



**School Depot (K) Limited v Kisia (Employment and Labour Relations Appeal E043 of 2022) [2025] KEELRC 1250 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1250 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E043 OF 2022**

**MA ONYANGO, J**

**APRIL 30, 2025**

**BETWEEN**

**SCHOOL DEPOT (K) LIMITED ..... APPELLANT**

**AND**

**FAITH LUCIAH KISIA ..... 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. E5 of 2020)*

**JUDGMENT**

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. E 5 of 2020 wherein the Respondent sued the Appellant vide a Statement of Claim dated 1<sup>st</sup> 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 30<sup>th</sup> September 2022 in which it 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 25<sup>th</sup> 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 30<sup>th</sup> September 2022 be set aside and substituted with an order dismissing the Claimant's claim with costs.
  5. The appeal was disposed of by way of written submissions. The Respondent filed her submissions on 4<sup>th</sup> March 2024 while the Appellant's submissions were filed on 16<sup>th</sup> April 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 her Statement of Claim dated 1<sup>st</sup> October 2020, 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 5<sup>th</sup> January 2018. She stated that she served the Respondent with dedication and commitment until on 26<sup>th</sup> July 2019 when she was unlawfully and summarily dismissed from employment.
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 2018.....Kshs 146,845.20
  - ii. Salary underpayment for the year 2019....Kshs 73,422.60
  - iii. Underpayment for house allowance for the year 2018Kshs 61,769.04
  - iv. Underpayment for house allowance for the year 2019.....Kshs. 30,884.52
  - v. July 2019 salary.....Kshs. 32,250.52
  - vi. Annual leave dues for 2018.....Kshs. 32,250.52
  - vii. Annual leave dues for 2019.....Kshs. 32,250.52
  - viii. Service benefits.....Kshs. 19,029.83
  - ix. 12 months compensation for unfair termination.....Kshs. 387,006.24
  - x. One month salary in lieu of notice... Kshs. 32,250.52
  - xi. Unpaid days off.....Kshs 15,442.26
  - xii. Loss of earning for the next 7 months from July to January 2020.....Kshs 180,159.70
  - Total.....Kshs. 1,100,183.09
9. The Respondent prayed for the following reliefs:



- i. A declaration that the Claimant's dismissal was unfair
  - 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 Honourable court may deem fit and just to grant.
10. In response, the Appellant filed a Memorandum of Response dated 19<sup>th</sup> November 2020 denying the allegations made by the Claimant in her statement of claim. According to the Appellant, the Claimant was employed as a general worker on a one year contract commencing on 1<sup>st</sup> October 2018 until 30<sup>th</sup> September 2019. The Appellant further averred that the Claimant took leave on 11<sup>th</sup> June 2019 to 22<sup>nd</sup> June 2019 but never reported back to work after the leave. The Appellant contended that on 19<sup>th</sup> July 2019, one of its employees, Desmas Khamas was caught stealing from the Appellant and the Claimant's name was mentioned adversely so she feared resuming work and absconded duty only to file the suit over one year later.
  11. The Appellant also stated that it was ready and willing to issue the respondent with a certificate of service and salary for the days worked in the month of July 2019 upon her clearing with the Appellant.
  12. Lastly, the Appellant averred that the Respondent is not entitled to any of the reliefs she sought in her Statement of claim and urged the court to dismiss the Respondent's suit with costs

### **The Evidence Adduced**

13. At trial the Respondent testified as CW1 and adopted her witness statement recorded on 1<sup>st</sup> October 2020 as her evidence in chief. In her testimony, the Claimant stated that on 26<sup>th</sup> July 2019, while in the course of her employment, she was called by the accountant and told that a Mr. John had released a statement and that she was told to go home until further notice. That when he went to the Appellant's premises a month later, she was told by the Human Resource Manager that she had been terminated from employment. According to the Claimant, the reason given for her dismissal was that she had stolen from Appellant. It was her case that she was present when the theft incident happened. That the suspect was arrested but she was not arrested nor summoned to the police station. The claimant stated that she has never been charged over the stolen goods.
14. On cross examination, the Respondent stated that she was paid overtime and also, that she was a beneficiary of the NSSF and NHIF scheme. She also stated that she was implicated in the theft incident and told to go home and was subsequently terminated from employment.
15. The Appellant called Lydia Koech, its Human Resource Manager who testified as RW1. She adopted her witness statement recorded on 1<sup>st</sup> July 2022 as her evidence in chief. RW1 contended that the Claimant had been employed by the Respondent on a one year contract. She produced the Claimant's employment contract as Exb 2. In her testimony, RW1 stated that on 19<sup>th</sup> July 2019, an employee implicated the Claimant and other employees in a theft by servant incident as a result of which they were called and sent home pending further investigations. The Respondent'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 Claimant could not be reached. It was her evidence that the Claimant was not terminated but her contract ended.

16. RW2 and RW3 Ruth Nanjala Saiyu and Gloria Chiko were among the Appellant's employees implicated in the theft incident. They both averred in their testimonies that after the investigations they were recalled back to work. It was also stated that the Appellant paid its employees overtime. On cross examination, RW3 stated casual employees were not entitled to go on leave.
17. After hearing the parties, the trial court delivered its judgment on 30<sup>th</sup> 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 year 2019 ..... Kshs. 16,550
  - iv. 12 months' salary for unfair termination .....Kshs 198,984
  - v. Certificate of service
  - vi. Costs and interests
18. It is the said judgment that is now the subject of this appeal.

