



**Ouma v Benson Mutie Maithya t/a Tornson Agencies (Employment and Labour Relations Appeal E119 of 2024) [2025] KEELRC 1168 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1168 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E119 OF 2024**

**K OCHARO, J**

**APRIL 24, 2025**

**BETWEEN**

**SHAULINI ADALA OUMA ..... APPELLANT**

**AND**

**BENSON MUTIE MAITHYA T/A TORNSON AGENCIES ..... RESPONDENT**

*(Being an appeal against the judgment of the Principal Magistrate – Hon G. Sogomo delivered on 17th May 2024 in Mombasa MCELRC No. 5 of 2018-Shaulini Adala Ouma v Benson Muite Maithya t/a Tornson Agencies.)*

**JUDGMENT**

**Introduction**

1. Contending that at all material times she was an employee of the Respondent, whose employment the latter terminated unfairly on 25<sup>th</sup> June 2016, the Appellant sued him in the above-stated suit, seeking declaratory and compensatory reliefs. The Respondent filed a reply to her claim, denying her cause of action and entitlement to the reliefs sought. The suit was heard on merit, and on the 17<sup>th</sup> May 2024, by his judgment, the Learned trial Magistrate dismissed the same.
2. Aggrieved by the judgment, the Appellant filed the appeal herein, assailing the judgment upon the premise of sixteen grounds of appeal as set out in the Memorandum of Appeal dated 7<sup>th</sup> June 2024.
3. When this matter came up before this Court for directions on the hearing of the appeal, I directed that the appeal be canvassed by way of written submissions. The direction was obliged by the parties. Their respective submissions are on record.



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

4. The Appellant stated that he first joined the Respondent's workforce on or about 7 October 2014 as a junior clerk at a monthly salary of KShs. 12 050. The terms and conditions of employment were embodied in a letter of appointment dated 7<sup>th</sup> October 2014.
5. He contended that he was paid below the minimum wage and without a house allowance at all material times. He on numerous occasions complained about it, and despite promises by the Respondent, there was no compliance with the Wage Orders in matters of payment of her remuneration and house allowance.
6. On June 24, 2016, the Respondent's Human Resource Manager called him to ask him to see her the following day, June 25. When he met the HRM, he was issued a termination letter.
7. The Respondent's decision to terminate her employment was unfair as she was not accorded an opportunity to defend himself.
8. He asserted that, in light of the circumstances of the matter, he was entitled to the following reliefs:
  - a. A declaration that the termination of her employment was unprocedural and unfair,
  - b. Three months' salary in lieu of Notice, KShs. 57 700.40.
  - c. Salary for the days worked in June 2016, KShs. 16 028.00.
  - d. Accrued pending leave days from 2<sup>nd</sup> May 2014 to 25<sup>th</sup> June 2015, KShs. 41,512.30.
  - e. Salary underpayments, during the period 2<sup>nd</sup> May 2014 to 30<sup>th</sup> April 2015, [14, 553.10-12, 050]x12, KShs. 30, 037.20.
  - f. Salary underpayment, during the period 1<sup>st</sup> May 2015 to 30<sup>th</sup> April 2016 [24 months] [16,299.50 -12050], KShs. 101, 988.60.
  - g. Salary underpayment in May 2016, [19,233.50-12,050], KShs. 7 183.50.
  - h. Compensation for unfair termination of her employment, twelve months' gross salary, KShs. 230,802.00.
  - i. Certificate of service.
  - j. Costs and interest.

### **The Respondent's case before the Lower Court.**

9. The Respondent asserted that Appellant was summarily dismissed from employment fairly. Leading to the dismissal, the fair procedure under section 41 of the *Employment Act* was adhered to. The dismissal was on a ground[s] under section 44 of the Act.
10. A meeting between the management of the Respondent and the Appellant was held on 24<sup>th</sup> June 2016. Issues of unauthorised absenteeism, being intoxicated while at the place of work rendering him incapable to work, neglect of duties, using abusive language against his employer and others in authority, and failing and or refusing to obey lawful and proper orders issued by his employer and or those in authority over him, were raised.
11. Instead of responding to the issues, the Appellant arrogantly kept quiet and left the meeting, promising to take revenge at his own time.



12. The Respondent was not left with any other option but to summarily dismiss him.
13. The Appellant wasn't entitled to any of the reliefs he had sought in his pleadings in the circumstances of the case.

