



Wasike v Gramo Properties Limited (Employment and Labour Relations Appeal E076 of 2022) [2025] KEELRC 1731 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1731 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E076 OF 2022**

**JW KELI, J
JUNE 12, 2025**

BETWEEN

MOSES NABISWA WASIKE APPELLANT

AND

GRAMO PROPERTIES LIMITED RESPONDENT

(Being an Appeal from the Judgment of the Honourable Lucy Ambasi(CM) delivered at Nairobi on the 26th February 2024 in Milimani MCERLC No. E1582 of 2022)

JUDGMENT

1. The Appellant, dissatisfied with the Judgment of the Honourable Lucy Ambasi(CM) delivered at Nairobi on the 26th February 2024 in Milimani MCERLC No. E1582 of 2022 between the parties filed a Memorandum of Appeal dated 25th March 2024 seeking the following Orders:
 - a) That this appeal be allowed and the judgment of the trial court be set aside.
 - b) That judgment be entered for the Appellant against the Respondent as prayed in the Statement of Claim.
 - c) That the costs of this appeal be granted to the Appellant.

The Grounds Of The Appeal

2. That the Learned Magistrate committed a gross injustice and a grave error in law and in fact by failing to enter judgment against the Respondent despite the overwhelming and uncontroverted evidence in support of the prayers sought by the Appellant in the Statement of Claim.
3. That the Learned Magistrate erred in law and in fact by selectively reading the Respondent's pleadings and evidence and completely ignoring the Appellant's pleadings and evidence thereby arriving at an erroneous decision.



4. That the Learned Magistrate erred in law and in fact and ruled unfairly, by giving undue regard to hearsay evidence adduced by the Respondent.
5. That the Learned Magistrate erred in law and in fact, and in fact made a finding that defied all the evidence and logic on the question of whether the Appellant had established a claim against the Respondent on a balance of probabilities.
6. That the Learned Magistrate erred in law and in fact in failing to find, in view of the evidence adduced, and hold that the Appellant was entitled to reinstatement and compensation for unfair termination.

Background Of Appeal

7. The Claimant/Appellant filed a claim against the Respondent vide a Memorandum of Claim dated 31st August 2022 seeking the following Orders:-
 - a. A finding that the termination of the claimant's contract was unfair and unlawful.
 - b. An Order compelling the Respondent to reinstate the claimant as its Internal Security Officer without loss of benefits or alternatively;
 - c. Compensation in the sum of Kshs. 7,169,250. 00 as more particularly set out in paragraph *para_88* above.
 - d. Interest on c) above at court rates from date of filing suit until payment in full.
 - e. Costs and interest. (pages 1-7 of ROA).
8. The Claimant filed his Witness statement and list and bundle of documents all of the same date (see pages 45-83 of ROA).
9. The claim was opposed by the Respondent who entered appearance and filed a Respondent's statement of response dated 23rd February 2023, list of witnesses and the witness statement of Everlyn Kangethe dated 30th January 2023, respondent's bundle of documents of even date together with the bundle (Pages 9-40 of ROA).
10. The claimant filed reply to the respondent's statement of response date 23rd March 2023(pages 41-43 of ROA).
11. The claimant's case was heard on the 17th July 2023 where the claimant testified on oath in the case, they produced his documents and adopted his witness statement as his evidence in chief. He cross-examined by Counsel for the Respondent, Njoroge (see pages 2-3 of ROA)
12. The Respondent's case was heard on even date where the Respondent's witness Everlyne Kangethe testified on oath , adopted her witness statement and produced the respondent's documents as evidence in chief. She was cross-examined by counsel for the Claimant, Mr. Masinde (pages 3-5 of ROA).
13. The parties took directions on filing of written submissions after the hearing. The parties complied.
14. The Trial Magistrate Court delivered Judgment on the 26th February 2024, dismissing the claim with costs to the respondent (Judgment at pages 110-113 of ROA).

Determination

15. The appeal was canvassed by way of written submissions. Both parties complied.



16. 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.”
17. The court 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.”

