



REPUBLIC OF KENYA



**Wandika v Towfiq Kenya Limited (Appeal E119 of 2023)  
[2025] KEELRC 716 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 716 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E119 OF 2023  
K OCHARO, J  
MARCH 6, 2025**

**BETWEEN**

**SAMSON BUCHACHA WANDIKA ..... APPELLANT**

**AND**

**TOWFIQ KENYA LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of Honourable W.K.  
Cheruiyot Senior Principal Magistrate of 11th October 2023)*

**JUDGMENT**

**Introduction**

1. By a memorandum of appeal dated 27<sup>th</sup> October 2023, the Appellant assailed the above-mentioned judgment of the Lower Court, setting out 11 grounds. However, the grounds can be condensed and considered under two broad issues:
  - I. Was the summary dismissal against the Appellant fair?
  - II. Whether the Appellant was entitled to the reliefs he had sought in his pleadings before the Lower Court.
2. This appeal was canvassed by way of written submissions pursuant to the directions of this Court.

**Appellant's case before the Lower Court.**

3. Through a Memorandum of Claim dated 20<sup>th</sup> March 2021, the Appellant sued the Respondent claiming that at all material times he was an employee of the latter, whose employment was terminated on 2<sup>nd</sup> May 2021, unfairly. He sought against them:
  - I. A declaration that the termination of his employment was procedurally unfair.



II. The Respondent be compelled to pay him:

- a. One month's salary in lieu of notice..... KShs.15,000.
  - b. Reimbursement of the medical bill incurred..... 3 500.
  - c. Underpayments effective from 1/2/2020 to 30/5/2021 [17, 412-15,000]x16.....  
KShs. 38, 611.500
  - d. Unremitted NSSF dues effective from 1/2/2020 to 30/5/2021.....KShs.  
3,200.
  - e. Overtime worked but not paid at two [2] hours per day for 360 days[136.55x360x2x1.50]  
.....147, 474.00
  - f. Maximum compensation for unfair termination.....KShs. 208, 958.40
  - g. Certificate of service.
4. It was his case that his monthly salary was KShs. 15,000. Throughout his employment with the Respondent, he worked on the night shift for twelve hours as a night security guard. He could work from 6:00 pm to 6:00 am, therefore working two hours extra per day, without any payment for the overtime worked. This was contrary to the Security Protective Order.
  5. He further asserted that at all material times, the Respondent paid him wages that were below the then statutory minimum wages. His efforts to have the Respondent pay him as per the Wage Orders didn't realize fruit.
  6. On 29<sup>th</sup> May 2021, he was taken ill, informed the Respondent and left the workplace for medical attention. Thereafter, he was allowed two days off, information which he communicated to the Respondent.
  7. He reported back on 2<sup>nd</sup> June 2021 and submitted copies of his treatment records to the Respondent. Despite that, the Respondent decided to terminate his employment verbally. Subsequently, he was issued with a Staff Exit Clearance Form to fill and sign.
  8. He contended that the termination of his employment was procedurally unfair as he was not accorded a hearing to defend himself against the accusations against him. Further, issued with a termination notice and given the reasons for the termination.

**The Respondent's Case before the Lower Court.**

9. The Respondent presented two witnesses to testify on their behalf. The 1<sup>st</sup> witness was Abdinasir Subane, their Coastal Manager. He testified that the Appellant was employed by the Respondent as a night security guard. He could work for six days, after which he could alternate and work as a day guard for six days in the subsequent week.
10. During the subsistence of the Appellant's employment, the witness received several complaints against the Claimant from the security supervisor regarding his behavior of being rude to his colleagues and supervisors, being negligent and lazy, and often absenting himself from duty without permission and reporting to work late.
11. The witness asserted that he on several occasions summoned the Appellant to his office and verbally warned him against his behavior, however, he didn't change the behavior. The behavior was affecting his work performance.



