



Nation Media Group Limited v Obar (Employment and Labour Relations Appeal E311 of 2024) [2025] KEELRC 2038 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E311 OF 2024**

**JW KELI, J
JULY 4, 2025**

BETWEEN

NATION MEDIA GROUP LIMITED APPELLANT

AND

THOMAS MBOYA OBAR RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. B.M. Cheloti (PM) delivered at Nairobi on the 8th day of September, 2023 in MCELRC No. 20 of 2018)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. B. M. Cheloti (PM) delivered at Nairobi on the 8th day of September, 2023 in in MCELRC No. 20 of 2018 between the parties filed a memorandum of appeal dated the 6th of October, 2023 seeking the following orders:-
 - a. The Appeal be allowed, and the judgement of the lower court delivered on 8 September 2023 be set aside and, in its place, this court be pleased to dismiss the claim filed by the Respondent and award the Appellant costs together with interest;
 - b. That the costs of this appeal be awarded to the Appellant.

Grounds of the Appeal

2. The Honourable Trial Magistrate erred in law and in fact in finding that the termination of the Respondent's contract of employment was unfair.
3. The Honourable Trial Magistrate erred in law and fact in awarding the Respondent the sum of Kshs. 443,448 together with interest and costs of the suit.



4. The Honourable Trial Magistrate erred in law and in fact by finding that the Respondent failed to discharge its burden of proof and in particular that the Respondent failed to produce all the material necessary to determine that the termination was fair.
5. The Honourable Trial Magistrate erred in law and fact by failing to appreciate that the burden of proof in employment cases is on a balance of probability and therefore arrived at an erroneous decision that the Respondent failed to discharge its burden of proof.
6. The Honourable Trial Magistrate erred in law and fact by failing to appreciate that the issues raised by the Respondent in the submissions had not been pleaded in the pleadings filed before the court.
7. The Honourable Trial Magistrate erred in law and in fact by failing to appreciate the factual background in the instant case and thereby considered extraneous matters beyond those stipulated in the law.
8. The Honourable Trial Magistrate erred in law and fact by failing to consider comparative authorities and in particular failed to appreciate and consider the principles applicable in case of termination on grounds set out under Section 44(4)(g) of the *Employment Act*.
9. The Honourable Trial Magistrate exercised her discretion capriciously in the circumstances.
10. The Honourable Trial Magistrate erred in law and in fact by predisposing her mind to a position against the Appellant and thereby failed to properly exercise her discretion.

Background to the Appeal

11. The Respondent filed a claim against the Appellant vide a memorandum of claim dated the 9th of October 2018 seeking the following orders:-
 - a) A declaration that the Claimant's dismissal was unjust, unlawful, inequitable and unfair and in breach of the *Employment Act*.
 - b) The Claimant's terminal benefits, including, one month's salary in lieu of notice.
 - c) General Damages for breach of contract and wrongful dismissal calculated at an amount equal to 12 months' salary.
 - d) Punitive damages for victimization and subjection of the Claimant by the Respondent to inhuman treatment including false imprisonment and prosecution.
 - e) Service pay together with issuance of Certificate of Service.
 - f) Interest on (b) and (c)
 - g) Costs of the suit
 - h) Any other/further relief that this Honourable Court deem fit to grant in the interest of justice.(Pages 4-12 of the ROA dated the 26th July 2024).
12. The Respondent also filed his verifying affidavit, list of witnesses, witness statement and list and bundle of documents all dated the 9th of October 2018 (See pages 13-23 of ROA).
13. The claim was opposed by the Appellant, who entered an appearance and filed a replying memorandum (pages 24-29 of ROA). They also filed the documents that they wished to rely on (pages



- 30-36 of ROA); and the witness statement of Sekou Owino dated 14th January 2020 (pages 138-141 of ROA).
14. The Claimant/Respondent's case was heard on the 15th of July 2021 and 2nd November 2021, with the Claimant testifying in the case relying on his witness statement. He produced his documents and was cross-examined by counsel for the Respondent/Appellant. (pages 153-157 of ROA).
 15. The Respondent/Appellant's case was heard on the 2nd of November 2021, when the witness for the Respondent testified, relying on his witness statement, and produced the Appellant's documents. The witness was cross-examined by counsel for the Claimant/Respondent (pages 157-158 of ROA).
 16. The parties took directions on filing of written submissions after the hearing. The parties complied.
 17. The trial court found unfair termination and entered judgment for the respondent against the appellant as follows:-
 - a. The Respondent do pay the Claimant Kshs. 443,448 being compensatory damages.
 - b. The cost of this suit be borne by the Respondent.
 - c. Interest on (a) and (b) above at court's rate from the date of delivery of this judgment until payment in full.
 - d. The prayer for punitive damages for false imprisonment and prosecution fails as that is a civil issue and the same cannot be determined in this forum.(Judgment at pages 162-164 of ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties filed.
19. 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.”
20. Further in on principles for appeal decisions in *Mbogo V Shah* [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

