Mutungi v Al-Barakat Agency Limited (Appeal E198 of 2024)
[2025] KEELRC 2402 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2402 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E198 OF 2024

K OCHARO, J

JULY 17, 2025

BETWEEN

BONIFACE MUTUA MUTUNGI ..... APPELLANT

AND

AL-BARAKAT AGENCY LIMITED ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of Honourable J. NYARIKI S.R.M in the Chief Magistrate's Court Mombasa, CMEL Cause No. 169 of 2022, delivered on 12th September 2022)

JUDGMENT

Introduction

1. By his Memorandum of Appeal herein dated 26th September 2024, the Appellant assails the Judgment of the Honourable Senior Resident Magistrate in the cause mentioned above, putting forth the principal grounds that she erred in law and fact;

    a. In relying on entirely wrong facts and principles, and as a result, arriving at wholly erroneous decisions altogether.

    b. In replacing facts and evidence by both parties and inferring her own facts in complete disregard of the evidence before her.

    c. In finding that the Respondent had followed the laid down procedure prior to the termination of the Appellant, and the termination was lawful.

    d. In denying the Appellant house allowance contrary to settled law and authorities placed before her.

e. In holding that there was due process on the part of the Respondent in the absence of proof of the same, and despite there being no evidence of compliance with the relevant law.

f. In holding that there was no Notice of termination produced by the Appellant and that the Notice relied upon by the Appellant was unsigned when, in fact, there was evidence produced to the contrary.

g. In holding that there was a disciplinary hearing meeting conducted by the Respondent despite there being no evidence of the same.

h. In making a finding that the Appellant did not prove termination on the one hand and on the other hand making a finding that the Respondent had complied with termination procedures, namely issuance of Notice to Show Cause and disciplinary hearing, rendering the judgment entirely contradictory.

2. When the matter came up for directions on the appeal, this Court ordered that the appeal be canvassed by way of written submissions and gave timelines for the parties to file their respective submissions. They complied. Their submissions are on record.

The case before the trial Court

3. The Appellant stated that he was verbally employed by the Respondent as a General Clerk in February 2018 at a basic salary of KShs 20,000 per month.

4. On 11th January 2022, he received a termination letter from the Respondent notifying him that his contract was to be terminated effective 10th February 2022. He was asked not to report to work anymore. There was no justifiable reason given to him why his employment was being terminated.

5. He contended further that the termination of his employment was without adherence to the dictates of procedural fairness. As such, the same was unlawful and amounted to unfair labour practice. He was neither issued with a notice to show cause nor afforded a fair hearing before his employment was terminated.

6. He further asserted that the monthly salary that he earned was below the minimum wages as stipulated under Legal Notice No. 2 of the Regulations of Wages [General] [Amendment] Order,2018.

7. He asserted that for 4 years he served the Respondent, but he never took his annual leave. At the time of separation, he had 48 accrued leave days, but they were unutilized.

8. He was not paid his house allowance of KShs. 3, 135.74 throughout the 4 years he worked for the Respondent.

9. The Respondent did not pay and failed to remit his statutory deductions to NHIF and NSSF for the period he worked for it.

The Respondent's Case before the Trial Court

10. Through the evidence of its Supervisor, David Mbithe, the Respondent stated that it first employed the Appellant to work as a Junior Clerk on a fixed-term contract for one year.

11. The Appellant's engagement was defined by several fixed-term contracts over different periods: from January 2018 to 31st December 2019, from 1st January 2019 to 31st December 2020, from 1st January 2020 to 31st December 2020, from 1st January 2021 to 31st December 2021, and from 1st January 2022 to 10th January 2022. The last contract was terminated due to the Appellant's gross misconduct.

12. The Appellant's earnings at the time of his termination were a total monthly wage of KShs. 20,195.00, which included all relevant allowances, such as housing allowance and motorcycle maintenance allowance.

13. The Appellant's employment relationship with the Respondent was amicable and continuous from 1st January 2022 until 11th January 2022, when, due to his persistent theft, the Respondent was forced to terminate his contract during probation and issued him a one month's paid notice.

