



Kariathi v Alfa Motors Limited (Employment and Labour Relations Appeal E005 of 2024) [2025] KEELRC 1374 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2024**

JW KELI, J

MAY 9, 2025

BETWEEN

JACKSON MWORIA KARIATHI APPELLANT

AND

ALFA MOTORS LIMITED RESPONDENT

(Being an Appeal from the Judgment of the Honourable B.C Mulemia (CM) delivered in Nairobi on the 8th December, 2023 in Nairobi CMELRC No. E591 of 2021)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of the Honourable B.C Mulemia (CM) delivered at Nairobi on the 8th December, 2023 in Nairobi CMELRC No. E591 of 2021 between the parties filed a Memorandum of Appeal dated 21st December, 2023 seeking the following orders:
 - i. That the appeal herein be allowed and this Honourable Court be pleased to set aside the order issued by Hon. Backy Cheloti Mulemi (Chief Magistrate) on 8th December, 2023 in M.C ELRC No. E591 of 2021;
 - ii. That this Honourable Court be pleased to make an order on costs of this Appeal; and
 - iii. Such further or consequential orders as this Honourable Court deems just

The Grounds Of The Appeal

2. That the learned trial Magistrate erred in law and in fact failing to find that there was no justifiable reason by the Respondent to dismiss the appellant from his employment;
3. That the learned Magistrate erred in law and in fact by failing to find that due procedure was not adhered to in the alleged summary dismissal of the appellant;



4. That the learned trial magistrate erred in law and in fact by failing to find that the appellant was entitled to damages under Section 49 of the [Employment Act](#); and
5. That the learned trial magistrate erred in law and in fact in failing to find that the appellant is entitled to gratuity as per the appellant's and respondent's collective bargaining agreement.

Background Of Appeal

6. The Claimant/Appellant filed claim against the Respondent vide a Memorandum of Claim dated 23rd March, 2021 seeking the following orders:-
 - a. A declaration that the Respondent action of sacking the Claimant is illegal, and/or unlawful that the Claimant is entitled to severance pay, terminal benefits, 1 months in lieu of notice, unpaid leave, salary underpayments, transport allowance and gratuity totaling to about Kshs. 1,371,840.00/= as particularized in paragraph 6 hereinabove;
 - b. General damages for wrongful dismissal as the court shall assess;
 - c. Costs of the suit and interest; and
 - d. Any other relief that this Honourable Court may deem fit and just to grant.
7. The Claimant filed his verifying affidavit, Witness statements of the Claimant and list and bundle of documents of even date (see pages 5-36 of ROA).
8. The claim was opposed by the Respondent who entered appearance and filed an Answer to Memorandum of Claim dated 21st June, 2021 (Pages 38-39 of ROA), Respondent's list and bundle of documents of even date, Respondent's list of witnesses dated 29th September, 2021, Respondent's Witness Statement of Harbinder Singh Bhogai and Respondent's further list of documents dated 29th September, 2021 (Pages 38-56 of ROA).
9. The claimant's case was heard on the 21st February, 2023 a where the claimant testified in the case, he adopted his Witness Statement as his evidence in chief and produced his list of documents dated 23rd March, 2021 as exhibits 1-11. He was cross-examined by Counsel for the Respondent Mr. Muriithi (see pages 61-62 of ROA)
10. The Respondent's case was heard on 28th August, 2023 where the Respondent's witness Mr. Harbinder Singh Bhogai testified on behalf of the Respondent and was cross-examined by counsel for the Claimant (Page 63 of ROA).
11. The parties took directions on filing of written submissions after the hearing. The parties complied.
12. The Trial Magistrate Court delivered Judgment on the 8th December, 2023 dismissing the Claimant's suit for lack of merit and that each party to bear their own costs. (Judgment at pages 142-145 of ROA).

Determination

13. The appeal was canvassed by way of written submissions. Both parties complied.
14. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither



seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. The court on first appeal is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for Determination

16. The Appellant in his submissions, submitted on the merits of his Appeal.
17. The Respondent identified two(2) issues for determination namely:
 - a. Whether the Appellant was lawfully and fairly dismissed from employment as held by the trial magistrate; and
 - b. Whether the trial Magistrate erred in dismissing the Appellant's claim entirely
18. The court, at first appeal, finds that the issues placed before the court for determination by the parties were as follows:-
 1. Whether the Appellant was lawfully and fairly dismissed from employment as held by the trial magistrate; and
 2. Whether appellant was entitled to reliefs sought on the claim.
Whether the Appellant was lawfully and fairly dismissed from employment as held by the trial magistrate;
19. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the [Employment Act](#) to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - SUBPARA (i)
related to the employees conduct, capacity or compatibility; or
 - SUBPARA (ii)
based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the [Employment Act](#) (*Walter Ogal Anuro v Teachers Service Commission*[2013]eKLR)



