



**Seventh Day Adventist Church (EA) Limited & another v Onderi (Appeal E003 of 2025) [2025] KEELRC 1460 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1460 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISII  
APPEAL E003 OF 2025  
NZIOKI WA MAKAU, J  
MAY 15, 2025  
(FORMERLY KISUMU ELRCA NO. E053 OF 2024)**

**BETWEEN**

**SEVENTH DAY ADVENTIST CHURCH (EA) LIMITED ..... 1<sup>ST</sup> APPELLANT  
TRUSTEE/EXECUTIVE COMMITTEE SEVENTH DAY ADVENTIST CHURCH  
SOUTH KENYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ROBERT OKINDE ONDERI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. P.C Biwott (SRM)  
in Ogembo SPMEELRC No. E004 of 2022 delivered on 28th August 2024)*

**JUDGMENT**

1. Through a memorandum of claim dated 14<sup>th</sup> June 2022 and filed in court on 15<sup>th</sup> June 2022, the Respondent sued the Appellants before the Magistrate’s Court at Ogembo, alleging that his employment had been unfairly terminated. He sought for an order of reinstatement, award of salary in lieu of notice, service pay, damages for unlawful termination, leave days, refund of pension contribution, and costs and interests of the suit.
2. The Respondent asserted that he had been employed by the Appellants as a pastor and had discharged his duties diligently until 4<sup>th</sup> June 2019, when he was unexpectedly served with a notice to show cause detailing allegations of sexual misconduct. In order to ensure anonymity and confidentiality of survivors of sexual offences during legal proceedings, the name, parentage, address or any identifying aspects of the victim ought to be redacted. As such the name of the alleged victim in this case is redacted and in place the Court will use initials. The Respondent attributed the accusations levelled against him to the decision he made recommending one XYZ (name redacted) for a pathfinder camporee trip to the United States. Following that recommendation, he stated that rumours began circulating that he



was involved in an inappropriate relationship with her. He asserts that pursuant to the notice to show cause, the Respondent was summoned for a disciplinary hearing on 16<sup>th</sup> June 2019. The very next day, on 17<sup>th</sup> June 2019, he was issued with a dismissal letter. He lodged an appeal against the decision, but the appeal was ignored by the Appellants. The Respondent asserts that the grounds for his dismissal were unfounded, especially since the alleged victim had denied the accusations. He also stated that the disciplinary process was biased, as he was denied representation and a fair chance to defend himself—suggesting a predetermined outcome.

3. Although the Appellants entered appearance in the case, they did not file a formal response nor did they call any witnesses during the trial.
4. In a judgment delivered on 28<sup>th</sup> August 2024 the Learned Magistrate found that the Respondent's termination of employment was both substantively and procedurally unfair. The Learned Magistrate ordered for his reinstatement and directed the Appellants to pay his salary for the entire period he had been out of employment.
5. Aggrieved by this determination, the Appellants lodged a memorandum of appeal and filed a record of appeal contending that the Magistrate:
  - i. Erred in law in granting reinstatement without consideration of the factors set out in section 49(4)(b), (c), (d) and (k) of the *Employment Act*.
  - ii. Erred in law in directing the payment of salary arrears from the date of dismissal to the date of reinstatement contrary to the *Employment Act* and the common law doctrine that salary is a reward for work done.
  - iii. Ignored evidence tendered by the Appellants' witnesses and instead chose to rely on the recanted statement by the victim to the exclusion of all other evidence.
  - iv. Failed to appreciate the mandate of the Appellants in exercising disciplinary control over its employees as advocated for in *the Constitution* and contractual terms of service.
  - v. Erred in arriving at the decision without considering the evidence tendered by the Appellants, law, facts, submissions and binding judicial precedents tendered before court.
  - vi. Did not provide any legal and/or reasoned justification on how the awards were arrived at in favor of the Respondent.
6. The Appellants thus sought the Magistrate's judgment be set aside and replaced with an order dismissing the Respondent's suit. They also sought the costs of both the appeal and the case before the Magistrate's Court.
7. Although there were initial efforts to settle the matter out of court, those efforts failed. Ultimately, the appeal was canvassed through written submissions.

