



School Depot (K) Limited v Kapkarich (Employment and Labour Relations Appeal e044 of 2022) [2025] KEELRC 1269 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E044 OF 2022**

MA ONYANGO, J

APRIL 30, 2025

BETWEEN

SCHOOL DEPOT (K) LIMITED APPELLANT

AND

STELLA ROTICH KAPKARICH RESPONDENT

(Being an appeal against the judgment of the Chief Magistrate's Court at Eldoret delivered by Honourable E. Kigen on the 30th September 2022 in Eldoret CMELRC No. 292 of 2019)

JUDGMENT

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. 292 of 2019 wherein the Respondent sued the Appellant vide a Statement of Claim dated 1st October 2020 seeking compensation and terminal dues for the alleged unfair termination of her employment.
2. After hearing the parties, the trial court delivered its judgment on 30th September 2022 and held that the termination of the Respondent from employment was not procedural as she was dismissed without being given a fair hearing. Judgment was entered in favour of the Respondent and she was awarded reliefs as set out in the trial court's judgment at page 100 of the Record of Appeal which reliefs will be addressed later in this judgment.
3. The Appellant being dissatisfied with that Judgement instituted the instant appeal vide the Memorandum of Appeal dated 25th October 2022 on the following grounds of appeal:
 - i. The learned trial magistrate erred in law and fact in failing to consider and analyze the evidence on record thus coming to a wrong decision.
 - ii. The learned trial magistrate erred in law and fact in failing to consider the Respondent's submissions on record and the legal and factual issues raised therein



- iii. The learned trial magistrate erred in law and in fact in making a conclusion that the Claimant was dismissed contrary to evidence on record.
 - iv. The learned trial magistrate erred in law and fact in making disproportionate awards.
 - v. The learned trial magistrate erred in law and fact in awarding an inordinately high award of damages for unfair termination of employment.
4. The Appellant prayed that the appeal be allowed and the judgment of 30th September 2022 be set aside and substituted with an order dismissing the Respondent's claim with costs.
 5. The appeal was disposed of by way of written submissions. The Appellant's submissions were filed on 5th April 2024. The Respondent's submissions are dated 29th February, 2024.

Analysis

6. This being a first appeal, this court, guided by the principles espoused in several decisions among them, *Selle & Another Vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123, is required 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 her Statement of Claim dated 25th September 2019, the Claimant (now the Respondent) averred that she was employed by the Appellant as a General Assistant in the department of Retail Solution Services with effect from 5th December 2016. She asserted that she served the Respondent with dedication and commitment until on 31st July 2019, when the Appellant unlawfully and summarily dismissed her from employment. It was the Respondent's case that her termination from employment was unlawful unprocedural, irregular, unfair, illegal and in violation of section 45(2) of the *Employment Act*.
8. The Respondent contended that owing to the unfair summary dismissal, she was entitled to terminal benefits which she itemized as follows:
 - i. Salary underpayment for
the year 2016 Kshs. 12,237
 - ii. Salary underpayment for
the year 2017 Kshs. 146,845.20
 - iii. Salary underpayment for
the year 2018 Kshs. 146,845.20
 - iv. Salary underpayment for
the year 2019 Kshs. 73,422.60
 - v. Underpayment for house allowance for
the year 2016 Kshs. 5,147.42
 - vi. Underpayment for house allowance for
the year 2017 Kshs 61,769.04
 - vii. Underpayment for house allowance for



- the year 2018 Kshs 61,769.04
- viii. Underpayment for house allowance for
the year 2019 Kshs. 61,769.04
- ix. July 2019 salary Kshs. 32,250.52
- x. Annual leave dues for 2016 Kshs. 32,250.52
- xi. Annual leave dues for 2017 Kshs. 32,250.52
- xii. Annual leave dues for 2018 Kshs. 32,250.52
- xiii. Annual leave dues for 2019 Kshs. 32,250.52
- xiv. Service benefits Kshs 38,605.65
- xv. 12 months compensation for
unfair termination Kshs. 387,006.24
- xvi. One-month salary in lieu of notice ... Kshs. 32,250.52
- xvii. Unpaid days off Kshs 30,884.52
- xviii. Loss of earning for the next 7 months
from July to January 2020 Kshs 180,159.70
- Total Kshs. 1,867,962.83

9. The Respondent prayed for the following reliefs:

- i. A declaration that the Claimant's dismissal was unlawful
- ii. Payment in lieu of notice
- iii. Unpaid salaries
- iv. Exemplary and punitive damages for unlawful termination of employment
- v. Termination benefits
- vi. Certificate of service, costs and interests of the suit from the date of filing until its final determination
- vii. Any other or further relief that this court may deem fit and just to grant.

