



**National Cereal and Produce Board v Wanyonyi (Appeal
17 of 2024) [2025] KEELRC 770 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 770 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL 17 OF 2024
MA ONYANGO, J
MARCH 6, 2025

BETWEEN
NATIONAL CEREAL AND PRODUCE BOARD APPELLANT
AND
CHARLES CHELOTI WANYONYI RESPONDENT

*(Being an appeal from the Judgment of F.M. Kadima, Senior Resident
Magistrate in Eldoret CMCC No. 1082 of 1995 delivered on 13th March 2001)*

JUDGMENT

1. The Appellant herein was sued by the Respondent at the trial court vide a plaint dated 11th March 1995 as amended on 12th March 1996 in which the Respondent claimed special damages, general damages, costs and interests from the Appellant in respect of his alleged unlawful dismissal from employment.
2. By a judgment delivered on 13th March 2001, the trial court found that the Respondent was wrongfully terminated from employment and was entitled to damages to wit: 3 months' salary in lieu of notice, four years' salary for wrongful termination, leave allowance for 2 years and general damages.
3. Being aggrieved by the findings and decision of the trial court, the Appellant filed this appeal on 31st May 2013 out of time vide an order of leave granted by the Court of Appeal on 15th May 2013. The Memorandum of Appeal sets out the following 5 grounds of appeal:
 - i. That the learned trial Magistrate erred in law and fact in using wrong principles in the assessment of damages such that the damages awarded are excessive in view of the dismissal.
 - ii. That the learned trial Magistrate erred in law and fact in failing to hold that the general damages are not recoverable in a claim for unlawful dismissal.



- iii. That the learned trial magistrate erred in law and in fact in arriving at a decision against the weight of the evidence on record.
 - iv. That the learned trial Magistrate erred in law and fact in failing to abide by the requirements of Order 21 Rule 4 of the Civil Procedure Rules.
 - v. That the learned trial Magistrate erred in law and fact in failing to consider the pleadings, the Appellant submissions hence an erroneous judgment that did not reflect the actual issues in controversy.
4. The Appellant prayed for orders that the trial court's judgment to be set aside and the Respondent's claim be dismissed with costs.
 5. The appeal was disposed of by way of written submissions pursuant to the directions of Hon. Justice Nyakundi on 9th January 2024 before the matter was transferred to this court for determination. The Appellant filed its written submissions on 7th February 2024 while the Respondent filed his submissions on 12th February 2024.

Analysis

6. This being a first appeal, this court is guided by the principles espoused in several decisions among them, *Selle & Another Vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123, to re-evaluate and re-examine the evidence adduced in the trial court in order to reach its own finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified.
7. Vide his Amended Plaintiff dated 12th March 1996, the Plaintiff (now the Respondent) averred that he was employed by the Appellant at its Lugari branch where he worked for 12 years until 28th February 1994 when the Appellant unlawfully terminated his employment without any reason. The Respondent further averred that after his suspension and subsequent termination, the defendant failed to pay him his terminal dues.
8. The Respondent particularized the terminal benefits owed to him by the Appellant to be:
 - a. Salary in lieu of notice
 - b. Arrears in salary
 - c. Severance pay
9. In his Amended plaintiff, the Respondent prayed for the following reliefs:
 - i. A declaration that the plaintiff's dismissal was unlawful
 - ii. An order for payment of Plaintiff's terminal dues
 - iii. Costs and interests
 - iv. Any other relief that the court may deem fit and just to grant
10. The Appellant filed a Defence dated 6th June 1995 and denied that it unlawfully terminated the plaintiff's employment on 28th February 1994.
11. It was the Appellant's case that the Respondent was lawfully dismissed from employment for gross negligence, dishonestly and irresponsibility.