### **Appellants' Submissions**

8. The Appellants submit that the role of a first appellate court is akin to that of a retrial. They assert that this Court has unfettered jurisdiction to re-evaluate the entire body of evidence afresh and draw its own conclusions, while bearing in mind that it did not have the benefit of observing the witnesses as they testified. In support of this position, they rely on section 78 of the *Civil Procedure Act* and the case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123. On the issue of reinstatement, the Appellants submit that the trial Magistrate granted this remedy contrary to the law and established judicial practice. While acknowledging that reinstatement is a discretionary



remedy, they emphasize that it is not automatic. In particular, they point out that the Magistrate reinstated the Respondent after a lapse of five (5) years, in clear contravention of section 12(3)(vii) of the Employment and *Labour Relations Act*, which bars reinstatement after three (3) years from the date of dismissal.

9. Furthermore, the Appellants submit that the Magistrate failed to consider the statutory factors required before granting reinstatement, as outlined in section 49(4) of the *Employment Act*. They affirm that the trial court did not provide reasons for deviating from these legal requirements. To support this submission, they rely on *Kenya Airways Limited v Aviation & Allied Workers Union & 3 others* [2014] eKLR, where the court affirmed that reinstatement is not an automatic right but must be based on considerations in section 49(4) of the *Employment Act* such as the exceptional nature of specific performance in employment contracts, the practicability of reinstatement, any compensation already paid, and the employee's prospects of securing alternative employment. With regard to the order for payment of salary from the date of dismissal to the date of reinstatement, the Appellants submit that this award was erroneous. They maintain that since the reinstatement itself was unlawful, the consequential award of back salary cannot stand. In support, they cite the case of *Teachers Service Commission v Timothy Onyango Olale* [2022] eKLR where it was held:

“The Respondent/Claimant would only have benefited from salary arrears if he were reinstated, as reinstatement restore an employee to the position he would have been had the dismissal not happened, and which includes payment of withheld salaries and benefits.”

10. The Appellants also submit that the trial Magistrate failed to properly analyse the evidence on record. Specifically, they submit that the Magistrate overlooked the fact that the Respondent did not notify the Appellants of his intention to be accompanied by an advocate during the disciplinary hearing. They assert that the Respondent appeared before the disciplinary committee on 16<sup>th</sup> June 2019 and was subsequently granted an opportunity to appeal. The Appellants submit that the trial court failed to interrogate these issues and whether the disciplinary process met the legal threshold. In further support of their case, the Appellants point out that the Respondent did not present the alleged victim of the sexual misconduct during the disciplinary proceedings, thereby weakening his defence. In conclusion, the Appellants submit that the judgment of the trial court was erroneous in its entirety.

### **Respondent's Submissions**

11. The Respondent submits that the appeal is incompetent and ought to be dismissed with costs. On the issue of reinstatement, the Respondent submits that section 49(4)(b), (c), (d), and (k) of the *Employment Act*, as cited by the Appellants, is inapplicable. He asserts that the provisions relate to the issuance of a certificate of appointment. Given the unfair manner of his dismissal, the Respondent affirms that the trial court correctly ordered his reinstatement. In support, he relies on *Teachers Service Commission v Timothy Onyango Olale* [2022] eKLR, where the court emphasized that reinstatement serves to safeguard an employee's position by restoring it under the same conditions as at the time of dismissal.
12. With respect to the order for payment of salary during the period he was out of employment, the Respondent submits that it was a justified consequence of the reinstatement. He once again relies on the case of *Teachers Service Commission v Timothy Onyango Olale* (supra), where the court affirmed that payment of withheld salaries and benefits forms part of the restorative conditions accompanying an order of reinstatement. Addressing the Appellants' claim that the trial Magistrate failed to consider their evidence of sexual misconduct, the Respondent submits that no such evidence was presented. He points out that the Appellants closed their case without calling any witnesses,