21. In their submissions dated the 6th of October 2024, the Appellant submitted generally on the grounds of appeal.



22. The Respondent also identified two issues for determination in his submissions dated the 14th of October 2024, namely:
- i. Whether the appeal should be allowed; and
 - ii. Who should bear the costs of the Appeal.
23. On perusal of the grounds of appeal the court found the issues for determination in the appeal to be – Whether the trial court erred in fact and law in its findings on the fairness of the termination Whether the reliefs granted were merited Whether the trial court erred in fact and law in its findings on the fairness of the termination
24. 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.
26. 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.’”

Substantive Fairness

27. 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.



28. The trial court's finding that there was unfair termination was premised on the appellant having not produced the work records and especially the gate pass to assist the court to determine whether the claimant had been fairly terminated for driving motor vehicle with missing cables(see paragraph 12 of the Judgment at page 164 of ROA) . Did the trial court rely on extraneous matters and ignore the factual background of the case as submitted by the appellant? - I perused the witness statement of the claimant now respondent (pages 11 and 12 of ROA)and established that he did not deny that he was driving the motor vehicle KBC 994C mentioned in the suspension letter (at page 16 of ROA). The respondent did not reply to the suspension letter despite being asked by the appellant to do so. The trial court appeared to have put unproportional weight on the mentioned exhibit Gatepass MV KBC 446C (at page 17 of ROA) stated in the investigation report of which report was relied on at the disciplinary hearing . At page 5 and 6 of the report the vehicle in question is identified as white canter No KBC 994C(pages 18 and 19 of ROA).
29. The claimant confirmed, before trial court, the contents of the minutes of the disciplinary hearing before the appellant. At page 21 the charges are stated to be in relation to MV KBC 994C of which the claimant was the driver. In his side of story before the disciplinary panel the claimant never denied that was the vehicle he drove on the material date. The court finds tthere existed before the lower court overwhelming evidence that the claimant all along knew the motor vehicle he was accused of having driven with the stolen cables was MV No. KBC 994C. The reference in the report of Gate pass for MV KBC 446C can only be treated as an error as the suspension letter, the body of the investigation report and the disciplinary hearing proceedings as well as the letter of termination of employment refer consistently to MV KBC 994C as one used by the respondent to remove the alleged stolen electric cable from the appellant's premises. The court noted that the respondent relied heavily on the discharge in the criminal case. The court returns that the acquittal in a criminal case does not affect internal proceedings of the employer as the processes are distinct with different standards of proof. The court found that the reason for termination as demonstrated in the internal disciplinary proceedings demonstrated basis of suspicion by the employer that the respondent had committed a crime as stated under section 44(4)(g) of the *Employment Act* to wit:-
- ‘(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.’”
- The Respondent admitted he took the car without having been assigned by the appellant authority, did not bother to check what he was carrying including whether even the vehicle had a padlock. The court having re-analysed the evidence before the lower court reached a contrary opinion to find that the employer had demonstrated a valid reason for the termination(see *Selle v Associated Motor Boat Co.* [1968] EA 123, supra).
30. On procedural fairness, the claimant was issued with a suspension letter under which he was asked to respond formally but failed to do so. He was informed of right to be accompanied by a fellow employee, he was heard in the presence of shop floor steward and made his representation and the minutes were produced of which he signed(see page 23 of ROA). The court then holds the termination was lawful and procedurally fair.

Whether the reliefs granted were merited

31. On reliefs granted of compensation, the court having held the termination was fair, hence the compensation was not justified under section 49 of the *Employment Act* and is set aside.



32. In the upshot, the appeal is allowed. The judgment and Decree of Honourable Becky Cheloti (Ms.), Principal Magistrate, delivered on 8th September 2023 is set aside and substituted with an order that the claim is dismissed with costs.

33. To temper justice with mercy, the court makes no order on costs at appeal. The file is marked as closed.

34. 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 –Ms. Athman

Respondent: Ms. Wafula h/b Kiunga