14. The Respondent argued that the Appellant did not carry out his duties diligently and honestly. He misconducted himself on various occasions, which led to several warning letters being issued against him. Despite these warnings, he did not improve his behaviour. On June 22, 2021, he was issued a show cause letter. His employment was ultimately terminated by a letter dated January 11, 2022.

The Trial Court's Judgment

15. After hearing the parties regarding their respective cases, the learned trial Magistrate, by her judgment dated 12th September 2024, dismissed the appellant's case, primarily on the ground that he failed to establish that the Respondent had terminated his employment.

The Appeal.

16. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal on the grounds set out hereinabove.

Analysis and Determination

17. Firstly, as this is a first appeal, this Court is obliged to re-examine and re-assess the evidence and material presented before the trial Court and to arrive at its own independent findings and conclusions. This position, as outlined in detail in the case of Selle vs Associated Motor Boat Co. [1968] EA 123).

18. 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 as follows: -

> " We have considered the records for the two appeals, the parties' submissions and the law. This being a first appeal, we are cognizant that our primary role is to re-evaluate the evidence before the ELRC and draw our own conclusions. 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, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

19. I have carefully considered the material that was placed before the learned trial Magistrate, the grounds of appeal set out hereinabove, and the submissions by both Counsel for the parties and return that the Appellant's grounds of appeal can be condensed into the following principal grounds:

    I. At separation, under what form of contract was the Appellant serving?

    II. Whether the Respondent terminated the Appellant's employment.

    III. If the answer to [I] above is in the affirmative, whether the termination was unfair.

    IV. Was the Appellant entitled to the reliefs sought?

20. It was not disputed that, at all material times, the Appellant was an employee of the Respondent. However, the parties appeared not to agree on the form of employment contract under which he was serving at the time of separation. The nature of an employment contract between the employee and the employer defines the parties' rights, obligations, and protections whenever a dispute arises out of the relationship. In the circumstances of the matter before her, the learned trial Magistrate was reasonably expected to distil the issue regarding the nature of the Appellant's employment at the material time and decide thereon. This she did not do, and as will be shown shortly hereinafter, it led her not to consider reliefs which she ought to have.

21. The Respondent asserted that the Appellant, throughout his service, served under various fixed-term contracts. The tone of the Appellant's memorandum of claim and his evidence suggested that he was employed under an indefinite contract. In his Reply to the Memorandum of Response dated 2nd October 2023, the Claimant specifically denied the Respondent's assertion that he served under fixed-term contracts.

22. A crucial element of the employment agreement, namely the nature of the contract, was in dispute. Under Section 10(7) of the *Employment Act*, 2007, it became incumbent upon the Respondent to demonstrate that, at the time of separation, the Appellant was employed under a fixed-term contract that commenced on 1st January 2022. I have carefully considered the evidence by the Respondent and conclude that it didn't prove the term.

23. In light of the foregoing premise, I am not convinced that the Appellant served, and was serving at the time of separation, under a fixed term contract[s].

24. It was the Appellant's case before the trial Magistrate that his employment was terminated unfairly at the initiative of the Respondent. The learned trial magistrate held;

> " .....In the instant case, the Claimant has not proved to the Court that indeed he had been terminated from employment by the Respondent; there was no letter of termination, and the only document he sought to rely on was an unsigned notice, which the Respondent, through its witness, has greatly disputed. Further, the Court has noted that there was a notice to show cause and a disciplinary hearing."

And proceeded to dismiss the Appellant's case.

25. As correctly submitted by Counsel for the Appellant, this holding by the learned trial Magistrate was utterly inconsistent with the evidence before her. I have carefully considered the pleadings by the Respondent, the witness statement of its witness [turned his evidence in chief], his oral testimony in chief and cross-examination, and note that throughout, the fact that the Appellant's employment was terminated at the Respondent's initiative was admitted; admitted facts never require proof. I am challenged to understand the basis on which the learned trial Magistrate concluded that the Appellant

needed to prove that the Respondent terminated his employment, given the clear admission. That conclusion was entirely incorrect.

26. I now turn to consider whether the termination was unfair. Tasked to determine whether the termination of an employee's employment was fair or not, a Court is enjoined to consider two vital statutory aspects. The presence or absence of procedural fairness in the process leading to the decision to terminate, and the substantive justification for the decision. Also see Pius Isindu Machafu vs Lavington Security Guards Limited [2017] eKLR.

