



Kenafriic Bakery Limited v Wanyama & 2 others (Employment and Labour Relations Appeal E256 of 2023) [2025] KEELRC 2030 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2030 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E256 OF 2023**

JW KELI, J

JULY 4, 2025

BETWEEN

KENAFRIC BAKERY LIMITED APPELLANT

AND

KEVIN BARASA WANYAMA 1ST RESPONDENT

RODGERS ALUKWE ONGATA 2ND RESPONDENT

JOHN KHUYOLE WAMBICHI 3RD RESPONDENT

(Being an appeal against the entire Judgement and Orders of Hon. R. L. Musiega (SRM) delivered on 17th November, 2023 in CMEL Cause No. E1223 of 2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Being an appeal against the entire Judgement and Orders of Hon. R. L. Musiega (SRM) delivered on 17th November, 2023 in CMEL Cause No. E1223 of 2021 between the parties filed a memorandum of appeal dated the 7th of December, 2023, and a supplementary memorandum of appeal dated the 18th of December 2023 seeking the following orders:-
 - a. The appeal be allowed.
 - b. The Judgement of Senior Resident Magistrate Hon Rawlings Liluma delivered on 17th November, 2023 in CMEL Cause No. E1223 OF 2021 be set aside.
 - c. The Appellant be awarded costs of this appeal.

Grounds of the Appeal

2. That the Honourable Trial Magistrate erred in law and in fact by holding that the respondent had not demonstrated the efforts made in looking for the claimant after they disserted their duties.



3. That the Honourable Trial Magistrate erred in law and in fact by failing to consider the documentary evidence produced by the Appellant showing the efforts made in looking for the claimants after they disserted duties.
4. That the Honourable Trial Magistrate erred in law and in fact by holding that the claimants were not served with show cause letters ignoring the evidence submitted by the Respondent to the effect that the claimants disserted and could not be traced.
5. That the Honourable Trial Magistrate erred in law and in fact by holding that no disciplinary hearing was ever given ignoring the evidence submitted by the respondent to the effect that the claimants disserted and could not be traced.
6. That the Honourable Trial Magistrate erred in law and in fact by holding that the claimants were entitled to payment for leave days ignoring the respondent's witnesses to the effect that the claimants had taken their leave days.
7. That the Honourable Trial Magistrate erred in law and in fact by holding that the claimants were entitled to their salary arrears for the month of April, 2021 despite them having not cleared with the respondent as required by the respondent's HR Manual.
8. That the Honourable Trial Magistrate erred in law and in fact by using a multiplier of Kshs. 25,000 in the award for unfair termination while the respondents' gross pay was Kshs. 17,636.
9. That the Honourable Trial Magistrate erred in Law and in fact by factoring in overtime pay (OP) as part of the respondents' gross pay.

Background To The Appeal

10. The Respondents filed a claim against the Appellant vide a memorandum of claim dated the 10th of June 2021, seeking the following orders:-
 - a) A declaration that the termination of the claimants' employment by the respondent was unlawful, malicious, unprocedural and an infringement on their constitutional rights.
 - b) Maximum compensation for wrongful dismissal;
 - c) special damages-
 1. Kelvin Barasa Wanyama
 - i. One month's Notice Ksh 28,750.00
 - ii. Salary arrears for April 2021 Ksh 28,750.00
 - iii. Damages for Unlawful termination Ksh 345,000.00
 - iv. Annual leave not granted Ksh 115,000.00
 2. Rodgers Alukwe Ongaya
 - i. One month's Notice Ksh 28,750.00
 - ii. Salary arrears for April 2021 Ksh 28,750.00
 - iii. Damages for Unlawful termination Ksh 345,000.00
 - iv. Annual leave not granted Ksh 86,250.00



3. John Khuyole Wambichi
 - i. One month's Notice Ksh 28,750.00
 - ii. Salary arrears for April 2021 Ksh 28,750.00
 - iii. Damages for Unlawful termination Ksh 345,000.00
 - iv. Annual leave not granted Ksh 115,000.00
 - d) Certificate of service
 - e) Interest on the total.
 - f) Costs of the Cause.
 - g) Any further relief this Honourable Court may deem fit and just to award under the circumstances.th November 2024).
(Pages 17-24 of the ROA dated 19
11. The Respondents also filed their verifying affidavits, list of witnesses, and witness statements all dated the 10th of June 2021, and attached the bundle of documents relied on (pages 25-65 of ROA).
 12. The claim was opposed by the Appellant who entered appearance and filed a memorandum of defence (page 67-73 of ROA), witness statement of Susan Kamau (page 94 ROA), witness statement of Silas Ogachi dated the 17th of May 2023 (page marked 92-93 of ROA), and attached their documents (pages 70-91 and 96 of ROA).
 13. The Respondent's/claimant's case was heard on 8th August 2023. The respondent's case was heard on even date with 2 witnesses Susan Kamau and Silus Obach an official of the union and closed (3-9 of the supplementary ROA).
 14. The parties took directions on filing of written submissions after the hearing. The parties complied.
 15. The Trial Magistrate Court delivered its judgment on the 17th November, 2023 partly allowing the Claimants' claims for one month's pay in lieu of notice, accrued leave, salary arrears and 12 months' salary as compensation for unfair dismissal (Judgment at pages 6-16 of ROA).

