



**Mugo v ASP Company Limited (Appeal E103 of 2021)  
[2024] KEELRC 191 (KLR) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 191 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E103 OF 2021  
J RIKA, J  
FEBRUARY 12, 2024**

**BETWEEN**

**PRISCA KARIMI MUGO ..... APPELLANT**

**AND**

**ASP COMPANY LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment and Order of the Chief Magistrate’s Court at Nairobi, delivered on the 25th May 2021, by the Honourable A. N. Makau, in C.M.E. & L.R Cause Number 938 of 2019)*

**JUDGMENT**

**Rika J**

Court Assistant: Emmanuel Kiprono

Mohammed Muigai LLP, Advocates for the Appellant

Ricar Advocates LLP, for the Respondent

1. In her Statement of Claimant filed at the Trial Court, the Appellant herein pleaded that she was employed by the Respondent, as a Receptionist. Her last basic monthly salary was Kshs. 20,775 and house allowance at Kshs. 3,116 – total Kshs. 23,891.
2. She was based at Nairobi. She was transferred to Isinya in a different role in the store. She considered transfer unreasonable. While at Isinya she fell ill. She was granted sick-off days. When she reported back to office, the Respondent alleged she was away without leave. She was informed verbally by the Production Manager on 25<sup>th</sup> January 2019, that a decision had been made to terminate her contract.
3. She prayed the Trial Court for the following orders: -



- a. Declaration that deployment to Isinya, contravened the Claimant's right to fair labour practices.
  - b. Declaration that termination was unfair.
  - c. Compensation for unreasonable deployment at Kshs. 72,000.
  - d. Refund of deduction of salary for days absent, at Kshs. 9,556.
  - e. Compensation for unfair termination at Kshs. 286,695.
  - f. Costs and interest
4. The Trial Court granted Judgment for compensation for unreasonable deployment, declining all other prayers.
  5. The Claimant filed the Appeal herein, advancing the following Grounds: -
    - a. The Trial Court erred in law and fact by failing to consider whether the Appellant was granted a fair hearing pursuant to section 41 of the Employment Act.
    - b. The Trial Court erred in finding that the Appellant was away from work without the leave of the Respondent, despite the Claimant supplying the Respondent a sick-off sheet, under Section 30 of the Employment Act.
    - c. The Trial Court's holding that the Claim lacked merit, was against the weight of evidence.
    - d. The Trial Court erred in failing to award compensation for unfair termination, and refund of salary deducted on account of the Appellant's absence.
  6. The Appellant proposes that the Appeal is allowed; she is awarded compensation for unfair termination; she is awarded the sum of Kshs. 9,556 in refund of irregular salary deduction; and granted costs of the Appeal and the Trial.
  7. The Respondent filed a Counter-Appeal, urging the Court to find that the Trial Court erred, in finding deployment unreasonable; and in awarding Kshs. 72,000 in compensation for unreasonable deployment. The Respondent prays for Judgment allowing the Counter-Appeal, declining the Appeal, and dismissing the Claim before the Trial Court in its entirety.
  8. It was agreed by the Parties, that the Appeal and the Counter-Appeal are considered and determined, on the strength of the Record of Appeal, and Submissions filed by the Parties
  9. The Parties confirmed compliance on filing and exchange of Submissions, at the last appearance before the Court, on 25<sup>th</sup> October 2023.

**The Court Finds: -**

10. In its Ruling dated 30<sup>th</sup> November 2022, on an Application made by the Appellant for leave to file the Appeal out of time, the Court found that the Judgment of the Trial Court lacks clarity, under its paragraphs 17 and 20.
11. At paragraph 17, the Trial Court states, " In the circumstances, I would allow the claim, award the Claimant Kshs. 22,000 x 9 years = Kshs. 188,000."
12. At paragraph 20, it is stated, " In the end, I enter Judgment in favour of the Claimant as against the Respondent, for a total of Kshs. 72,000, being compensation for unreasonable deployment."



