



**Modern Coast Builders Limited v Sdalim (Appeal E059 of 2024)
[2025] KEELRC 2349 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E059 OF 2024**

**K OCHARO, J
JULY 31, 2025**

BETWEEN

MODERN COAST BUILDERS LIMITED APPELLANT

AND

SALIM ALI SDALIM RESPONDENT

(Being an Appeal against the Judgement and Decree of Hon. Maureen Nabiya, Principal Magistrate, in MCELRC NO. 097 of 2020, dated and delivered on 7th March 2024)

JUDGMENT

Background

3. Following the directions of this Court, the appeal was canvassed by way of written submissions.

The Respondent's Case Before the Trial Court.

4. It was the Respondent's case that he first came into the employment of the Appellant on 23rd October 2012, as a Dispatch Clerk. His employment was without a written contract. He worked for the Appellant up until 17th February 2020, when the Appellant summarily dismissed him.
5. At the time of separation, he was earning a gross salary of KShs. 49,072.
6. On or about 19th December 2020, he committed a clerical error by inadvertently recording details of a motor vehicle KCV 853 W instead of KBR 230K on the vouchers intended for disbursing drivers' allowances prior to a trip.
7. The error notwithstanding, the allowance was correctly paid to the driver of the motor vehicle KBR 230K. No driver was paid twice as a result of the inadvertent recording.



8. On 7th February 2020, the Accounting Office noticed that two vouchers bore the exact motor vehicle registration numbers. He was summoned to the office on 19th December 2020, and upon examining the vouchers, he indeed identified the error.
9. He apologised to the supervisors and wrote to them explaining the clerical error and emphasising that no one had been paid twice.
10. On 10th February 2020, he was summoned to a disciplinary hearing, where he was told to either admit to issuing the voucher twice or forfeit his January pay.
11. On 17th February 2020, the Appellant issued him with a summary dismissal letter. Prior to the dismissal, he had not had any disciplinary issues.
12. The dismissal was unlawful, illegal, and unfair, as the Respondent did not give him an opportunity to be heard, issue him with a notice of termination, and pay his terminal dues.
13. He asserted that during his employment, he was not permitted to take his annual leave. Despite this, he was not compensated in lieu.
14. He worked on Sundays and public holidays but could only be paid KShs—1000, whenever he worked, which was an underpayment.
15. After dismissing him from his employment, the Appellant refused to pay him his service pay.

The Appellant's case.

16. The Appellant called witness George N. Nzoi to testify on their behalf before the trial court.
17. It was the Appellant's case that the Respondent was employed as a Dispatch Clerk through a letter of employment dated 23rd October 2012, with a monthly salary of KShs. 25,000.
18. On or about February 2020, the Appellant discovered that the Claimant, in the course of his duties, breached his contractual obligations by duplicating a voucher dated 23rd December 2019 for KShs. 8000 and another dated 30th December 2019 for KShs. 8,100. The discovery was made while it was carrying out a reconciliation of its accounts.
19. Upon further investigation, it was discovered that the Respondent had duplicated a cash voucher for one task, contrary to policies and practices. This represented gross misconduct and a breach of his contractual duties and company policy.
20. As a result, he was issued a notice to show cause why disciplinary action should not be taken against him, as his conduct amounted to gross misconduct, justifying dismissal. He was also summoned for a disciplinary hearing on 10th February 2020.
21. On 10th February 2020, a disciplinary hearing was held in the presence of the Respondent. The Respondent was allowed to defend himself through oral and written representations. The Respondent requested more time, and the meeting was postponed to 12th February 2020, to enable him to provide necessary evidence. On 12th February 2020, at the hearing, the Respondent admitted issuing the voucher twice.
22. The Appellant further stated that the Respondent was paid all his terminal dues and had no leave days outstanding at the time of separation.
23. The Appellant further argued that the Respondent's employment termination was justified. It was due to the Respondent's own actions. The termination was procedural, lawful, and fair.



The Judgment by the Lower Court.

24. After reviewing the parties' respective evidence and submissions by their counsel, the learned trial Magistrate entered judgment in favour of the Respondent against the Appellant. The learned trial Magistrate found that the termination of the Respondent's employment was unfair, as the Appellant failed to prove that a further hearing was held on 12th February 2020, as alleged. She ordered the Appellant to pay one month's salary in lieu of notice, KShs. 49,072; compensation for earned but untaken leave days, for three years, amounting to KShs. 103,068; twelve months' gross salary, KShs. 585,864, as compensation for unfair termination; interest on the awarded sums and the costs of the suit.

