



REPUBLIC OF KENYA



**Nuclear Investment Limited v Kinyanjui (Appeal E008 of 2023)
[2025] KEELRC 1998 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1998 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E008 OF 2023
AN MWAURE, J
JULY 4, 2025**

BETWEEN

NUCLEAR INVESTMENT LIMITED APPELLANT

AND

DANIEL MWAURA KINYANJUI RESPONDENT

*(Being an Appeal from the Judgment and order of the Honourable Y.I Khatambi,
Principal Magistrate delivered 13th April, 2023 in Nakuru CM ELRC No. E91 OF 2022)*

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and order of the Honourable Principal Y.I Khatambi, filed this appeal vide a Memorandum of Appeal dated 27th April 2023 on the grounds that: -
 1. The learned Magistrate erred in law and in fact in failing to make a finding that the Respondent had failed to prove his case to the required standard, and further dismissed his case with costs to the Appellant.
 2. The learned Magistrate erred in both law and fact by failing to appreciate the overwhelming evidence adduced by the Appellant.
 3. The learned Magistrate erred in law and fact in finding in favour of the Respondent and giving weight to the entire evidence of the Respondent while wholly disregarding the Appellant's rebuttal evidence thereby failing to consider that the Respondent by his conduct was liable for termination under section 43(2) of the *Employment Act*.
 4. The learned Magistrate erred in law and fact in awarding the Respondent underpayment of Kshs. 543,462/= when the Appellant had adduced compelling evidence demonstrating that the Respondent was paid a daily commission of Kshs. 500/= together with Kshs.6,000/= at the end of every month, and thus his salary was a total of Kshs. 21,000/=.



5. The learned Magistrate erred in law and fact in awarding compensation under section 49(1) (c) of the *Employment Act* when the Appellant had adduced evidence showing that the Respondent failed to answer the letters summoning him to attend a disciplinary hearing.
 6. The learned Magistrate erred in law and fact in awarding the Respondent an award of Kshs. 10,377.75/= as notice pay when the said award is unwarranted.
 7. The learned Magistrate erred in law and fact in finding that the Respondent had been unfairly terminated from this employment.
 8. The trial Magistrate erred in law and fact by awarding the Respondent Kshs.124,526/= as compensation for unfair and unlawful termination, when the same had not been proved.
 9. The learned trial Magistrate erred in law and fact in awarding Kshs.44,218.35/= as leave pay when the said award is unwarranted.
 10. The learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.
 11. The learned trial Magistrate erred in law and fact in disregarding the evidence of the Appellant on record, hence resulting in a wrong decision.
2. The Appellant prays that:
 1. The appeal herein be allowed
 2. Judgment and decree of the Honourable Magistrate delivered on 13th April 2023 be set aside.
 3. Judgment be entered in favour of the Appellant against the Respondent.
 4. The costs of this appeal, as well as those of the suit be borne by the Respondent.
 5. Both parties canvassed the appeal by way of written submissions.

Appellant's submissions

6. The Appellant submitted that in appeals from a trial court, the first appellate court bears the duty to independently re-evaluate all evidence, both factual and legal, and arrive at its own conclusions, while accounting for its limited opportunity to observe witness demeanour. It is well settled in Sir Clement De Lestang's principles and affirmed in *David Kaburuka Gitau & Another V Nancy Ann Watbiti Gatui & Another (Nyeri HCCA No. 43 of 2013)*, the appellate court must not blindly follow the trial court's findings, especially where material misapprehension of evidence or circumstances is evident.
7. The Appellant submitted that in line with Section 47(5) of the *Employment Act*, the burden of proving unfair termination lies initially with the employee, who must establish a prima facie case that the dismissal lacked a valid reason or fair procedure as outlined under section 45(2) of the *Employment Act*. The Appellant relied on the case of Josephine M. Ndungu V Plan International Inc [2019] eKLR, where the court stated that under section 47(5) of the *Employment Act*, the employee bears the initial burden of proving unfair termination by establishing a prima facie case that the dismissal lacked a valid reason or fair procedure as outlined in section 45 of the *Employment Act*. Valid reasons may relate to the employee's conduct, capacity, compatibility, or the employer's operational needs, while fair procedure includes giving the employee a chance to be heard. Once this threshold is met, the employer must justify the termination under sections 43(1), 45(2), and 47(5) of the *Employment Act* by proving both substantive and procedural fairness.



8. The Appellant submitted that the Respondent failed to discharge this burden, offering no substantive proof of wrongful termination. Conversely, the Appellant demonstrated, through unchallenged evidence and testimony, that the dismissal stemmed from persistent poor performance, financial mismanagement, and operational necessity. The termination thus met both procedural and substantive legal thresholds, as emphasized in *Jared Mangera V Professional Clean Care Ltd* [2008] eKLR and *Matsesho V Newton* [2022] eKLR, rendering the trial court's decision to award remedies erroneous.
9. The Appellant submitted that the impugned awards granted to the Respondent lack a legal and evidentiary bias. The underpayment claim was unsupported by wage computation or documentation and ignored the actual remuneration, which exceeded statutory minimums. The notice pay award was unjustified, given the lawful summary dismissal under section 44(4) of the *Employment Act* due to gross misconduct. Compensation under section 49(1)(c) of the *Employment Act* was unwarranted, as the Respondent failed to prove unfair termination under section 47(5) of the *Employment Act*, and the Appellant provided valid reasons and followed due process as required by sections 43 and 45 of the *Employment Act*.
10. The Appellant relied on the cases of *Gas Kenya Ltd V Odhiambo* [2022] eKLR, *Alfred Muthomi V NBK* [2018] eKLR, and *TSC V Timothy Onyango* [2022] eKLR, the courts stated that maximum compensation must be based on exceptional circumstances, none of which existed here. Furthermore, the leave pay award violated section 28(4) of the *Employment Act*, as there was no specific evidence of denied leave or unused entitlement.
11. The Appellant urged this Honourable Court to find that the trial court therefore erred, and the appeal should be allowed.

