



Ongweso v Green Pastures Farm (Employment and Labour Relations Appeal E011 of 2023) [2024] KEELRC 1687 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1687 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2023**

**JW KELI, J
JUNE 26, 2024**

BETWEEN

JOASH AMBOGO ONGWESO APPELLANT

AND

GREEN PASTURES FARM RESPONDENT

(An Appeal from the Judgment and or decision of the Honourable Cosmas Maundu, CM delivered on 11/7/2023 in Bungoma Cause CMELR No. E013 of 2022)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and or decision of the Honourable Cosmas Maundu, CM delivered on 11/7/2023 in Bungoma Cause CMELR No. E013 of 2022 Between Joash Ambogo Ongweso Versus Green Pastures Farm, filed the Memorandum of Appeal dated 27th July 2023 and Record of Appeal dated 1st February 2024, seeking the following orders: -
 - a. The Lower court judgment/decision that only awarded the appellant Kshs. 35,000/- which amount was very low and dismissing the rest of the Appellant's suit be set aside and or varied.
 - b. The appellant's suit be allowed and judgment be entered for him as sought for in the Lower Court.
 - c. The respondents to pay the costs of this Appeal and the lower court.
2. The Appeal was premised on the following grounds: -
 - i. The Learned Trial magistrate erred in law and fact when he found that the Appellant failed to prove his claim against the Respondent when the case had been proved on a balance of probability having not been defended by the respondent.



- ii. The Learned Trial magistrate erred in law and fact when he rightfully held that the respondent did not rebut the evidence and the appellant's case despite being served with a hearing notice but went on to partially allow the same instead of allowing the whole case as it was not defended.
 - iii. The Learned Trial Magistrate erred in law and fact when he failed to allow the appellant's case as it was not opposed but instead only awarded the appellant Kshs. 35,000 which amount is too low.
 - iv. The Learned Magistrate erred in law and fact when ruled on the appellant's case as if the respondent testified and adduced evidence when the respondent had not appeared in court at all.
 - v. The Trial Magistrate fell into an error of law and fact when he found that the Appellant had been lawfully dismissed from his place of employment when there was overwhelming evidence to the contrary which evidence was not objected to as the respondents never showed up in court on the day of the hearing.
 - vi. the Learned Trial Magistrate erred in law and in fact by requiring the Appellant to prove his case otherwise than on a balance of probability as required in civil matters a case that as not opposed, hence a miscarriage of justice.
 - vii. The Learned Trial Magistrate erred in law and fact when he found that the appellant had not proved that he was unlawfully dismissed when the respondent did not rebut the appellant's evidence that he was unlawfully dismissed and thus arrived at a wrong decision
 - viii. The Learned Trial Magistrate's judgment and or decision is against the weight of the evidence on record.
 - ix. The learned Trial Magistrate was biased as against the Appellant. (Pages 1-2 of Record).
3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Nabibia & Company Advocates were dated 27th July 2023 and received in court on 11th April 2024. The Respondent did not appear in the appeal.

Background to the appeal

4. The Appellant/Claimant filed a suit Bungoma CMELR Cause No. E013 of 2022 against the Appellant for unfair termination. Through the Memorandum of Claim dated 1st July 2022 and filed on 5th July 2022, the Appellant/Claimant sought the following reliefs: -
- a. As prayed in paragraph 16 above.
 - b. Costs and interest
 - c. Any such further or other relief the Honourable Court deems fit to grant.
- (Pages 3-7 of the Record was the Appellant's claim).
5. The Memorandum of Claim had been supported by the Verifying sworn by the Appellant on 1st July 2022 and accompanied by the Appellant's list of witnesses of even date, the Appellant's Witness statement dated 1st July 2022, the Appellant's list of documents of even date and the Appellant's documents (Page 8 to 28).



6. The Respondent on 12th August 2022 filed a Response to the Memorandum of Claim dated 11th August 2022 (pg. 29-31 of the Record).
7. The Trial Court proceeded with the hearing of the Appellant's/Claimant's case ex-parte with the Appellant as the only witness of fact on 16/5/2023. The Defence was a no-show (pages 33-35 of the Record).
8. The Trial Court (Hon. Cosmas Maundu, CM) delivered its judgment on the 11th of July 2023 partially in favour of the Appellant/Claimant to the tune of Kshs. 35,000 as salary in lieu of notice and granted costs and interest to the Appellant/Claimant (Pages 36-41 of the Record was the Judgment).
9. The Trial Court proceedings indicate that the respondent filed a Notice of Motion application dated 21st July 2023 seeking to set aside the judgment delivered on 11th July 2023. The trial court directed parties to file submissions on the application (Pages 41- 43 of the record). The Record of appeal does not show the fate of the said application.

