Hot Point Appliances Limited v Ogutu (Appeal E149 of 2024)
[2025] KEELRC 1650 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1650 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E149 OF 2024

K OCHARO, J

JUNE 5, 2025

BETWEEN

HOT POINT APPLIANCES LIMITED ..... APPELLANT

AND

ISIAH ONYANGO OGUTU ..... RESPONDENT

(Being an appeal against the Judgment delivered on 27th June 2024 by Hon. Noelyne Reuben Akee (SRM) in Mombasa CMELRC No. E 217 of 2021)

JUDGMENT

Introduction

1. At all material times, the Appellant employed the Respondent as a Brown Goods Technician. His employment was terminated by the Appellant, citing poor performance as the justification. Asserting that the termination was unlawful and unfair, the Respondent initiated legal proceedings against the Appellant in the suit mentioned above, seeking various forms of relief. The Learned Trial Magistrate entered Judgment for him, awarding him general damages for breach of contract, notice pay and compensation under section 49[1][c] of the Employment Act. The central issue in this appeal revolves around whether the Respondent's employment was terminated fairly and whether he was entitled to the relief granted.

The case before the Trial Court

The Respondent's case

2. The Respondent's case was that he began his employment with the Appellant on 1st February 2011 as a Technician. He worked for the Appellant for 10 years until 2nd March 2021, when his employment was unfairly terminated for alleged poor performance. At his dismissal, he was earning a gross monthly salary of Kshs. 35,300.

3. His employment relationship with the Appellant began to deteriorate in 2019. His working environment became harsh and unwelcoming, and he was continually threatened with dismissal. At one point during the year, the Appellant's Human Resources Manager attempted to terminate his employment via Skype but was unsuccessful. Subsequently, his daily workload increased from five to nine tasks.

4. In 2020, disregarding the impact of the COVID-19 pandemic on businesses, including the Appellant's, and the performance of employees, the Appellant pressured him into an unrealistic Performance Improvement Plan.

5. On 28 January 2021, the Appellant issued a show cause letter to him. Subsequently, he was invited to a virtual disciplinary meeting. During the meeting, he was not allowed to defend himself. Afterwards, he was coerced into signing the meeting minutes despite them containing several errors and omissions, rendering the minutes unreflective of the actual events of the meeting.

6. On the 2nd day of 2021, the Appellant terminated his services illegally, wrongfully, and unfairly. He had not committed any infraction to warrant the termination.

7. He asserted that in the circumstances of the case, he was entitled to;

    I. Salary for the days worked in March 2021.

    II. Being a permanent employee, salary for the remaining years: [22 years x12 months x 35,300] =KShs. 9, 319,200.

    III. Severance pay

    IV. 12 months' gross salary compensation for unfair termination: [12 months x 35,300] ..... KShs. 432,600.

    V. One month's pay in lieu of notice.....KShs. 35,300.

    VI. Unpaid,

    VII. Pension,

    VIII. A Certificate of service.

The Appellant's case

8. The Appellant admitted that the Respondent was its employee as a Technician at all material times, having joined its workforce on 25 January 2011.

9. It notified the Respondent of his deliverables as a Technician via a Technician Deliverables Note dated 20th May 2019, receipt of which he acknowledged on the same day.

10. The Respondent was, therefore, aware at all material times of the deliverables expected of him regarding desired productivity levels, the efficacy of repairs, the timeframes within which tasks were to be completed, and the frequency of updates.

11. In 2020, the Appellant noted the Respondent's declining performance. In its letter dated 13th October 2020, the Appellant informed the Respondent that he could be placed under a performance improvement plan.

12. He was notified of the performance improvement plan's duration (13 October 2020 - 12 January 2021) and that he would be reviewed monthly during this period.

13. Ordinarily, the Respondent was expected to achieve 9 HE units daily. To facilitate his achievement of targets during the PIP, the Appellant reviewed the daily targets downwards for the Respondent to 6 HE units per day, for the entire duration of the PIP.

