



**Kariki Limited v Karimi (Employment and Labour Relations Appeal  
E005 of 2023) [2024] KEELRC 217 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 217 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023  
ON MAKAU, J  
FEBRUARY 9, 2024**

**BETWEEN**

**KARIKI LIMITED ..... APPELLANT**

**AND**

**CATHERINE KARIMI ..... RESPONDENT**

*(Being an Appeal against the Judgment of the Chief Magistrate at Meru,  
Hon. John Njoroge delivered on 11th March, 2023 in MELRC No. E005 of 2021)*

**JUDGMENT**

1. This appeal arises from employment relationship between the parties herein. The appellant employed the respondent in the Harvesting Department from July 2009 to 28<sup>th</sup> February 2020 when it terminated her employment for absencing herself from work without permission. The respondent challenged the termination in the lower court alleging that the termination was unfair and prayed for compensation and terminal benefits totaling to Kshs 468,230.00.
2. The appellant denied liability and upon trial, the court rendered the impugned judgment in which he found that the termination was unlawful and awarded her a total of Kshs 280,160.00 plus costs and interest.
3. The appellant was aggrieved and filed the instant appeal seeking to reverse the impugned judgment on the following grounds: -
  - a. That the learned Magistrate erred in law and fact and/or applied wrong principles and parameters by finding and holding that the Claimant/Respondent's dismissal was unfair and unlawful.



- b. That the learned Magistrate failed to consider the Respondent/Appellant's evidence and/or misapprehended the law in arriving at a decision that the Claimant/Respondent was unlawfully and unfairly dismissed from employment.
- c. That the learned Magistrate erred in law and fact and/or applied wrong principles and parameters by finding and holding that the claimant/Respondent was unfairly dismissed from employment and that the dismissal was unlawful and unfair.
- d. That the learned Magistrate erred in law and fact and/or applied wrong principles and parameters by awarding the Claimant/Respondent Kshs 40,134 3 months' pay *in lieu* of notice.
- e. That the learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant in awarding the Claimant/Respondent Kshs 160,536.00 as compensation for unfair termination or any amount thereof.
- f. That the learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant and parameters by awarding the Claimant/Respondent Kshs 66,890.00 as service pay or any amount thereof.
- g. That the learned Magistrate erred in law and fact and/or applied wrong principles and/or failed to consider the evidence adduced by the Respondent/Appellant and parameters by awarding the Claimant/Respondent Kshs 12,600.00 unpaid leave allowance.
- h. That the learned Magistrate erred in law and fact and/or applied wrong principles in awarding the Claimant/Respondent interest and costs.

### **Factual background**

4. In August 2019, the respondent started experiencing swelling on her right leg allegedly due to harsh working conditions which required her to stand for 12 hours a day. As a result, she was seen by the company nurse who referred her to Nanyuki Teaching and Referral Hospital. On 20<sup>th</sup> November 2019, the hospital gave her two weeks sick leave but when she informed the employer, the HR Manager directed her to take annual leave up to 4<sup>th</sup> January 2020.
5. She reported back on 4<sup>th</sup> January 2020 and she had not fully recovered. She worked up to 28<sup>th</sup> January 2020 and she was paid up to that day. However, her condition became worse and she was treated on 29<sup>th</sup> January 2020. The nurse assured her that the supervisor would note her attendance. She admitted that her employer contributed NSSF dues for her during her employment.
6. The appellant's case on the other hand, was that the respondent absented herself from duty in January 2020 until 28<sup>th</sup> January 2020 when she reported back. DW1 produced Attendance Register as proof, show cause letter and invitation to disciplinary hearing. However, on cross-examination DW1 admitted that the Attendance Register produced indicated that the respondent absented herself from 28<sup>th</sup> January 2020 and not from 1<sup>st</sup> December 2019. She admitted that the respondent did not sign to acknowledge receipt of the show cause letter and invitation to the hearing.
7. Dw1 further contended that the company was not aware of the respondent's leg injury as she never reported. However, she admitted that she had seen her treatment form from Nanyuki Hospital. She also contended that the company signed a leave form for her. She also admitted that the respondent was entitled to a sick leave of two weeks. She admitted that the disciplinary committee did not recommend for redeployment but termination.



8. RW2, Appellant's employees' welfare representative confirmed that the company's clinic nurse gave the respondent a referral, and that is procedurally right. He admitted that he never delivered the letter dated 2<sup>nd</sup> March 2020 to the respondent since he never traced her. He further admitted that the respondent was sickly and she was referred to Nanyuki Referral Hospital. He attended the disciplinary hearing as employees' representative but the respondent did not attend and she was dismissed. He confirmed that the respondent had no previous record of indiscipline or any warnings.
9. The appeal was canvassed by written submissions.