12. On 15<sup>th</sup> April 2021, he prepared a notice to show cause to be served on the Appellant. The notice required him to show cause why disciplinary action couldn't be taken against him for absconding duty on numerous occasions without informing his supervisor and or other officer of his whereabouts.
13. The notice to show cause letter was given to an office messenger to serve the same on the Appellant. He did serve the appellant, but the appellant refused to sign on the return copy.
14. The Appellant failed to report to work for his shift on 15<sup>th</sup> and 16<sup>th</sup> April 2021 without the permission of the security supervisor or himself. He showed up on 17<sup>th</sup> April 2021 for a disciplinary meeting and was accorded an opportunity to respond to the complaints against him.
15. The witness stated that on 31<sup>st</sup> May 2021, the management team upon considering the employment records of the Appellant got convinced that the Claimant never exercised diligence in his work and that he was rude to his colleagues and superiors, negligent and lazy often absenting himself from work without permission and reporting to work late and drunk. Despite calls for him to change his behavior, he failed to.
16. As a result, the Appellant was thereafter dismissed from employment vide a letter dated 31<sup>st</sup> May 2021. In the dismissal letter, he was informed of his right to appeal within twelve days of the decision. However, he did not appeal.
17. The summary dismissal was procedurally fair and substantively justified as the Appellant breached the terms of the contract of employment and failed to discharge his duties as per the rules and code of conduct of the Respondent.
18. Their 2<sup>nd</sup> witness was Zaddock Tondo [ RW2]. The witness stated that at all material times, he was a Security Supervisor at the Respondent's. His role mainly entailed checking and ensuring that the security guards working for the Respondent were on duty at all material times.
19. He stated that he worked with the Appellant for one year prior to the termination of his employment. As a Supervisor, he often noticed that the Appellant had a habit of absenting himself from work without informing him or any official of the Respondent Company of his whereabouts.
20. His chronic absenteeism greatly affected the operations at the Respondent. Sometimes, the Supervisor could be forced to step in and work through the Appellant's shift whenever he failed to turn up for work, without informing him or any other officer.
21. He stated that the Appellant was negligent and would often report to work late and sometimes could even report to work drunk. On several occasions, the Appellant used abusive and insulting language against his co-workers despite the witness's several warnings.
22. The Appellant attended a disciplinary meeting on 17<sup>th</sup> April 2021 and admitted to having absconded duty, apologized and promised not to repeat the misconduct. He further presented an apology letter to the Respondent's Management team for being irresponsible in his work.
23. The Appellant was granted an opportunity to defend himself against the allegations that had been levelled against him before the Management team retired to make a decision on the matter.
24. On 31<sup>st</sup> May 2021, the Management team decided that the Appellant be dismissed from employment. Through a letter of the same day, the Appellant was informed of the decision.
25. The witness asserted before the Trial Magistrate that the termination of the Appellant's employment was both substantively and procedurally fair.



## The Trial Court's Judgment

26. After hearing the Parties' respective cases, the Learned Trial Magistrate rendered himself on the matter through his Judgment dated 11<sup>th</sup> October 2023. The Learned Trial Magistrate held that the termination of the Appellant's employment was procedurally fair, as he was taken through a disciplinary process, as evidenced by the minutes that were placed before him by the Respondent, and substantively justified as the Appellant admitted his infractions and apologized for the same. He further found that the Appellant was not entitled to the reliefs sought, save for the refund of KShs. 3500, a refund for the medical bill that was incurred by him.

## The Appeal

PARA 27.

Aggrieved by the Learned Trial Magistrate's Judgment, the Appellant initiated the instant appeal, setting forth the number of grounds of appeal mentioned hereinabove.

## Analysis and Determination

28. I have carefully considered the material presented in the record of appeal, and the submissions filed by Counsel for the parties, for and against the appeal, and take a clear view, that notwithstanding the numerous and over split grounds of appeal, this appeal revolves around two prime questions thus; whether the Learned Trial Magistrate was in error when he held that the summary dismissal against the Appellant was fair, and whether the Learned Trial Magistrate erred in substantially declining to award the Appellant the reliefs he had sought.
29. It is now a trite principle that a first appellate Court's role in an appeal entails re-evaluating the material that was placed before the trial Court and come to its own independent findings and conclusions. This position was set out in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123), where the Court held: -
- “An appeal to this Court from a trial by the High Court is by the way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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, this 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 E.A.C.A. 270)”.
30. The Learned Trial Magistrate was called upon inter alia to interrogate and determine whether the summary dismissal against the Appellant was unfair, considering the diametrically opposite positions taken by the adversaries in the dispute. Tasked as such, the Learned Trial Magistrate was obligated to consider two statutory aspects whose presence in the termination of an employee's employment will denote fairness in the termination, but whose absence will denote unfairness. Also see *Pius Isundu Machafu v Lavington Security Guards Limited* [2017]eKLR.
31. Section 41 of the *Employment Act* provides an elaborate mandatory procedure that an employer contemplating terminating an employee's employment must adhere to; otherwise, the termination



shall be deemed unfair by dint of the provisions of Section 45 of the Act. It is important to point out that the duty to prove that the dictates of procedural fairness contemplated in this provision were conformed lies on the employer.