Determination

Issues for determination

18. The appellant presented two issues for determination in the appeal namely:-
 - a. Whether there was procedural fairness
 - b. Whether there was substantive fairness.
19. The Respondent presented the following as issues for determination by the Court:-
 - i. Whether the learned trial magistrate erred in law and fact in arriving at the conclusion that the Respondent had valid reasons to terminate the Appellant’s employment.
 - ii. Whether the learned trial magistrate erred in law and fact in holding that the Appellant had been afforded an opportunity to be heard before the decision to terminate his contract of service.
 - iii. Whether the learned trial magistrate erred in law and fact in arriving at the conclusion that the Appellant was undeserving of the reliefs that he had sought in the Statement of Claim.
20. The court found that the parties were in agreement that the issues for determination in the appeal were:-
 - i. Whether the trial court erred in its finding on substantive fairness in the termination.
 - ii. Whether the trial court erred in its finding on procedural fairness in the termination.
 - iii. Whether the appellant was entitled to claims as sought before the trial court

Whether the trial court erred in its finding on substantive fairness in the termination

Appellant’s submissions

21. The termination letter does not give any reason for the termination. It only speaks of termination by notice as per the contract of employment. The enactment of the [Employment Act, 2007](#) did away with



blanket termination on notice particularly by the employer since an employee is entitled to challenge the termination under Section 46 of the Act. An employer has a duty to provide reasons for termination where a challenge is raised on the termination. Failure to provide reasons, as is the case here, shows that the termination of the Appellant was without a valid reason and offended Sections 43 and 45 of the Act. The Supreme Court had occasion to consider a dispute concerning termination as per contract in *Kenfreight (E.A) Limited v Benson K. Nguti KESC 79 (KLR)* where it stated at paragraph 29 of the Judgment that an employee terminated by notice has the right to challenge the termination under Section 46 of the Act. The Appellant challenged his termination. The Respondent did not provide any valid reason for the termination. If anything, the evidence of the Respondent's witness as recorded at the hearing (page 106 of the record) on cross-examination shows that the Appellant had good reviews.

22. The Appellant submitted that his termination was unfair and unjustified and invited the court to so find. The Appellant urged the court to allow his appeal and enter judgment in his favour as prayed in the memorandum of claim. While praying for judgment as per the memorandum of claim, the Appellant reiterates the submissions made before the trial court particularly at paragraphs *para_3 3* to *para_6 6* at pages 85 to 87 of the record. The caselaw that was relied upon before the trial court are annexed herewith and duly highlighted. Save to add that the prayer for reinstatement is still valid since 3 years have not yet lapsed since the Appellant was terminated and the court is reminded to take judicial notice of the scarcity of employment opportunities in the country.

Respondent's submissions

23. It is a well-established principle of law that the role of the appellate court is to evaluate the evidence on record and reach its own conclusions, while exercising the necessary caution, not to overturn the trial court's findings unless absolutely necessitated. Thus, in *Mutaki V Tire World Limited (Employment And Labour Relations Appeal E015 Of 2022) [2024] KEELRC 1047 (KLR)*, the Court held that,:-“This is a first appeal. As such, the role of this court is to evaluate the evidence on record and reach its own conclusion on the matters in controversy. However, the court ought to do so with the usual caution that unlike the trial court, it did not have the benefit of taking the evidence of the witnesses in the cause. As such, it should only depart from the findings of fact by the trial court if they are not supported by the evidence on record or are inconsistent with the law.”
24. The essence of a fair and just employment relationship is the adherence to established rules and the mutual respect for contractual obligations. Reliance is placed in the matter of *Wanyera V Central Isiolo Investment Limited (APPEAL E002 OF 2023) [2024] KEELRC 596 (KLR) (8 MARCH 2024)*, where it was provided that,

“The jurisprudence on termination of employment by an employer is now well settled. Termination is unfair and unlawful if it is not justified by a valid reason and if it is not done in accordance with a fair procedure. Section 45 (1 & 2) of the *Employment Act* which provides for requirements to be considered when determining whether termination was unfair as follows:

- 1) No employer shall terminate the employment of an employee unfairly.
- 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 employee’s 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.”

