



**Manegene v Mamba Group of Hotels Limited (Appeal E038 of 2023)  
[2025] KEELRC 706 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 706 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E038 OF 2023  
NJ ABUODHA, J  
MARCH 7, 2025**

**BETWEEN**

**TIRUS THUO MANEGENE ..... APPELLANT**

**AND**

**MAMBA GROUP OF HOTELS LIMITED ..... RESPONDENT**

*(Being an appeal arising from the entire Judgment of Honourable G.M  
GITONGA (PM) delivered in CMEL No. 1 of 2018 on 3rd March, 2023.)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 29<sup>th</sup> March, 2023, the Appellant appeals against the whole of the Judgment of Honourable G. M. GITONGA delivered on 3<sup>rd</sup> March, 2023.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law by finding that the Appellant lacked a prima facie case on a balance of probability which facts are well demonstrated in the Memorandum of Claim dated the 24<sup>th</sup> day of July, 2018.
  - ii. The Learned Magistrate erred in failing to consider and appreciate the uncontroverted evidence contained in the Appellant's Memorandum of claim dated 24<sup>th</sup> day of July 2018.
  - iii. The Learned Magistrate failed to consider any of the submissions dated 1<sup>st</sup> day of November, 2022 cited in support of the said Memorandum of Claim dated 24<sup>th</sup> day of July 2018.
  - iv. The Learned Magistrate misdirected himself when he came to a finding of a fact that there was no sufficient evidence to show that the Appellant was terminated from employment despite admittance from the Respondent that they knew where the Appellant was upon his admission to Hospital.



- v. The Learned Magistrate misdirected himself when he came to a finding that the Appellant had failed to discharge his burden of proof as necessitated by section 47(5) of the [Employment Act](#).
  - vi. The Learned Magistrate erred by determining the matter on a preponderance of facts and evidence applicable in an ordinary civil matter as opposed to a cause of action founded vide section 45 of the [Employment Act](#) upon which the Appellant's Memorandum of claim was and is premised upon.
  - vii. The Learned Magistrate erred by increasing the threshold of the Appellant's Memorandum of claim to one that is beyond a balance of probability as opposed to the applicable threshold leading to his finding that the Appellant's case was un meritorious and proceeding to dismiss the same with no orders as to costs.
  - viii. In all the circumstances of the case, the Leaned Magistrate failed to do justice before him.
3. The Appellant prayed that the Appeal be allowed with costs and the order of dismissal made by the Learned Magistrate in the trial court on 3.3.2023 be set aside and the Memorandum of Claim dated the 24<sup>th</sup> day of July 2018 be allowed as prayed.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates S.K Opiyo and Company Advocates filed written submissions dated 14<sup>th</sup> November 2024. Counsel relied on the case of *Selle & Another V Associated Motors Boat Co. Ltd & Others (1968) EA* and submitted on the duty of the first appellate court that the court has power to subject the whole evidence that was tendered before the trial court and make its own conclusions bearing in mind that it didn't have the opportunity of seeing and hearing the witnesses first hand.
6. Counsel submitted on the ground1-8 of Appeal that the Appellant filed his claim in lower court on 25<sup>th</sup> July,2018 seeking a declaration that his termination was unfair, illegal and unprocedural and for payment of his compensatory damages and terminal benefits. That the claim was defended by the Respondent, proceeded to hearing and determination. Counsel submitted that the Appellant was employed by the Respondent as a steward at a salary of Kshs 8,500/= up to the time of termination where he had worked for a year.
7. Counsel submitted that the Appellant served the Respondent with loyalty, devolution and diligence until on or about 25<sup>th</sup>July 2015 when he sustained injuries at the workplace as a result of an assault by the Respondent's guards and was hospitalized up to the month of October 2015. That he kept returning on visiting the Respondent's office severally for follow up only to be told that he stood suspended on account of assault suffered by him.
8. Counsel submitted that it was on 10<sup>th</sup> March 2016 that the Appellant was informed by the Respondent's HR that he was dismissed. That the Respondent, through its H.R RUTH KAGO terminated the services of the Appellant without so much as a warning letter despite the fact that the Appellant had been a faithful employee for over one year and was never given an opportunity to defend himself.
9. Counsel submitted that the Respondent through its three witnesses alleged that the Appellant absconded from employment and was not terminated without adducing any evidence to support this allegation. That DW1 and DW2 admitted that they were not aware as to the Appellant's Employment status and his employment records which testimony would not aid this case as they testified about the



