followed.
26. It was submitted that the respondent demonstrated by evidence that the appellant was served with a show cause letter dated 24<sup>th</sup> October, 2024 and she failed to respond. As a result, she was served with a termination letter dated 31<sup>st</sup> October 2024. It was argued that the employer is only required to give reasonable grounds for termination and evidence that the employee was provided with an opportunity to be heard.
27. It was submitted that the respondent had proved gross misconduct on the part of the appellant including Chronic absenteeism, dismal performance of duty, insubordination, failure to safeguard office confidentiality by entertaining authorised persons to the office and to access computer, defying authority openly and asking school principal to seek typing services from Cyber Cafe, mismanagement and fraud, and negligence of duty.



28. To support the above submissions that the dismissal was fair and lawful several cases were cited including Kenfreight (EA) Ltd v Benson K Nguti [2016] eKLR, Nicholas Kipkemoi Korir v Hatari Security Guards Ltd [2016] eKLR and Nicholas Muasya Kyula v Farmchem Limited [2012] eKLR.
29. In the end the court was urged to find that the appeal is not merited and dismiss it with costs.

### **Issues for determination and Analysis**

30. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own independent conclusions. I gather support from *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 the court held thus: -

“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 consider the evidence, evaluate 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.”

31. Having carefully considered the evidence on record and the submissions made in this appeal, the following issues fall for determination: -
- a. Whether the dismissal of the appellant was unfair and unlawful.
  - b. Whether relief sought in the lower court were merited.
  - c. What appropriate orders should this court make?

### **Unlawful and unfair dismissal**

32. Section 45 (1) & (2) of the *Employment Act* provides that: -

“(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 employee’s 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.”

33. Flowing from the foregoing provision, it is clear that for termination of employment to be unfair, the employer must have acted on no valid reason, and/or fair procedure was not followed.



34. In the instant case, the reason for termination was captured in the termination letter dated 31<sup>st</sup> October 2019, thus: -

“Re:Termination of Appointment

Following the full BOM meetings held on 1<sup>st</sup> November, 2018 and 17<sup>th</sup> October 2019 among other meetings that evaluated your performance of duty, it was established that there is necessity to improve efficiency in the office of Receptionist/Typist which you could not prove to attain.

This has advised to have your appointment terminated on the date of this letter. You will be paid one-month salary in lieu of notice. Any other accrued dues will be communicated to you in due course.

I, on behalf of the BOM, wish to appreciate you for the period that you served in this institution.

Thank you.

Yours faithfully,

Stephen Karori

Principal/Secretary B.O.M

Cc: The chairman, Board of Management”

35. The reason cited is not very clear but it is about performance of the appellant’s duty as Receptionist/Typist. The letter alleged that her performance of duty was evaluated during the full BOM meeting on 1<sup>st</sup> November 2018 and 17<sup>th</sup> October 2019 among other meetings and it was found that improvement towards efficiency was required. The letter did not indicate how the evaluation was done and whether the appellant was present during the alleged evaluation.
36. I have perused the minutes of the said BOM meetings and found no single minutes about the alleged evaluation of the appellant’s performance as a Receptionist/Typist. There are however letters written to the appellant accusing her of dismal performance and failing to deliver a letter to a teacher called John Gituthi.
37. The letter on dismal performance of duty was dated 24<sup>th</sup> October 2019 and it accused the appellant of poor time management, reporting to work late and leaving the office before time, and failure to take her duties seriously. She was further accused of wasting a lot of time in the office making noise which showed lack of respect for the office of the Principal. In view of the above matters, the letter invited the appellant to show cause why disciplinary hearing should not be taken against her by 25<sup>th</sup> October.
38. The appellant failed to respond to the show cause letter and she was served with the termination letter dated 31<sup>st</sup> October 2019. The mandate to take action against the appellant was delegated to the Principal by the BOM vide Min4/17/10/2019 during the full BOM meeting on 17<sup>th</sup> October 2019. The minutes stated: -

“It was observed that despite warning the secretary to facilitate the filing of minutes in good time, she still drags up to the last minute. The principal was directed to issue warning letter in the meeting of 1<sup>st</sup> November 2018. The current principal to take action immediately. The accounts clerk was as well to get a warning letter for poor time management and lack of



commitment to her work. The two were accused of idling in noise making and reporting and leaving the office at their convenience. The accounts clerk is to be warned officially.”

39. Having considered the allegations made against the appellant by the respondents in the various documents referred to above, I am satisfied that there was a valid reason justifying the termination of the appellant’s employment. Her conduct indicates a fundamental breach of her obligations under the contract of service. She failed to perform her duties as a Typist or performed below the required standards, she was reporting to work late and leaving before time, she insubordinated her supervisors among other infractions. Such as employee deserves a summary dismissal under section 44 of the Employment Act as it happened herein.
40. As regards the procedure followed, I have already observed that the principal was instructed by the BOM to take action against the appellant immediately. It is evident that she was afforded an opportunity to defend herself in writing by responding to the show cause letter dated 24<sup>th</sup> October 2019.
41. The show cause letter gave timelines for responding but the appellant failed to respond. In the circumstances the appellant squandered the opportunity accorded to her to deny the allegations made against her, and open a further opportunity for an oral hearing. However, by failing to respond to the show cause letter the employer was left with no option but to take disciplinary action against her including termination.
42. It is my view that an employee who squanders an opportunity afforded to defend herself against allegations at work place, is barred from raising the matter in court. In this case, the appellant was served with allegation vide a show cause letter and failed to defend herself. Consequently, I find that the termination of her employment was fair both procedurally and substantively. I gather support from the case of *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR it held that:

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the Employment Act or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

### **Reliefs sought**

43. Having found that the reason for the termination was valid and that fair procedure was followed, the appellant is not entitled to declaration that the termination was unfair and unlawful.
44. Flowing from the above finding the prayer for two months’ salary in lieu of notice and compensation for unfair termination also fails. However, the appellant is entitled to one-month salary as per the termination letter since it was not contested.



45. The claim for salary under payment, leave, house allowance, medical allowances lack particulars and supporting evidence and therefore they must also fail.
46. The claim for gratuity also lacks particulars and supporting evidence. It is trite law that an employee has a burden of proving that the contract of employment provided for payment of gratuity. The copy of appointment letter produced does not state that the appellant would be paid gratuity.
47. The prayer for aggravated damages and punitive damages has not been justified by evidence.
48. The prayer for certificate of service is granted since it is provided for under section 51 of the [Employment Act](#). This is the only issue where the trial court erred.

### **Conclusion**

49. I have found that the termination of the appellant's employment was fair and lawful. I have also found that she is not entitled to the reliefs sought in her suit except a certificate of service. Consequently, the appeal fails to the extent highlighted above and it is dismissed with costs save for the award of a certificate of service which ought to be issued to her forthwith.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF MARCH, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

