



**Hantex Garmets [EPZ] Limited v Jacob (Appeal E070 of 2022)
[2024] KEELRC 113 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 113 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E070 OF 2022
AK NZEI, J
FEBRUARY 1, 2024**

BETWEEN

HANTEX GARMETS [EPZ] LIMITED APPELLANT

AND

PATIENCE KWEKWE JACOB RESPONDENT

JUDGMENT

1. The Appellant was the Respondent in Mombasa CMC ELR Case No 440 of 2019 whereby it had been sued by the Respondent seeking the following reliefs:-
 - a. a declaration that termination of the Respondent's employment was unfair, unjust and wrongful.
 - b. terminal and contractual dues amounting to Kshs 625,814.80, tabulated as follows:-
 - i. One month salary in lieu of noticeKshs 17,561
 - ii. Underpayment
2017 (Kshs 16,724.75-14,651)x12 months..Kshs 159,088
2018 (skhs. 17,561-14,651)x12 months....Kshs 34,920
2019 (Kshs 17,561-14,561).....Kshs 2,910
 - iii. Unpaid leave days
2017 (Kshs 805.95x21 days).....Kshs 16,921.95
2018 (Kshs 846.25 x21 days).....Kshs 17,771.25
2018 (Kshs 846.25x 3 days)Kshs 538.75



- iv. Remainder of contract 2019(Kshs 14,651x2 months)Kshs 29,302.
- v. Unpaid holidays
 - 2017 (Kshs 805.95x16 days).....Kshs 12,895.60
 - 2018 (Kshs 846.25x12 days).....Kshs 11,001.25
- vi. Unpaid off days
 - 2017 (kh. 805.95x48 days).....Kshs 38,685.60
 - 2018 (Kshs 846.25x48 days).....Kshs 40,620
 - 2019 (Kshs 846.25x6 days).....Kshs 5,077.50
- vii. Deductible payment unremitted (NSSF) 2017 JuneKshs 400
- viii. Severance pay (Kshs 846.25x 15 days)Kshs 25,387.50
- ix. Compensation for unfair termination (Kshs 17,561x12 months)ksh, 210,732
- x. Costs of the suit and interest
- xi. Any other relief that the Court may deem fit and just to grant.

2. The Respondent had pleaded in the trial Court:-

- a. that the Respondent was on 10/1/2017 employed by the Appellant as a Machinist earning, a monthly gross salary of Kshs 14,651 at the time of termination.
 - b. that on 25/2/2019 at 6.30 am, the Respondent terminated the Appellant's employment on account of desertion, without any justifiable reasons and without following the laid down procedure, and without paying the Respondent's dues.
 - c. that the termination was contrary to provisions of the Employment Act and was unfair.
3. Documents filed by the Respondent in the trial Court alongside the memorandum of claim included the Respondent's written witness statement dated 14/5/2019 and an evenly dated list of documents listing 4 documents. The listed documents included the Respondent's Identity Card, a copy of her NSSF statement, the employment contract and a demand letter dated 12/4/2019. On 25/6/2019, the Respondent filed an evenly dated supplementary list of documents, listing one document. The listed further document was a reply to the Respondent's demand letter, dated 13/6/2019.
4. On 29/7/2019, the Appellant filed response to the Respondent's claim and denied the same. The Appellant denied the existence of any employment relationship between it and the Respondent. The Appellant had further pleaded that if there was any dismissal, then the same was effected on the basis of the law, pursuant to breach of terms of the employment contract by the Respondent by absenting herself from work without permission on 28/2/2019 to 1/3/2019.
5. Other documents filed by the Appellant alongside its response to the claim included a witness statement of one Maureen Mwongeli, the Appellant's Human Resource Manager, and a list of documents dated 9/9/2019 listing 7 documents. The listed documents included a copy of the Respondent's contract of employment dated 13/12/2018, a warning letter dated 4/1/2019, leave application form dated 4/2/2019, a warning letter dated 12/4/2019, a notice of disciplinary hearing