injury sustained at workplace which was a different matter in another court altogether. That DW3 alleged that the Appellant was a less than model employee occasionally presenting himself drunk whilst in employment and occasionally absconding from duty yet there were no records produced that either proved that the Appellant was drunk as alleged or at all. That no witness was called to confirm that the Appellant was drunk.

10. Counsel submitted that it was baffling that from both DW2 & DW3s' testimonies, both of them admit to having known that the Appellant was admitted to hospital on account of the injuries sustained yet they maintained that the Appellant absconded duties.
11. Counsel submitted that the Respondent never; sought from the Appellant when he is expected to be fit and report back to work; activated its work injury policy to ensure that an employee injured whilst at work was treated; prepared the Appellant's sick off despite the knowledge that the Appellant was injured and he lay on his death bed in ICU. That with such knowledge the Respondent did not seek out the Appellant as admitted by the DW3 the Appellant's sister who worked with the Appellant yet no effort was shown to have been made at tracing the Appellant's whereabouts if indeed it is shown that the Appellant had absconded from duty.
12. Counsel submitted that the Appellant clearly informed the court that at no material time was he ever admonished by the Respondent verbally or by being issued with a warning letter. That with regard to the suspension letter dated 20<sup>th</sup> July 2015, the Appellant submitted that the same was not delivered to him as it remains baffling that the injuries he sustained on 25.7.2015 occurred to him whilst on suspension.
13. Counsel submitted that the warning letter of 20.7.2015 does not contain any proved evidence that the alleged offences indicated therein were predicated upon a disciplinary procedure as per section 41 of the Employment Act. That the reasons as advanced by the Respondent were found wanting and lacking in cogent evidence. That the reasons ought to be proved to exist and valid as per section 43 of the Act. That no evidence was tabled by the Respondent to show that the Appellant absconded duties. That the Respondent through its HR DW3, failed to produce employee records that would have shown whether the Appellant was always a model employee, his disciplinary record or at all.
14. Counsel submitted that the Respondent never accorded the Appellant the benefit of enjoying the aforesaid Constitutionally and statutorily protected benefits in events leading up to his termination. That the said termination fell short of mandatory requirements of section 41 and 45 of the Employment Act. That there was no record of any investigations being conducted by the Respondent into any offence that may have warranted the Appellant's termination in March 2016 tabled by the Respondent.
15. Counsel submitted that the Appellant testified that he had been reporting to work from October 2015 with promises only being made and it was only in March 2016 did DW3 inform him that his employment had been terminated. That there is no record of any allegation being levied against the Appellant that would have required the Appellant to respond thereto.
16. Counsel submitted that there was no complaint directed at the Appellant in relation to his performances as an employee of the Respondent and there was no Notice to Show Cause delivered to the Appellant since from his testimony, he was terminated verbally and without any letter of termination. That DW2 and DW3 admitted that they knew that the Appellant was admitted in Kenyatta Hospital after being transferred from Guru Nanak Hospital. That the Respondent possessed the Appellant's telephone number where it was alleged that the Appellant never returned the Respondent's calls or messages. That it defeats logic as to why no Notice to show cause was sent by WhatsApp messaging service or even SMS which is at present an acceptable mode of communication.



