



Mary Help The Sick Mission Hospital & another v Ngung'u (Employment and Labour Relations Appeal E198 of 2022) [2025] KEELRC 1938 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1938 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E198 OF 2022**

BOM MANANI, J

JUNE 30, 2025

BETWEEN

MARY HELP THE SICK MISSION HOSPITAL 1ST APPELLANT

JOHN MURIMI MWANGI 2ND APPELLANT

AND

MARTIN MBUGUA NGUNG'U RESPONDENT

JUDGMENT

1. The Respondent was employed by the 1st Appellant as its accountant until 28th September 2018 when his services were terminated. Upon termination of his services, he moved to court to challenge the decision.
2. After hearing the case, the trial magistrate arrived at the conclusion that the 1st Appellant had terminated the Respondent's services lawfully. The court found that the 1st Appellant had valid reasons to support the impugned decision and that it had processed the Respondent's release from employment in accordance with fair procedure. As such, the trial magistrate declined the Respondent's prayer to declare the termination of his contract as unlawful. The court further declined the Respondent's plea for compensation for unfair termination of the contract.
3. In the suit, the Respondent had also claimed for service pay. The trial magistrate found that the Appellants had not opposed this claim. As such, he allowed it and awarded the Respondent Ksh. 173,250.00 as service pay.
4. Both parties were dissatisfied with the judgment. As such, they appealed with the Appellants filing the appeal and the Respondent filing the cross appeal.



Grounds of Appeal

5. The Appellants' Memorandum of Appeal has three grounds of appeal. However, a reflection on the grounds yields only two issues for determination. These are:-
 - a. Whether the learned trial magistrate erred in law in awarding the Respondent service pay despite the provisions of section 35 (6) (d) of the *Employment Act* which disentitles an employee who is a contributor to the National Social Security Fund (NSSF) from claiming service pay.
 - b. Whether the learned trial magistrate erred in law and fact in awarding the Respondent costs of the suit despite having found that the 1st Appellant's decision to terminate the contract of service between them was lawful.

Grounds of Cross Appeal

6. The cross appeal has four grounds of appeal which yield the following issues for determination:-
 - a. Whether the learned trial magistrate's finding that there was a variance of Ksh. 1.6 Million between the report that was presented by the Respondent and the actual stock on the ground was not supported by evidence.
 - b. Whether the learned magistrate erred in law and fact in finding the Respondent guilty of the accusations the Appellants had leveled against him despite the fact that he was not the primary collector of the data which informed the discrepancies that triggered the disciplinary process against him.
 - c. Whether the learned magistrate erred in not awarding the Respondent service pay despite the provisions of section 35(1) (c) of the *Employment Act*.
 - d. Whether the learned trial magistrate erred in not awarding the Respondent damages for wrongful loss of employment.

Analysis

7. Being a first appeal, the duty of this court is to re-evaluate the evidence on record and come to its own conclusion regarding the dispute. However, whilst doing so, the court must remain alive to the fact that unlike the trial magistrate, it did not have the benefit of listening to the testimony of the witnesses in the cause and examining their demeanor. As such, it must make allowance for this reality (Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment)).
8. Although a first appellate court is entitled to depart from the decision of the trial court, it must proceed with caution in upsetting the findings of fact by the trial court. Underscoring this fact, the court in the case of Otieno v Dodhia Packing Limited (Civil Appeal E844 of 2021) [2024] KEHC 6703 (KLR) (21 May 2024) (Judgment) (quoting with approval the decision in Peters vs Sunday Post Limited [1958] EA 424) expressed itself on the matter as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



9. In evaluating the aforesaid grounds of appeal and cross appeal, this court will remain alive to the above principles.
10. The 1st ground of appeal is that the trial magistrate erred in law in awarding the Respondent service pay despite evidence that he was a registered contributor to the NSSF. According to the Appellants, this decision is an affront to section 35 (6) (d) of the *Employment Act* which disentitles employees who are registered with the NSSF from claiming service pay.
11. In the Statement of Claim, the Respondent pleaded for service pay for seven (7) years totaling Ksh. 150,000.00. He later filed an amended Statement of Claim increasing this amount to Ksh. 173,250.00.
12. The record shows that although the Appellants filed a Statement of Defense to the original Memorandum of Claim, they did not file an amended Statement of Defense to specifically react to the matters that the Respondent introduced including the increase in the claim for service pay. However, the Statement of Defense has an express statement praying that the Respondent's suit be dismissed with costs. In effect and contrary to the trial court's findings, the Appellants contested this claim.
13. The trial court's record shows that the Respondent tendered in evidence two of his pay slips for the months of June 2018 and August 2018. The documents are at pages 11 and 12 of the Record of Appeal.
14. The pay slips show that the Respondent was a registered contributor to the NSSF. It is apparent that he used to remit Ksh. 200.00 to the Fund through direct deductions from his salary.
15. Section 35 (6) (d) of the *Employment Act* provides as follows:-