The appellant's submissions

20. The Appellant testified that on 4th December, 2020, during lunch time, he went shopping and forgot one item i.e. wheat flour. He returned to the cereals shop to get it since his boss was still having his lunch. The Appellant testified that his boss had noted his absence and questioned him. The Appellant informed his boss where he was. His Boss became verbally abusive and accused the Appellant of doing his own errands using the Company Motor Vehicle. The Appellant was directed to alight the Vehicle, which he did. He was directed to collect his terminal dues from Madam Rose.
21. The Appellant was denied the right to be heard. He was not issued with a Notice to show Cause. No disciplinary hearing was conducted and referred to the Respondent's Director's Witness Statement. (Pages 48-49 of the Record of Appeal). There is no mention of any show cause letter issued to the Appellant. There is no mention of a disciplinary hearing being conducted. The Respondent did not tender any Notice to show Cause and/or Minutes of a disciplinary hearing.
22. That, prior to terminating the Claimant's employment, the Respondent did not allow a Representative of the Claimant, being either a fellow employee or a Representative, to be present during the information/explanation of the reasons. That the Respondent did not hear and consider any explanations given by the Claimant. The appellant reiterated his Submissions at the Lower Court. (Page 66-71 of the Record of Appeal).

Respondent's submissions

23. The appeal is based on grounds that the Respondent did not issue a Notice to Show cause to the Appellant and further failed to give him a chance to be heard before dismissing him thus making his dismissal unprocedural and unlawful. The Appellant's dismissal was lawful and due procedure was followed and as such the Appellant's appeal should be dismissed. That a fair termination or dismissal means that an employer complied with the strict requirements of sections 41, 43, 45 and 47(5) of the [Employment Act](#), in respect of procedure and the validity and fairness of reasons for termination. The Respondent relied on the decision in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] e KLR where the Court of Appeal held that:

“It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for 'Notification and hearing before termination on grounds of misconduct' in the following manner:-

- (1) Subject to section 42(1), an employer shall before terminating the employment of a employee, on the grounds of misconduct; poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee of his choice present during this 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 on misconduct or poor performance, and the person, chosen by the employee within subsection (1) make.”

From the above, four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being:



- (a) An explanation of the grounds of termination in a language understood by the employee;
- (b) The reason for which the employer is considering termination;
- (c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of termination is made;
- (d) Hearing and considering any representation made by the employee and the representative chosen by the employee.” The appellant condensed the foregoing into 2 issues, the reason for termination of employment and procedure of termination. The reason justifies the dismissal while the procedure addresses the adequacy of the notice and the nature of the hearing.
 - a. Reason for termination

24. Section 43(1) of the *Employment Act*, 2007 provides that:-

“In any claim arising out 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.” In this case, the reasons for the termination were captured in paragraphs 1 to 4 of the termination letter as follows:

"On numerous occasions you have been verbally cautioned by the CEO on the above negligence. In spite of these continuous reminders, you still persist with the above undesirable habits showing no improvements. In fact, you seem to be getting worse by the day!

You regularly forget to carry out duties assigned to you.

You regularly drive carelessly endangering the passengers.

You repeatedly drive recklessly, knocking car tyres on curbs, pot holes and road traffic islands." Basically, the termination was for the reason of neglect of duties and careless driving which was uncontroverted by the Appellant."

25. Section 44 (4) (c) of the *Employment Act* provides that: -

“(4)Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(c)an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.” The Respondent submitted that It issued verbal warnings and a letter dated 8th April 2020 wherein the Appellant had caused damage to the Respondent’s vehicles because of his careless and reckless driving and the Respondent has pointed out the extent of damages the Appellant had caused.

Further, the letter served as a three months’ notice in which the Appellant had to show improvement in his conduct made failure to which would result in termination. That as set



out above, the actions of the Appellant amounted to gross misconduct as per the contract of service between him and the Respondent thus justifying his dismissal.

b. Procedure for termination

26. The Respondent submitted that with due regard to the circumstances of the case, the termination of the Appellant's employment did not occur arbitrarily; rather, it followed an extensive process of investigation, verification, hearing and a formal determination. Section 41 of the *Employment Act*, which governs the procedure for termination states thus:-

“(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 shop floor union representative of his choice present during this explanation.”
The events that led to the termination of the Claimant's employment are as clear as day. The first event is that the Claimant had caused damage to the Respondent's vehicles because of his careless and reckless driving. In letter dated 8th April 2020 the Respondent postulated the extent of damages the Claimant had caused as a result of his errant, irrational and absurd manners. That it was imperative to recognize that the said letter served as a warning letter wherein it stated as follows:- "...The management regrettably has no choice but to give 3 months' Notice in which to improve immediately on the above issues. If you fail to improve, your services will be terminated without further notice..."

