



REPUBLIC OF KENYA



Bob Morgan Services Limited v Mangi (Employment and Labour Relations Appeal E131 of 2021) [2025] KEELRC 1494 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E131 OF 2021**

K OCHARO, J

MAY 22, 2025

BETWEEN

BOB MORGAN SERVICES LIMITED APPELLANT

AND

ROBERT YAA MANGI RESPONDENT

(Being an appeal against the judgment of the Principal Magistrate – Hon M. Nabibya delivered on 26th October 2023 in Mombasa MCELRC No. E 170 of 2021)

JUDGMENT

Introduction

1. Contending that at all material times he was an employee of the Appellant, as a night guard whose employment was terminated unfairly, the Respondent sued the Appellant in the above-stated suit, seeking various reliefs. The Appellant filed a reply to his claim, denying his cause of action and entitlement to the reliefs he sought. The suit was subsequently heard on merit, and on the 26th October 2023, by her judgment, the Learned trial Magistrate allowed the claim and vailed the Respondent various reliefs.
2. Aggrieved by the judgment, the Appellant filed the appeal herein, assailing the judgment upon the premise of five grounds of appeal as set out in the Memorandum of Appeal filed on 26th November 2023.
3. When this matter came up before this Court for directions on the appeal hearing, I directed that the appeal be canvassed through written submissions. The direction was complied with. The parties' respective submissions are on record.



The Respondent's case before the Lower Court.

4. The Respondent asserted that he joined the Appellant's workforce in July 2017 as a night watchman in the dog handling department. He initially worked under a one-year fixed-term contract, and upon its expiry, he continued working for the Respondent without any other written contract until his employment was terminated. In the circumstances, his employment was terminable with one month's notice.
5. At all material times, he was issued with an itemized pay slip.
6. He alleged that throughout his employment with the Appellant, he worked from 6:00 P.M to 6:00 A.M, thus working four hours of overtime each day. He was never compensated for this.
7. On 5th July 2019, the Respondent's Coordinator called him and instructed him not to report for duty until further instructed on the way forward. By the date of filing the claim herein, he had not been called back or given a way forward.
8. In his view, the Appellant's action amounted to summarily dismissing him from employment under the circumstances of the matter. Additionally, the summary dismissal was unlawful, unfair, and inhuman because he was not issued a show cause letter requiring him to answer any accusations; he didn't commit any infraction that could warrant the sanction of summary dismissal; and he was not accorded an opportunity to be heard.
9. The Appellant didn't faithfully make remittances to the National Social Security Fund on his account.
10. He asserted that in the premises of his case, he was entitled to;
 - a. Service Pay.....Kshs. 21,796.
 - b. Overtime pay.....KShs. 1690,806.
 - c. Compensation for unfair termination, twelve [12] months' gross salary..... KShs. 181,703.
 - d. A certificate of service.
 - e. Costs and interest.

The Appellant's case before the Lower Court.

11. The Appellant admitted that the Respondent was its employee, earned a salary, and was, at material times, issued a pay slip.
12. It refuted the Respondent's overtime claim, asserting that he received compensation according to the applicable legal standards throughout his employment. In line with its policy, any hours worked beyond the standard work period, known as overtime, are typically calculated and compensated monthly after statutory deductions have been applied to the salary.
13. Contrary to the Respondent's assertion, he was dismissed without delay following a disciplinary hearing. The allegation made against him during the hearing was persistent unauthorised absenteeism. He acknowledged the accusation and offered an apology.
14. On 13th April 2019, he was issued a show cause letter, which he responded to on the same date.



15. 15 The Disciplinary Committee conducted a disciplinary hearing on 7 May 2019. The Respondent was in attendance. Following deliberations, it was determined that he would be summarily dismissed from employment.
16. Prior to the incident that culminated in the summary dismissal, the Respondent had had disciplinary issues, which led to the issuance of warning letters against him.

The Lower Court's Judgment.

17. After hearing the parties on their respective cases, and considering their evidence and submissions, the Learned Trial Magistrate rendered judgment, holding that the Respondent had been unfairly dismissed from employment. She awarded him notice pay [KShs. 15, 141.95], overtime [KShs. 169, 806], and five months' gross salary [75,705] as compensation for unfair dismissal. Furthermore, she directed the Appellant to issue him a certificate of service.

The Appeal.