The Appeal

25. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;
- i. The Learned Magistrate erred in law and fact in holding that the termination process was unfair, even though the Claimant was accorded opportunities to be heard, and that his termination was a result of a fair process as contained in the Summary Dismissal Letter dated 17th February 2020. Also, the hearing was conducted at Modern Coast Builders & Contractors' Mombasa Yard and in the presence of other staff members.
 - ii. The Learned Magistrate erred in law and in fact when she premised her holding that the termination process was unfair due to the fact that the Respondent herein was not accorded a second disciplinary hearing or follow-up meeting on 12th February, 2020. The evidence presented proved that the Respondent herein was scheduled to appear for a second hearing but failed to show up and also did not present any evidence, which he had promised to adduce to justify his actions.
 - iii. The Learned Magistrate erred in law and fact in holding that the Respondent herein is entitled to 100 per cent of the claim without taking into account the fact that dues owed to the Respondent herein had been paid. The learned Magistrate failed to take into account the fact that the Respondent herein had received payments from the Appellant.
 - iv. The Learned Magistrate erred in law and fact in holding that the Respondent is entitled to one month's salary in lieu of notice (49,072) when the records and evidence show that the Respondent had been paid all his outstanding dues.
 - v. The Learned Magistrate erred in law and fact in holding that the Respondent herein is entitled to KES. 103,068 as leave pay for the three years since termination, which is contrary to the evidence available to the court that all dues owed to the Respondent were paid to the Respondent herein.
 - vi. The Learned Magistrate further erred in law and fact in holding that the Respondent herein is entitled to KES. 103,068 as leave pay for the three years despite the same being out of time, as the same was not claimed within 12 months of the cause of action arising under the heading of a continuous injury.
 - vii. The Learned Magistrate erred in law and in fact in holding that the Respondent herein is entitled to 12 months' salary (KES. 588,864) for unfair termination when the same termination process was conducted in a fair and just manner with the Respondent herein appending his signature to the termination letter voluntarily. Therefore, the termination process does not



meet the definition of unfair termination provided for under section 45 of the *Employment Act* (Amended), 2007.

- viii. The Learned Magistrate erred in law and fact and wrongly exercised her jurisdiction by awarding the maximum compensation of 12 months' salary (KES. 588,864) for unfair termination when the same termination process was conducted in a fair and just manner and further faulting the Respondent for not conducting a second disciplinary meeting which was instigation of the Claimants himself.
- ix. The Learned Magistrate erred in law and fact in holding that the termination process was unfair when the Respondent's termination was a result of his own actions, which were in violation of the Appellant's policies and terms of contract signed between the parties, and that the consequences of the same should be borne by the Respondent herein.
- x. The Learned Magistrate erred in law and fact in holding that the termination process was not fair when the reasons for the Respondent's summary dismissal were based on the Respondent's negligence, which amounted to gross misconduct, wherein the Respondent failed to present sufficient cause to justify his actions during the disciplinary.
- xi. The Learned Magistrate erred in law and in fact when she failed to acknowledge the fact that the Respondent herein was accorded a second hearing chance but failed to show up, thereby leaving the Appellant with no option but to summarily dismiss the Respondent herein.
- xii. The Learned Magistrate erred in law and fact when she misdirected her mind to matters which were not before the court when the evidence adduced showed that the termination process was procedural, lawful and fair and dues owed to the Respondent herein were paid.
- xiii. The Learned Magistrate erred in law and fact in holding that the termination was unfair while the Contract of Employment signed between the Appellant and the Respondent herein provided for summary dismissal, a provision which was violated by the conduct of the Respondent herein, thereby necessitating his fair and justified dismissal.
- xiv. The Learned Magistrate misdirected herself and erred in fact and in law in failing to take cognisance of the fact that the Respondent had not discharged the burden of proof placed upon him by the *Evidence Act* Cap 180 Laws of Kenya.
- xv. The Learned Magistrate wholly erred in law and fact in arriving at the said decision, consequently causing a miscarriage of justice.