DETERMINATION

Issues for determination.

10. The Appellant in his submissions identified the following issues for determination in the appeal: -
 - a. Whether the trial court erred in holding that the termination of the appellant was lawful despite holding that the respondent did not testify after having been served with the hearing date hence the case was not defended.
 - b. Whether the trial court erred in awarding the appellant only Kshs. 35,000/- from the entire suit and dismissing the other reliefs sought on the grounds that the other reliefs were not proved despite the respondent not offering any evidence in court to defend their case.
11. The Respondent did not file any submissions.
12. The Court sitting on appeal from the Trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen nor heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123.
13. The court adopted the issues identified by the Appellant as the respondent did not file submissions being; -
 - A. Whether the trial court erred in holding that the termination of the appellant was lawful despite holding that the respondent did not testify after having been served with the hearing date hence the case was not defended.
 - B. Whether the trial court erred in awarding the appellant only Kshs. 35,000/- from the entire suit and dismissing the other reliefs sought on the grounds that the other reliefs were not proved despite the respondent not offering any evidence in court to defend their case.
 - a) . Whether the trial court erred in holding that the termination of the appellant was lawful despite holding that the respondent did not testify after having been served with the hearing date hence the case was not defended.
14. The appellant pleaded in paragraph 3 of his memorandum of claim that he was employed by the respondent as a farm manager from 25th January 2021 to 23rd May 2022 when his employment was



- terminated. On the 23rd May 2022, he received an interdiction letter which also stated his services stood terminated. That he was not accorded a hearing. He then sought for various reliefs (pages 5-6 of the Record)
15. The Respondent filed a response to the claim stating the termination was by mutual consent, and that the claimant was in breach of terms and conditions of employment by engaging in activities that created a serious conflict of interest and breach of a fundamental term of loyalty (pages 29-31 of the Record was the response drawn by CBG Ouma). No document(s) or witness statement(s) was filed by the Respondent.
 16. The appellant's case was heard on the 16th May 2023 in the absence of the defence, where the appellant adopted his witness statement as evidence in chief and produced his documents under the list dated 1st July 2022 as his evidence. He stated he was unfairly dismissed (pages 34-35).
 17. The Learned Trial Magistrate delivered judgment in the claim on the 11th of July 2023 where he held the appellant was granted the opportunity to be heard but did not take it and that the reasons for the termination were reasonable. The court further granted one month's notice under the contract of employment.
 18. The standard of proof of lawful termination of employment is as per section 45 of the [Employment Act](#) to wit: - (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.
 - 4) A termination of employment shall be unfair for the purposes of this Part where—
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee,
 - (b) the communication of that decision to the employee and the handling of any appeal against the decision;
 - (c) the conduct and capability of the employee up to the date of termination;
 - (d) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;



- (e) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee.”

19. The right to fair hearing under section 41 of the [Employment Act](#) is mandatory and states: - ‘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.”
20. The burden of proof in employment claims is as per section 47(5) of the [Employment Act](#) to wit: - ‘For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
21. For termination of employment to pass the fairness test there has to be a demonstration of substantive fairness and procedural fairness as held in *Walter Ogal Anuro V Teachers Service Commission*[2013]e KLR.
22. The court in re-evaluation of the facts and the law in the Trial Court will apply the foregoing provisions of the law. The burden of proof under section 47(5) of the [Employment Act](#) is discharged once the employee proves the fact of employment, the termination, and that unlawful and/or unfair termination occurred. Then the burden shifts to the employer to justify the termination.
23. The claimant in proof of his employment by the respondent produced the contract of employment dated 18th January 2020(pages 16-19 of the Record). To prove the termination of the employment he produced a letter dated 23rd May 2022(page 20 of the Record). To prove unfair termination, he relied on the same letter of 23rd May 2022 the interdiction letter as well as the termination letter, and that there was no hearing.
24. The Respondent pleaded the termination was by mutual consent but that position remained to be unsubstantiated allegations as there was no affidavit before the court or even a document to prove the mutual consent. The only evidence before the Trial Court was by the Appellant.
25. On the question of fair hearing the provisions of section 41 of the [Employment Act](#) ought to be complied with. The learned magistrate stated the claimant was granted the opportunity to be heard and did not take it up.
26. The claimant stated that the interdiction also had a termination clause hence a predetermined decision. He also denied the accusations in the letter.
27. The letter dated 23rd may 2022 read: - ‘it has come to our attention that you presently running a business as an agrovet. This is in direct conflict with your terms and conditions of service as it presents a serious conflict of interest. It is apparent that you will certainly not be in a position to give your duties the undivided attention contemplated by your contract of employment in the recent past we have been unhappy with your attitude as a farm manager and there are many instances when your conduct has