32. The procedure encapsulates three ingredients, thus;
- a. the notification- the employer has to notify the employee of their intention, and the reasons, the basis thereof,
  - b. the hearing- the employer must accord the employee an adequate opportunity to prepare and make a representation on the reasons. Put in another way, the employee has to be accorded an opportunity to prepare and defend himself against the accusations levelled against him. Conjoined with the right to be heard is the right accompaniment, and as such, he or she must be allowed to be accompanied when making the representation with a colleague of his choice or a trade union representative if he is a member of a trade union.
  - c. the consideration- the employer shall consider the representations made by the employee and the accompanying person, if any, before reaching a final decision on the issue.

The absence of all or any of these ingredients shall no doubt make the termination procedurally unfair.

33. The Learned Trial Magistrate found that the termination of the Appellant’s employment was procedurally fair, and this is all he said in his finding;

“On the second issue, the claimant has submitted that there was no disciplinary proceeding culminating in the termination. The claimant, however, testified that he was called to a meeting. The respondent produced minutes of a disciplinary hearing.

The claimant submitted that he didn’t sign the said minutes. I do I doubt if this is a requirement.....”

34. The presence of minutes might not be proof of all the ingredients of the fair procedure contemplated under section 41 of the Act, especially where notification is denied and cannot be discerned from the minutes. In such a situation, the minutes of an alleged disciplinary hearing can only, at most, be proof of the presence of two ingredients out of the three. The hearing and consideration. As such, it won’t be proper for a Court to conclude that mere production of minutes in evidence equates to proof of procedural fairness. The Court must interrogate whether those minutes and the material before it actually reveals that the process leading up to the termination of the Claimant’s employment embodied the three components.

35. I have carefully, considered the pleadings by the Appellant, and take the view, that on the matter procedural unfairness, he wasn’t grieving about lack of being accorded a hearing by the Respondent, but about absence of all the three ingredients that constitute procedural fairness, in the process that led up to the termination of his employment.

36. The Appellant denied ever receiving a show cause letter as asserted by the Respondent, in essence denying that before the termination he wasn’t notified of the allegations, allegedly levelled against him and the invitation contained therein for the alleged disciplinary hearing.

37. The Respondent’s witnesses testified before the trial Court that the show cause letter and the embodied invitation to the disciplinary hearing were served on the Appellant by a messenger whom was detailed to. The name of the messenger was not disclosed. The date and time of the alleged service the show cause letter was not disclosed either. Considering the dispute over the service, the Respondent could



only discount the Appellant's version of non-service by presenting the messenger to testify. They didn't not. The Learned Trial Magistrate didn't consider this matter, which in my view, was relevant.