14. The Respondent was encouraged to promptly inform the Appellant of any circumstances that could impede his ability to meet the performance targets.

15. Despite being afforded all the necessary support during the PIP, the Respondent failed to improve his performance and achieve the targets.

16. During the Performance Improvement Plan duration of 15th October 2020 to 14th November 2020, the Respondent was only able to achieve 51 HE units out of a target of 156 HE units [6 units x26 days].

17. In the second month of the PIP [15th November to 14th December 2020], the Respondent could only achieve a daily average of 3 units instead of the targeted 6 units.

18. In the third month, from 15th December 2020 to 12th January 2021, the Respondent could only achieve a daily average of 4.3 HE units instead of the expected 6 HE units.

19. Following the Respondent's failure to meet the targets and improve his performance during the PIP duration, the Appellant issued a show cause letter dated 25th January 2021 asking him to explain why disciplinary action could not be taken against him.

20. Via a letter dated 3rd February 2021, the Respondent responded to the show cause letter. He acknowledged that it had not been possible for him to attain the daily targets during the PIP period. He didn't give any plausible reason as to why.

21. Consequently, in a letter dated 8 February 2021, the Appellant invited him to a disciplinary hearing scheduled for 12 February 2021.

22. In the invitation letter, the Respondent was informed of his right to accompaniment, and that during the hearing, he and his accompanying colleague would be free to ask questions and make representations.

23. The disciplinary hearing was conducted as scheduled on 12 February 2021. The Respondent attended the hearing accompanied by Benjamin Mukatia, a fellow technician.

24. At the hearing, the Respondent confirmed that he had been given sufficient time to prepare his defence for presentation before the Disciplinary Committee. He acknowledged that he had participated in the Performance Improvement Plan review meetings throughout the duration of the Performance Improvement Plan and that he had signed each copy of the minutes of the review meetings to affirm their accuracy.

25. In his defence, the Respondent asserted that he couldn't meet the targets due to the COVID-19 pandemic. This explanation was not persuasive, as other Technicians in the same Job category routinely recorded higher units than the six repair units he had been assigned.

26. When he was unable to provide a plausible explanation for his unsatisfactory performance, he exhibited hostility towards the Disciplinary Committee. He interrupted the meeting with inappropriate interjections, rendering it impossible for the meeting to progress further.

27. The Respondent's witness acknowledged the Respondent's disruptive behaviour during the meeting and noted this in the meeting minutes.

28. The Disciplinary Committee advised that his employment should be terminated. The Respondent was notified of the decision. However, he declined to accept the termination letter, so the Appellant sent it to him via email and registered post, along with a certificate of service.

29. Through his letter dated 2 March 2021, the Respondent acknowledged receipt of the termination letter and certificate of service.

30. The Respondent's employment was therefore terminated on 2 March 2021 due to poor performance and careless or improper execution of his duties, violating the Appellant's policies and procedures.

31. The Respondent was informed that he would receive his final dues upon clearance with all the necessary departments. These included payment for the days worked in March 2021, compensation for unused leave days, a pension as per law, and one month's salary in lieu of notice, less statutory deductions.

32. On or around 1 April 2021, the Appellant remitted the Respondent's final dues, amounting to KShs 31,237.00, to him via a cheque deposit.

The Lower Court's Judgment.

33. By her Judgment of 27th June 2024, the Learned Trial Magistrate held that the Respondent's employment was unfairly terminated, and she granted him notice pay [KShs. 35,300], twelve months' gross salary [KShs. 423,600], as compensation for "unprocedural termination", and General damages for breach of contract [KShs. 3,000,000].

The Appeal.

34. The Appellant, aggrieved by the decision of the Learned Trial Magistrate, filed the present Appeal on the grounds;

    I. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant unfairly terminated the Respondent's employment, which finding was against the weight of the evidence on record and the law applicable in instances of dismissal for poor performance.

    II. The Learned Trial Magistrate erred in law and in fact in awarding 12 months' compensation for unfair termination without any reasonable justification.