bordered on insubordination and lack of respect for the undersigned as your superior. you have also failed and/or neglected to provide weekly reports as requested.

We have accordingly lost confidence in you as a farm manager and are desirous of terminating your contract in accordance with the terms and conditions of your service. Therefore, in accordance with your letter of employment we hereby offer you one month's salary in lieu of notice to take effect immediately if you accept the offer your employment will stand terminated by mutual consent with immediate effect.

Before we make a final decision, we hereby give you an opportunity to make written representations on the intended action. Please note that should we not hear from you within seven days. your contract stands terminated with immediate effect and your salary for the month of May 2022 and one month's salary in lieu of notice will be paid to you.

In the meantime, your contract stands suspended pending the determination of the intended action. Accordingly, you are requested to hand over any farm assets in your possession to Mr. John Musakali on 24th May 2022 at 10am and to stay away from the farm unless otherwise requested in writing.

Yours faithfully

For: Green Pastures Farm

Catherine Musakali

Managing Proprietor”

28. The court finds that under the filed defence there was an allegation of mutual consent termination and yet the letter of 22nd May 2022 simply made an offer and at the same time suspended the claimant and there was no evidence of acceptance of the terms. The court found and determined that this was not a mutual consent termination.

Procedural fairness

29. As concerns the hearing opportunity stated in the judgment, the letter dated 23rd May 2022 stated: “Before we make a final decision we hereby give you an opportunity to make written representations on the intended action. Please note that should we not hear from you within seven days, your contract stands terminated with immediate effect and your salary for the month of May 2022 and one month's salary in lieu of notice will be paid to you.” The claimant was then informed he stood suspended pending the intended action.
30. Section 41 of the *Employment Act* states:- ‘(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.” The court holds that the letter dated 23rd May 2022 was not compliant with the mandatory provisions of section 41 of the *Employment Act* as there was no evidence that the claimant was ever invited for a hearing in the presence of another employee or a shop floor union representative of his choice. There was no hearing or evidence of opportunity to be heard as found by the Learned Magistrate.



Substantive fairness

31. On reasons for the termination, the letter dated 23rd May 2022 stated: “It has come to our attention that you are running a business as agrovet. This is in direct conflict with your terms and conditions of service as it presents a serious conflict of interest.....in the recent past we have been unhappy with your attitude as a farm manager and there are many instances when your conduct has bordered on insubordination and lack of respect for the undersigned as your superior . You have also failed and or neglected to provide weekly reports as requested.”
32. The Respondent in response asserted that the termination was by mutual consent, which the court found was not true.
33. The claimant produced as his evidence performance appraisal for the period 1st January 2022 to 31st March 2023. The evidence of the claimant was uncontroverted. The allegations in the letter were unsubstantiated, there was a dearth of details on the alleged agrovet business or evidence of its existence, the allegation by the Respondent of being unhappy with his attitude was also unsubstantiated and so was the allegation of the insubordination to the signatory of the letter. There was no evidence of any prior warning of the alleged attitude which made the employer unhappy. The proof of reasons for termination of employment is further elaborated in section 43 of the Employment Act to wit: - ‘(43)(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.’(emphasis given)
34. The burden to prove of the reasons for termination (i) related to the employee’s conduct, capacity, or compatibility; or (ii) based on the operational requirements of the employer; as per section 45(2) lay with the Respondent. Evidence could only have been by way of testimony and documents of employment like appraisal reports, disciplinary action like warnings issued in the past etc. The Respondent did not discharge the burden which the court holds had shifted upon the Claimant pleading and proving the occurrence of unfair termination according to section 47(5) of the Employment Act to wit:- ‘For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.’(emphasis given)
35. Section 45(4)(b) provides that termination of employment shall be unfair where— ‘(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.’
36. For the foregoing reasons, the Court holds that the Learned Trial Magistrate erred in fact and law in holding the termination was lawful. The termination of the Appellant’s employment contract is held to have been unlawful and procedurally unfair.

b). Whether the trial court erred in awarding the appellant only Kshs. 35,000/- from the entire suit and dismissing the other reliefs sought on the grounds that the other reliefs were not proved despite the respondent not offering any evidence in court to defend their case.

