



**Asp Company Limited v Ole Kutata (Appeal 20 of 2022)
[2024] KEELRC 641 (KLR) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 641 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL 20 OF 2022
B ONGAYA, J
MARCH 15, 2024**

BETWEEN

ASP COMPANY LIMITED APPELLANT

AND

NTIATO OLE KUTATA RESPONDENT

(Appeal from the Judgement and Order of the Chief Magistrate's Court at Kajiado delivered on the 16th day of September 2022 by Honourable V. Kachuodbo in CM ELR Cause No. E040 of 2021)(Before Hon. Justice Byram Ongaya on Friday 15th March 2024)

JUDGMENT

1. The respondent filed a memorandum of claim in the lower Court on 01.07.2021 through Nairi & Company Advocates. The respondent (claimant) claimed against the appellant:
 - a. A declaration that the dismissal or termination of the claimant's employment by the respondent was unlawful, unjust and unfair.
 - b. Payment of a sum of Kshs. 138,440.64/= being sum equivalent to salary in lieu of leave from 2013 to 2020.
 - c. Payment of a sum of Kshs.162,440/= being gratuity for the period between the year 2013 and 2020.
 - d. Payment of a sum of Kshs. 40,610/= being salary in lieu of notice.
 - e. General damages for unlawful, unjust and unfair termination.
 - f. An Order compelling the Respondent to issue the claimant with a positively referenced certificate of service.



- g. An order compelling the respondent to issue an apology to the claimant for associating him with criminal activities and elements.
 - h. Costs of the suit.
 - i. Interest at court rates on the prayers above.
 - j. Any relief that the Honorable Court may deem fit to grant.
2. The appellant filed its reply to claim dated 01.10.2021 through Ndalila & Company Advocates. The appellant admitted that the respondent worked for the appellant on short term engagement contracts between October 2013 and August 2020 as a security guard. The appellant pleaded that the gross monthly salary of the respondent was between Kshs. 9,101 and Kshs. 15,047.90 for the engagement period and house allowance of between Kshs. 1,820 and 2,257. Kshs 1,000 was paid for work done on Saturday and Sunday.
3. The appellant denied the allegations pleaded in the claim and stated that it did not need to issue notice since summary dismissal is justified under section 44 (4) (g) of the *Employment Act*. The respondent prayed that the claim be dismissed with costs.
4. The trial Court delivered judgment on 16.09.2022, found that the alleged issues of theft leading to the termination of the respondent herein were serious, and deserved some semblance of due process and fair hearing. The trial Court found the appellant fell short of according the respondent due process, hence, rendering the termination unlawful. The trial Court awarded the respondent as follows:
- a. One-month salary in lieu of notice.
 - b. Damages for wrongful and unfair termination assessed at equivalent of six months' gross pay less statutory deductions.
 - c. The respondent to issue the claimant with certificate of service.
 - d. Costs of the suit plus interest at court rates from the date of Judgement until payment in full.
5. The appellant brought the appeal vide a memorandum of appeal dated 12th October 2022 through Ndalila & Company Advocates. The appellant was partially dissatisfied with the Judgement and Order of the lower Court upon the following grounds:
- a. That the learned trial Magistrate erred in law and in fact in failing to find that the respondent was accorded a fair hearing prior to termination of employment in the presence of a fellow employee of the respondent's choice or a trade union representative as provided for in section 41 of the *Employment Act*, 2007.
 - b. That the learned trial Magistrate erred in law and in fact in failing to analyse the pleadings, the oral testimonies of the parties and the documentary evidence and failing to be guided by Section 45 of the *Employment Act*, 2007 in arriving at the decision rendered.
 - c. That the learned trial Magistrate erred in law and in fact in awarding the respondent one-month salary in lieu of notice.
 - d. That the learned trial Magistrate erred in law and in fact in awarding the Respondent damages for wrongful and unfair termination assessed at equivalent of six month's gross pay less statutory deductions.
 - e. That the learned trial Magistrate erred in law and in fact in awarding the Respondent costs.



6. The appellant prayed for the following orders:
 - a. The Honourable Court be pleased to allow the appeal.
 - b. The Honourable Court be pleased to set aside the Judgement dated 16th September 2022; and
 - c. Award the costs of the appeal and costs in the Magistrate's Court to the Appellant.
7. The parties filed their respective submissions. The court has considered the parties' respective cases and submissions and makes returns as follows.
8. The 1st issue is whether the termination was unfair in procedure and substance. The respondent was employed on term contracts between October 2013 and August 2020 as a security guard. It was alleged that the respondent stole a mallet, the property of the appellant. DW1 was equally a security guard in appellant's employment. DW1 testified that he confronted the respondent on the material date and the respondent told him that he was taking the mallet to respondent's house but in circumstances that the respondent lacked the requisite gate pass. At paragraph 5, of his witness statement the respondent stated that he was forced to admit that he was in possession of stolen property. He did not plead or provide evidence of the forced admission. The Court finds that the trial Court erred in failing to find and consider that the respondent had admitted the allegations levelled and the appellant had established the reason for termination existed as valid as at termination per section 43 of the Employment Act. Further, the reason was fair as it related to the respondent's conduct, compatibility, and the appellant's operational requirements per section 45 of the Act. The respondent confirmed that he was suspended. He was notified about the disciplinary hearing by the notice dated 05.08.2020 which he received and attended the disciplinary hearing on 17.08.2020 accompanied by a fellow security guard. The minutes of the proceedings show that the respondent admitted the allegations. The Court finds that the appellant accorded the respondent due notice of allegations and a hearing per section 44 of the Act. Accordingly, the Court returns that the trial Court erred in finding that the dismissal was unfair for want of due process.
9. The award of one-month salary in lieu of termination notice and six months salaries for unfair termination are liable to setting aside. The respondent was entitled to a certificate of service as awarded by the trial Court. In that considered margin of success, each party to bear own costs of the suit in the trial Court and the appeal. The 2nd issue on reliefs is thus determined.

In conclusion, judgment on appeal is hereby entered for the appellant against the respondent with orders:

- a. The trial Court's orders in judgment and decree are set aside and substituted with an award on certificate of service to issue in 30 days hereof and each party to bear own costs.
- b. Each Party to bear own costs of the appeal.
- c. The Deputy Registrar to return the file to the Machakos Sub-Registry forthwith.

Signed, dated and delivered by video-link and in court at Nairobi this Friday 15th March 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

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