- dated 25/2/2019, a copy of minutes dated 25/2/2019, and a summary dismissal letter dated 25/2/2019.
6. On 26/2/2021, the Appellant filed a supplementary list of documents listing 4 more documents. The further listed documents included a certificate of service, a warning letter dated 5/12/2018, annual leave day analysis for the years 2017 and 2018, and copies of payrolls for the years 2017 and 2018.
 7. The Appellant was on 20/2/2021 granted leave to amend its response to the claim, and filed an amended memorandum of response, introducing the following new paragraphs:-
 - a. that the Respondent absented herself from work on 21/2/2019 to 23/2/2019 without permission or lawful cause.
 - b. that the Respondent was notorious for being absent from work without permission, and was issued with several warning letters on account of absenteeism without permission during employment.
 - c. that the Respondent absented herself from work without lawful cause and/or permission, and was in breach of the employment contract, and that the same amounted to gross misconduct.
 - d. that termination of the Respondent's employment was justified, fair and was in accordance with provisions of the Employment Act.
 - e. that the Appellant followed a lawful and fair procedure in terminating the Respondent's employment.
 8. Trial is shown to have commenced before the trial Court on 16/11/2021. The Respondent adopted her filed witness statement and produced in evidence the documents stated in paragraph 3 of this judgment. The Appellant further denied having filled or signed any leave application forms, denied receiving or signing for any warning letter or disciplinary hearing letter; and stated that her name was not on the alleged disciplinary minutes, that she never received any warning letter, and was not invited for a disciplinary hearing. That she was away from duty for 3 days and had been orally permitted by her immediate supervisor, and that no letter was given to her regarding that permission.
 9. The Appellant called one witness, Maureen N. Katula (RW1), who adopted her filed witness statement as her testimony and produced in evidence the documents referred to in paragraph 5 of this judgment.
 10. The trial Court is shown to have delivered its judgment on 14/9/2022 in favour of the Respondent as follows:-
 - a. Compensation for unfair termination of employment (equivalent of 6 months salary)Kshs 105,366
 - b. One month salary in lieu of notice.....Kshs 17,561
 - c. Remainder of contract.....Kshs 7,610
 - d. Unremitted NSSF deductions.....Kshs 400
 - e. Severance pay.....Kshs 25,387.50
 - f. Leave pay.....Kshs 38,234
 - g. Underpayment.....Kshs 77,268
 - h. Costs of the suit and interest at Court rates



- i. The Appellant to be issued with a certificate of service.
11. Aggrieved by the foregoing judgment, the Appellant preferred the present appeal and stated that the Honourable Magistrate erred in law and fact in:-
- a. finding that the Respondent's termination was unfair and unjust despite her admission that she absented herself for 3 days without permission from the Appellant; and despite acknowledging that the Appellant followed lawful procedure in terminating the Respondent.
 - b. finding that the Respondent worked for the Appellant for 4 years from 2015 – 2018, when the Respondent was employed on 10/1/2017 and was dismissed on 25/2/2019 as pleaded by her.
 - c. holding that the Respondent was earning a salary of Kshs 14,631 despite the Respondent adducing evidence that she was earning a basic salary of Kshs 14,651 plus 15% of the basic salary being house allowance (Kshs 2,197) which added to Kshs 16,848 per month.
 - d. holding that the Respondent was underpaid when the Appellant presented evidence in form of employment contracts and payrolls that show that the Respondent was earning a salary of Kshs 16,848.
 - e. awarding the Respondent Kshs 7,610 being 13 days pay for March 2019 despite the Respondent acknowledging that she worked until 25/2/2019, and despite the Appellant giving evidence that the claimant worked upto 25/2/2022.
 - f. awarding the Respondent Kshs 25,387.50 as severance pay when the Respondent was, indeed, dismissed on disciplinary grounds and not on account of redundancy.
 - g. awarding the Respondent Kshs 38,324 leave pay despite the Appellant producing annual leave analysis for the years 2017 and 2018 clearly indicating that the Respondent's leave balance was 10 days, for which she was paid Kshs 5,585 as per the leave analysis.
 - h. making a finding that the Respondent was underpaid for the period 2017-2018 and awarding her Kshs 24,888 for the period despite sufficient evidence that the Respondent was earning a total salary of Kshs 16,848, which was above the minimum wage of Kshs 14,650 for Mass Production Machinist at the material time.
 - i. awarding the Respondent Kshs 52,380 as underpayment for the period May 2018-December 2019 (18 months) when the Respondent in fact worked until 25/2/2019, a fact that was undisputed and despite the fact that the Respondent was earning an all-inclusive sum of Kshs 16,848, which was way above Kshs 15,383 provided for in the Wage Order in force at the time.
 - j. in awarding the Respondent excessive damages for unfair termination notwithstanding the unquestioned fact that the Respondent absented herself from work without the Appellant's permission; and despite the finding that the Appellant followed due procedure in dismissing the Respondent.
12. The Appellant sought the following reliefs on appeal:-
- a. that the appeal be allowed.
 - b. that the judgment, decree and order of Maureen Nabibya made at Mombasa Magistrate's Court be set aside in its entirety, and the same be replaced with an order dismissing the claimant's suit with costs.
 - c. that costs of the appeal be awarded to the Appellant.