25. The Appellant’s employment was terminated for valid reasons as demonstrated to the trial court, allegations which threatened not only the Respondent’s business but also the safety and wellbeing of its staff and guests and for which the Appellant failed to defend himself against. These include but are not limited to:

- a) Bullying and use of violent words against colleagues;
- b) Divulging a guests COVID-19 status, leading to stigmatization & ostracization of said guest, and poor reviews for indiscretion in the management of the guest’s health status;
- c) Disclosing to other employees that the Respondent considered selling the business due to Covid-19 causing low morale among the Respondent’s staff;
- d) Being temperamental and combative with guests to the extent that guests were put off by his attitude and would express their anxiety in dealing with him;
- e) Unethically manipulating the Respondent’s essential security footage; and
- f) Threatening to stab another employee with a knife.

26. The Court in the case of *Korich V Fairview Hotel Limited* [CAUSE 594 OF 2018] [2023] KEELRC 499 [KLR] cited with approval of *Dede Esi Amanor Wilks v Action Aid International* [2014] eKLR, provided the requisite clarity on the issue when it pronounced itself as such: -“Employers generally are entitled to have harmonious working relationships in their organizations and can do so by weeding out trouble makers, eccentrics and disruptive employees from their organizations. Employers can tolerate mild eccentricities or idiosyncrasies but cannot reasonably be expected to tolerate downright impossible or unmanageable employees... there is a limit to reasonable accommodation.”

27. The Appellant’s contention that the Magistrate selectively read the pleadings and evidence on record giving undue regard to hearsay is completely misguided as this was not the sole basis of the court’s decision. Rather, it was considered in the broader context of all evidence presented, including verbal warnings and the Show Cause letter outlining various allegations against the Appellant. In any case any reliance on such evidence was made with due caution and within the bounds of the law. Further to this, corroboration to the Appellant’s conduct was evidenced through the Respondent’s witness, Everlyne Kangethe, a Manager at the company, who had a first-hand experience working with the Appellant and even overheard him threatening to stab his fellow colleague. This oral testimony was never challenged during cross-examination. The Appellant failed to meet the standard of proof required of him as outlined in the case of *Milano Electronics Limited V Dickson Nyasi Muhaso* [2021] eKLR citing the case of *Peter Otabong Ekisa V County Government Of Busia* [2017] eKLR which stated: -

“The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words, the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.”



28. The trial court's findings were supported by substantial evidence demonstrating the Appellant's breaches, which justified and necessitated the Respondent's actions meant to maintain the integrity and efficiency of its operations.

Decision

29. 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 of employment 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.
30. The burden of proof in employment cases is as stated in section 47(5) of the Employment Act as follows:
SUBPARA -'47 (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.”
Further section 43 provides for proof of reasons for termination of employment as follows:
“ 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.” It is on the basis of the foregoing legal framework the court proceeded to re-evaluate the evidence before the lower court to reach own conclusion on the substantive fairness, which relates to the fairness of the reason(s) for the termination of the employment.
31. The trial court held as follows on the fairness:- '14. The Respondent in line with its internal process issued the claimant with a show-cause letter dated 6 April 2022 inviting him to respond to the allegations of intimidation and to show why disciplinary action should not be taken against him and despite this, the failed to acknowledge receipt of the letter, sign or tender any response despite the seriousness of it and the subsequent effects.



15. The Notice to Show Cause was clear that the claimant was charged with bullying and threats of violence (stabbing) and required him to tender his response before 11 April 2022, showing reasons why he should not be taken through the disciplinary process.'
16. Pursuant to its legal obligations, the Respondent requested the claimant to respond to the show cause letter for almost two months which he did not and as such, the Respondent held a disciplinary hearing and thereafter, he was furnished with a termination letter dated 13/6/22 which effectively terminated his employment. In the case of *Okun vs Kenyatta university (Cause 363 of 2019)* [2023] KEELRC 2340 (KLR) it was held that an employee subject to disciplinary procedure cannot scuttle the disciplinary hearing and turn around to claim there was no due process.
17. Similarly, in *Bernard Shem Koweru v United Millers Limited* [2020] eKLR the court faced similar circumstances and it was held that:

"...the claimant declined to sign the show cause notice and did not respond to it. That the claimant also declined to attend a disciplinary hearing despite the fact that he could read and understand the notices... accordingly, the court is satisfied that the Respondent has demonstrated that it followed a fair procedure before terminating the employment of the claimant as is required under section 41, 44 and 45 of the *Employment Act*."
32. Based on the evidence tendered, it is clear that the claimant was given various avenues to exonerate himself or in the alternative give his side of the story but failed to do so and as such left the Respondent with no choice but to terminate his employment, I hold that this termination was not unjust or unlawful."
33. The appellant held a letter of employment dated 23rd October 2018 with termination notice of 1 month (pages 22-27 of ROA). A show cause letter was produced before the lower court by the respondent dated 6th April 2022 which stated as follows:-

‘ GSP/HR/001/2021

GRAMO SUITES

April 6th, 2022

Moses Nabiswa Wasike

Box 194, Malava, Kakamega.

Dear Moses,

REF: SHOW CAUSE LETTER OF BULLYING AND THREATENING TO BE VIOLENT.

We have noted with great concern that you have been bullying some of your colleagues. You have consistently used violent and inappropriate words to intimidate them. On 1st April 2022 you verbally told your fellow colleague that you would stab her, and nothing would happen to you. Please note that it is against our company policy to abuse your position of power to intimidate others.

Bullying and threatening to be violent towards your fellow colleagues is a serious offence and thus breach of conduct and violation of company's rules and regulations. According to the *Employment Act* of 2007 Section 44: (*) a, Bullying and threatening to be violent is a ground for summary dismissal. and threatening



In view of above, you are hereby called upon to show cause why disciplinary action should not be taken against you. Your response should be received by the undersigned by Monday 11th April 2022 by 12.00 noon.

if you fail to submit your explanation within the specified time, it shall presume that you accept the charges to be correct and have no explanation to offer. In that event, management will be at liberty to take an appropriate action without further reference to you.

Yours sincerely,

Gramo Properties Ltd

Lawrence Gichuki, DIRECTOR

Employee Acknowledgement of Receipt

Employee name.....Sign.....Date”

34. RW1 stated in the witness statement (paragraphs 7-12) that the claimant refused to sign the show cause and despite a reminder to respond to the letter for close to 2 months failed to do so leading to the termination letter dated 13th June 2022 which is re-produced below:-

“Dear Moses,

RE: TERMINATION OF CONTRACT

We refer to the above subject and draw your attention to your offer of employment contract which states that your contract may be terminated at any time by either party giving to the other one months' notice in writing (expiring on any day of the month) or pay in lieu of NOTICE.

Pursuant to the above clause, your appointment with Gramo Properties Ltd shall be terminated effective 5th April, 2022.

Your dues will be worked out as below, less any liabilities to the company.

Salary for days worked up to 5th April, 2022

One months' pay in lieu of notice

Pro rata leave days as at 31st March, 2022 (i.e. Thirty six (36) Days)

Severance pay 15days for each year worked, three (3) years

You will be issued with a certificate of service as stipulated by the [Employment Act](#) Sec 51.

To this end we hereby request you to engage in the clearance formalities with the relevant departments to enable us to process your final dues less all statutory deductions and/or liabilities with the company, in a timely manner. In case of any clarifications, kindly do not hesitate to contact the Human Resource office.

We thank you for your service with Gramo Properties Ltd and wish you all the best in your future endeavours.

Yours Sincerely,

Gramo Properties Ltd

Lawrence Gichuki

DIRECTOR



EMPLOYEE RECEIPT AND ACCEPTANCE

Name....Sign....Date.”

The Court found that the said letter did not relate to the show cause letter and did not disclose the reason for termination. The letter backdated the termination to 5th April 2022.