17. Counsel submitted that the onus after admitting employment of the Appellant fell on the Respondent to provide details of disciplinary action taken against the Appellant and whether the same complied with terms of the Employment contract as provided for under Section 74 of the *Employment Act*.
18. Counsel submitted that the Appellant was never given an adequate opportunity to defend himself from whatever allegations that the Respondent may have possessed against him. That he was never accorded a hearing in presence of co-employee of his choice prior to termination.
19. Counsel submitted that despite full knowledge of the whereabouts of the Appellant and his telephone number, no letter or document was provided that would show an attempt at complying with section 41 was made by even forwarding the same via sms and furthermore, even after service of court process, the fact that the Respondent did not deem it fit to take remedial action inclusive of settlement of the Appellant's terminal dues and issuance of the Appellant's certificate of service which was his by right. The Respondent was not remorseful for its actions towards the Appellant.
20. Counsel submitted that the Respondent ought if the Appellant refused to resume duties upon being called to have taken him through disciplinary process as required by section 41 of the Act for absconding duties. That absconding employees are entitled to be taken through disciplinary process enshrined in the law. That the Respondent never issued the Appellant with show cause letter, no disciplinary hearing and never issued him with termination letter.
21. Counsel relied on among others the case of Judith Atieno Owuor v Sameer Agriculture and Livestock Limited [2020] eKLR and submitted that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.
22. Counsel submitted that that a missed call is not enough evidence to demonstrate that the Respondent acted justly, equitably and fairly in its dealings with the Appellant as required under Section 45 (4) & (5) of the *Employment Act*, 2007 and that the purported missed calls and text message sent many months apart are a red herring and a gimmick.
23. Counsel submitted that the Appellant testified that he had gone to the Respondent's offices several times seeking to be allowed to work but had always been turned away which act eventually led to him being verbally terminated by the Respondent through its witness DW3. That the Learned magistrate erred in not finding that the Respondent failed to prove that his termination of employment was unfair as outlined in Section 47(5) of the *Employment Act*.
24. Counsel submitted that the Learned magistrate misdirected himself by failing to address and analyze the Appellant's entitlement to the terminal dues claimed inclusive of unpaid salary and accrued leave pay saying the same were independent of whether the Appellant was wrongly terminated or not.
25. On the issue of whether the Appellant is entitled to terminal dues, counsel submitted on the prayers as sought under the Memorandum of Claim under the heads of one month's pay in lieu of notice, unpaid house allowance, unpaid salary from June 2015 to February 2016 (9 months), unpaid Leave for one (1) year, unremitted NSSF & NHIF deductions, 12 months' salary for wrongful termination and a Certificate of Service.

### **Respondent's Submissions**

26. The Respondent's Advocates Kimandu & Ndegwa Co. Advocates filed its submissions dated 23<sup>rd</sup> December 2024 and on the issue under grounds 1,5,6 and 7 of the Memorandum of Appeal, counsel



submitted that the burden of proof in employment claims is provided for under section 47 (5) the [Employment Act](#).