18. Aggrieved by the judgment, the Appellant filed the instant appeal, setting forth the following grounds;
 - a. That the Learned Trial Magistrate erred in law and fact when she held that the Appellant didn't comply with the provisions of section 41 of the *Employment Act*.
 - b. The Learned Trial Magistrate erred in fact and law in failing to consider the Appellant's documentary evidence, which showed that the notice to show cause was issued and the charges against the Respondent set out therein.
 - c. The Learned Trial Magistrate erred in law and fact when she failed to consider that the Respondent had received five warning letters in one year, a fact which the Respondent admitted during the disciplinary hearing.
 - d. The learned Trial Magistrate erred in law and fact in awarding payment for overtime ostensibly because the Appellant did not produce records to show the Respondent's attendance, while failing to appreciate that the evidence that was produced by the Respondent to prove that he worked overtime especially since the Appellant's witness testified that overtime pay for employees ordinarily computed at the end of the and payable as part of salary after deduction of taxes.
 - e. The Learned Trial Magistrate erred in law and fact in making an assumption that since the Appellant had not produced attendance sheets, then the Respondent's claim ought to be allowed as prayed, while ignoring that a claim for overtime pay, being a special damage claim, must be both pleaded and proved. The Respondent adduced no evidence at all to substantiate the claim for overtime.

Analysis and Determination

19. I have carefully considered the grounds of appeal, the material presented to the Learned Trial Magistrate, and the submissions by the parties herein, and conclude that the appeal herein revolves around two principal grounds, thus:
 - a. Did the Learned Trial Magistrate err in holding that the Respondent was unfairly dismissed from employment?



- b. Did the Learned Trial Magistrate err in awarding the Respondent the various reliefs she awarded?
20. Before I delve further into the issues, it is crucial to appreciate the role of this Court as a first Appellate Court regarding the controversy between the Appellant and the Respondent. It is established law that a first Appellate Court must re-evaluate and analyse the material presented before the trial Court and arrive at its own conclusions on the issues in controversy, without necessarily being bound by those of the trial Court. However, in doing so, it must keep in mind that it neither saw nor heard the parties testify, and thus must allow for that consideration. Where it departs from the findings or conclusions of the trial Court, clear reasons must be provided. See *The German School Society v Helga Ohany & another* [2023] KECA 894 [KLR].
21. The Respondent contended before the trial Court that he was summarily dismissed from employment and that the dismissal was unfair. The Appellant held a contrary view. Confronted with the task to determine whether the termination of an employee's employment or summary dismissal was fair, the Court must consider two aspects, which are now statutory: procedural and substantive fairness. Also see *Pius Isundu Machafu vs Lavington Security Guards Limited* [2017] eKLR.
22. Section 41 of the *Employment Act*, 2007, outlines a mandatory process that the employer must follow when terminating an employee's contract or dismissing them due to misconduct, poor performance, or incapacity. Failing to follow this procedure can result in the termination or dismissal being legally classified as unfair, as stated in section 45 of the Act.
23. The procedure contemplated under the above-stated provision embodies three components. The absence of one or any of the components will render the process leading up to the decision to terminate or summarily dismiss unfair. First, the employer must inform the affected employee of their intention to either terminate their employment or summarily dismiss them, as well as the reasons for the contemplation. Second, the employer must allow the employee adequate opportunity to render a representation on the ground[s]. Conjoined with this right is the right to accompaniment. During the hearing, the employer will allow the employee to be accompanied by an employee of their choice or a trade union representative if they are a trade union member. Lastly, the employer must consider the representations before making a final decision.
24. The Respondent stated in his pleadings and witness statement that he was not issued a show cause letter and informed of the reason[s] why the Appellant contemplated terminating his employment. In essence, he asserted that the notification component was lacking in the process that culminated in his dismissal. In my view, ordinarily, the information regarding the contemplation could be contained in a show cause letter or an invitation document for a disciplinary hearing.
25. In its pleadings and evidence by its witness, the Respondent expressly stated that the Respondent was issued a show cause letter dated 13th April 2019 and responded to it on the same day. The Appellant presented the show cause letter and the response before the lower Court as documentary evidence. I have carefully examined the evidence by the Respondent and hold that it cannot be reasonably claimed that the show cause letter wasn't served on him as he alleged. The Appellant's evidence thus successfully controverted the Respondent's claim that he was not served with the notice.
26. The show cause letter explicitly sets out the accusations against the Respondent, reporting late to work and failing to report to duty.
27. In his pleadings, the Respondent claimed that no disciplinary hearing was undertaken against him. However, upon close examination of his cross-examination testimony, it becomes clear that the Respondent admitted to attending a disciplinary hearing with two union representatives. This directly