27. Section 41 of the *Employment Act* 2007 establishes a mandatory procedure that any employer contemplating terminating an employee's employment must follow; otherwise, the termination will be considered unfair under the provisions of section 45 of the Act. The procedure comprises three components. The notification component requires the employer to inform the affected employee of their intention and the reasons for it. The hearing component requires the employer to provide the employee with an adequate opportunity to prepare and make representations on the reasons. Lastly, the employer must consider the representations made by the employee and/or the person accompanying them before making a final decision.

28. The onus to demonstrate that there was compliance with the provisions of this section of the law is always on the employer. I note that in a bid to prove that it conformed with the dictates of procedural fairness, the Respondent asserted that it issued the Appellant with a notice to show cause dated 22nd June 2021. The Appellant denied receiving the show cause letter. The Respondent was asserting service of the same; it was its duty to prove the service. It didn't.

29. In the show cause letter, the Appellant was accused of stealing the Respondent's Client's employee's cellphone. This Court notes that neither the employee nor the Client was named in the letter. Referencing the show cause letter, in a letter dated 30th September 2021, the Respondent wrote;

> "……Lastly, the company has forgiven you and given you another opportunity to transform."

30. It is therefore clear that the matter concerning the alleged misconduct of theft was settled, with a warning and forgiveness extended to the Appellant. In my view, it would be a breach of the principles of procedural fairness for an employer to seek to revive a matter on which an employee has been forgiven and warned about, and then use it as the basis for disciplinary proceedings at a later date. At most, the matter could be considered a factor influencing the severity of sanctions in subsequent disciplinary processes against the employee.

31. The Respondent asserted that the Appellant was invited to a disciplinary hearing and made representations prior to the termination of his employment. Accordingly, it adhered to the requirements outlined in section 41 of the *Employment Act*. The Appellant vigorously denied this assertion. After a meticulous review of the evidence presented by the Respondent, I have concluded that it does not substantiate the claim that the Appellant was ever invited to a disciplinary hearing with explicit information regarding the allegations against him, nor that he was heard on any accusations, nor that a decision was made following a disciplinary hearing.

32. In conclusion, the termination of the Appellant's employment was procedurally unfair.

33. Section 43 of the *Employment Act* states that, in disputes related to the termination of an employee's employment, the employer has the legal responsibility to prove the grounds for termination. Furthermore, Section 45(2) requires the employer to demonstrate that the reasons provided are fair and valid. In my view, a valid reason is one that can legitimately justify the dismissal/termination.

34. I have carefully considered the evidence presented before the learned trial Magistrate regarding the reasons for the termination. The evidence was so sketchy and incoherent that she should have concluded that the reason was not proved. It is not sufficient to assert that the employee's employment was terminated on a particular ground without providing adequate evidence, and then expect the Court to venture into the realm of speculation.

35. In his evidence under cross-examination, the Respondent's witness admitted that the Respondent did not set out any reasons for the dismissal in the dismissal letter.

36. In sum, the learned trial Magistrate erred in law in not holding that the dismissal against the Appellant was without substantive fairness.

37. Having found, as I have hereinabove, that the dismissal against the Appellant was both procedurally and substantively unfair, I now turn to consider whether the Appellant was entitled to the reliefs sought.

38. The Appellant's employment was terminable by notice pursuant to the provisions of Section 35 of the *Employment Act*. Accordingly, if the requisite notice was not issued, he would typically be entitled to compensation equivalent to one month's salary in lieu of notice. In the present case, the Respondent asserted, and this was not disputed, that a one-month termination notice was issued. Indeed, during cross-examination, he admitted that the termination letter included a one-month notice period. He is not entitled to the notice pay sought.

39. Under the *Labour Institutions Act*, particularly under section 48, an employee to whom Wage Orders apply but who was at any time paid less than the minimum wage specified in the Wage Orders has the right to claim from their employer the difference between what they could have earned if paid according to the Wage Orders and what they actually received. The relief for underpayments does not depend on a claim for unfair termination. The dismissal of a claim for unfair termination does not automatically mean that the claim for underpayments can be denied. The entitlement to relief must be considered independently of the claim.