Respondent's submissions

12. The Respondent submitted that the appeal was fatally defective due to the Appellant's failure to attach a certified copy of the decree, contravening Order 42, Rules 2 and 13(4)(f) of the Civil Procedure Rules. As affirmed by the Supreme Court in *Bwana Mohamed Bwana V Silvano Buko Bonaya* [2015] eKLR and the Court of Appeal in *Chege V Suleiman* [1988] eKLR, this omission renders the appeal incompetent and strips the court of jurisdiction. Substantively, the termination of the Respondent's employment was found to be both invalid and procedurally flawed.
13. The Respondent also submitted that the Appellant failed to justify the reasons for dismissal under sections 43 and 45 of the *Employment Act*, particularly due to contradictory termination letters and the absence of a disciplinary hearing as required by section 41 of the *Employment Act*. The Respondent further submitted that the trial court's award of damages under sections 49 and 50 of the *Employment Act* was supported by uncontroverted evidence of unfair termination, long service, and denial of terminal dues.
14. The Respondent urged this Honourable Court to find that the Appellant demonstrated no error warranting appellate interference; thus, the appeal is ripe for dismissal with costs.

Analysis and determination

15. The court has considered the record of appeal and rival submissions by both counsels. The issue for determination is whether the appeal is merited.
16. Section 47(5) of the *Employment Act* when an employee claims unfair termination or wrongful dismissal, they bear the initial burden of proving that the termination occurred and was indeed unjust.



Once this is established, the employer must then justify the reasons for the termination, demonstrating that it was based on valid grounds and followed a fair procedure.

17. In *Pius Machafu Isindu V Lavington Security Guards Limited* [2017] eKLR, the court stated as follows:

“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 the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and a hearing before termination. The Act also provides for most of the procedures to be followed, thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

“..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees..”

18. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others* [2019] KECA 300 (KLR), the Court of Appeal cited the case of *Bamburi Cement Limited V William Kilonzi* [2016] eKLR, the court stated as follows:

The question that must be answered is whether the appellant’s suspicion was based on reasonable and sufficient grounds. According to section 47(5), the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing..... The test to be applied is now settled. In the case of the *Judicial Service Commission vs. Gladys Boss Shollei*, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in *Mc Kinley vs. B.C.Tel.* (2001) 2 S.C.R. 161

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

19. Still in *Bamburi Cement Limited V William Kilonzi* (supra), similar guidelines are to be found in *Halsbury’s Laws of England*, 4th Edition, Vol. 16(1B) para 642, thus: -

“...In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable



responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

20. In this instant appeal, the Appellant did not adhere to section 43 of the *Employment Act* by giving valid reasons for Respondent's termination, and section 43 needs to go hand in hand with section 41, which deals with the procedure of terminating an employee from employment. This Honourable Court has perused the dismissal letter dated 6th June, 2019, which shows that the Respondent did not decline to report to the new station or abscond from duty.

21. The Appellant sent two letters to the Respondent. One is dated 24th May 2019 which stated that Claimant was dismissed for poor performance forcing the Appellant to close their Nakuru Kanu office. The Appellant was not given an opportunity to defend himself as provided in mandatory terms. Section 41 of *Employment Act* states as hereunder-

- (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

22. The termination was to take effect on 31st May 2019. On 6th June 2019 he got a dismissal letter and reasons given were “due to ignorance and misconduct.” He was not given the exact details of the ignorance and misconduct and so could not defend himself.

The Respondent failed to comply with the requirements of termination as set out in Sections 43(1), 41 and 45 of the *Employment Act*.

23. The Appellant in their submissions claim they established a prima facie case in terminating the Claimant. They rely on the case of Josephine N. Ndungu & Others -VS- Plan International INC (2019) eKLR where court held as follows:

- “ 68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon



discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under section 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed.”

24. On interrogating the evidence of this instant case however the Respondent failed to show substantive justification and procedural fairness in terminating the Claimant. The foregoing is well stated in the case of Walter Ogal Anuro -vs- Teachers Service Commission Cause 955 of 2011 where the court held “For termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness.
25. There Respondent failed to prove valid reasons as provided that whoever alleges must prove as in Sections 107, 108 and 109 of the *Evidence Act*. The court agrees with the trial court that the Respondent was unlawfully terminated. The court therefore holds that the appeal lacks merit and is dismissed.
26. On the remedies awarded however, the court holds the prayer for under payment part of the same was locked out by time limitation as provided in Section 89 of the *Employment Act*. A Claim can only stand for 3 years under the *Employment Act*. The said is enhanced by the Court of Appeal case Civil Appeal No. 23 of 2013 Mary Kitsao Ngoma & 36 Others -vs- Krystalline Limited where the Court of Appeal upheld the judgment of Justice Makau who had held that part of their claim was time barred. The Appellants in the above case had claimed this was a continuous injury but the court held that it was not a continuous injury since they had already left their employment.
27. In this case the learned Magistrate had awarded underpayment for 96 months @ Kshs.2,477.75.
The court will replace 96 months with 36 months which amounts to Kshs.85,572/=.
28. The leave pay is warranted and compensation for 12 months is also deserved considering the period the Claimant had worked for the Appellant.
The award of Kshs.543,462/= for under payment is replaced with Kshs.85,572 but other reliefs are upheld.
29. The interest will accrue at 14% per annum from date of Judgment till full payment.
30. Respondent is awarded costs of both cases of the lower court and of this appeal.
Orders accordingly.

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

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty



of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