27. Counsel relied on the case of Josephine M. Ndungu & others v Plan International Inc [2019] eKLR and submitted that the burden of proving unfair termination lies with the employee to establish a prima facie case. That the Appellant failed to prove that he met the legal threshold of Section 45 (sic) of the [Employment Act](#) on proving unfair termination on account of redundancy as he was fully responsible for his own woes due to being intoxicated and or using drugs and or alcohol which led to him sustaining injuries and eventually absconding work. That he cannot claim to be unfairly terminated yet he absconded.
28. On the issue of whether the Learned magistrate erred in holding that the Appellant had not proved his case on a balance of probability counsel relied on the case of Edwin Mukhwana Lumanyasi v West Kenya Sugar Company Limited ELRC Appeal NO. 22 of 2023 and submitted that standard of proof in employment claims is on balance of probabilities and that the test of reasonableness also applies as envisaged under section 45(4)(b) to extent the termination is unfair if (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
29. Counsel submitted that the Respondent found no fault in the Learned magistrate finding that no proof on balance of probability on the wrongful dismissal/termination was established. The Appellant had a duty to discharge the burden. That the Appellant alleged both unfair and or unlawful termination based on redundancy and he also alleged that he was assaulted by the Respondent's employee which led to injuries which subsequently got him fired because, as he alleged, of pursuing a criminal claim against the Respondent.
30. Counsel submitted that the Appellant was unable to prove any of the contradictory reasons he gave which he alleged led to unlawful and or unfair termination. That the Appellant also alleged that the Respondent failed to provide a safe working environment leading to his injuries but the evidence that was adduced by the Respondent showed that the Appellant inflicted injuries on himself by out rightly leaping out of a window while intoxicated as captured on O.B report number 17/26/7/15 as an attempted suicide and once injured himself he never reported back to work or even applied for any sick leave.
31. Counsel submitted that the Appellant never communicated to the Respondent at all the nature of injuries suffered and even sought time off from work whether by himself or through an agent such as his sister who was working for the Respondent also. That the learned magistrate correctly decided that the Appellant failed to discharge the burden of proof as expected.
32. On grounds 2 and 4, counsel submitted on the issues of whether the learned magistrate erred in failing to consider and appreciate the uncontroverted evidence contained in the Appellant's Memorandum of Claim and whether the Learned Magistrate misdirected himself when he came to a finding that there was no sufficient evidence to show that the Appellant was terminated from employment. Counsel submitted that the evidence contained in the Appellant's Memorandum of Appeal is controverted as the Respondent filed their response to the Memorandum of Claim outlining their defense and even conducted the hearing in the matter where the Respondent out rightly denied the Appellant's allegations and proved that the Appellant had absconded duty after suffering injuries he inflicted upon himself. That the Appellant never applied for sick leave and even after recovery from the injuries he did not report back to the Respondent and only surfaced when he filed the suit.
33. Counsel submitted that the Appellant worked for the Respondent for a period of 11 months before he absconded duty. That Section 45(3) of the [Employment Act](#) provides that an employee has to be in



employment for at least thirteen months before they allege unfair dismissal. That the Appellant ought not to have brought a claim for unfair termination.

34. On the issue of whether the learned Magistrate erred in failing to consider the Appellant's submissions, counsel submitted that the Learned Magistrate rightfully considered the submissions of the Appellant while giving its judgment.
35. On the issue of whether the Learned Magistrate was fair in his decision, counsel submitted that the Learned Magistrate was fair in his judgment and that he observed all aspects of justice while delivering his judgment as he observed all the parties evidence adduced. That the magistrate's decision could not be said to be unfair because the Appellant lost the case. The court considered both sides of the case before rendering its judgment. That the Appeal lacked merit and should be dismissed with costs.

### **Determination**

36. The court has considered the grounds of appeal, the record of appeal and submissions filed by the both parties herein and notes that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held in Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
  - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
37. In this case, the trial court dismissed with no orders as to costs the appellant's claim while declaring that the Claimant did not discharge his burden of proof under section 47(5) of the *Employment Act* and declined to award the appellant the terminal dues as prayed. The Appellant appeals the whole of the Judgment raising 8 grounds. The court finds that the issues placed by the parties for determination in the appeal and the grounds could be condensed to with regard to whether the trial court was right when it held that the Appellant did not discharge his burden under section 47(5) of the *Employment Act* of proving if he was unfairly terminated hence unfair termination or not and if the trial court erred by disallowing the reliefs sought by the Appellant.

### **Whether the trial court erred by finding that Appellant did not discharge his burden under section 47(5) of the *Employment Act* that he was unfairly terminated hence unfair termination or not**

38. It was not in dispute that the Appellant was an employee of the Respondent engaged as a steward at a salary of Kshs 8,500/= from September, 2014. The Appellant alleged that he was attacked by the Respondent's guards on 25<sup>th</sup> July, 2015 where he was injured, taken to Guru Nanak Hospital and later transferred to Kenyatta Hospital. That he was hospitalized up to October 2015, he kept visiting the Respondent about his work who advised him that he was on suspension due to the injuries sustained on and on March, 2016 through the HR, the respondent informed him that he had been terminated.
39. The Respondent on the other hand alleged that the Appellant used to come to work while drunk and he absconded duties. That they issued him with a suspension letter dated 20<sup>th</sup> July, 2015 for the said