### **The Lower Court's Judgment.**

14. After hearing the parties on their respective cases, and considering their evidence, the Learned Trial Magistrate rendered judgment, holding that the Appellant had failed to prove that he was summarily dismissed from employment unfairly, and that he was not entitled to any of the reliefs embodied in his pleadings. Consequently, he dismissed the Appellant's claim with costs.

### **The Appeal.**

15. Aggrieved by the judgment, the Appellant filed the instant appeal, setting forth sixteen grounds as mentioned hereinabove.

### **Analysis and Determination.**

16. I have carefully considered the sixteen grounds set out in the Memorandum of Appeal, the material that was placed before the Learned Trial Magistrate, and the submissions by the parties herein, and conclude that the appeal herein revolves around three principal grounds, thus:
  - a. Was the termination of the Appellant's employment both procedurally and substantively fair?
  - b. Was the Learned Trial Magistrate obligated not to diverge from the Judgment of his colleague predecessor?
  - c. Was the Appellant entitled to the reliefs sought in his pleadings?
17. The lower court suit was first heard before Honourable C.N. Ndegwa, Senior Principal Magistrate. After hearing the parties on their respective cases, he found in favour of the Appellant by his judgment dated 26th May 2020. He declared that the termination of his employment was unlawful and unfair, allowed his claim for notice pay and salary underpayment, and granted him compensatory damages for unfair termination of employment, six months' gross salary.
18. Subsequently, through an application dated 5<sup>th</sup> June 2020, the Respondent sought to set aside the Judgment, reopen the case, and leave to call more witnesses. The application was allowed by the consent of the parties. The respondent's case was reopened. They were given the liberty to call more witnesses.
19. The Appellant laments that the Learned Magistrate, G. Sogomo, erred in law and fact when he, in his judgment, took a diametrically opposite position from his predecessor. All that this Court can state is that there is decisional independence. A Magistrate isn't bound by a set aside judgment of his predecessor. However, desirably, where the facts and evidence remain the same, there shouldn't be a radical departure from the earlier judgment for public confidence in the institution, the judiciary.
20. The Appellant's submissions, as presented, suggest that they require me to do a comparative analysis of the two judgments. I would have no reason to embark on that suggested task.
21. It was a common cause that at all material times, the Appellant was an employee of the Respondent.
22. Faced with the task of interrogating whether termination of an employee's employment was fair or whether a summary dismissal against an employee was wrongful, the Court has to interrogate the presence or otherwise of two statutory aspects in the termination or summary dismissal, procedural



and substantive fairness. Substantive fairness concerns the decision to terminate or summarily dismiss, whilst procedural fairness speaks to the procedure leading to the decision. See *Pius Machafu Isundu vs Lavington Security Guards Limited* [ 2017] eKLR

23. Section 41 of the *Employment Act*, 2007 provides for a 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[2] of the Act.
24. The process contemplated under the above-stated provision embodies three components. The absence of any or all of them renders the process unfair. First, the employer must inform the affected employee of their intention and the grounds, the basis thereof. Second, the employer must accord the employee adequate opportunity to make a representation of the grounds. Conjoined with this right to be heard is the right of accompaniment. He or she should be allowed to be accompanied during the hearing by a colleague of his or her choice, or a trade union representative [if he or she is a member of a trade union]. Lastly, the employer must consider the representations made by the employee before taking a final decision on the matter.
25. The Respondent contended that they summarily dismissed the Appellant, conforming to the procedural dictates of the provision. They asserted that they notified the Appellant of their intention to take disciplinary action against him on the various counts they set out in the notice to show cause dated 16<sup>th</sup> June 2016. The Appellant denied having been served with the show cause letter. He was seeing it for the first time when it was presented to the court.
26. No doubt, the issue of service was a pivotal issue that needed to be interrogated, and a reasoned determination was made thereon, as it was contentious. The Learned Trial Magistrate didn't see this as such. He didn't identify the issue, as such and give a reasoned determination thereon.
27. The Respondent was asserting the service. Therefore, duty fell upon him under section 107 of the *Evidence Act* to prove that they effected service on the Appellant. The Respondent's witness admitted in his evidence under cross-examination that the Respondent had nothing to demonstrate that indeed service was effected.
28. I have carefully considered the Respondent's witness's statement dated 1<sup>st</sup> October 2017, and this is all he stated as regards a show cause

“ 4. The Claimant and the labour officer were duly notified of the Notice to show cause why the Claimant cannot be dismissed”

This statement isn't unambiguous about whether it referred to the alleged show letter dated 16 June 2016. Assuming for a moment that it did, the statement, his oral evidence in court, and the Respondent's pleadings do not state when and by whom the service was effected. Indeed, if it were, nothing could have been easier for the Respondent than having it expressly stated.