35. The claimant in his witness statement stated that :-
- ‘6. On 5th April, 2022, I reported to work as usual when I was verbally terminated at around 3.pm by the Respondent’s Director Mr. Lawrence Gichuki. I was not given any reason for the termination and neither was I given a hearing nor accorded a chance to defend myself before the termination.
 7. During my service with the Respondent, I neither received any warning letters, notice to show cause letters nor was I disciplined for dereliction of duty. I was never invited for any disciplinary hearings/ proceedings.
 8. My termination was unlawful, abrupt and in total contravention of all relevant labour laws as I was never afforded an opportunity to defend myself in an open, fair, transparent and democratic forum. I was never granted concise information of the charges leveled against me and/or relevant material/time to mount my defence.”
36. During cross-examination, the appellant told the court he was fired verbally with no reason. He had no complaints from any staff, he was a guard, he knew Regina and did not threaten her. The appellant denied having disclosed COVID 19 status of anyone, he did not speak about financial status of the respondent and did not handle finances. He was not given the show cause nor did the human resources call him. He was never warned. He was terminated from employment by the Director at 5pm as he was showing work to new staff. He stated he was coerced to sign the termination letter.
37. The Respondent called Everline Kangethe as RW1 who adopted her witness statement. RW1 told the trial court that the appellant threatened to kill a colleague over the phone. The colleague complained to her, they issued a disciplinary letter, conducted disciplinary and terminated the service of the appellant. During cross-examination, RW1 told the court the termination was because of the notice in the letter; she admitted that the letter had no reference to the termination reason. RW1 told the court she was a manager but not the Human Resources Manager. She admitted the appellant had no negative reviews and that the Human Resources confirmed good reviews at employment. RW1 told the court the certificate of service (Exhibit 6- page 63 of ROA) indicated the claimant left because of expiry of contract. At re-examination RW1 told the court the claimant did not show up for disciplinary, that he was served and that the human resources advised for a disciplinary. That at page 4 of the contract 1 month notice was acceptable.
38. The claimant produced letter dated 13th may 2022 by the Group HRO, Adrian Odeny. The letter addressed to whom it may concern stated that the claimant was their employer November 2018- April 2022, that he retained this position due to his good performance, being meticulous and reliable for the three years he was working with the respondent and he was an asset to the organisation.
39. The court having re-evaluated the evidence before the court, being documents by employer finds that there was no evidence before the lower court that the show cause was ever served on the appellant and that there was no evidence the HR called him. There was no evidence of any warning prior to the show cause letter as envisaged under clause 20 of the employment letter (page 26 of ROA). RW1 confirmed that the Group HRO Adrian wrote a letter dated 13th May 2022 to effect that the appellant was an asset to the company and worked without any issues. The court, from the said letter discerned that at



that time the claimant had been dismissed. The termination letter was dated 13th June 2022 backdating the termination to 5th April 2022 which was a day before the show cause letter dated 6th April 2022. The court noted that the appellant pleaded his contract was terminated on 5th April 2022 (page 47 of ROA paragraph *para_66*) before the date of the show cause. The show cause was dated 6th April 2022.

40. The court, taking the foregoing into consideration, found that the termination was not related to the matter in the show cause letter and most important the termination letter did not disclose the reason for termination. The court found that the letter by employer of 13th May 2022 stated the appellant was a good employee. The test for proof of reason is as stated in section 43 of the *Employment Act* to wit- ‘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.’ The court on perusal of the documentary evidence before the trial court, found no evidence on the balance of probability of a valid reason for termination. Indeed, the letter of termination had no reason at all. At paragraph *para_11* the letter referred to termination vide notice as per contract and provided for notice pay. In the upshot the court on re-evaluation of evidence before trial court found there was no substantive fairness.