Analysis and Determination

26. This being a first appeal, I must reassess the evidence on record and arrive at my own independent conclusions. [see *Kenya Ports Authority v Kuston [Kenya] Limited* [2009]2EA212. In so doing, this Court will not lose sight of the fact that, unlike the trial Court, I didn't have the benefit of hearing or seeing the witnesses. I will only interfere with such findings if they are anchored on no evidence or the learned Magistrate acted on wrong principles in arriving at the findings.
27. In *Mohammed Mohammed Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, Hancox, JA. Stated;

“The Appellate Court only interferes with the trial Court's findings of fact if it is shown that it took into account facts or factors which he should not have taken into account, into account, or that he failed to take into account matters of which he should have taken into



account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

28. I have carefully considered the fifteen grounds of appeal, which, in my view, are excessively divided, the parties’ pleadings, evidence (both oral and documentary that were presented before the trial court), and the submissions filed herein by the counsel for the parties. In my assessment, two issues will effectively determine this appeal: [a] whether the summary dismissal against the Respondent was fair, and [b] whether the Respondent was entitled to the reliefs awarded to him by the learned trial Magistrate.

a. Was the Summary dismissal of the Respondent from employment fair?

29. There is no dispute that the Respondent’s employment was brought to an end at the initiative of the Appellant. As correctly submitted by Counsel for the Appellant, the Respondent was summarily dismissed from his employment. Owing to the diametrically opposite positions taken by the combatants herein, the above posed question springs up for determination.

30. Faced with the question, as is the above, a Court must appreciate that the *Employment Act, 2007*, requires it to consider two statutory aspects, procedural and substantive fairness. Furthermore, it places distinct legal burdens on both the employer and the employee in disputes regarding the termination of an employee’s employment or summary dismissal of an employee. Elaborating on the two aspects and the legal burden on the employer, the Court of Appeal, in the case of *Pius Machafu Isundu v Lavington Security Guards Limited* [2017] eKLR, aptly stated;

“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law.

The employer must prove reasons for termination/dismissal [section 43]; prove that the reasons are valid and fair [section 45]; prove that the grounds are justified [section 47[5], among other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination.....”

31. Procedural fairness pertains exclusively to the processes leading up to termination or summary dismissal, whereas substantive fairness concerns the merits of the decision itself. Section 41 of the *Employment Act, 2007*, outlines a procedure that employers must follow when considering terminating an employee’s employment or executing a summary dismissal. It is now well-established law that compliance with this procedure is mandatory, and any failure by the employer to adhere to it renders the termination or summary dismissal unfair.

32. Additionally, the process encompasses three key elements: notification, whereby the employer shall inform the employee of the contemplated action and the grounds for it; the hearing- employer must provide the employee with adequate time to prepare and to make representations regarding the proposed action and its grounds, in the presence of a colleague of their choice or a trade union representative if the employee is a member; and finally, consideration, in which the employer shall consider the employee’s representations, along with those of the accompanying person, prior to making a final decision.

33. The learned trial Magistrate determined that the termination of the Respondent’s employment was unfair, citing the absence of evidence indicating a “follow-up meeting” on 12th February 2020. While the term “follow-up meeting” may be considered a misnomer, this Court observes that, given the legal responsibility to establish procedural fairness, the Appellant, through the testimony of its witness, contended that the show cause letter dated 10th February 2020, served as an invitation to a disciplinary



hearing scheduled for the same day at 5:00 pm. This Court notes that the letter was presented as evidence before the trial Court, and that the Respondent admitted attending the meeting.

34. The minutes of the show cause meeting of 10th February 2020, read, Salim asked for time to go and check for the voucher, but up to now has not, but is requesting time up to 12th February 2020 to provide necessary evidence. Salim admitted the mistake of writing a voucher twice, one dated 23rd December 2019, for Kshs. 8000 and another one dated 30th December 2019 of KShs. 8,100 for a vehicle that is still on transit. The case will resume on 12th February 2020 and listen to Salim and then issue the verdict.”
35. From the foregoing, it is evident that although the hearing was scheduled for 10th February 2020 and commenced accordingly, it was not concluded. Instead, it was deferred to 12th February 2020, at which time the Respondent was to be heard further. In my view, with this, the trial Court reasonably expected the Appellant to place minutes or any other form of evidence to demonstrate that the Respondent was further heard on the 12th February 2020, and that the decision to dismiss him flowed from the proceedings of both the 10th and 12th of February 2020.
36. The Appellant’s Counsel submitted that though the matter was adjourned for further hearing on 12th February 2020, the Respondent didn’t turn up, leaving the Appellant with no option but to dismiss him. The Respondent cannot be heard to complain that he was not heard. To buttress this submission, Counsel cited the case *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] where the Court stated;

“Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights that courts are duty-bound to respect and uphold. As often stated, justice is a two-way highway.”

