



**Wanjigi v Superfoam Pty Ltd (Civil Appeal E029 of 2023)  
[2025] KEELRC 1379 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1379 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL E029 OF 2023**

**JW KELI, J  
MAY 9, 2025**

**BETWEEN**

**HARRISON NJOROGE WANJIGI ..... APPELLANT**

**AND**

**SUPERFOAM PTY LTD ..... RESPONDENT**

*(An Appeal against the judgment of the Chief Magistrate Hon. P.N. Gesora delivered on 28/05/2020 in CMEL No. 216 of 2018 at Chief Magistrates Court Nairobi)*

**JUDGMENT**

1. The Appellant herein aggrieved by the judgment of the Chief Magistrate Hon. P.N. Gesora delivered on 28/05/2020 in CMEL No. 216 of 2018 at Chief Magistrates Court Nairobi, filed a memorandum of appeal dated 25<sup>th</sup> January 2023 seeking the following reliefs: -
  - a. The appeal be allowed and the judgment of the trial magistrate, Hon. P.N Gesora be set aside.
  - b. The judgment of Hon. P.N Gesora is substituted with an order allowing the appellant's reliefs set out in the Memorandum of Claim with costs.

**Grounds Of The Appeal**

2. The Learned Magistrate erred in law and facts in failure to determine the dispute before the court based on pleadings filed by the parties and evidence tendered before it, and thus occasioned injustice to the appellant herein.
3. The Learned Magistrate erred in law and facts in failure to award the appellant uncontroverted unpaid commissions and salary arrears as claimed.



4. The Learned Magistrate erred in law and facts in failing to believe the evidence of the appellant despite no cogent evidence submitted by the Respondent to the contrary, submitting falsified evidence, and its witness continuously lying under oath.
5. The Learned Magistrate erred in law and facts in failure to establish that the dismissal of the Appellant was flawed, null, and void; therefore, he was entitled to the reliefs sought in his memorandum of claim.
6. The Learned Magistrate erred in law and facts in failure to evaluate the evidence of the Respondent's witness and their hollow defense. A witness who admitted in Cross-Examination not only was he lying, but he did not know why he was lying, and indeed the Appellant was "illegally terminated".
7. The Learned Magistrate erred in law and facts in failure to disapprove the Respondent's contention that the Appellant's dismissal was on account of poor performance despite the Appellant having demonstrated competence and made more sales as exhibited in the weekly reports.

### **Background To The Appeal**

8. The claimant alleged unfair termination in memorandum of claim dated 19<sup>th</sup> September 2018 filed in court on even date and sought orders against the respondent for unpaid commissions , notice pay and compensation for wrongful dismissal. The total sum of the claim was Kshs. 16,068, 265.15(Pages 1-24 of ROA was the claimant's case)
9. The claim was opposed by the respondent who filed memorandum of response dated 5<sup>th</sup> February 2019 on the 7<sup>th</sup> February 2019 together with witness statement and documents (page 44-54 of ROA).
10. The Appellant then filed reply to the defence on the 8<sup>th</sup> March 2019 and additional documents (pages 55-97 of ROA).
11. The claimant's case was heard on the 1<sup>st</sup> October 2019 where he gave his evidence and was cross-examined by counsel for the Respondent, Macharia. The respondent's case was heard on the 25<sup>th</sup> November 2019 when Reuben Nyaberi testified as its evince and was cross-examined by the appellant. The parties filed written submissions after the close of the Respondent's case.

### **DETERMINATION**

12. The appeal was canvassed by way of written submission by the Respondent while the appellant told the court he relied on his record of appeal.
13. 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."
14. 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

15. The appellant relied on his record of appeal essentially the grounds of appeal while the respondent addressed the grounds of appeal on the fairness of the termination and the reliefs sought in the claim.
16. The court on perusal of the grounds of the appeal and submissions of the respondent, was of the considered opinion that the issues for determination in the appeal were :
  - a. Whether the termination was lawful and fair.
  - b. Whether the appellant was entitled to reliefs sought in the claim.

### Whether the termination was lawful and fair

17. Under the issue the relevant grounds of appeal were :-
  - a. The Learned Magistrate erred in law and facts in failure to establish that the dismissal of the Appellant was flawed, null, and void; therefore, he was entitled to the reliefs sought in his memorandum of claim.
  - b. The Learned Magistrate erred in law and facts in failure to evaluate the evidence of the Respondent's witness and their hollow defense. A witness who admitted in Cross-Examination not only was he lying, but he did not know why he was lying, and indeed the Appellant was "illegally terminated".
  - c. The Learned Magistrate erred in law and facts in failure to disapprove the Respondent's contention that the Appellant's dismissal was on account of poor performance despite the Appellant having demonstrated competence and made more sales as exhibited in the weekly reports.
18. 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—
    - (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).
19. On procedural fairness the respondent submitted that the appellant had inserted a 2 year oral contract with initial probationary period in his claim. That the probationary status of the appellant at termination was not in dispute as evidenced by RW1 testimony (page 50-51 of ROA) and the appellant’s own acknowledgment in his pleadings. That section 42 of the *Employment Act* exempts probationary contracts from procedural requirements under section 41 of the *Employment Act*.