13. The Decree dated 20<sup>th</sup> December 2021, issued by the Trial Court is for the sum awarded as compensation for unreasonable deployment. Nothing is said of the award made in paragraph 17 of the Judgment. The Court cannot trace the award of Kshs. 188,000 against any of the prayers made by the Appellant in her Pleadings.
14. The Judgment is silent on whether any form of disciplinary hearing, was afforded to the Appellant. It does not mention section 41 of the [Employment Act](#).
15. At paragraph 13 of the Judgment, the Trial Court states that the Appellant had previously been issued with explanation notice following her absenteeism. The Trial Court states that it had seen excuses given by the Appellant, for absenteeism like “sickness and school issue.”
16. The Trial Court made no reference to charges, a letter to show cause issued to the Appellant, invitation to disciplinary hearing, and finding upon such hearing that the Claimant was absent without leave or other lawful cause, and therefore guilty of an act of gross misconduct, under section 44[4] [a] of the [Employment Act](#).
17. The Court does not think that a previous explanation notice, whatever this was, issued by the Respondent upon the Appellant, amounted to a disciplinary hearing, contemplated under Sections 41 and 45 of the [Employment Act](#).
18. Ground [a] of the Memorandum of Appeal carries substantial weight, and is allowed.
19. The letter of termination before the Trial Court, states that the Appellant had been away from work, since 21<sup>st</sup> January 2019 without permission. The letter is dated 28<sup>th</sup> January 2019.
20. The sick-off sheet exhibited by the Appellant before the Trial Court, dated 21<sup>st</sup> January 2019, indicates she was granted 2 days’ off. The Appellant does not seem to have gone back to work at the end of the 2 days, as had been agreed. She instead states that she was required to go back to hospital, on 24<sup>th</sup> January 2019. There is no medical evidence exhibited before the Trial Court, showing that she was required to go back on 24<sup>th</sup> January 2019, or that she was granted permission by the Respondent on her extended sick-off. Clause 6 of her contract entitled the Respondent to summarily dismiss her, if she was away from work, without reason.
21. She alleges that she reported back to Isinya Office, on 25<sup>th</sup> January 2019, where she was told by the Production Manager, that a decision had been made, to terminate her contract. The Respondent’s Witness confirmed in his evidence that the Appellant exceeded the number of days stipulated in the sick-off sheet. The Court does not think that the Trial Court erred, by rejecting her evidence, that she was away from the place appointed for the performance of her work, on account of illness. She only had been authorized to be away for 2 days. The sick-off sheet she exhibited was not an open-ended authorization to be away from work. Ground [b] of the Memorandum of Appeal is declined.
22. Ground [c] is partly merited. The Trial Court erred in finding that termination was fair, while there was no evidence that the Claimant was taken through a disciplinary hearing; but did not err, in finding that the Appellant was dismissed for valid reason.
23. Ground [d] is partly successful, in that the Trial Court ought to have compensated the Appellant, on account of lack of procedural fairness. The Trial Court did not err in rejecting the prayer for deduction made on the Appellant’s salary, for days when she was found to have been away without permission. Deduction was well-grounded under section 19 [1] [c] of the [Employment Act](#).
24. On the Counter-Appeal, the Court has not found any legal or factual justification, for the award made in favour of the Appellant, of compensation for unreasonable deployment, at Kshs. 72,000.



25. The Appellant pleaded Kshs. 2,000 per week. What clause in her contract, or provision in law, was this compensation of Kshs. 2,000 per week founded?
26. Clause 8 of the contract allowed the Respondent to transfer the Claimant to any department, project site or any sister organization.
27. The Appellant was transferred from the Respondent's Embakasi Site, to Isinya, on 16<sup>th</sup> May 2018. The Trial Court took issue with the short notice, issued for the Appellant to transfer. It termed the transfer as inhumane.
28. There was no evidence before the Trial Court, to establish that transfer was inhumane. The Appellant did not exhibit any communication to the Respondent disclosing inhumane circumstances, or requiring the inhumane circumstances to be addressed.
29. Isinya is not too distant from Nairobi. The Appellant was not being transferred to a far-flung location. She was given 3 days' off by the Production Manager upon reporting, on 16<sup>th</sup> May 2018, to enable her complete transfer. She did not complain about lack of other facilitation, or complain about any disability on her part. She reported at Isinya, and by the time she was alleging to be away on account of illness, on 21<sup>st</sup> January 2019, she had in fact been at Isinya for over 6 months. She had acceded to the transfer, and the Court does not see what she was being compensated for, on account of transfer, in the sum of Kshs. 72,000. There was a transfer clause in her contract. Transfer was not made in bad faith. The Respondent was not shown to have been goaded by extraneous considerations in transferring the Appellant. The Respondent explained that it was opening a new block at Isinya, and the Appellant was trained for her new role by the Production Manager. In Raphael Kihara Ruthuku v. Kenya Revenue Authority [2019] e-KLR, [E&LRC Mombasa], the Court ruled that transfer of an Employee, is a managerial prerogative. Unless the prerogative is exercised unreasonably, the Court has no reason to intervene.
30. The Courter-Appeal is allowed, and the award of compensation for unreasonable transfer, in the sum of Kshs. 72,000, set aside.
31. The Appellant was employed by the Respondent on 1<sup>st</sup> October 2009, and left on 29<sup>th</sup> January 2019. She worked for close to 10 years. She cannot be entirely absolved of the circumstances leading to termination of her contract. She appears not to have fully embraced transfer to Isinya, and engaged in all manner of activities, to be absent from Isinya. The attendance register at Isinya showed she was a frequent absentee. There were complaints from the Respondent, that on Mondays and Fridays, she was frequently absent, late in reporting, and early in departing. Her extended sick-off, leading to termination, was the last stroke that broke the camel's back. The record does not disclose whether the Appellant mitigated loss of her employment, by securing an alternative job. Termination was on valid ground, but poorly executed.
32. The Court allows Ground [a] of the Appeal.
33. Grounds [c] and [d] are partly allowed. The Judgment of the Trial Court relating to these Grounds is set aside, and the following orders granted-
  - a. It is declared that termination of the Appellant's contract by the Respondent was not based on fair procedure and was to that extent unfair.
  - b. The Respondent shall pay to the Appellant, equivalent of 6 months' salary in compensation for unfair termination, at Kshs. 143,346.



34. The Counter-Appeal is allowed and the award of Kshs. 72,000 in compensation for unreasonable deployment, set aside.
35. No order on the costs on both Trial and Appeal.

**In Sum it is Ordered: -**

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- a. The Appeal is allowed, as follows: -
  - i. It is declared that termination of the Appellant's contract was not based on fair procedure, and to that extent was unfair.
  - ii. The Respondent shall pay to the Appellant equivalent of 6 months' salary in compensation for unfair termination, at Kshs. 143, 346.
- b. The Counter-Appeal is allowed and the award of Kshs. 72,000 in compensation for unreasonable deployment, set aside.
- c. No order on the costs on both Trial and Appeal.

**DATED, SIGNED AND RELEASED TO THE COURT ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 12<sup>TH</sup> DAY OF FEBRUARY 2024.**

**JAMES RIKA**

**JUDGE**