### **Appellant's submissions**

10. The appellant submitted that the trial court failed to consider its evidence and proceeded to hold that the appellant had failed to explain the reason for the termination and also failed to offer her disciplinary hearing. As such the finding on the above point was contrary to the evidence.
11. The appellant contended that it produced as evidence show cause letter and a letter which invited the respondent to disciplinary hearing but the court failed to consider the same. It further submitted that the termination letter expressly cited the reason for the termination as absenteeism from work without permission which amounted to gross misconduct. Therefore, it maintained that the trial court's decision was reached in blatant disregard of the evidence produced during the trial.
12. It further submitted that the respondent was invited to disciplinary hearing and failed to attend, as such the court fell into error by holding that she was condemned unheard. For emphasis, it relied on the case of *Bifu v Barclays Bank of Kenya* (2014) eKLR and *Mathew Lucy Pherusa v Poverelle Sisters of Belgamo t/a Blessed Louis Palazzalo Health Centre* (2013) eKLR.
13. The appellant further submitted that the trial court applied the wrong principles and misapprehended the law and disregarded evidence in awarding the respondent the financial reliefs sought. It submitted that the court failed to give reasons for the award of the maximum compensation under section 49 of the *Employment Act*. For emphasis it relied on the Court of Appeal decision in *Regent Management Ltd v Wilberforce Ojiambo Oudo* (2018) eKLR where the court held that trial court ought to give reasons for awarding the maximum compensation.
14. It further submitted that the trial court misapplied the law by awarding service pay yet there was evidence of remittance of NSSF contributors for the respondent. Consequently, it urged the court to reverse the impugned judgment and dismiss the respondent's suit with costs.
15. The respondent submitted that the trial court was right in finding that she was dismissed without being accorded a disciplinary hearing. She submitted that the appellant failed to prove that it served her with a show cause letter and an invitation to attend disciplinary hearing. She maintained that the court was right in finding that the termination of her employment was done without following the procedure under section 41 of the *Employment Act*.
16. She further submitted that the reason for the termination was invalid because the appellant was fully aware of her sickness. That when she sought a sick leave the appellant gave annual leave. She submitted that her evidence on that point was not impeached by the appellant. Consequently, he maintained that the termination of her employment was unlawful and the trial court was right in awarding her compensation plus other reliefs.
17. She contended that, the compensation is merited since she worked for the appellant for 11 years, her chances of getting another job are slim and that, she lost her job due to discrimination on account of sickness. Consequently, she urged the court not to disturb the impugned judgment since the trial



court never erred in awarding maximum compensation under section 49 of the *Employment Act*. For, emphasis reliance was placed on *Roslyn Khadenyi Madere v Naisula Holding Ltd & another* (2022) eKLR.

### Issues for determination

18. This being a first appeal, my mandate is well cut out. In the case of *Kenya Ports Authority v Kushton (Kenya) Limited* (2009) 2EA 212 the Court of Appeal held that:-

“On first appeal from the High court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

19. More recently, the Court of Appeal in *J.S.M v E.N.B* (2015) eKLR held that:

“We shall however bear in mind that this court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent in which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned Judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

20. Having regard to the grounds of appeal, evidence presented to the trial court, the entire record of Appeal and the written submissions filed in this appeal, the following issues fall for determination: -

- a. Whether the termination of the respondent’s employment was unfair and unlawful.
- b. Whether the award of damages by the trial court should stand.

### Unfair termination

21. Section 45 (1) and (2) of the *Employment Act* provides that:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (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 employee’s 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.”



22. The foregoing provisions provides that the employer has an obligation of demonstrating that the termination of employees' services is justified by valid and fair reason, and that a fair procedure was followed. Section 43 of the *Employment Act* provides that: -
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."
23. In this case the appellant cited the reason for termination as absence from duty from 28<sup>th</sup> January 2020 without permission or reasonable cause. The termination letter stated that the respondent had failed to avail formal letter from her doctor at Nanyuki Referral Hospital upon request by the appellant's HR Department. Hence her absence from work was deemed to amount to gross misconduct.
24. The respondent, on the other hand stated that she had a swelling on the right leg due to long hours of standing while on duty. She produced a Treatment note from Nanyuki Hospital to confirm she had been sick. The evidence was corroborated by the DW2 who confirmed that the respondent was sickly and the company nurse referred her to Nanyuki Referral Hospital. DW1 also confirmed that she saw the treatment note from Nanyuki Hospital.
25. Having considered the above summary of evidence, I am satisfied that the respondent failed to attend work due to sickness and the employer was fully aware of the same. She sought sick off but she was instead given annual leave without request. Consequently, I find and hold that the reason cited for the termination was not valid.
26. As regards procedural fairness, section 41 of the *Employment Act* provides that:-
- (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."
27. In this case, the respondent was never given a hearing before the termination DW2 admitted in evidence that he was sent to deliver the hearing notice to the respondent but she was not traced. He further admitted that he attended the hearing as employees' representative but the respondent did not attend. In the circumstances, I am satisfied that the respondent was not afforded an opportunity to defend herself before the termination contrary to rules of natural justice as codified by Article 47 of our *Constitution* and section 41 of the *Employment Act*.