#### **Appellant's submissions**

19. While submitting on ground 1 and 3 of its Memorandum of Appeal, the Appellant stated 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 Claimant was dismissed from employment. In addition, it was contended that the trial court failed to consider the fact that the Claimant 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 issue of her declining to resume work and whether that would have a bearing on the outcome of the case.
20. With regard to ground 2 on whether 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, the Appellant submitted that the court had a duty to make a proper determination of the facts existing and as such ought not to come to a conclusion that the Claimant was unfairly terminated without a basis. The Appellant submitted that despite the contradictions on record on the evidence of the Appellant and that of the Claimant, the trial court went ahead and determined that the claimant's employment was unfairly terminated.
21. On grounds 4 and 5, in relation to the awards, the Appellant submitted that the trial court erred by awarding the claimant 12 months' salary for unfair termination without regard to the considerations under section 49(4) of the *Employment Act* noting that the Claimant had worked for the Respondent for only one year and a half, that on 1<sup>st</sup> October 2018 the Respondent had signed a contract up to 30<sup>th</sup> September 2019. That bearing the aforesaid in mind it was unfair to award compensation of 12 months for unlawful termination of employment in the circumstances.
22. In sum, the Appellant submitted that the grounds of appeal be allowed with costs.



### **The Respondent's submissions**

23. On her part, the Respondent framed the issues in her submissions 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
24. 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 Univeristy of Nairobi* (2015)eKLR, the Respondent submitted that the burden lay on the Appellant to prove that it did in fact recall the Respondent from suspension. The Respondent submitted that it would have sufficed for the Appellant to furnish the court with a letter addressed to the Respondnet or internal records documenting the suspension of the Respondent, the investigation process and the result of the investigations clearing the way for the Respondnet to resume her duties which the Appellant did not. In this regard, the Respondnet 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.
25. 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 appellants 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.
26. The Respondent thus submitted that the damages awarded by the trial court are well grounded in law .
27. The Respondent urged the Court to dismiss the appeal with costs.

### **Analysis and determination**

28. 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**

29. 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.
30. Section 41 of the *Employment Act* supplies the structure for procedural fairness, it provides:
- “(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.”

31. Under section 41 of the *Employment Act*, the mandatory procedure requires notification, a hearing and consideration of the employee’s representations and those of the person accompanying the employee before making a decision whether or not to terminate.
32. In the instant case, the Respondnet alleges that she was unlawfully and unprocedurally terminated from employment after being implicated in a theft incident, where she was suspended and subsequently terminated from employment.
33. On the other hand, the Appellant maintained that the Respondnet was never terminated from employment, that she absconded duty after being suspended for implication in the theft incident. That after investigations were conducted, she was found not culpable and was recalled to work but she declined and instead filed the claim before the trial court.
34. In essence, the Appellant in its defence contended that the Respondent absconded duty.
35. 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 Claimant 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 Claimant 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 Respondnet absconded duty. She was further not taken through any disciplinary process. As such it is my finding that the Respondent was unfairly and unprocedurally terminated from employment.
36. In the upshot, I find and hold that the summary dismissal of the Respondent from employment was procedurally unfair. 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.**

37. In its judgment, the trial court awarded the Respondent Kshs. 16,582 as salary for July 2019, Kshs 16,582 as one month’s salary in lieu of notice, Leave allowance for the year 2019 at Kshs. 16,550 and 12 months’ salary for unfair termination totaling to Kshs 198,984. The Respondent was also awarded Costs and interests of the suit.
38. 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 Respondnet salary for the days she worked in July 2019. From the evidence on record, the Respondent was suspended from work on 26<sup>th</sup> 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 11 of the Record of Appeal, the Respondent was earning Kshs 13,951 per month which is substituted with Kshs 11,805 for the 22 days worked in the month of July 2019.

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. The same is however substituted with Kshs 13,951 which is what she is entitled to.

iii. Leave allowance

The trial court awarded the Respondent Kshs 16,550. I have perused the record and found 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, particularly, the Respondent's employment contract which was produced before the trial court as Respondent's Exhibit 2, the Respondent was in the Appellant's employment for less than one year. 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. This justifies interference by this court. The award is set aside and substituted with 1 month salary as compensation for the unfair termination.

39. In sum, the judgment of the Trial Court is set aside only in respect of the awards made in the following terms:

i. The award of one month's salary in lieu of notice is upheld but replaced with Kshs 13,951

ii. The award of salary arrears for July 2019 is substituted with Kshs. 11,805

iii. The award of 12 months' salary as compensation for unfair termination is substituted with an award of one month's salary at Kshs 13,951.

iv. The award of leave allowance is set aside.

40. This Appeal having only partially succeeded, I order that each party bears their own costs of the Appeal. The order for costs in the lower court is upheld as this court has upheld that the termination of the Respondent's employment was unfair.

41. Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30<sup>TH</sup> DAY OF APRIL, 2025**

**MAUREEN ONYANGO**

**JUDGE**

