



**Obonyo v Kibos Sugar & Allied Industries (Appeal E034 of 2023)  
[2024] KEELRC 1392 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1392 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E034 OF 2023  
CN BAARI, J  
JUNE 13, 2024**

**BETWEEN**

**CHARLES ODHIAMBO OBONYO ..... APPELLANT**

**AND**

**KIBOS SUGAR & ALLIED INDUSTRIES ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. Dr. D. OGOTI (CM) Kisumu  
delivered on 24th May, 2023 in Kisumu CMELRC CAUSE NO. E77 OF 2021)*

**JUDGMENT**

1. Charles Odhiambo Obonyo (the Appellant) sued Kibos Sugar & Allied Industries (the Respondent) before the Kisumu Chief Magistrate’s Court alleging unfair termination. He sought pay in lieu of notice and underpayments all amounting to Kshs 356,208/= plus costs of the suit and interests thereon.
2. In a judgment delivered on 24<sup>th</sup> May, 2023, the Trial Court found the Appellant’s claim unmerited and dismissed it with costs to the Respondent.
3. The Appellant being dissatisfied, lodged a Memorandum of Appeal dated 12<sup>th</sup> June, 2023 contending THAT:
  - i. The Learned Magistrate erred in both law and fact in failing to appreciate the totality of the evidence as placed before him thereby arriving at a wrong decision.
  - ii. The Learned Trial Magistrate erred in both fact and law in failing to appreciate that the Claimant had discharged his duty on a balance of probability thereby arriving at a wrong decision.



- iii. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the employer failed to justify termination on grounds of absconding duty by the Appellant as evidenced on postage of termination letter was not accompanied by evidence of certificate of postage.
  - iv. The Learned Trial Magistrate erred in both law and fact in failing to consider that the employer failed to reply to the letter by the union official who had received a complaint and had a discussion with Manager of the Respondent on continual locking out of the Appellant who in turn promised that the same was going to be resolved.
  - v. The Learned Trial Magistrate erred in law and fact in failing to consider that the issue of absconding was nothing but a ploy to terminate the employment of the employee who had diligently served the company for five years.
  - vi. The Learned Magistrate erred in law and fact in failing to consider that the procedural and substantive justice was not served in the entire process of the purported termination, thereby making the termination unfair.
4. The Appellant prays that his appeal is allowed and the judgment of the Trial Court set aside. He further prays for costs of both the claim before the lower court and for this appeal.
  5. Both parties filed submissions on the matter.

### **The Appellant's Submissions**

6. The Appellant submits that the genesis of his woes was the 16<sup>th</sup> July, 2018, when he was invited to show cause why disciplinary action should not be taken against him for cutting a conveyor belt.
7. It is the Appellant's submission that the Respondent did not review CCTV footage of the conveyor belt incident nor carry out any investigations, but still suspended him on the pretext of carrying out investigations. He avers further that after the disciplinary hearing, he was issued with a warning letter and instructed to resume duty.
8. It is his submission that the issuance of the warning letter was done in the absence of any wrongdoing.
9. The Appellant submits that on resumption of duty he was denied access to the work premises. That despite denying him entry, the Appellant submits that the Respondent thereafter inexplicably accused him of absconding duty.
10. In further support of the appeal, the Appellant submits that the Respondent did not call or send him the termination letter as alleged. He avers that there were no call logs or any certificate of postage produced in evidence.
11. It is his submission that the onus was on the employer/Respondent in instances of abscondment to prove that they tried to reach out to the him in vain, which burden the Respondent has not discharged.
12. The Appellant additionally avers that being the custodian of records under Section 74 of the *Employment Act*, the Respondent did not provide any evidence of abscondment.
13. It is the Appellant's submission that despite intervention from the union the Respondent still persisted with the lock out and thereafter terminated his employment.
14. The Appellant finally states that he is abandoning the issue of underpayments and concentrating on the claim of unfair termination and the payment in lieu of notice claim.
15. The Appellant urges this court to allow his appeal.



### **The Respondent's Submissions**

16. The Respondent submits that the Appellant was rightfully dismissed for absconding duty. The Respondent further submits that the Appellant vandalised a conveyor belt for which he was let off with only a warning letter.
17. It is the Respondent's assertion that they dismissed the Appellant after he absented himself from duty without leave upon being issued with the warning letter.
18. The Respondent contends that before dismissing the Appellant, they made efforts to call and reach out to him on his address in vain. It is the Respondent's further submission that they did not lock out the Appellant.
19. It is the Respondent's submission that the union's letter protesting the lock out, was an afterthought calculated to mislead the court having been served 1 month after the termination.
20. In further opposition to the appeal, the Respondent contends that by not producing proof of his lock out, the Appellant had failed to discharge the burden of proof under Section 107 of the Evidence Act.
21. The Respondent avers that the Appellant had failed to prove unfair termination as stipulated by Section 47 (5) of the Employment Act. It stresses that where there is fair reason for dismissal, termination cannot be deemed unfair. It placed reliance in the case of CMC Aviation Limited v Mohammed Noor, Civil Appeal No. 199 of 2013 to support this assertion.
22. It is the Respondent's prayer that the appeal be dismissed with costs.