10. In response, the Respondent (now the Appellant) filed a Memorandum of Response dated 4th November 2019 denying the allegations made in her Statement of Claim. The Appellant asserted that the Respondent was employed as a general worker on a one year contract commencing 1st August 2018 to 31st July 2019.

11. According to the Appellant, the Respondent took leave from 18th July 2019 to 31st July 2019 but never reported back to work. The Appellant contended that on 19th July 2019, one of its employees, Desmas Khamas was caught stealing from the Appellant and the Respondent's name was mentioned adversely as a result of which she feared resuming work and absconded duty.



12. The Appellant averred that the Respondent was not entitled to the reliefs she was seeking in her Statement of Claim and the court was urged to dismiss the suit with costs.

The Evidence adduced

13. At trial the Respondent testified as CW1 and adopted her witness statement recorded on 25th September 2019 as her evidence in chief. It was the Respondent's testimony that she proceeded on leave on 18th July 2019 and reported to work on 31st July 2019 when she was informed that her services had been terminated.
14. During cross examination, the Respondent stated that she was employed as a general worker and that she was terminated from employment on grounds that she was an accomplice to a theft incident that occurred at the Appellant's company while she was on leave. She also stated that she was not paid her July 2019 salary. On cross examination, the Respondent stated that she was paid overtime and that she was a member of the NSSF and NHIF schemes. She further stated that she was implicated in the theft incident and told to go home and was subsequently terminated from employment.
15. The Respondent called Lydia Koech, its Human Resource Manager who testified as RW1. RW1 adopted her witness statement recorded on 1st July 2022 as her evidence in chief. RW1 contended that the Respondent was employed by the Respondent on a one year contract. She produced the Respondent's employment contract as Exhibit 1. In her testimony, RW1 stated that on 19th July 2019, an employee implicated the Respondent and other employees in a theft by servant incident which resulted in their suspension pending further investigations. RW1 stated that the Respondent was sent home pending investigations, that she was not terminated from employment. The Appellant's witness contended that after the investigations some of the implicated employees were found not culpable and were asked to return to work but the Respondent could not be reached.
16. On being cross examined, RW1 stated that the Respondent was paid overtime of Kshs 60 per hour.
17. RW2 was Ruth Nanjala Saiyu, the Appellant's employee was among those implicated in the theft incident. She testified that she was sent home with the Respondent to pave way for investigations. That after the investigations she was recalled back to work. RW2 also contended that employees of the Appellant were entitled to 21 days leave.
18. Gloria Chiko testified as RW3 and introduced herself as an employee of the Appellant. She stated that she was suspended with the Respondent after she was implicated in the theft incident but was recalled back to work after the investigations were concluded.
19. After hearing the parties, the trial court delivered its judgment on 30th September 2022 in favor of the Respondent in the following terms:
- i. Salary for July 2019 Kshs. 16,582
 - ii. One month salary in lieu of notice Kshs. 16,582
 - iii. Leave allowance for the years 2016,2017,
2018 and 2019 Kshs. 66,200
 - iv. 12 months' salary for unfair
termination Kshs 198,984
 - v. Certificate of service