38. In the circumstances of the matter, including that the purported disciplinary proceedings' minutes were not signed by the Appellant, inexplicably, the failure to call the messenger to testify could have attracted an adverse inference against the Respondent. Inexplicably, as the reason given by the 2<sup>nd</sup> Respondent's witness under cross examination for the failure on the part of the Appellant to execute the minutes if indeed he was in the meeting was with great respect unreasonable.
39. I will draw an adverse inference that had the alleged messenger been called, he could have given evidence prejudicial to the Respondent's case.
40. In the absence of proof that the show cause letter was served on the Appellant and, therefore, that he was invited to a disciplinary hearing, it is safe to conclude that the Appellant was not notified of the grounds, the basis for the Respondent's intention to terminate his employment, and accorded an adequate opportunity to defend himself.
41. For the foregoing reasons, I am unpersuaded, and the Learned Trial Magistrate ought to have been, that there was any disciplinary hearing that was undertaken against the Appellant.
42. In conclusion, the Trial Magistrate erred in law and fact when he failed to find that the summary dismissal was procedurally unfair.
43. It shall be remiss of this Court if I fail to point out that not every meeting should be labeled a disciplinary hearing meeting. A meeting not shown to have been convened for the said purpose, with information to the employee affected to that effect, cannot suffice to be a disciplinary hearing meeting.
44. The Respondent asserted before the Trial Magistrate that the Appellant was notified of the accusations against him through the show cause letter. I have carefully considered the generalized grounds that were set out in the purported show cause letter and the termination letter and hold that a Court of law could only find them valid and fair reasons for a summary dismissal if there was evidence with specifics as regards the alleged infractions. For instance, to whom was the Appellant rude and how? How was the Appellant not committed to his job in performing assigned duties and responsibilities?
45. This Court notes that even the evidence that was adduced by the Respondent's witnesses, in support of the allegation that the Appellant committed the various alleged infractions was generalized as regards how.
46. The Appellant's evidence that he was absent from duty since he was unwell, and with the knowledge of the supervisor, [the Respondent's second witness, before the trial Court] was not challenged at all, by more specifically this witness. Therefore, dismissing him from employment on the basis that he was absent from duty, without care about this fact, was unfair, unjust, and without equity.
47. The Learned Trial Magistrate heavily relied on the fact that in the undated "apology letter", the Appellant amounted to an admission of his infractions. In my view, reading it between the lines does not reveal any admission. An 'apology' for being absent from duty because the person apologizing was sick cannot be held to be an apology, strictly speaking, by a reasonable man.
48. In the upshot, I hold that the summary dismissal against the Appellant was without a valid and fair reason[s] as required by section 45[2] of the Employment Act, 2007. Consequently, it was substantively unfair.



### **Was the Appellant entitled to the reliefs sought?**

49. Having found that the Appellant was unfairly dismissed from employment, it becomes imperative for this Court to consider whether the Appellant is entitled to the compensatory contemplated under section 49[1][c], being one of the reliefs that he sought in the lower court.
50. Section 49[1][c] of the Act gives this Court the authority to grant the relief. However, it is important to point out that the authority is exercised discretionarily, depending on the circumstances of each case. I have carefully considered the fact that the Respondent did not conform with both procedural and substantive requirements of the law when they dismissed the Appellant, the length of service to the Respondent, the fact that his employment was allegedly terminated on account of absenteeism even for the dates when he was unwell and with the knowledge of his supervisor, and conclude that he is entitled to the relief and to the extent of six months' gross salary.
51. Undoubtedly, his employment was terminable by a twenty-eight days' notice under section 35 of the Employment Act. The notice was not issued. He is entitled to notice pay under section 36 of the Act, therefore.
52. The Appellant had claimed overtime compensation worked. The Learned Trial Magistrate dismissed the claim, holding that duty lay on him to prove that he worked overtime by producing attendance logs. This was not in line with section 74 of the Employment Act, which enjoins the employer to keep employment records, and more so, considering that the Appellant had expressly pleaded he worked from 6 am-6 pm and the specific number of days in which he worked overtime.
53. I have carefully considered the Respondent's witnesses' evidence and hereby conclude that it didn't at all address this claim. In my view, the Appellant's evidence remained unrebutted.
54. The Learned Trial Magistrate erred in not finding that the relief was available to the Appellant.
55. I have considered the Regulations of Wages [General] Amendment] Orders 2015 and 2018 and hold that the Learned Trial Magistrate was right when she concluded that the Appellant wasn't underpaid.
56. In conclusion, I find the Appellant's appeal merited. It is hereby allowed. Consequently, this Court hereby sets aside the judgment of the Learned Trial Magistrate and substitutes the same with one in favour of the Appellant, in the following terms:
- I. A declaration that the summary dismissal against the Appellant was unfair.
  - II. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, 6 months' gross salary, KShs. 90,000.
  - III. One month's salary in lieu of notice, KShs. 15,000.
  - IV. Overtime compensation, KShs. 147, 474.
  - V. The Respondent to issue a certificate of service to the Appellant within 30 days of the date of this Judgment.
  - VI. Interest on the awarded sum from the date of this Judgment till full payment.
  - VII. Costs of this suit.

**READ, DELIVERED AND SIGNED THIS 6<sup>TH</sup> DAY OF MARCH 2025**

**OCHARO KEBIRA.**

**JUDGE**



In the presence of:

Ms. Anjiko for Respondent.

Ms. Nyaga for Appellant.