13. This is a first appeal, and all the evidence presented before the trial Court is before this Court for re-evaluation. This Court has taken into account the fact that it did not see or hear the witnesses first hand. It was stated in *Selle & another v Associated Motor Boat Company Ltd & another* [1968] E.A 123 that a first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment, and to arrive at its own independent judgment on whether to allow the appeal.
14. Having considered the pleadings filed and evidence adduced in the trial Court, issues that present for determination in my view, are as follows:-
 - a. whether termination of the Respondent's employment by the Appellant was unfair.
 - b. whether the Respondent was entitled to the reliefs given/awarded by the trial Court.
15. On the first issue, it is trite that for termination of employment to pass the fairness test, it must be demonstrated that there was both procedural and substantive fairness. Section 41 of the *Employment Act* provides a mandatory procedure that must be adhered to by an employer before terminating an employee's employment on account of misconduct, poor performance or physical incapacity. Sections 43(1) and 45(1) (2) (a) of the said Act address the issue of substantive fairness whereby an employer must prove that the reason for the termination was valid. Failure to adhere to the set down mandatory statutory procedure and to prove validity of the reason for termination renders the termination unfair. The said provisions of the statute are couched in such a way that termination must pass both the procedural and substantive fairness tests if it is to be held to have been fair.
16. It was held as follows in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR:-

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
17. Whereas the Appellant meticulously demonstrated, on a balance of probability, that the Respondent had absented herself from duty and that she did not demonstrate that she had been permitted to be away, the Appellant failed to demonstrate compliance with Section 41 of the *Employment Act*.
18. The Respondent was not shown to have been informed of the charges against her in the manner set out in Section 41 of the *Employment Act*, and to have been given an opportunity to be heard and to be accompanied to the hearing by a witness as by law provided. The letter dated 25/2/2019 and produced in evidence by the Appellant was not shown to have been served on and/or received by the Respondent. The letter purported to invite the Respondent for a disciplinary hearing on the same date (25/2/2019). The Respondent was dismissed on the same date. This was grossly unfair. An employee served with a charge sheet/a catalogue of charges against him or her, must be given reasonable time to respond to the charges and to prepare for the disciplinary hearing. I have severally stated in previous judgments that a notice to show cause and an invitation to attend a disciplinary hearing should never be combined, as the two are different. An employee must always be given reasonable time to respond to a notice to show cause and reasonable time to prepare for a disciplinary hearing.
19. I find and hold that termination of the Respondent's employment was procedurally unfair, and I uphold the trial Court's finding in that regard.
20. On the second issue, I uphold the trial Court's award of an equivalent of six months' salary (Kshs 105,366) being compensation for unfair termination of employment.



21. The award of Kshs 17,561 being one month salary in lieu of notice is upheld. The Respondent was not shown to have been given a termination notice pursuant to Section 35(1) (c) of the *Employment Act*.
22. The award of kshs. 7,610 shown to have been made regarding the remainder of the contract is set aside. The award is not shown to be supported by any evidence, and is not one of the reliefs set out in Section 49(1) of the *Employment Act*.
23. The award of Kshs 400 being unremitted NSSF contribution is set aside. I have severally pointed out in previous judgments that once deducted from an employee's salary, statutory deductions cease to be the employee's property/entitlement. They become the property and/or entitlement of the statutory entities regarding which the deductions were made. Such statutory entities, including the NSSF, have statutory mechanisms of recovering any withheld deductions from employers.
24. The award of Kshs 25,387.50 being severance pay is set aside as the Respondent's termination did not result from redundancy under Section 40 of the *Employment Act*.
25. The award of Kshs 38,387.50 being leave pay is upheld. Section 74(f) of the *Employment Act* obligates an employer to keep written records of an employee's leave entitlement, days taken and days due. The Appellant did not exhibit documents (leave application forms) demonstrating when the Respondent applied for leave during the period of employment, how many leave days were taken upon each application, and how many accrued leave days the Respondent had at the time of termination. Indeed, the Respondent's summary dismissal letter dated 25/2/2019 did not even mention accrued leave days.
26. The award of Kshs 77,268 being salary underpayment is set aside. The Respondent's contract of employment dated 13/12/2018 stated that the Respondent's basic monthly salary was Kshs 14,651 plus 15% of the basic salary being house allowance. This made a total of Kshs 16,848.65. The Respondent did not demonstrate, by evidence, the basis of her underpayment claim. Alleged underpayments are in the nature of special damages, and must always be strictly proved. There was no such proof in the present case.
27. The order for issuance of a certificate of service to the Respodnent by the Appellant is upheld pursuant to Section 51(1) of the *Employment Act*.
28. The appeal herein partly succeeds to the extend stated in this judgment; with the total sum upheld by this Court being Kshs 161,314.5. Judgment accordingly.
29. Each party will bear its own costs of the appeal.
30. The Respondent is awarded costs of proceedings in the Court below. Interest on the sum decreed by the trial Court and upheld in this judgment shall be calculated from the date of the trial Court's judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE



.....for Appellant

.....for Respondent