20. The respondent explained the termination procedure it followed to be having issued a warning letter to the appellant dated 21<sup>st</sup> August 2015 (page 53 ROA) documenting concerns about the appellant's performance, subsequently issued the appellant with termination letter dated 25<sup>th</sup> September 2015 (page 54 of ROA) which was not disputed by the appellant and the termination provided a notice extending service to 31<sup>st</sup> October 2015 total notice of 36 days from date of the termination letter.
21. The trial court held that the claimant was issued a warning and notice in line with section 42 of the *Employment Act*. That the contract was performance based and stated that the failure to meet the indication would lead to automatic termination of the same. The court on appeal is obliged to re-evaluate evidence before trial court and reach own conclusion (Selle). The appellant stated he was on oral contract of 2 years extendable subject to performance. He was engaged in the month of June 2015 and the contract was terminated on ground of very poor performance, which termination was effective on the 31<sup>st</sup> October 2015. In this statement, the appellant stated how he was to be paid commission while on probation. In defence the respondent relied on the witness statement of Reuben Nyaberi (page 50 ROA) who stated that the appellant was engaged on probation as a Sales Representative for 3 months effective June 2015. That the contract was oral and did not guarantee confirmation on completion of probation. That the appellant's services were terminated for poor performance with notice of 35 days which exceeded the 7 days.

### **Decision**

22. The respondent's position on fairness of the termination adopted by the trial court was that the appellant being on probation his termination was under section 42 of the *Employment Act* hence no procedural fairness was required. It was not in dispute the appellant was engaged in June 2015 on probation for 3 months. RW1 said the appellant was not guaranteed of confirmation after completion. The court then wondered what was the appellant's status after completion of the probation period? All the same assuming the appellant was on probation as held by the trial court, the defence of the Respondent that the appellant were not entitled to hearing before termination fails as section 42 of the *Employment Act* was declared unconstitutional in *Monica Munira Kibuchi & 6 others v. Mount Kenya University & Another* [2021] eKLR, a decision of a bench of three judges of the ELRC (Mbaru, Abuodha and Ndolo, JJ.) and the decision has been upheld by the Court of Appeal in *Red Lands Roses Ltd v Mugo* (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR) (24 January 2025) (Judgment). The court holds that the termination of the appellant's contract while on probation was without procedural fairness for lack of compliance with mandatory provisions of section 41 of the *Employment Act*.
23. The respondent stated the reason for termination of the appellant's employment as very poor performance (page 54 of ROA). On the reason for termination based on performance it must be proved by the employer to have existed (section 43 of the *Employment Act*). The termination letter simply stated very poor performance. There was no evidence of the evaluation of the performance. The respondent relied on the warning letter dated 21<sup>st</sup> August 2015 and the letter of termination dated 25<sup>th</sup> September 2015. The Court opined that there was no proof of fair criteria in evaluation of performance and further this ought to be discussed with the employee and the employer ought to demonstrate measures taken to assist the employee improve performance. The employee must then be heard on the performance and explained why the termination is considered. The termination fell short of valid reasons and procedure and is held unfair.

### **Whether the appellant was entitled to reliefs sought in the claim.**

24. On finding unfair termination the court is obliged to issue compensation under section 49 of the *Employment Act*. The court took into account the claimant was on his 5<sup>th</sup> month of service. The



respondent denied the contract of 2 years and asserted 3 months yet the claimant worked for 5 months. This was an oral contract and for lack of evidence to the contrary the court returns in favour of the claimant that he had oral contract of 2 years. Taking into account the foregoing the court awards the claimant compensation the equivalent of 2 months' salary and 1 month notice for lack of procedural fairness. The appellant stated his salary was Kshs. 70,000 and he is thus awarded the total sum of Kshs.210,000.

25. On the claim for unpaid 10 % commission, just like the trial court on re-evaluation of the evidence before the trial court I found no proof of the alleged sales. I found no basis to disturb the decision of the trial court on the claim for unpaid commission (Mbogo v Shah)

### **Conclusion**

26. The appeal is allowed. The judgment of the Chief Magistrate Hon. P.N. Gesora delivered on 28/05/2020 in CMEL: 216 of 2018 is set aside and substituted as follows-

Judgment is entered for the claimant against the respondent as follows:-

- a. The termination of employment is held as unfair.
  - b. Notice pay for lack of procedural fairness is awarded for Kshs. 70,000
  - c. Compensation for unfair termination is awarded equivalent of 2 months salary for Kshs.140,000
  - d. The total sum awarded Kshs. 210,000 payable with Interest at court rate from date of judgment.
  - e. Costs of the suit.
27. Costs of the appeal to the appellant
28. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY , 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant : -Absent

Respondent:- Tanui

Further Court Order

Stay granted for 30 days.

09/05/2025

