



**Truckers Paradise Limited v Kilunda (Appeal E146 of 2023)  
[2024] KEELRC 1471 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1471 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E146 OF 2023  
M MBARÚ, J  
MARCH 20, 2024**

**BETWEEN**

**TRUCKERS PARADISE LIMITED ..... APPELLANT**

**AND**

**PETER MWANIA KILUNDA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Akee delivered  
on 6 December 2023 in Mombasa CMELRC No. E121 of 2020)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 6 December 20223 in Mombasa CMELRC No. E121 of 2020. Following the judgment, the appellant was aggrieved and lodged this appeal on the grounds that the trial court erred in awarding general damages at Kshs. 100,000 as compensation for unfair termination of employment. The awards of leave and notice pay were not justified since this was not working at the time employment was terminated.
2. The appellant is seeking that the judgment of the trial court be set aside with regard to the awards of notice pay, leave, and compensation.
3. The background to the judgment is that the respondent filed his claim on the grounds that he was employed by the appellant as a pump attendant in the year 2013. His wage was Kshs. 20,300 per month. He claimed that on 26 September 2010, his employment was unfairly terminated without reason or due process. On 25 September 2020, he was summoned to a sham disciplinary hearing that failed to adhere to the mandatory provisions of the law. No warning was issued prior. The respondent then claimed from terminal dues;
  - a) Notice pay Kshs. 20,200;
  - b) Salary for September Kshs. 20,000;



- c) Leave pay Kshs. 1,347;
  - d) Gratuity Kshs. 81,576;
  - e) 12 months' compensation Kshs. 242,400;
  - f) Certificate of service;
  - g) Costs.
4. In the response, the appellant admitted that the respondent's employment was terminated on 26 September 2020 for gross misconduct. He was summoned for a disciplinary hearing to allow him to make his representations. The respondent was found to be of gross misconduct which allowed for summary dismissal and the claims made are not justified. Notice pay and compensation are not due in summary dismissal. He had taken leave and was paid for days worked. A certificate of service is due for collection.
5. In judgment, the learned magistrate made a finding that termination of employment was unlawful, no notice was issued, the respondent was entitled to leave pay, and the following awards were made;
- a) Compensation at 10 months at Kshs. 100,000;
  - b) Notice pay Kshs. 20,200;
  - c) Leave pay Kshs. 1,347;
  - d) Certificate of service;
  - e) Costs.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that upon the finding by the trial court that there was unfair termination of employment, compensation was awarded at Kshs. 100,000 without giving reasons for such allocation stated to be for 10 months. At the time employment was terminated, the respondent was earning Kshs. 20,200 per month. Section 49 of the *Employment Act*, 2007 (the Act) directs that the assessment of compensation should be for an amount equivalent to up to 12 months' gross wage. The allocation of Kshs. 100,000 is not commensurate with the law.
8. The respondent was summarily dismissed for gross misconduct. The appellant is allowed under Section 44(1) and Section 41(2) of the Act to dismiss the employee without notice. The award of notice pay is not justified in this case. The trial court misapplied the evidence and the law in making the awards that should be set aside.
9. The respondent submitted that the finding that there was unfair termination of employment was proper and justified and in accordance with principles outlined in the case of *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR. The employer must abide by the provisions of Section 41 of the Act and the attendant motions therein. Following a meeting held by the appellant, it was resolved that the respondent should be given a warning. Instead, he received notice of summary dismissal. That was unfair and without justification.
10. In making a compensation award, the court is given discretion. Section 49 of the Act allowed the learned magistrate the discretion to award 10 months' compensation as held in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR that upon the court finding that there was unfair termination



of employment, Section 49 allows the court to award compensation of up to 12 months' gross wage. The judgment of the trial court is proper and lawful. The appeal should be dismissed with costs.