37. Having found that the reasons for the termination were not proved to exist at the time of termination nor was the termination procedurally fair hence unlawful and unfair termination the court proceeds to re-consider the reliefs sought.



Notice pay

38. The Learned Trial Magistrate awarded one month's notice. The claimant sought three months' notice pay in lieu. The contract of employment provided for one month's notice pay in lieu (page 17 of the Record).
39. The award of Kshs. 35,000/- notice pay in lieu is upheld.

Accrued leave

40. The Appellant /claimant sought for payment of accrued leave for 1 year and 4 months in the sum of Kshs. 22,000/-. The defence did not produce record of the leave having been taken or any action taken in event it was not applied for. The claim is uncontroverted. The employer is the custodian of employee records including leave under section 74 of the *Employment Act* to wit:- "74(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;". The relief for accrued leave is allowed.

Claim for unpaid salary in May, June, and July 2022.

41. The court having found the claimant's services were terminated on 23rd May 2022 there was no basis for claim of salary for June and July 2022. The respondent stated the Appellant was paid a salary for May and the court finds having asked for payment beyond May on a balance of probabilities, it is more probable that not that the Appellant was paid his salary for May 2022. The relief is disallowed.

Claim for house allowance.

42. According to the employment letter the salary was consolidated at Kshs. 35000 pm hence no basis for the relief.

Claim for Gratuity and bonus

43. Gratuity was not provided in the employment letter and is disallowed as it is not a statutory payment.
44. Bonus, the same was not proved to be due on balance of probability

Compensation for unfair termination

45. The termination of the employment of the Appellant is held to be unlawful and procedurally unfair.
46. The remedy for unfair termination is as provided under section 49 of the *Employment Act* to wit:- "(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." The claimant sought 12 months' salary compensation.



47. Section 49 (4) of the *Employment Act* provides for the issues the court is to consider in the award of remedy of compensation for unfair termination including :- ‘The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the employee’s length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; the opportunities available to the employee for securing comparable or suitable employment with another employer; the value of any severance payable by law; the right to press claims or any unpaid wages, expenses or other claims owing to the employee; any expenses reasonably incurred by the employee as a consequence of the termination; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.’”
48. The Court re-examined the contract of employment and found no social security was provided, the employment was open-ended meaning the employee was entitled to expect he would serve permanently, there was no proof of the reasons for termination, and no procedural hearing. The appellant had served for 2 Years and 5 months. Considering the foregoing circumstances, and the fact that the appellant did not prove he could not get another employment, I find and award compensation for unfair termination without social security the equivalent of 10 months’ salary thus Kshs. 350,000/-.

Conclusion and disposition

49. The appeal is allowed. The Judgment and or decision of the Honourable Cosmas Maundu, CM delivered on 11/7/2023 in Bungoma Cause CMELR No. E013 of 2022 is set aside and substituted as follows: -

The claim dated 1st July 2022 is allowed as follows: -

- a. A declaration that the termination of employment of the claimant was unlawful and unfair.
 - b. Notice pay of Kshs. 35,000
 - c. Accrued leave in lieu of Kshs. 22,000
 - d. Compensation for unfair termination Kshs. 350, 000
(Awards b, c, and d above payment subject to statutory deduction of PAYE)
 - e. Interest at court rates from the date of the judgment of the trial court until payment in full.
 - f. Costs of the claim.
50. Cost of the Appeal to the appellant.
51. Stay of 30 days.
52. It is so Ordered.

DATED, SIGNED, AND DELIVERED ON THE 26TH DAY OF JUNE 2024 IN OPEN COURT AT BUNGOMA

J.W. KELI

JUDGE

In The Presence Of:-



C/A Brenda

For Appellant: Nabibia

For Respondent: Absent