The Evidence adduced

12. At trial the Respondent testified as PW1. He stated that he was employed as a store clerk and his duties entailed doing documentation on sold rice, beans, millet, gunny bags and acetic dust. He was suspended and dismissed from work after a stack of maize fell from the store killing one casual worker and injuring other workers. PW1 stated that it was not his duty to ensure the stacks were well arranged as it was the supervisor's (stocker's) duty. He contended that he was dismissed from employment without notice and was not paid his terminal dues.
13. On cross examination, PW1 stated that he was suspended on 30th March 1993 and dismissed from employment on 28th February 1994 without a salary. It was his testimony that as a member of the union, he was to be paid ½ salary while on suspension. PW1 also stated that before he was dismissed from employment, he was not given an opportunity to defend himself.
14. The plaintiff called Peter Lumasi who testified as PW2. It was PW2's evidence that it was the stocker who arranged stacks and ensured they were well arranged to prevent them from falling. PW2 stated that the stocker in charge of the store where the stacks fell was one Mr. Ngome. That the Plaintiff was a store clerk and not responsible for arranging stacks. He also attributed the fall of the stacks to vibrations of trains as the store was near a railway line.
15. The Appellant called George Omollo Abila, its personnel officer who testified as DW1. According to DW1, the Respondent was employed as a stocker and acting stores clerk and was tasked with supervising casual workers stocking bags of maize. The Appellant's witness blamed the Respondent for the accident that occurred stating that as an experienced stocker, he knew stocking had to be done in an organized manner and not hurriedly, that he neglected his duty of overseeing the arrangement of maize stacks hence the accident. DW1 also stated that the investigation report showed that the plaintiff and 2 others were negligent in the performance of their work leading to the accident. He denied that the plaintiff was unfairly dismissed and contended that the plaintiff was given a chance to defend himself.
16. After hearing the parties, the trial court delivered its judgment on 13th March 2001 in favour of the Respondent which judgment is now the subject of this appeal.

The Appeal

The Appellant's Submissions

17. The Appellant in its submissions majored on the issue whether the trial court had jurisdiction to entertain the matter and award damages for unlawful dismissal. According to the Appellant, the trial magistrate erred in law and fact in awarding general damages to the Respondent without jurisdiction. It contended that under the Workmen's Compensation (Repealed) Act, Cap 236 Laws of Kenya, a magistrate of the rank of Senior Resident Magistrate lacked jurisdiction to entertain a work injury claim as the Act ousted magistrates' jurisdiction unless the magistrate was of a first-class rank.
18. It was also the Appellant's submission that the Appellant's witness, DW1, testified that the Respondent was responsible for the stores as well as the clerk and supervisor and was careless in allowing the mixing of jute bags and sisal which led to the slip leading to the accident that resulted in the death of one of the stockers. In this regard, the Appellant submitted that the court erred in law by failing to appreciate the evidence of the Defence Witness who was in charge of all the employees.
19. The Appellant therefore submitted that the trial magistrate erred in both law and fact in awarding general damages without carefully considering the evidence tendered by the Appellant as to the facts of the matter and the jurisdiction to handle such a claim.



20. The Appellant urged the court to allow the appeal by setting aside the trial court's Judgment and issuing an order dismissing the suit with costs.

The Respondent's submissions

21. In response to the submissions by the Appellant that the trial court had no jurisdiction to entertain the claim, the Respondent submitted that the issue of the court's jurisdiction was never raised either in the defence, during the proceedings and in their Memorandum of Appeal. The Respondent submitted that Jurisdiction is a point of law that ought to have been raised and dealt with conclusively prior to the hearing or in the course of the proceedings as envisaged under the Civil Procedure Rule.
22. The Respondent also submitted that it is only in the Appellant's submissions that it has attempted to raise the issue of gross misconduct on the part of the Respondent hence the summary dismissal. According to the Respondent, the trial court stated that DW1 the only witness of the Appellant, never worked at Lugari depot and he was not present when the accident occurred. The Respondent submitted that the evidence of PW2 who was present when the accident took place was not challenged or controverted by the Appellant. The Respondent submitted that PW2 clearly stated that the accident was caused by the vibration of the train passing nearby as there was a railway line near the store. Further, that that the stacks were arranged by other people and not the Respondent.
23. The Respondent submitted that the Appeal herein had no basis and ought to be dismissed with costs.

Determination

24. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issue that falls for my determination is whether the findings and the award of the Trial Court are in conformity with the pleadings and evidence adduced before the Trial Court.
25. From the onset, it is important that I address the issue of jurisdiction of the trial court as raised by the Appellant in its submissions on this Appeal. According to the Appellant, under the Workmen's Compensation (Repealed) Act, Cap 236 Laws of Kenya, a magistrate of the rank of Senior Resident Magistrate lacked jurisdiction to entertain a work injury claim as the Act ousted magistrates' jurisdiction unless the magistrate was of first-class rank.
26. With all due respect to the Appellant, the claim herein was not a work injury claim as alleged by the Appellant. The cited repealed Act, that is the Workmen's Compensation Act provided for compensation to workmen for injuries suffered in the course of their employment and not for employees claiming unfair termination of their employment. The issue of jurisdiction does not therefore arise in this claim
27. I will now address the grounds of appeal in the order in which they have been set out in the Memorandum of Appeal.
28. In ground 1 of Appeal, the Appellant raises the issue whether the learned trial Magistrate erred in law and fact in using wrong principles in the assessment of damages such that the damages awarded are excessive in view of the dismissal. From a perusal of the judgment of the trial court, I note that the Respondent was awarded 3 months' salary in lieu of notice, four years' salary as compensation for unfair termination and leave allowance for two years after the trial court found that the Respondent was wrongfully terminated from employment. The Respondent in its pleadings before the trial court stated that he was unfairly suspended for one year from employment and thereafter terminated on account of negligence in the performance of his work leading to stacks of maize falling and injuring two casual workers, one of them fatally. In his testimony before the court, the Respondent maintained