Whether the trial court erred in finding on procedural fairness in the termination

41. The court established the termination happened on 5th April 2022 as per termination letter and consistent with paragraph 6 of the claimant’s witness statement. The show cause was dated 6th April 2022 a day later. The appellant denied having been issued with the letter which the court finds probable as his employment had already been terminated a day earlier. An employer cannot take out disciplinary proceedings post termination of employment. The court on re-evaluation of the evidence before the lower court held there was no procedural fairness according to section 41 of the *Employment Act* to wit:- ‘41. Notification and hearing before termination on grounds of misconduct

- (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 a shop floor union representative 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 of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”

Whether the appellant was entitled to claims as sought before the trial court

42. The claimant sought the following reliefs before the trial court;-
- a. A finding that the termination of the claimant’s contract was unfair and unlawful.
 - b. An Order compelling the Respondent to reinstate the claimant as its Internal Security Officer without loss of benefits or alternatively;
 - c. Compensation in the sum of Kshs. 7,169,250. 00 as more particularly set out in paragraph *para_88* above.
 - d. Interest on c) above at court rates from date of filing suit until payment in full.



- e. Costs and interest. (page 1-7 was the claim)
43. The court is obliged under section 50 of the *Employment Act* to consider the remedies under section 49 of the *Employment Act* and award as it considers fair on finding unfair termination. The court held the termination was unlawful and unfair for lack of valid reasons and procedural fairness. Section 49 provides for the following reliefs:- ‘(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
 - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.
- (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—
- (a) reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or
 - (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”
44. It was the opinion of the court that, taking into account that manner in which the termination occurred the employer employee relationship had broken down and the respondent being a private business, it would not be prudent to reinstate the Appellant. The court then considered the alternative remedies under section 49. The court noted that Respondent at trial produced terminal benefits calculation (EK5).
45. At paragraph 16 of the RW1 witness statement she stated that the claimant refused to report to the office to collect the cheque when he was informed he was subject of termination (page 17 of ROA). The court then finds do dues were not paid to the claimant. The court awards notice pay of Kshs. 33,000 under section 35 of the *Employment Act* and a salary for 5 days worked in April 2022 Kshs. 8250.
46. On the claim for untaken leave, the appellant did not lead evidence why he never took leave. The Respondent in termination letter admitted prorated leave of 36 days as at 31st March 2022. The court finds no reason to doubt the position of the employer and grants prorated leave pay of 36 days thus(33000/30x36) Kshs. 39600/-.
47. On claim for Service pay- the claimant was on NSSF. No service pay was provided for under the contract. Applying section 35(6) of the *Employment Act* the prayer fails.



48. On prayer for salary on the remainder of the contract- the court finds that this is not a remedy under section 49 of the Employment Act. The basis of the prayer was not established and the same is disallowed.
49. On claim for Damages for unfair termination- This court on appeal held the termination was unlawful and unfair. The court can further to the notice award a maximum 12 months compensation for the unfair termination applying factors under section 49(4) of the Act. The court found the appellant held contract with respondent since 23rd October 2018. His services were terminated in April 2022. The court found no evidence of the appellant having contributed to the termination. The court found that prior to 2018 the claimant had been in employment with the respondent since 2011 under different terms. The court taking into account the aggregate period of service, the lack of evidence of having contributed to the termination and likely difficult in securing similar employment at 50 years, the claimant having been born in 1975, (page 52 of ROA) and the measly NSSF dues hence insufficient social security the court awards the appellant compensation equivalent of 10 months' gross salary thus 330,000.

Conclusion

50. The appeal is allowed. The Judgment of the Honourable Lucy Ambasi(CM) delivered at Nairobi on the 26th February 2024 in Milimani MCERLC No. E1582 of 2022 is set aside and substituted as follows:-

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

- a. The termination of the claimant's contract was unlawful and unfair
 - b. Notice pay of Kshs. 33,000
 - c. Leave pay in lieu for 36 days thus Kshs. 39,600/-
 - d. 5 days (April 2022)salary backpay of Kshs, 8250
 - e. Compensation for unfair termination Kshs. 330,000
 - f. The Total sum awarded for Kshs. 410,850 (b-e above) is payable with interest at court rate from date of judgment of the lower court.
 - g. Cost of the suit.
51. Costs of the appeal are awarded to the appellant.
52. Stay of 30 days granted.
53. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE, 2025.

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

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant : -Ms Naututu



Respondent: Kibuthu

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