The Respondent urged the court to find that the Claimant was issued with both verbal and written warnings prior to 4th December 2020, the date of his dismissal.

27. The Respondent submitted that the Claimant was given a hearing in the following respects:- Exchange of letters and correspondence: On cross-examination, he testified that he received memos explaining why he was being dismissed. Among these include a memo dated 8th April 2020 to put the Claimant on notice to show improvement on his conduct, to which he failed to improve from his insolent behavior. The Claimant was engaged in a physical hearing despite having denied so. On the date of his dismissal, the Claimant was invited to explain his conduct but instead of presenting his defence or even apologizing, the Claimant affronted rudeness, discourtesy and insolence. In addition to the hearing instances, on the day of the termination letter, he was called by the Respondent's Office Administration and he was issued with a termination letter.

28. The Respondent contended that the appellant had in submissions misconstrued the meaning of a hearing. That a hearing need not to be oral or formal, or carried out in one sitting and relied on the decision in *Kenya Revenue Authority v Menginya Sallim Murgani Civil Appeal No.108 of 2010*, where the Court held that:-

“The hearing contemplated under section 41 is not necessarily an oral one but one that will be determined on a case-by-case basis, depending on the circumstances of each case, that in some instances, even exchange of correspondence would be constitute sufficient hearing for the purpose of section



41." Similarly, in R-vs-Immigration Appeal Tribunal Ex-Parte Jones [1988] I WLR 477,481 the court observed as follows:

"The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.....Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made..."That the Appellant was invited to a hearing on 4th December 2020 shortly after he had used the Respondent's company vehicle without authority. He attended but failed to give satisfactory explanation to exonerate himself from the allegations made against him. Instead, he became insolent and consequently the Respondent issued him with a termination letter later on that day. As such, the Respondent followed due procedure before terminating the Appellant's services."

Decision

29. There was no dispute that the appellant was an employee of the Respondent and that his employment was terminated summarily vide memo date 4th December 2020 with immediate effect (page 19 of ROA). The court deduced the reason for termination to be insubordination (failure to obey directions of the employer). The employer termed the conduct as gross-misconduct which if proved is true under section 44 of the *Employment Act*. Section 47 (5) of the *Employment Act* provides for the burden of proof in employment cases as follows:- '5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.'" The court found that the Appellant laid basis of his case of his employment having been terminated unfairly and the burden of proof shifted to the employer to justify the termination as based on valid grounds as stated in section 43 of the *Employment Act* to wit:- '43. Proof of reason for termination
- (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."
30. On the issue of fairness the trial court held that claimant had breached trust with the respondent as per the warning and the taking of the director's car without permission led to the termination. The trial court was of the opinion that the claimant had duty to notify the director that he had forgotten something the supermarket. The trial court found that the claimant ought to have reported the running of personal errands to the human resources. The trial court further found that indeed the claimant had been running personal errands for the director for sometime. At the hearing RW was the said Director who told the court that the claimant used his personal motor vehicle to run errands for him. During cross-examination RW told the court the claimant had to undertake his personal errands. During the cross-examination the claimant told the court the employer did not sent him any communication. RW had recorded a statement (pages 47-48) to the effect that the claimant had been employed on 2nd November 2002 to 4th December 2020. That is a 17 years of service. He stated that on



the 4th December 2020 the claimant was assigned duty and informed to use the respondent's company car KAM 955C and instead ignored the instructions and used the RW's personal car without authority. The claimant's position in witness statement was that he was doing personal errands of RW, his boss, and had gone to pick an item he had forgotten(wheat flour) which he gave the boss together which change.