that he was employed by the Respondent as a store clerk and that he was not responsible for arranging stacks. This evidence was supported by the testimony of PW2, Peter Lumbasi who testified that the Respondent was not in charge of arranging stacks and further that the accident was caused by vibrations of trains passing as the store was near a railway line. The Appellant's witness apart from blaming the Respondent for not supervising the stockers while arranging the maize did not attribute any fault on the Respondent for the accident. DW1 did not tender any evidence that the Respondent was a supervisor or an investigation report showing that the Respondent was to blame for the accident.

29. Based on that evidence, it is the finding of this court that the reason for the termination of the Respondent was not proved.
30. Further, no evidence was tendered in court to show that the Respondent was given a chance to defend himself before he was terminated of his employment.
31. It is noteworthy that the Respondent's terms of service were contained in the National Cereals and Produce Board Terms and Conditions of Service which among other terms provided for hearing before termination of service or dismissal on disciplinary grounds.
32. From the foregoing, it is clear that the trial court indeed considered the evidence before it before arriving at its decision. It must be noted that as the time the suit herein was filed, the Employment Act, 2007 had not been enacted.
33. It is my view that the award of four years' salary as damages as at the time was justified taking into consideration the circumstances in which the Respondent's employment was terminated and the fact that he was on suspension without pay for more than one year contrary to the terms of service applicable to him.
34. The 2nd ground of appeal is whether the trial Magistrate erred in law and fact in failing to hold that the general damages are not recoverable in a claim for unlawful dismissal. In its judgment at page 91 of the Record of appeal, the trial court awarded the Claimant 3 months' salary in lieu of notice, four years' salary for wrongful termination and leave allowance. The trial court referred to the terminal benefits as general damages.
35. It is not true that general damages could not be awarded in an employment claim under legal regime in which the claim was filed. The Employment Act 2007 came into force on 2nd June, 2008. It repealed the Employment Act, 1976 which was based on common law. Under the repealed Employment Act, 1976, the court had discretion to award general damages to an employee depending on the terms of service of employment of such employee.
36. In the case of Kenya Ports Authority v Silas Obengele [2008] eKLR the Court of Appeal observed as follows:

There are several imponderables which affect an award of damages in such cases. We derive guidance from the case of Southern Highlands Tobacco v. McQueen [1960] EA 490, in which the predecessor of this Court rendered itself, thus:

“A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation.”

The above case was cited with approval in a later decision by the same Court, of East African Airways VS. Knight [1975] EA 165. Law Ag. P who delivered the leading judgment in that



case to which the other two members of the court agreed with, rendered himself in this manner:

“In assessing the damages to be awarded, the Judge used, as a basis for his calculations, the difference between Mr. Knight’s probable earnings from the corporation, had he not been dismissed, and his earnings from Cassman Brown Ltd. He then deducted a substantial proportion on account of accelerated receipt of damages, and such contingencies as sickness, death and redundancy. In my opinion the Judge proceeded on a correct principle in this respect, and in accordance with what was said by this Court in *Southern Highlands Tobacco v. McQueen* [1960] EA 490”

37. I find no reason to interfere with the award of damages by the trial court.
38. Grounds No. 3, 4 and 5 all relate to whether the findings of the Trial Court is supported by the evidence adduced. As already observed, the trial court in its judgment found that from the evidence of PW2, the accident occurred 15 minutes after trains had passed causing vibrations hence the falling of the stacks. The court found that the cause of the accident was the vibrations from the trains and that the Respondent was not involved in any way in the said accident. The court also found that the Respondent was not heard prior to the termination and on this basis, it made a finding that the termination of the Respondent’s employment was wrongful.
39. In its judgment, the trial court made the following awards: Kshs 7,470 as three month’s salary in lieu of notice, Kshs 119,520 as compensation for wrongful termination, and Kshs 1,200 as leave allowance for two years.
40. The general principles on circumstances when an Appellate court may interfere with a discretionary power of a trial court was well captured in the case of *Mbogo & Another vs Shah*, [1968] EA, as follows:

“ An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
41. From the foregoing, I find no reason to interfere with the judgment of the trial court.
42. Consequently, the judgment of the trial court is upheld and the appeal herein is dismissed with costs.
43. Orders accordingly.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 6TH DAY OF MARCH 2025

MAUREEN ONYANGO

JUDGE