- drunkenness and insubordination of seniors. The trial court on the other found that the Appellant had not discharged his burden under section 47(5) of the *Employment Act* to show that termination occurred.
40. This court notes that section 47(5) of the Act distributes the burden of proof of occurrence of an unfair termination and proof of reasons thereof between the employee and the employer. The section puts the burden of proving that an unfair termination occurred on the employee and the burden of justifying the grounds of termination on the employer. The Respondent raised a defence of absconding of duties by the Appellant and further stated that the Appellant on the material day came to work intoxicated and leaped out of the window in a case of attempted suicide which was reported to the Police as O.B report number 17/26/7/15.
  41. The appellant further alleged that he was terminated based on redundancy and he also alleged that he was assaulted by the Respondent's employee which led to injuries which subsequently got him fired because, as he alleged, of pursuing a criminal claim against the Respondent.
  42. From the record of Appeal at page 83, the appellant admitted that he was injured at his place of work and upon being referred to a letter from IPOA admitted that his injuries were as a result of attempted suicide. In re-examination, the appellant further stated that he was hit by a blunt object and taken to hospital by his brother whom he neither named or called as a witness.
  43. The trial who tried the matter however was not persuaded by any of the reasons proffered by the appellant as the cause for his termination. This Court however cautions itself that as an appellate Court it did not have the benefit of observing the demeanour of witnesses before the trial court but the contradictions by the appellant over the true cause of his termination is rather confusing and the Court cannot just like the trial court help disbelieve him. The evidence that was adduced by the Respondent that the Appellant inflicted injuries on himself by out rightly leaping out of a window while intoxicated remains more credible than his own account of events.
  44. From the foregoing the Court agrees with the trial court that the appellant failed to discharge the burden of proof cast upon him by law to show in cases of this nature that his service was unfairly terminated.
  45. The court has stated previously that it is not within its realm to over-analyze the reason for which employment has been terminated. The test usually is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss"? If the answer be in the affirmative, the court will not interfere.
  46. In this case, the Appellant was the author of his own misfortunes by reporting to work, attempting suicide while intoxicated and thereafter absconding duties.
  47. Intoxication to the extent of inability to perform work or obey lawful orders is a valid ground for summary dismissal. The respondent therefore had valid ground to summarily dismiss the appellant however from the record of appeal there is no evidence that the appellant was subjected to any disciplinary process before his service was terminated. However going by the appellant's conduct, the Court will award him nominal damages of one month's salary as compensation for unfair termination only for the reason that the respondent did not carry out the dismissal through a fair procedure. The claimant is further entitled to one month's pay in lieu of notice for termination.

#### **Whether the trial court erred by disallowing the reliefs sought by the Appellant**

48. On the claims for unpaid salaries for June 2015 to February,2016, House allowance and leave pay the same are continuous injury under section 90 of the Act which should be brought within 12 months



after cessation. The relationship herein ended in March, 2016 and the claim was filed in July,2018 which was past the stated period. These claims fail for being sought past the one-year duration.

49. On the claim for unremitted NSSF and NHIF deductions the same fails for the reasons that the Appellant ought to have produced his NSSF and NHIF statements to illustrate that the same were not remitted. Failure to produce any evidence in that effect makes this prayer unsuccessful. The Appellant is however entitled to certificate of service as per section 51 of the *Employment Act*.

50. In the upshot the Appeal partially succeeds with costs to the Appellant as follows: -

- a. One month's salary as compensation for unfair termination.....Kshs 8,500/=
  - b. One Month salary notice pay.....Kshs 8,500/=
- TOTAL...KSHS 17,000/=
- c. Certificate of service.

51. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH, 2025**

**DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF MARCH, 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