### **Analysis and Determination**

23. From my own evaluation of the memorandum and the record of appeal, together with the written submissions by both parties, I consider the following as the issues falling for determination: -
  - i. Whether the Appellant's termination was unfair.
  - ii. Whether the Appellant is entitled to the remedies sought.
24. My jurisdiction as a first appellate court is to reappraise the evidence adduced before the Trial Court in its entirety and make my own conclusion. (See *Selle & another v Associated Motorboat Co Ltd & others* [1968])
25. In *Ramji Ratna and Company Limited v Wood Products (Kenya Limited)*, Civil Appeal No. 117 of 2001, the Court of Appeal stated that a first appellate court can only interfere with the decision of the trial judge where it is based on no evidence or on a misapprehension of the evidence or the judge is shown to have obviously acted on wrong principles in reaching the findings he did. This court shall endeavour to abide by the above edicts.

### **Whether the Appellant's termination was unfair**

26. Section 41 of the Employment Act behoves an employer considering termination of an employee on grounds of misconduct, poor performance or physical incapacity to allow an employee to make representations while accompanied by a representative of his choice prior to termination/dismissal.



27. The principles in Section 41 were succinctly elucidated by Radido J in *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited* [2013]eKLR where he stated:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

28. The disciplinary process that the Appellant was taken through resulted in a warning, following which he was expected to resume duty.

29. Having extensively gone through the record of appeal, nothing shows that the Appellant was asked to show cause on absconding duty. As a matter of fact, it is not even alleged that the Appellant was taken through another process of discipline related to the charge of absconding duty that resulted in his termination.

30. It is clear that the Appellant was not informed of the charges he was facing nor was he allowed an opportunity to reply to the allegations of abscondment before his dismissal.

31. The previous charges against the Appellant that point to a fairly legal process, are distinct and separate from the charge of absconding duty, and whose result of termination could only be said to have been fair by a fresh disciplinary process.

32. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that: -

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties (emphasis own).”

33. It is the Respondent’s evidence that all it did upon the Appellant’s alleged abscondment of duty, was issue a termination, whose postage is also questionable, a certificate of postage not having been produced in evidence.

34. Although the Respondent allegedly made calls to the Appellant, and which calls the Appellant denied receiving, without tangible proof of efforts made to reach out to the Appellant, the termination is unfair. Abuodha J. in *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR held that: -

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate the efforts were made to contact such an employee without success.”

35. For the reasons foregone, I find the Appellant’s termination unfair and the finding of the Learned Trial Court is set aside.



## **Whether the Appellant is entitled to the remedies sought**

### **Compensation for unfair termination.**

36. A finding of an unfair termination no doubt entitles the Appellant to compensation in accordance with Sections 49 and 50 of the [Employment Act](#), 2007.
37. In making an award of compensation, the court is guided by the statutory capping under Section 49(4) of the [Employment Act](#). (See [Ndugu Transport Company Limited v Onyango \(Civil Appeal 24 of 2019\)](#) [2023] KECA 1249 (KLR).
38. Considering the circumstances under which the Appellant was terminated and his length of service with the Respondent, I deem an award of 10 months' salary sufficient compensation for the unfair termination and which is hereby awarded.

### **Pay in lieu of notice**

39. Having found that the Appellant was unfairly terminated, I find the claim for pay in lieu of notice merited and is awarded as prayed.

### **Underpayments**

40. In his submissions, the Appellant indicated that he had abandoned this head of the claim. I let it rest.
41. In whole, the appeal succeeds and the Judgment of the Trial Court is set aside in its entirety, and substituted therewith with the following orders:
  - a. A declaration that the Appellant was unfairly terminated.
  - b. An award of pay in lieu of notice at Kshs 17,500/=
  - c. 10 months' salary as compensation for the unfair termination at Kshs 175,000/=
  - d. The Respondent shall bear the costs of the suit both at the lower court and for this appeal.
42. It is so ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13<sup>TH</sup> DAY OF JUNE, 2024.

**C. N. BAARI**

**JUDGE**

### **Appearance:**

Mr. Odhiambo present for the Appellant

Ms. Onsongo present for the Respondent

Anjeline Wanjofu- C/A

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