29. I am not persuaded that the document dated 16<sup>th</sup> June 2016 was served on the Appellant and the Labour officer as alleged.
30. This Court hasn't lost sight of the fact that in his pleadings, the Appellant pleaded that he attended a meeting with the Human Resources Manager of the Respondent, following an invitation by the said manager through phone on the 24<sup>th</sup> of June 2016. The Manager didn't testify to discount this version by the Appellant.
31. The Contents of a notice to show cause are supposed to embrace specificity regarding the allegations against the affected employees. This is to enable the employee to prepare and defend himself adequately.



Generalised accusations in a show cause letter cannot, therefore, suffice. Even if it were to be that the alleged letter was served, [this without prejudice to the foregoing], the same could not be of any aid in showing that the notification component of the procedure contemplated under section 41 of the Act. The allegations put forth thereon are too general.

32. The Respondent alleged that there was a management meeting on 24<sup>th</sup> June 2024, where the accusations set out in a document dated 11<sup>th</sup> June 2016 were explained to the Appellant. The detailed document predates the alleged show cause letter. Inexplicably, the Respondent does not assert that it was served on the Appellant under the cover of the show cause letter or at all. This propels me to conclude that the document, just like the show cause letter, was an afterthought crafted and geared only to sanitize an unfair process that had been undertaken. And this speaks to the Respondent's candidness.
33. Disturbingly glaring, the termination letter does not refer to any notice to show cause, invitation to a disciplinary hearing, or the alleged disciplinary hearing. If all these were truly present, reasonably, it could be expected that they would be pointed out in the termination letter. Their absence fortifies my position regarding the Respondent's candidness and strips off the credibility of their evidence.
34. In conclusion, this Court isn't convinced that the Appellant was served with a show cause letter, invited to a disciplinary hearing, and a disciplinary hearing was conducted as alleged by the Respondent. Therefore, the summary dismissal was procedurally unfair. The Learned Trial Magistrate erred in law and fact when he held otherwise.
35. Joinder of issues has been accepted to mean that point in a lawsuit when the defendant has challenged some or all of the plaintiff's/claimant's allegations of fact, or when it is known which legal questions are in issue. Usually, the point arrives when pleadings close. In the instant case, pursuant to rule 13[4] of the Employment and Labour Relations Court [Procedure] Rules, pleadings closed fourteen days after service of the last pleading [the Respondent's Reply to the claim] was served. Issues joined. The fact that the Appellant didn't file a response to the Respondent's pleadings to deny the purported particularised allegations of misconduct, in my view, didn't amount to an admission by the Appellant as was held by the Learned Trial Magistrate. Clearly, from the pleadings, it was known that the question of substantive justification was in issue.
36. It isn't in all cases that a reply to the defence must be filed. It is as a result of this that Rule 13[3] isn't couched in a mandatory manner. It employs the word 'may file.'
37. Section 43 of the *Employment Act* places a duty on the employer in a dispute regarding the termination of an employee's employment to prove the reasons for the termination. The law further imposes a duty on the employer under section 45 of the Act to prove that the reason[s] were valid and fair.
38. Procedural and substantive fairness, sometimes depending on the circumstances of the case, are interwoven. To an extent, therefore, where the court finds that the reasons alleged to be the basis for the termination, when considering the procedural fairness aspect of it, are too general or fabricated, as is the case in this case, it can seldom hold that the reason[s] were valid and fair. I am not ready to find that those generalised grounds set forth in the purported show cause letter [which I have hereinabove found not genuine] were valid.
39. In any event, considering the testimony of the Respondent's witness, it isn't difficult to conclude that it was insufficient to prove the reasons for the termination and that they were valid and fair.
40. In the upshot, I find that the Learned Trial Magistrate erred in law and fact when he held that the summary dismissal of the Appellant from employment was substantively fair.



