



**Manga v Wildlife Works Sanctuary Limited (Appeal E043 of 2023)  
[2024] KEELRC 1402 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1402 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E043 OF 2023  
M MBARÚ, J  
MARCH 14, 2024**

**BETWEEN**

**GRACE MANGA ..... APPELLANT**

**AND**

**WILDLIFE WORKS SANCTUARY LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment by Hon. A. M. Obura, Chief Magistrate in Voi ELRC No. E002 of 2022 delivered on 17 April 2023)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 17 April 2023 in Voi CMELRC No. E002 of 2023. There are four (4) grounds for appeal that;
  - a. The learned magistrate erred in law and fact by deciding that the appellant failed to prove her claim thus dismissing the same.
  - b. The trial magistrate erred in law and fact by deciding that the claimant failed to prove her claim for unlawful termination despite evidence supporting her claimant being tendered in court.
  - c. The learned magistrate erred in law and fact by deciding that the appellant was lawfully terminated by the respondent.
  - d. The trial magistrate erred in law by failing to consider the appellant’s submissions and the authorities cited therein.
  
2. The appellant is seeking that the appeal be allowed and judgment of the trial court be set aside and judgment in her favour against the respondent with costs.

3. The background to the appeal is a claim filed by the appellant on the grounds that on 1<sup>st</sup> March 2011, she was employed by the respondent and served until 8 June 2021 when her employment was terminated without due process. She claimed the following terminal dues;
  - a) One-month notice pay Kshs. 38,406.81;
  - b) 12 months' compensation Kshs. 460,881.72;
  - c) Unpaid salary from June 2021 Kshs. 10,241.84;
  - d) Severance pay/gratuity for 10 years Kshs. 192,034.50;
  - e) Lost pension years Kshs. 14,287,333.32;
  - f) Certificate of service and costs.
4. In response, the respondent's case was that they were approached by the Voi DCI and assistant chief for Marungu Division stating that the appellant had been involved in defrauding some community members, a minor James Kea, and his mother, Unith Mary Makumbo of approximately Kshs. 400,000 which was meant to be the minor's compensation for an accident involving the minor. The appellant used the money to purchase two plots in the Msharingi or Msharini and Kasigau areas. The respondent is engaged in community work and outreach, these allegations severely compromised its work in the area and the appellant was found in breach of the human resource policy. Its employees are required to conduct themselves in a manner to fosters community empowerment and to protect the reputation of the respondent. The appellant had committed a criminal offense affecting a community member while in the employment of the respondent which amounted to gross misconduct. The appellant agreed to surrender one of the plots she had purchased with the proceeds of fraud to partly reimburse the minor and pay the balance in cash through the minor's mother's bank account.
5. It was the respondent's case that the appellant was served with a notice to show cause dated 2 June 2021 to explain the allegations made against her and was suspended. A disciplinary hearing was held on 7 July 2021 where she admitted to the fraudulent activities against the minor and asked for a final chance. She also delivered a letter dated 7 July 2021 admitting that the allegations against her were true and hence apologized to the respondent for the fraudulent actions. On 8 July 2021, the respondent summarily dismissed the appellant for gross misconduct. At the time, the appellant was earning a basic wage of Kshs. 22,758.18 per month. her final dues have been ready for collection upon the return of company uniforms and other equipment to prevent other used to defraud other members of the community.
6. In judgment, the learned magistrate analyzed the pleadings and evidence found the claim without merit, and dismissed it. The appellant was directed to attend before the respondent and undertake clearance for payment of terminal dues.

Aggrieved by the judgment, the appellant filed this appeal.
7. Both parties attended and agreed to address the appeal by way of written submissions.
8. The appellant submitted that the trial court failed to properly analyze the evidence before it and that the burden of proof was upon the respondent in terms of Section 107 of the [Evidence Act](#) to demonstrate that termination of employment was in accordance with Sections 43, 45, and 47 of the [Employment Act, 2007](#) (the Act). This resulted in unfair termination of employment as there were no justified reasons as held in *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR. The trial court applied pleadings filed by the respondent without regard to the evidence. The assertion that Voi DCI and the chief made complaints against the appellant were matters not subjected to evidence to rely on Section 44(4)(g) of the Act as comprising a case for summary dismissal. In the witness statements

of Eunith Mary Makumbo, she denied any fraud and that she is an in-law to the appellant and had given her a loan facility of Kshs. 350,000. The allegations that there was a fraudulent activity of Kshs. 400,000 was without evidence.