- contrasts with his earlier witness statement and pleadings, leading this Court to perceive him as lacking candour.
28. I remain aware that, although he did not formally plead it, the Respondent claimed in the trial Court that he was denied the opportunity to call witnesses during the disciplinary hearing. Parties are obligated to their pleadings, and no outcome can hinge on matters that arise from evidence not previously pleaded. Furthermore, there is no indication that he requested permission to call witnesses, nor that the Appellant denied such a request.
 29. By reason of the foregoing premises, I find that the Appellant conformed with the dictates of procedural fairness under section 41 of the *Employment Act*.
 30. In determining that the summary dismissal was unfair, the Learned Trial Magistrate initially concluded that the Appellant failed to demonstrate that it had invited the Respondent to a disciplinary hearing. I am of the firm view that this conclusion was incorrect and indicates that the Learned Trial Magistrate did not fully take into account the evidence presented to her, as she was required to do. Since the Respondent acknowledged during cross-examination that he attended the disciplinary hearing, the question of non-invitation became irrelevant.
 31. In conclusion, this court holds that the summary dismissal was procedurally fair, and the Learned Magistrate erred in her contrary finding.
 32. The Respondent's case before the trial Court was that the summary dismissal was unfair, as the dictates of section 41 of the Act were not complied with. Indeed, the Magistrate found the dismissal unfair on this aspect [want of procedural fairness]. The case did not involve substantive unfairness to any extent. I think it is because of these premises that Counsel for the parties addressed me solely on procedural fairness as it relates to this appeal, rather than together with substantive fairness. As such, I will not have a reason to venture into the latter aspect in any way.
 33. Two sought remedies, notice pay and compensation for unfair termination under section 49[1][c] of the *Employment Act*, 2007, are typically sought under claims for unfair termination or summary dismissal. Given that the trial Court made an error in determining that the summary dismissal was procedurally unfair, it follows that the two reliefs awarded by the Respondent cannot be upheld. They are therefore set aside.
 34. The Appellant asserts that the trial court erroneously and without justification determined that the Respondent was entitled to the overtime compensation sought. The Appellant contests the award on two grounds: first, that the court's finding that the Appellant failed to present documentary evidence to refute the Respondent's claim was incorrect; and second, that the claim constituted a special damage claim which required specific proof, a requirement that the Respondent did not fulfil.
 35. As I begin to examine the position adopted by the Appellant, it is crucial to highlight from the outset that, in most respects under the *Employment Act*, the interplay of the burden of proof with various issues diverges from its treatment in ordinary civil matters concerning similar issues, such as the production of documents and the proof of certain matters, particularly in instances where the Employer does not provide a written contract.
 36. This Court notes that Section 74 of the *Employment Act* bestows a duty upon the Employer to be the custodian of employment records. It follows, therefore, that where a term or condition of employment is in issue, the custodian of the documents is reasonably expected to tender the relevant document[s] before the Court to disprove or prove the existence of the term or condition. This requirement isn't there without purpose. In its wisdom, the legislature recognized how insurmountable it could be for



an employee to access every employment record. Some documents may not contain details of a single employee; attendance logs and payrolls are perfect examples that one can think of.

37. However, it is imperative to note that the expectation that the employer reasonably regards it as a duty to produce a specific record necessitates that the employee frame his pleadings and witness statements in a manner that unequivocally indicates such expectations of the employer.
38. The Respondent pleaded, and maintained in his witness statement that he could work from 6:00 P.M. to 6:00 A.M throughout his period of employment. In countering this assertion, the Appellant stated that he did not work overtime and that it was their policy that compensation followed whenever an employee worked overtime. The Appellant didn't specifically deny that the Respondent worked between 6:00 P.M. and 6:00 A.M, thus indicating 4 hours of overtime each day he worked. If he did not, nothing could have been easier for the Appellant than to state the specific times between which he worked, which could translate to the statutory working hours per day, or to assert that he was compensated for the extra time he worked.
39. In my view, the Appellant did not discount the Respondent's entitlement to relief. Therefore, the Learned Trial Magistrate did not err in awarding the relief.
40. By reason of the foregoing premises, the Appeal herein succeeds partially. Consequently;
 - a. The Learned Trial Magistrate's holding that the summary dismissal of the Respondent was unfair, and that as such he was entitled to compensation for unfair termination pursuant to section 49[1][c] of the *Employment Act*, five months' gross salary, and notice pay, one month's salary, is hereby set aside.
 - b. The award for overtime is sustained.
 - c. The costs for the lower court suit shall be computed on the sustained amount.
 - d. Each party shall bear its costs for this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 22ND DAY OF MAY, 2025.

OCHARO KEBIRA

JUDGE