leaving his testimony unchallenged. In support of this argument, he cites the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR, where the court held that the Plaintiff's case stood uncontroverted due to the Defendant's failure to call witnesses in support of their defence and counterclaim. Additionally, he cites the case of *Grace Nzula Mutunga v Joyce Wanza Musila* [2017] eKLR, where it was similarly held that in the absence of any evidence by the Defendant, the Plaintiff's case remained unchallenged and the defence amounted to mere allegations. Finally, in response to the Appellants' contention that the trial magistrate failed to appreciate their right to exercise disciplinary control, the Respondent submits that such control must be exercised lawfully and fairly. He affirms that instead of according him a fair hearing, the Appellants simply issued him with a dismissal letter when he presented himself for the disciplinary hearing. He therefore maintains that the Appellants cannot purport to invoke constitutional protections while simultaneously violating his fundamental rights.

## Disposition

13. The case before the Court being a first appeal in the hierarchy of judicial avenues for determination of disputes, requires the appellate court to reconsider the evidence, evaluate it afresh and draw its own conclusions but making allowance for the fact that it neither saw nor heard the witnesses. (See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123. The Court has sufficiently warned itself that it neither saw nor heard the parties and proceeds to give latitude for this handicap. The Court has reconsidered the pleadings, the testimony adduced as well as the submissions herein and the law in coming to this determination. The Court has also considered the judgment made by Hon. P. C Biwott PM.
14. The Court would like to take this opportunity to educate the Appellants. Employment law is a special area of law, it is not akin to civil litigation where common law paradigms hold sway. In appropriate cases reinstatement can be ordered together with back pay. A salary is not a reward for work done. It is an entitlement to an employee. So, the Appellant falls into an oft repeated error in asserting that it is a common law doctrine that salary is a reward for work done. Common law is judge made law. Salary is not within that realm. It is hoped the Appellants are now able to differentiate between what is common law and what is contractual. It was apparent the Appellant may be aware of this as one of the decisions cited is *Teachers Service Commission v Timothy Onyango Olale* (supra) which dealt with salary payment for a reinstated employee.
15. The Appellants employed the Respondent as a pastor. The employment was terminated subsequent to which he preferred a claim. The Appellants herein did not seriously challenge the claim as no defence was offered nor was any evidence tendered in its behalf.
16. Under the [Employment Act](#), there is provision as follows under section 43.
  43.
    - (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
    - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
17. The reverse burden of proof is what permits an employer to tender reasons for the termination and where there is a reason proffered that satisfies the test in section 43, the termination is considered fair



and lawful. The Court was within the law when it granted some of the reliefs to the Respondent. The only fault in as far as the determination goes is the reinstatement of the Respondent as the statutory period for reinstatement had passed. It would have been opportune to instead grant remedies in terms of the *Employment Act*. These range from re-engagement or compensation.

18. The reinstatement ordered was erroneous for having fallen out of the legal parameters. Instead of the backpay which was ordered by the Learned Magistrate, the Court will grant the remedy of 12 month's salary as compensation to the Respondent and order a re-engagement to the position he held with no loss of benefit. The Respondent is to have the costs of the case before the Magistrate's Court. There is no order on costs in respect of the appeal herein.
19. In the final analysis the decision of the Magistrate's Court is set aside and substituted with an order as follows:-
  - a. A declaration be and is hereby issued that the dismissal of the Respondent was unfair and unlawful within the meaning of section 43.
  - b. An award of 12 month's salary compensation for the dismissal.
  - c. Re-engagement of the Respondent on the same terms with no loss of benefits.
  - d. Costs of the suit before the Magistrates Court.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025**

**NZIOKI WA MAKAU, MCI Arb.**

**JUDGE**