    III. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent KShs. 3,000,000 as general damages for breach of contract.

    IV. The Learned Trial Magistrate erred in law and in fact in failing to accord due consideration to the Appellant's pleaded case in its Memorandum of Response, its evidence on record and written submissions filed on its behalf, thereby arriving at an erroneous decision.

    V. The Learned Trial Magistrate misdirected herself on the facts and the applicable law, and instead based her findings on wrong and extraneous considerations, thereby arriving at an erroneous decision.

Analysis and Determination

35. The mandate of the first Appellate Court was espoused in Ngatia Farmer's Co-operative Society Limited v Ledidi & 15 others [2009] KLR 331 as follows;

> "An appeal to this Court from a trial by the High Court is by way of a re-trial, and the principles upon which this court acts in such an appeal are well settled. Briefly, put they are

that, this 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 witness and should make due allowance in that respect. In particular, this 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."

36. In the German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: -

> "A first appeal is a valuable right of the parties and, unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2EA 212)."

37. In my considered view, the instant appeal stands or fails on two main issues, namely: Whether the learned trial Magistrate erred by finding that the Respondent's employment was unfairly terminated, and whether the learned trial Magistrate erred in awarding the reliefs she did to the Respondent.

38. Before delving further into the two primary identified issues, it is essential to emphasise that a balanced and equitable Judgment takes into account all the pleadings submitted by the parties and the evidence presented before the Court. By engaging in this thorough consideration, the Court can identify the respective cases posited by the parties and the issues under dispute, thereby ensuring a balanced and impartial judgment.

39. The Appellant took a clear position throughout the proceedings: it terminated the Respondent's employment for poor performance. In its pleadings, it elaborately averred that the termination was substantively justified and procedurally fair in the context of this ground. The Appellant's witness's statement [turned evidence in chief] detailed the substantive fairness aspect of the decision to terminate the Respondent's employment, contending that the reason was fair and valid, and demonstrated that the Respondent was subjected to a disciplinary process that was in accord with the tenets of procedural fairness.

40. I have thoroughly reviewed the Judgment rendered by the learned trial Magistrate. I must conclude that she did not adequately consider the assertions made by the appellant in its pleadings, nor the evidence provided by its witness. To rephrase, she wholly neglected to account for the appellant's case. Consequently, the resulting Judgment was markedly unbalanced and did not convincingly address the substantive issues in controversy.

41. An employee's employment may be terminated at the initiative of either the employer or the employee. Termination by the employer typically occurs due to misconduct, inadequate performance, incapacity, or operational requirements. An employee can terminate their contract by asserting constructive

dismissal or resignation. Therefore, it is not conceivable that an employee could argue that their employment was terminated unfairly [at the employer's initiative], while simultaneously claiming constructive dismissal, which is at an employee's initiative.

42. In constructive dismissal cases, the provisions of sections 41, 43, and 45 of the Employment Act are inapplicable.

43. The Respondent pleaded constructive dismissal. Constructive dismissal has been understood to mean actions on the part of the employer that drive the employee to leave, regardless of whether there is a form of resignation. The circumstances of constructive dismissal are so infinitely various that no rule of law can provide an exhaustive list of the same.

44. In the Pretoria Society for Care of the Retarded v Loots [1997] 6 BLLR 721[LAC], the Labour Appeal Court aptly put it, thus;

> " When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in fact, saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable working environment. If she is wrong in the assumption and the employer proves that her fears were unfounded, then she has not been constructively dismissed and her conduct proves that she has in fact, resigned."

45. The duty to prove constructive dismissal lies with the employee. I have carefully considered the Respondent's evidence before the learned trial Magistrate and note that it was not geared at all towards establishing constructive dismissal. It didn't establish constructive dismissal. It isn't easy to fathom how and why the learned trial Magistrate could, as she did, make constructive dismissal the basis for her Judgment.