31. Taking into account the above, I find that the claimant was under lawful instructions of his boss to run the bosses' personal errands which the boss admitted before the trial court. The wheat flour was for the boss. This was an employee who had served for 17 years. The applicable test of a reasonable employer when applied in the case, the harsh reaction would have failed the test for a reasonable employer. (*British Leyland (UK) Ltd v Swift*) The trial court correctly found the claimant had been running the personal errands of the boss. The employee was not even given an opportunity to explain his story in the presence of another employee before the termination letter was issued(section 41 of the [Employment Act](#)). The court finds the fairness test is as stated in section 45 (2) of the [Employment Act](#) to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the [Employment Act](#) (*Walter Ogal Anuro v Teachers Service Commission*[2013]eKLR).
32. In the instant case applying the decision in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) that : “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”; The court was satisfied that the subordinate court decision was clearly wrong. The employee ought to have been issued with a notice to show cause and heard according to section 41 of the [Employment Act](#) before the termination. The court was not persuaded that the claimant was on 3 months' notice as per the warning letter of 8th April 2020. He was dismissed on 4th December 2020 and the three months had long lapsed. The warning notice was overtaken by events. RW admitted that the claimant ran his personal errands. He was a boss hence the HR in the dismissal could not be justified in blaming the appellant for obeying directions of the boss on personal errands. A show cause should also have been effected on the Director for fairness. The court on re-evaluation of the evidence finds that the trial court misdirected itself by failing to take into effect the statement of the claimant and admission of RW that the appellant used to run the boss's personal errands and was doing so when he was dismissed for that reason. In this case the appellant had returned to the supermarket to get an item for the said boss. If it was a personal errand why did the boss /HR expect the Appellant to use the company car assuming this was factual?
33. The court was satisfied that there was no fairness in the termination on ground of lack of valid reasons, the lack of procedural fairness the accusations having been made and decision to dismiss on same day without any evidence of notice to show cause and hearing the appellant in the presence of his colleague. The court was of the opinion that the *Postal Corporation* case did not exclude the



minimum requirements of section 41 if the Employment Act that notice to show cause be issued of the accusation and the explanation of reason of termination be done in presence of a colleague more so when explanation by employer was done orally and swiftly. The appellant had served for 17 years and that counts for something. The court returns that the termination was unlawful and unfair. The decision of the trial court is set aside.

Whether the claimant was entitled to reliefs sought

34. In the memorandum of claim the claimant had sought the following reliefs:-
- e. A declaration that the Respondent action of sacking the Claimant is illegal, and/or unlawful that the Claimant is entitled to severance pay, terminal benefits, 1 months in lieu of notice, unpaid leave, salary underpayments, transport allowance and gratuity totalling to about Kshs. 1,371,840.00/= as particularized in paragraph 6 hereinabove;
 - f. General damages for wrongful dismissal as the court shall assess;
 - g. Costs of the suit and interest; and
 - h. Any other relief that this Honourable Court may deem fit and just to grant.

Compensation for wrongful dismissal

35. The court on finding unfair termination is consider and apply remedies under section 49 of the Employment which it proceeds to do(section 50 of the Employment Act).
36. For lack of procedural fairness notice pay is issued as per the contract for 1 month Kshs. 32,740 as per payslip pf November 2020 (page 14 of ROA). On Compensation for unfair termination, the court is guided by the factors under section 49(4) of the Employment Act. The claimant had served over 17 years. His social security was only NSSF which is minimal and probably, he may not secure another suitable job as a driver which requires agility being born 1962. There was only one warning letter produced by his employer in his service of 17 years and he had no other benefits. Taking into account the foregoing the court finds that the claimant was entitled to maximum compensation which is awarded at Kshs. 32740 x12 Kshs. 392,880.
37. On gratuity claims, the court did not find membership to the union and the claimant did not prove the membership or even the entitlement.
38. On the claims for unpaid leave, salary underpayments, transport allowance there was no case established for the same.
39. On service pay, under section 35 (6) service pay was not due as the claimant was under NSSF.
40. The other claims having not been proved before the trial court on balance of probability, the court found no basis to disturb the position of the trial court on these claims.

Conclusion

41. The appeal is allowed. The Judgment of the Honourable B.C Mulemia (CM) delivered in Nairobi on the 8th December, 2023 in Nairobi CMELRC No. E591 of 2021 is set aside and in place judgment entered for the claimant against the respondent as follows:-
- a. A declaration that the summary dismissal of the claimant from employment was unfair and unlawful.



- b. Notice pay of one month's salary Kshs 32740
- c. Compensation for the unfair termination the equivalent of 12 month salary for total Sum of Kshs. 392,880.
Total sum awarded Kshs. 425,620
- d. Interest at court rates from date of judgment until payment in full
- e. Costs of the suit.

42. Costs of the appeal to be borne by the respondent

43. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

**J.W. KELI,
JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant : -Absent

Respondent:-Ogara

Further Court Order

Stay granted for 30 days.

It is so ordered.

**J.W. KELI
JUDGE.**

09/05/2025