37. With great respect, the submissions on this point by Counsel are unfortunately and deliberately misleading. They aren’t aligned to the Appellant’s pleadings and evidence. In paragraphs 10 and 11 of the Appellant’s Statement of Response, it was averred;

“10. The Respondent states that the hearing was conducted on 10th February, 2020, at Modern Coast Mombasa Yard, in the presence of other staff members, where the Claimant was given an opportunity to defend himself and his oral and written testimony was received, the Claimant further sought time, and the meeting was postponed to the 12th February, 2020 to enable the Claimant provide necessary evidence.

11. On the 12th February, 2020, at the hearing, the Claimant admitted issuing the voucher twice, then sought time to look for the voucher, and the hearing proceeded. The Respondent listened to him and issued a verdict.”

38. In their pleadings, the Appellant explicitly stated that, on 12th February 2020, a disciplinary hearing was held, during which the Respondent was heard, and a verdict was subsequently delivered. It cannot be permissible for the Appellant to assert in evidence or submissions that the hearing did not take place, as the Respondent was not present. Parties are bound by their own pleadings. Any evidence that contradicts a party’s pleadings is irrelevant. The summary dismissal letter does not mention that a further disciplinary meeting was held on 12th February 2020, nor that the Respondent failed to attend it. Nothing could have been easier than for the Appellant to mention that, as reasonably, any reasonable employer could in the circumstances of the matter.



39. The Respondent contended that although the disciplinary hearing scheduled for 10th February 2020 was deferred to 12th February 2020, the meeting was not duly convened. Consequently, the Appellant proceeded to dismiss him without conducting a full hearing. In light of the foregoing premises, I am persuaded by the Respondent's version and conclude that he was dismissed based on an incomplete disciplinary hearing.
40. A dismissal based on an incomplete disciplinary hearing will undoubtedly be procedurally unfair and evidence of unfair labour practices by the employer.
41. Counsel for the parties devoted considerable effort to the issue of substantive fairness in their submissions. This Court notes that the learned trial Magistrate's conclusion that the termination was unfair was solely based on procedural fairness. She did not consider the aspect of substantive justification at all. None of the parties challenged the judgment, citing the trial Court's failure to address this element. By their submissions, the parties are inviting this Court to consider the aspect. I decline to.

Was the Respondent entitled to the reliefs awarded?

42. Section 49 of the *Employment Act* 2007 grants the court the authority to award compensatory damages to an employee who has successfully challenged their employer's act of terminating their employment or summarily dismissing them as unfair. However, the award is at the court's discretion, depending on the circumstances of each case. As in the exercise of any other legal discretion, reasons must be given for the exercise. In the context of the *Employment Act*, Section 49 delineates the factors considered in deciding whether or not to grant the relief, as well as the extent of such relief.
43. This Court notes that the learned trial Magistrate did not provide reasons for the extent of the award. I have carefully considered that the Appellant's liability arose solely due to a lack of procedural fairness. Additionally, the conduct of the Appellant in summarily dismissing the Respondent from employment based on an incomplete disciplinary hearing, along with the length of service [almost 8 years], leads me to agree with the learned trial Court's conclusion that the Respondent was entitled to the compensatory relief. However, I must emphasise that if she had taken into account the factors I have outlined above, she might have awarded a lesser amount.
44. In light of the foregoing, this Court hereby sets aside the award made by the learned trial Magistrate. The award is hereby reduced to five [5] months' gross salary. The applicable gross wage is Kshs. 49,072. Given the inadequately challenged payslip tendered in evidence by the Respondent, I am not persuaded by the Appellant's Counsel that the salary specified in the employment contract, KShs. Twenty-five thousand would remain the same eight years later.
45. The Appellant challenged the learned trial Magistrate's award under the head of compensation for leave days earned but not taken. I have carefully considered the documents that were presented before the trial Magistrate by the Appellant, and agree with the Respondent's Counsel that they didn't relate to annual leave under section 28 of the *Employment Act*. The Appellant didn't prove that they discharged their statutory obligation at all material times, allowing the Respondent to enjoy his statutory right to annual leave.
46. Contrary to Counsel for the Appellant's Counsel's submissions, sick offs and paid off days are never part of the annual leave contemplated under section 28 of the *Employment Act*. They cannot be a factor diminishing an employee's right to pursue a claim for earned but untaken leave days.



47. In the upshot, the Appellant's appeal succeeds partially, only to the extent that the learned trial Magistrate's award for compensation for unfair dismissal is set aside, and reduced to KShs. 245, 300. Each Party to shall bear its costs of this appeal.

READ, SIGNED, AND DELIVERED VIRTUALLY IN MOMBASA ON JULY 31, 2025.

OCHARO KEBIRA

JUDGE