Appellant's submissions

20. While submitting on ground 1 and 3 of its Memorandum of Appeal, the Appellant averred that the trial magistrate failed to consider the evidence of the Appellant and hence no proper determination was made on the facts especially the allegation that the Respondent was not dismissed from employment. In addition, it was contended that the trial court failed to consider the fact that the Respondent had only been suspended pending investigation and when recalled to resume work she opted to file the claim herein. It was the Appellant's submission that a determination should have been made on the impact of the Respondent declining to resume work and whether this would have had a bearing on the outcome of the case.
21. With regard to ground 2 on whether the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on record and the legal and factual issues raised therein, the Appellant submitted that the court had a duty to make a proper determination of the facts existing and ought not to have come to a conclusion and finding that the Respondent was unfairly terminated. The Appellant submitted that despite the contradictions on record in the evidence given by the Appellant and that of the Respondent, the trial court went ahead and determined that the Respondent's employment was unfairly terminated.
22. On grounds 4 and 5, in relation to the awards, the Appellant submitted that the trial court erred by awarding the Respondent 12 months' salary for unfair termination without regard to the considerations under section 49(4) of the *Employment Act* noting that the Respondent had worked for the Appellant for only one year and a half and was unfair to award compensation of 12 months compensation for unlawful in the circumstances.
23. The Appellant urged that the appeal be allowed with costs.

Respondent's Submissions

24. In her submissions the Respondent set out the issues for determination to be:
 - i. Whether the Respondent was unlawfully terminated,
 - ii. Whether the damages awarded to the Respondent were disproportionate,
 - iii. Who should bear the costs of the Appeal.
25. On the first issue, the Respondent submitted that the Appellant through RW1 stated that the Respondent was sent home pending investigations but was recalled later. The Respondent denied that this was the correct position. While relying in the case of *Jane Achieng & Another vs University of Nairobi* (2015) eKLR, the Respondent submitted that the burden lay with the Appellant to prove that it did in fact recall the Respondent from suspension. The Respondent submitted that it would have been sufficed for the Appellant to furnish the court with a letter addressed to the Respondent or internal records documenting the suspension of the Respondent, the investigation process and the result of the investigation clearing the way for the Respondent to resume her duties which it did not. In this regard, the Respondent submitted that even if the Appellant is to be believed, the process of suspension and lifting of suspension was haphazard and amounted to constructive dismissal.
26. On the issue whether the damages awarded to the Respondent were disproportionate, the Respondent submitted that section 49(1)(c) of the Act sets the compensation payable under such circumstances. The Respondent submitted that the trial magistrate awarded the maximum allowed by law. It was



further submitted that section 49(1)(a) entitles an employee to pay in lieu of notice if indeed notice was never issued or if the same was insufficient and that in the instant case, the trial court awarded the same. With regard to the award of one month leave allowance, it was the Respondent's submission that from the Appellant's records, the Respondent went on leave on two occasions for a total of 21 days and the second batch of dates consisting 11 days were forced leave which do not count as annual leave.

27. The Respondent thus submitted that the damages awarded by the trial court are well grounded in law.
28. The Respondent urged the Court to dismiss the appeal with costs.

Analysis and determination

29. I have considered the Record of Appeal and the submissions by both parties. The grounds of appeal may be summarized as follows:
 - i. Whether Respondent was unlawfully terminated or she absconded duty
 - ii. Whether the compensatory damages awarded to the Respondent by the trial court should be set aside.

Whether Respondent was unlawfully terminated from employment or she absconded duty

30. The burden of proof in termination of employment is on the employer who is required to prove that the reasons for the termination are valid and the procedure is fair.
31. The Respondent filed the instant claim before the trial court alleging that her employment had been terminated unfairly. In her pleadings and oral testimony, she alleged that she was on leave from 18th July 2019 and when she resumed work on 31st July 2019, her employment was terminated on account that she was an accomplice in a theft incident that occurred on 19th July 2019 at the Appellant's shop.
32. On its part, the Appellant denied unlawfully terminating the Respondent's employment. In its defence, the Appellant contended that after the Respondent was implicated in the theft incident, was suspended to pave way for investigations and was later recalled but she could not be reached.
33. I have considered the record of appeal and in particular the Respondent's employment contracts. In her list of documents, the Respondent filed a contract of employment that ran from 1st November 2017 to 1st November 2018.
34. At page 34 of the Record of Appeal, I note that the Appellant in its list of documents filed the Claimant's contract of employment which had a commencement date of 1st August 2018 to 31st July 2019.
35. It is worth noting that the Appellant did not plead that the Respondent's contract lapsed by effluxion of time which would call for interrogation of the Claimant's employment contracts.
36. Taking into consideration the evidence of RW1 that after the investigation the Respondent was recalled but could not be reached, it is my finding that the Respondent's contract of employment was not an issue.
37. Section 41 of the [Employment Act](#) provides for procedural fairness as follows:
 - “(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering



termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

38. The mandatory procedure requires notification, a hearing and consideration of the employee’s representations and those of the person accompanying the employee before a decision is made whether or not to terminate employment.
39. In the instant case, the Respondent alleges that she was suspended and subsequently terminated from employment unlawfully and unprocedurally after being implicated in a theft incident.
40. On the other hand, the Appellant maintained that the Respondent was never terminated from employment, that she absconded duty after being implicated in the theft incident and that after investigations were conducted, she was found not culpable and was recalled back to work but declined and instead filed the claim before the trial court.
41. Under Section 44(4) (a) of the *Employment Act* 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. I have perused the pleadings and the evidence tendered in court by the Appellant and I have not found evidence that the Appellant commenced any disciplinary action against the Respondent under Section 41 of the *Employment Act* after she allegedly failed to report on duty. No attendance registers were produced to show that, indeed, the Respondent absconded duty or absented herself from work at any given time. Further, although the Appellant contended that it recalled the Respondent after the investigations, no evidence was tendered in court to prove that she was indeed recalled back to work. I therefore find that the Appellant did not prove that the Respondent indeed absconded duty. As such, it is my finding that the Respondent was unfairly and unprocedurally terminated from employment.
42. The upshot is that I find and hold that the summary dismissal of the Respondent from employment was procedurally unfair.
43. The trial’s court finding on this limb is therefore upheld.

Whether the compensatory damages awarded to the Respondent by the trial court should stand.

44. In its judgment, the trial court awarded the Respondent Kshs. 16,582 as salary for July 2019, Kshs 16,582 as one month salary in lieu of notice, Kshs 66,200 as leave allowance for the years 2016 to 2019, and 12 months’ salary for unfair termination totaling to Kshs 198,984. The Respondent was also awarded costs of the suit and interest.
45. I will proceed to address the awards under the specific heads.
- i. Salary for July 2019

The Appellant in its submissions admitted that it owed the Respondent salary for the days she worked in July 2019. From the evidence on record, the Respondent was suspended from work on 26th July 2019. The trial court awarded the Respondent Kshs 16,582 under this head. In 2019, the minimum wage of a general worker in Kenya was Kshs 12,552.70 per month exclusive of house allowance. From her pay slip of June 2019 at page 17 of the Record of Appeal, the



Respondent was earning Kshs 15,525 per month excluding overtime. I award her the said sum of Kshs. 15,525.

- ii. One month pay in lieu of notice.

Having found that the summary dismissal of the Respondent was without valid reason and due process was not followed, she is entitled to pay in lieu of notice. I award her Kshs. 15,525 under this head.

- iii. Leave allowance

The trial court awarded the Respondent Kshs 66,200 as leave dues for the period it is alleged she worked for the Appellant. From the Respondent's testimony before the trial court, I am convinced that the Respondent proceeded on leave during the course of her contract. The award of leave allowance by the trial court was therefore not justified and is set aside.

- iv. 12 months' salary as compensation for unfair termination

From the evidence on record, the Respondent had served the Appellant for a period of just over 2 years. Taking into consideration all the circumstances of the case and the factors set out in section 49(4) of the *Employment Act*, it is my view that the award of 12 months' salary as compensation was indeed inordinately high and justifies interference by this court. An award of one months' salary would suffice as compensation for the unfair termination. The award by the trial court is substituted with one months' salary as compensation for the unfair termination in the sum of Kshs. 15,525.

46. In sum, the judgment of the Trial Court is set aside only in respect of the award on pay in lieu of leave and 12 months' salary as compensation for unfair termination. The court substitutes the same with the following:

- i. The award of salary arrears for July 2019 Kshs. 15,525
ii. The award of one month's salary in lieu of notice Kshs. 15,525
iii. The award of leave allowance is set aside.
iv. The award of one months' salary as compensation for unfair termination is substituted with an award of one months' salary at Kshs. 15,525.

47. Each party shall bear its own costs of the Appeal.

48. The orders for costs in the lower court is upheld as this court has upheld that the termination of the Respondent's employment was unfair.

49. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF APRIL, 2025

MAUREEN ONYANGO

JUDGE