9. The respondent submitted that the appellant was not issued with notice before termination of employment. Section 44(2) of the act requires notice to issue even in a case of summary dismissal. There was no leave pay in terms of Section 28 of the Act and for want of due process, the appeal should be allowed and the claims made be awarded as pleaded.
10. The respondent submitted that the appellant failed to prove her case before the trial court and the findings dismissing it were proper and justified. Section 44(4)(g) of the Act allows an employer to dismiss an employee who is found to have engaged in gross misconduct of a criminal nature. The appellant admitted to having defrauded a community member in the course of her duties and which matters were brought to the attention of the respondent as the employer. The DCI Voi and the chief undertook their independent investigations and found the appellant culpable. The appellant was found to have stolen from a minor and the respondent called sufficient evidence to prove such theft.
11. The respondent submitted that the appellant admitted to her mistake and asked for an apology. These matters were put into account by the trial court in dismissing the claim and the instant appeal is without merit and should be dismissed with costs.

### **Determination**

12. This is a first appeal. The court is required to consider the record and findings of the trial court, undertake a re-evaluation, and make its conclusions.
13. The issues that arise are whether the dismissal of the appellant's case was justified and whether the appeal has merit.
14. As outlined above, the appellant was an employee of the respondent but on 8 July 2021, she was issued with notice of summary dismissal. The grounds for dismissal were that she had participated in fraudulent activities against a disabled minor and community member.
15. The appellant does not contest that she was issued with a show cause notice dated 2 June 2021 together with a suspension letter of equal date to allow for investigation. On 7 July 2021, the appellant was invited to a disciplinary hearing and she admitted in writing that she had engaged in fraudulent activities and offered an apology.  
These facts are not contested.
16. In her evidence before the trial court, the appellant testified that the human resources office, Amos Matoke told her to resign from her employment or she would be dismissed. That she did not sign the letter of resignation on 8 June 2021. In cross-examination, the appellant confirmed that she wrote a letter dated 7 July 2021 and it related to her apology for an offence she was involved in. The Voi DCI and the Chief were involved in the matter.
17. An admission of misconduct by an employee over a case of gross misconduct is purely at the hands of the employer to determine. Under Section 44 of the Act, an employee who engages in gross misconduct is subject to summary dismissal. In this regard, the respondent took the appellant through due process, a show cause notice was issued to allow for investigations, and eventually, she was invited to a disciplinary hearing. By her admission, the appellant accepted the allegations made against her.

18. The learned magistrate analyzed these facts, applied the law accordingly, and arrived at a correct finding. The summary dismissal of the appellant was justified. The court finds no matter to fault the learned magistrate in this regard.
19. Notice pay and compensation are remedies unavailable in a case where summary dismissal is justified.
20. On the claim for severance pay and gratuity, severance pay is only due in the case of redundancy. This was a case of justified summary dismissal. Gratuity is only available at the end of employment where the employment contract allows for such benefit.
21. In the employment contract dated 1<sup>st</sup> August 2011, there is no benefit for payment of gratuity.
22. On the claim for lost pension, with summary dismissal, the letter of employment did not make provision for such benefit. The alleged lost years of service arose from the appellant frustrating her employment through gross misconduct and cannot justify such a claim for a period not served. See D. K. Njagi Marete v Teachers Service Commission [2017] eKLR.
23. on the claim for a Certificate of Service, such is due at the end of employment in accordance with Section 51 of the Act. The practice is to allow the employee to undertake clearance and return all company property, and the certificate is issued.
24. The learned magistrate made provisions for such matter in the judgment by allowing the appellant to attend within 14 days of the judgment to have her cleared and be paid terminal dues. such is sound judgment and cannot be faulted.
26. The appellant failed to address whether she attended for clearance and payment of her terminal dues and collection of Certificate of Service. The appeal put into perspective, the appellant having failed to attend as directed, costs for the appeal should be awarded to the respondent.
27. Accordingly, the appeal is without merit and is hereby dismissed. costs awarded to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet**

..... **and** .....