Determination

16. The appeal was canvassed by way of written submissions. Both parties filed.
17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [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."



18. Further in on principles for appeal decisions in *Mbogo v Shab* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed 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.”

Issues for determination

19. The Appellant raised two issues for determination in their undated submissions, namely:-
- i. Whether the trial court properly analyzed the evidence adduced by the Appellant prior to arriving at the impugned decision.
 - ii. Whether the trial court erred by holding that the Respondent's were earning a salary of Kshs 25,000 consequently arriving at the wrong figure while computing the damages payable.
20. In their submissions dated 2nd May 2025, the Respondents submitted generally on the role of the appellate court, the concept of parties being bound by their pleadings and on the grounds of the appeal.
21. The court having considered grounds of appeal, and the submissions by the parties finds the issues for determination to be:-
- a. Whether the trial court erred in its finding on the termination
 - b. Whether the reliefs granted were merited

Whether the trial court erred in its finding on the termination

22. 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).
23. The burden of proof in employment cases is as stated in section 47(5) of the *Employment Act* as follows:-‘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.”



24. 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.
25. On re-evaluation of the evidence before the trial court I find that the alleged reason for termination of absconding was not proved as valid. In terms of prove of absconding the court upheld the decision cited by the appellant - *Ramogi v Great Lakes University of Kisumu* (Cause 2 of 2022) [2022] KEELRC 13032 (KLR) (2 November 2022) where the Court observed as follows: -“Further, under the statutory framework in our jurisdiction, even the deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through phone, email, colleagues or even contact details in the employee's file (records).” The respondent called DW1 union representative, who it alleged to have called the claimant at the request of the respondent but DW1 had no evidence of making such calls. DW1 admitted the respondent never issued the union with a letter of show cause to issue to the claimants and there was no disciplinary hearing (see cross-examination at page 7 of supplementary ROA). DW2 was Susan Kamau. She testified to have sent notice to the claimants and invited them for hearing on email but no evidence was placed before the court. DW1 contradicted DW2 as he said they were not issued with notice to share with the claimants. If the appellant asked the union to call the claimants, it is not logical that it sent notices and invites for disciplinary hearing to the claimants without informing the union. No evidence of the notices or invites was placed before the court. The claimants stated they were dismissed by the Production Manager called Mwangi Silas Ogachi by word of mouth. The said person did not record a statement before court hence the averment of the claimants that their services were terminated by Mwangi remained uncontroverted. The court found that the burden of prove of reason validity lies with employer under section 43 of the *Employment Act*. The alleged reason of absconding was not proved on a balance of probability and the court agreed with the conclusion by trial court that it was more probable than not that the claimant were telling the truth of having been fired by Mwangi. The termination was unfair. The court finds no basis to interfere with finding of the trial court (*Mbogo v Shab*).

Whether the reliefs granted were merited

26. The appellant challenged the salary multiplier of Kshs. 25,000 stating the monthly salary was Kshs. 17,636, that overtime was part of gross pay and that the claimant had taken leave. I perused the payslip(sample) and found itemisation of the gross pay as follows-

Basic Salary Kshs 15,236.00

Housing Kshs. 2,400

Agreed Overtime (included in the payslip but varying month to month)



(The Claimant's payslips at pages 88-91 of the ROA).

27. The court holds that overtime depends on extra time work performed hence for the purposes of compensation the right monthly salary was Basic pay plus House allowance thus Kshs. 17636.00 for all the claimants. The trial court erred in using figure of Kshs. 25,000 without basis as the claimant stated salary as Kshs.28,750 in the prayers (Page 23 of ROA) while the payslips had been produced. RW2 had no evidence of the payslip having been issued to the claimants. A comparison between the amount stated in the claim as salary indicates the claimant stated a figure which included overtime. The court then finds error in the multiplier and holds the gross salary was Kshs. 17,636.00 .The court then sets aside the awards.
28. The court upheld the finding of unfair termination and further the 6 months awarded taking into factor the 4 years of service and innocence of the claimants.
29. On the claim for accrued leave the employer did not produce evidence to rebut the evidence in chief of the claimants that they did not take leave. The court notes that the claimants did not provide evidence of having applied for leave and the same denied. Section 28(4) of the *Employment Act* limits accrued leave carried forward to 18 months – ‘(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.’ The award on accrued leave by the lower court is set aside and substituted with award of accrued leave days of 18 months.

Conclusion

30. The appeal is allowed. The Judgement and Orders of Hon. R. L. Musiega (SRM) delivered on 17th November, 2023 in CMEL Cause No. E1223 of 2021 is set aside and substituted as follows:-

Judgment is entered for each of the 3 claimants against the respondent as follows:-

The termination of the claimants is held as unfair

Notice pay Kshs. 17636.00

Salary arrears Kshs. 17636.00

Accrued annual leave 18 months –Kshs. 26,454

Compensation for unlawful termination Kshs. 105,816

Total award to each of the 3 claimants Kshs. 167,542 with interest at court rate from date of judgment.

Costs of the suit .

Certificate of service to issue to the 3 claimants under section 51 of 31.the *Employment Act* within 14 days of the judgment

31. The unfair termination having been upheld the court makes no order on costs at appeal. The file is marked as closed.
32. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.



J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant – Kariuki

Respondent: Wetaba