28. Having made a finding of fact that the respondent's employment was terminated without a valid reason and without following a fair procedure, I proceed to hold that the termination was unfair and unlawful. I further hold that the trial court was right in concluding that the respondent was condemned unheard.

### **The award of damages**

29. The trial court awarded the respondent three months salary in lieu of notice and twelve months salary as compensation for unlawful termination of employment. Section 49 and 50 of the [Employment Act](#) empowers the court to award salary *in lieu* of notice and compensation for unfair termination. Subsection (4) then sets out the factors to consider when exercising discretion to award relief to an unfairly dismissed employee.
30. I have considered the respondent's contract of employment produced as exhibit by the respondent and the appellant. The appellant's copy is not complete and it contains a termination clause which provides for a termination notice of 30 days but if he serves above five years, the notice period is 45 days. The copy filed by the respondent is amended version of the earlier contract which increased her wages and other financial benefits but all the other terms and conditions of service remained unchanged.
31. It follows that the award of three months' salary in lieu of notice was not supported by evidence and it is therefore set aside and replaced with an award of 45 days salary in lieu of notice. The contract provides for 45 day notice or payment of salary for 30 days, but it is well settled law that compensation for failure to give notice is the salary or wages for the notice period.
32. As regards the award of 12 months' salary compensation for unfair termination, it is evident from the record that the trial court never gave any reason to justify the maximum award of 12 months gross salary. The emerging jurisprudence is that the discretion to award compensatory damages must be judicially exercised by considering only the relevant factors. If the court fails to consider relevant factors or takes into account irrelevant factors, the discretionary award is open for interference on appeal.
33. In this case, the trial court failed to consider relevant facts as set out and contemplated under section 49 (4) of the [Employment Act](#). The maximum award was plugged from the sky without justification and that brought it under the appellate powers of this court to review discretionary awards.
34. The respondent has submitted that the award should not be disturbed because she served the appellant diligently for a long time but suffered an abrupt dismissal due to sickness. She further submitted that she has no chances of securing another job. I have also noted that DW2 confirmed that the respondent had no record of indiscipline and had not received any warning.
35. In view of the above matters, especially the ill-health, I will not interfere with the award of 12 months' salary compensation even though the trial court had fallen into error by not assigning the reasons for the maximum statutory compensation of 12 months' salary.
36. As regards the award of service pay, the appellant submitted that the trial court erred by awarding the relief contrary to the evidence on record. I can't agree more with the appellant on that point. PW1 admitted in evidence that the employer was remitting NSSF contributions for her during the time of her service. Section 35 (6) of the [Employment Act](#) disqualifies employees from service pay, if they are beneficiaries of their employer's pension or gratuity scheme or if they are registered as beneficiaries of NSSF. Consequently, the award of service pay was contrary to evidence on record and it is set aside.
37. Lastly, the award of leave allowance was challenged. The award of unpaid leave allowance was not sought in the pleading. What was sought was leave for one year being Kshs 13,378.00. consequently,



the award of leave allowance of Kshs 3,150 x 4= Kshs 12,600.00 was unsupported by pleadings and evidence and I proceed to set it aside.

### **Conclusion**

38. I have found that the appellant terminated the respondent's employment unfairly because there was no valid reason and fair procedure was not followed. I have further found that the trial court also fell into error in awarding damages to the respondent without supporting evidence or by considering irrelevant factors. I have also varied or set aside the quantum of damages awarded. Consequently, the appeal succeeds to the extent highlighted above. Accordingly, I set aside and substitute the impugned judgment with the following orders:

- i. A declaration that the appellant terminated the respondent's employment contract unfairly and unlawfully.
- ii. A declaration that the respondent is entitled to terminal dues plus compensatory damages highlighted above.
- iii. The appellant to pay the respondent the following: -
  - a. Notice.....Kshs 20,067.00
  - b. Compensation.....Kshs 160,536.00Kshs 180,603.00

The award is subject to statutory deduction but it will attract interest at court rate from the date of the impugned judgment. Each party will bear own costs of the appeal since it only succeeded partially.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF FEBRUARY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