40. The learned trial Magistrate did not approach this relief appropriately, therefore.

41. There was no dispute that the Respondent employed the Appellant as a Clerk. The Appellant's Counsel argued that under the Minimum Wage Order, as a General Clerk, the Appellant should have earned Kshs 20,904.90, but at the time of separation, he was earning KShs. 20,000. The Appellant stated under cross-examination that his salary was KShs. 20,195. The Respondent's witness confirmed this in his evidence. I take the figure, Kshs. 20,195 as the amount the Appellant was earning at the material time.

42. The Appellant placed before the learned trial Magistrate the Regulation of Wages [General] [Amendment] Order, 2018, which came into effect from 1st May 2018. Under the Order, inclusive of a house allowance, a General Clerk was entitled to a minimum monthly wage of KShs. 20,904.90. As such, the Appellant was underpaid KShs. 709.9 monthly from the 1st May 2018 to 10th February 2022, a period of 42 months. Had the learned trial Magistrate appropriately considered the relief, no doubt, she could have awarded the Appellant compensation for the underpayment, KShs. 709.9 x42 KShs. 29, 815.8.

43. The Appellant submitted that the learned trial Magistrate erred in law and fact when she failed to find that the Appellant was entitled to compensation for unpaid house allowance for 48 months. I note that the trial court did not consider this relief as one that could be granted independently of the claim for unfair dismissal/termination. In fact, she did not consider it at all.

44. Having found that the minimum wage prescribed in the Wage Order mentioned above was inclusive of house allowance, and granted the underpaid amount, to issue a further award under this head would amount to double compensation and unfair enrichment on the part of the Appellant.

45. Under section 35 of the *Employment Act*, the Appellant was entitled to service pay, a statutory benefit not dependent on the claim for unfair termination/dismissal. The trial Magistrate erred when she did not consider the Appellant's entitlement to the relief. I hereby award him KShs. 48, 242.08.

46. Section 49[1][c] of the *Employment Act* empowers this Court to award compensatory damages in favour of an employee who successfully challenges their employer's decision to terminate their employment as unfair. However, it is essential to note that the authority is discretionary, exercised on a case-by-case basis. I have carefully considered the unclear circumstances under which the Respondent decided to terminate the Appellant's employment, the length of service he rendered to the Respondent, the Respondent's failure to adhere to the dictates of the law and more specifically, matters procedural and substantive justice, and hold that the Appellant is entitled to the relief, and award him five months' gross salary, KShs. 104, 524.5.

47. I decline to grant the reliefs sought for the payment of unremitted NSSF and NHIF contributions. The obligation on the employer to make these contributions is outlined in the specific acts that establish the funds. The Acts provide statutory mechanisms for enforcing payment by the employer in cases of non-remittance. These mechanisms should be utilised.

48. The Appellant asserted that throughout his employment with the Respondent, he was not allowed to take leave. Under Section 28 of the *Employment Act*, leave is a statutory right of an employee. Facilitating enjoyment of the right is the employer's statutory responsibility. From the outset, the Appellant was explicit about the period of his earned but unutilized leave days. With this, the Respondent didn't bother to put forth any documentary evidence to discount the position taken by the Appellant. In the circumstances, the trial Court ought to have granted the relief, compensation for earned but untaken leave days. I award him, KShs. 58, 533.72[21x4x20,904.9/26].

49. In the upshot, the Appellant's appeal succeeds. The learned trial Magistrate's Judgment is hereby set aside. In place thereof, this Court substitutes the same with its own, allowing the Appellant's claim in the lower court in the following terms;

    I. A declaration that the dismissal of the Appellant from employment was procedurally and substantively unfair.

    II. Compensation for salary underpayments, KShs. 29,815.8.

    III. Service Pay, KShs. 48,242.08.

    IV. Compensation for unfair dismissal pursuant to section 49[1][c] of the *Employment Act*, KShs. 104, 524.5.

    V. Compensation for leave days earned but not taken, KShs. 58,533.72.

    VI. Interest on the sums awarded above at court rates from the date of this Judgment till full payment.

    VII. Costs of the lower court suit.

    VIII. Costs of this Appeal shall be for the Appellant.

READ, DELIVERED AND SIGNED THIS 17th DAY OF July 2025

OCHARO, KEBIRA.

JUDGE