41. Section 49 of the *Employment Act* bestows the court with the authority to grant in favour of an employee who has successfully challenged his or her employer's decision to terminate his or her employment or summarily dismiss him or her from employment, compensatory damages for the unfair termination or wrongful summary dismissal. However, it is essential to point out that the power is exercised discretionarily depending on the circumstances of each case.
42. I have carefully considered the circumstances under which the summary dismissal occurred, which can easily pass as retaliatory, the length of service of the Appellant, the Respondent's failure to adhere to what the law required of them, [adhering to procedural and substantive fairness dictates], and that the Appellant didn't in any proven manner contribute to the summary dismissal and hold that he is entitled to the compensatory award, six months' gross salary.
43. The Appellant sought notice pay; Clause 8 of his contract of service provided for three months' termination notice, or salary in lieu. There is no dispute that the notice wasn't issued. Having found that the summary dismissal was unfair, I see no factor that can be a basis for depriving him of the benefit. I hereby award him the relief.
44. In his pleadings, the Appellant sought two categories of remedies. Those which were tied to his claim for wrongful dismissal, such as the compensatory award contemplated under section 49[1][c] of the *Employment Act* and notice pay, and those that were clearly independent of the claim, for instance, salary for the days worked in June 2016, salary underpayments, and compensation for earned but unutilised leave days.
45. Had the Learned Trial Magistrate approached the reliefs in this manner, he could have granted those independent of the claim, notwithstanding the dismissal of the Appellant's claim for wrongful dismissal. The collapse of a claim for unfair termination or wrongful dismissal never collapses with reliefs not anchored on the claim.
46. It was not disputed that the Appellant worked from 1<sup>st</sup> June 2016 to the date of his dismissal, 25<sup>th</sup> June 2016. Further, he was not paid his salary for the days he worked. I am unable to fathom why this relief wasn't granted. I award the same.
47. Section 48 [1] of the *Labour Institutions Act* provides;
- “ 1 Notwithstanding anything contained in this Act or any other written law-
- a. The minimum rates of remuneration or conditions of employment established in the wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement.
- b. If the contract of an employee to whom a wages order applies provides for payment of less remuneration than the statutory minimum remuneration, or does not provide for conditions of employment prescribed in wages regulation order or provide for less favorable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.”
48. Considering the stipulations of the section, it cannot be available for any employer who has paid an employee to whom the Wage Order[s] apply, below the set minimum remuneration, to argue that the



remuneration paid to the employee was contractually agreed upon. A minimum wage or a condition provided for in a Wages Order cannot be out contracted.

49. Section 48[5] of the *Labour Institutions Act* expressly bestows upon the employee the right to claim the difference between the cumulative amount that he or she was paid and what he or she would have earned had the employer paid his or her salary per the minimum wage set at the material time.
50. The Regulation of Wages [General] [Amendment] Order, 2015, which I hold was relevant and applied to the Appellant, provided a basic minimum monthly wage [exclusive of housing allowance] for a junior clerk as KShs. 14,173.50. No doubt then, the Appellant was at all material times underpaid by KShs. 1,898.20, monthly. He is entitled to compensation to the extent of the cumulative underpaid salary.
51. The Appellant also sought compensation for earned but untaken leave days. In my view, the Respondent did not present any evidence to discount the claim. Surprisingly, without any basis drawn from the pleadings or evidence before him, the Learned Trial Magistrate, in dismissing entitlement to the relief, held;

“The court is not convinced that the Claimant could have worked a year with no rest on leave, public holidays and off days.....”

It is interesting to note that nowhere in his pleadings, witness statement or oral evidence in court did the Appellant assert that he worked during public holidays and off days, and sought compensation for the same.

52. Having found that there was no sufficient evidence placed before him to discount the Appellant’s claim for compensation under the head, I hold that this is a relief that the Learned Magistrate would have awarded.
53. Under Section 51 of the *Employment Act*, a certificate of service to an employee who has exited employment on any account is a statutory right.
54. In the upshot, I allow the Appeal herein, set aside the Learned Magistrate’s Judgment, and substitute the same with this Court’s in favour of the Appellant in the following terms;
  - a. A declaration that the summary dismissal against him was unfair and wrongful.
  - b. Compensation for wrongful dismissal, six months’ gross salary, [14.173.50x6], KShs. 85,041.
  - c. Unpaid salary for the twenty-five [25] days worked in June 2016, [14,173.50 x 25/30] KShs. 11, 811.25.
  - d. Three months’ salary in lieu of notice, KShs. 42,520.50.
  - e. Compensation for earned but untaken leave days, [21/30 x 14,173.50] =KShs. 9,921.10.
  - f. Cumulative underpaid salary, [1,898.20 x 24 months], KShs. 45, 556.80.
  - g. Costs of the suit.
  - h. Interest at court rates from the date of this judgment till full payment.
55. The costs of this appeal shall be in favour of the Appellant.
56. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 24<sup>TH</sup> DAY OF APRIL, 2025.

OCHARO KEBIRA

JUDGE