46. The Respondent substantially pleaded the issue of constructive dismissal. The Appellant denied the same. It became an issue of determination. The Respondent's Counsel is off mark to submit that "the case only happened to contain constructive as part of its facts." Further, I am unpersuaded that the learned trial Magistrate didn't make constructive dismissal an integral part of her judgment.

47. The Respondent stated in his pleadings that the termination of his employment was procedurally unfair, as he was not given an adequate opportunity to be heard. Section 41 of the Employment Act sets out a mandatory procedure that any employer contemplating terminating an employee's employment or summarily dismissing an employee must follow. The procedure embodies three components: the notification component, the employer must notify the employee of the intention and the reasons for the contemplation, the hearing component, the employee must be accorded an opportunity to defend themselves against the charges/ allegations in the company of a colleague of choice or a trade union representative if he or she is a member of a trade union, and the employer must consider the representations made by the employee and or the person accompanying him.

48. The Appellant presented evidence that the Respondent had received a notice to show cause and was invited to a disciplinary hearing, which he attended with a colleague. Following the hearing, a decision was made to terminate his employment. He admitted all of this in his evidence under cross-examination. The learned trial magistrate, without considering this evidence or giving any reasons, concluded, and I hold, erroneously so, that the termination was procedurally unfair.

49. A keen analysis of the Appellant's evidence reveals that it conformed with the procedural dictates under section 41 of the Employment Act.

50. The Appellant contended that it terminated the Respondent's employment due to poor performance. The evidence presented to the learned trial Magistrate clearly indicates that the parties canvased this as one of the central issues. However, the learned trial Magistrate failed to examine this issue and decide on it for unclear reasons.

51. In Jane Samba Mukala v Ol Tukai Lodge Limited [2010] LLR 255[ICK], cited with approval by the Court of Appeal in National Bank of Kenya v Samuel Nguru Mutonya [2019] KECA 404 [KLR], the Court stated;

    a. Where performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

    b. It is imperative on the part of the employer to show what measures were in place to enable them to assess the performance of each employee, and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to the decision must be established.

    c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee.

52. The Respondent's case, as discerned from his pleadings and evidence before the trial court, was not that the Appellant lacked a practice or policy to identify poor and good performers, nor that it had no assessment mechanism, or that the Appellant did not take any actions to assist him in improving his performance. Rather, he argued that he was coerced into signing an unrealistic "performance improvement plan". He did not provide details regarding how he was coerced, nor did he explain why and how he considered the Performance Improvement Plan unrealistic. This material fact was not proven, leaving the Appellant's version undiscounted.

53. I have carefully considered the Appellant's material regarding the termination of the Respondent's employment due to poor performance, and hold that it demonstrates that the Appellant had a procedure for assessing technicians' performance. By tracking the number of tasks completed, it could identify poor or good performance; the Respondent had specific daily targets, which he failed to meet. As a result of the failure, the Appellant initiated measures to assist him in improving his performance, placing him on a Performance Improvement Plan. However, his performance did not improve, leading to disciplinary action, which I have concluded was procedurally fair.

54. For the foregoing premises, I am persuaded that termination of the Respondent's employment was procedurally and substantively fair. The learned trial Magistrate's finding that it wasn't is hereby set aside.

55. I have carefully considered the averments in the Respondent's pleadings; nowhere did he seek damages for breach of contract. Yet the learned trial Magistrate awarded him KShs. 3,000,000. A relief can only be availed to a party if the party had sought the same in their pleadings, to enable the adversary to challenge or admit it. The award of the general damages was without foundation. It is hereby set aside.

56. Having found that the termination of the Respondent's employment was fair, the compensatory award under section 49[1][c], and the notice pay that the learned trial Magistrate awarded him, cannot stand. I hereby set aside the same.

57. In the upshot, the Appeal herein is allowed. The learned trial Magistrate's Judgment is hereby set aside. The suit before the trial court is dismissed with costs.

58. The Appellant shall bear the costs of this appeal.

READ SIGNED AND DELIVERED THIS 5TH DAY OF JUNE 2025.

OCHARO KEBIRA

JUDGE