“This section shall not apply where an employee is a member of the National Social Security Fund.”
16. Clearly, this provision disentitles an employee who is registered with the NSSF from claiming service pay. As such, the Respondent, being a contributor to the NSSF, was not entitled to pursue a claim for service pay. Consequently, it was not open to the trial court to make an award for service pay in the circumstances (see *Wanjiku v Vanela House of Coffees (Cause 454(N) of 2009) [2018] KEELRC 663 (KLR) (9 November 2018) (Judgment) & Oruko v Roto Moulders Limited (Cause 1648 of 2017) [2022] KEELRC 12859 (KLR) (14 October 2022) (Judgment)*).
17. The trial magistrate dismissed the Respondent's claim except for the prayer for service pay which, as has been observed above, was improperly granted. In the circumstances, is the Respondent entitled to the order for costs that was issued in his favour? I think not.
18. Although the decision regarding whether to grant costs is in the discretion of the trial court, the general principle is that costs follow the event. This means that costs will ordinarily be granted to the party who is successful in a suit.
19. The trial court's record shows that the Respondent largely lost the claim against the Appellants. However, he had marginal success when the claim for service pay was granted in his favour. In the circumstance, the trial court was entitled to exercise its discretion to award him costs.
20. However and as is clear from the preceding parts of this decision, the court was not entitled to award the Respondent service pay. As such, the award must be set aside with the consequence that the Respondent will have lost the claim before the lower court. The result of the foregoing is that the trial court's order for costs in favour of the Respondent must also be set aside.
21. In the cross appeal, the Respondent contends that the trial court erred in finding that there was a variance between his report to management and the actual stock worth Ksh. 1.6 million without evidence to support the finding. This ground of cross appeal is misconceived. Page 196 of the Record



- of Appeal which contains evidence extracted from the Respondent through cross examination shows that he admitted this variance (see lines 8-10). The Respondent having admitted this fact, no other evidence was required to be presented to the trial court to prove it.
22. The second ground of cross appeal raised by the Respondent relates to whether the learned magistrate erred in law and fact in finding him culpable of the accusations which the Appellants had leveled against him despite the fact that he was not the primary collector of the data which informed the discrepancies that triggered the disciplinary process. The Respondent stated in evidence that his work involved taking stock of the 1st Appellant's goods on regular basis. It was his case that this would be done by him collecting and compiling data from departmental heads.
 23. The Respondent contended that it was not his duty to physically do the stock taking in every department. As such, he denied responsibility for any discrepancies in the data upon which his reports were based.
 24. The Respondent's position on the matter was intended to assist him to evade responsibility for his missteps in the course of executing his duties. As was stated by the Appellants' witness, he was expected to cross check the data in his position with the respective departmental heads before he could finalize and present his reports to management.
 25. A glaring example of the missteps by the Respondent in this respect is to be found on the report that he prepared with respect to the pharmacy department. The evidence on record shows that the information in the report was at variance with the physical stock available in the department. The evidence further shows that it took the vigilance of staff from the pharmacy department to flag this discrepancy.
 26. In his evidence before the trial court, the Respondent conceded that some of the reports he had prepared contained errors. He also conceded this fact in his response to the notice to show cause. However, he sought to blame this state of affairs on lack of sufficient manpower and the need to meet stringent timelines in tendering of the reports.
 27. The Respondent cannot avoid responsibility for the errors which he admits he was aware of and which originated from his reports to the 1st Appellant's management. The fact that he elected to present the reports with errors that he was aware of was clear dereliction of duty on his part. As such, the trial court was right in holding him responsible for the missteps.
 28. In his submissions on appeal, the Respondent abandoned the third ground of cross appeal. As such, there is no need to comment on it in this decision.
 29. The Respondent's final ground of appeal relates to whether the learned trial magistrate erred in not awarding him damages for wrongful loss of employment. Compensation for unfair loss of employment presupposes that the court has arrived at the conclusion that the decision to terminate an employee's employment was wrongful. In the instant case, the trial court found that the Respondent's employment was legitimately terminated.
 30. This court has re-evaluated the evidence on record on this aspect of the cross appeal. The record shows that the Respondent admitted that he presented to the Appellants reports which he knew contained errors (see his response to the show cause letter). He further admitted that these reports were critical in decision making within the 1st Appellant's institution (see page 196 of the Record of Appeal). In this court's view, this evidence affirmed the Appellants' contention that the Respondent had acted negligently and was guilty of dereliction of duty. As such, I agree with the trial court's finding that the Appellants' decision to terminate the Respondent's services was informed by valid reasons.



31. The record also shows that the Respondent was issued with a show cause letter and subjected to a disciplinary hearing. As such, I agree with the trial court's finding that he was accorded fair procedure.
32. The foregoing being the case, the trial magistrate was correct in declining to grant the Respondent's plea for compensation for unfair termination of his employment. As such, the Respondent's contention that the trial court erred in not awarding him damages for unfair loss of employment is without merit.

Determination

33. The upshot is that the court arrives at the conclusion that the Appellants' appeal is merited.
34. As such, it is allowed and the trial court's orders awarding the Respondent service pay, interest and costs of the case are hereby set aside.
35. In place thereof, this court hereby issues an order dismissing the entire claim by the Respondent before the trial court.
36. Conversely, the court arrives at the conclusion that the cross appeal by the Respondent is without merit.
37. As such, it is hereby dismissed.
38. Each party to bear own costs both before the trial court and on appeal.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JUNE, 2025.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Appellants

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