#### Determination

11. This is a first appeal and the court is given the duty to re-evaluate the entire record, reassess the findings by the trial court, and make its conclusions. However, regard must be the fact that the trial court had the opportunity to hear the witnesses in evidence.
12. There are three issues that the appellant has raised, the award of compensation being without reasons; the award of notice pay, and leave pay whereas such had been addressed.
13. The respondent filed his claim on the grounds that his employment was dismissed unfairly. He asserted that he was invited to a disciplinary hearing that was a sham. In his evidence-in-chief on 17 August 2023, he admitted that he was invited to a disciplinary meeting. There was a show-cause notice and he signed it. He was then dismissed the next day.
14. Through a letter dated 26 September 2020, the appellant issued the respondent with notice of termination of his employment on the grounds that he had been directed to relocate to Shell Changamwe Service Station but he failed to do so. He became rude to his seniors. His employment was terminated with effect on the same date.
15. The appellant's case was that the respondent was of gross misconduct. His case related to breach of duty.
16. Whereas an employer is allowed to address gross misconduct through summary action in accordance with Section 44 of the Act, termination of employment on account of misconduct is regulated under Section 41 of the Act. The notice terminating employment does not speak to the motions of Section 44 of the Act but those of Section 41 thereof.
17. Equally, at the disciplinary hearing, whether there is alleged gross misconduct or misconduct, the motions of Section 41 of the Act require that the employee's right to make representations in the presence of another employee of his choice to present. Such provisions are mandatory as held in *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited*, Cause No. 74 of 2013 that whatever reasons for an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Act. The notice issued to the respondent to attend a disciplinary hearing dated 25 September 2020 failed this legal threshold. He ought to have been advised to bring another employee of his choice to the disciplinary hearing.
18. The finding by the learned magistrate that there was an unfair termination of employment cannot be faulted.
29. However, the award of compensation must be for the given reasons as held in the case of *Gas Kenya Limited v Odhiambo (Appeal E006 of 2022)* [2022]. The court must exercise the discretion conferred upon it judicially when allocating compensation. Whether to award the maximum allowed at 12 months or not is a decision for the trial court. However, such discretion only applies where there are valid reasons for the allocated award.
20. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum compensation must be based on sound judicial principles, and that the trial court must justify or explain why a claimant is entitled to the maximum award. The award must be explained. For example, in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No 42 of 2015, the Court of Appeal considered the conduct of the employee as a material aspect to reduce the award of compensation.



21. Under Section 49(2) of the Act, the award allocated must be applied based on the gross wage of the employee.
22. In this case, the respondent was earning Kshs. 20,200 per month. The award of Kshs. 100,000 compensations is not commensurate with the gross wage.
23. The general principle for allocation of compensation is the provisions of Section 45(5) of the Act. The record of the employee at the time employment terminated is imperative. The respondent filed his warning letter issued the same day with the notice terminating his employment. Save for want of due process and provision of another employee of his choice, he does not contest that the issue at hand with regard to his misconduct is not correct.
24. Putting all these aspects into account, having worked for the respondent from the year 2013 to 2020, compensation at 3 months' gross wage is herein found sufficient all at Kshs. 60,600.  
For lapse in due process, notice pay is due at Kshs. 20,200.
25. The claim for untaken leave days was properly assessed at Kshs. 1,347.
26. Issuance of a certificate of costs is a requirement under Section 51 of the Act. upon clearance and return of all company property, such should be issued.
27. On the question of costs, this is also discretionary in terms of Section 12(4) of the *Employment and Labour Relations Court Act*, 2011. Costs in employment claims are not a matter of general application. They ought to issue with reasons.
28. The appeal partially succeeds and the judgment in Mombasa CMELRC No. E121 of 2020 hereby reviewed in the following terms;
  - a) Compensation Kshs. 60,600;
  - b) Notice pay Kshs. 20,200;
  - c) Leave Kshs. 1,347;
  - d) Certificate of service to be issued upon clearance;
  - e) Each party is to bear the costs of this appeal.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

