



**Sinohydro Corporation Ltd v Oduor (Appeal E005 of 2024)  
[2024] KEELRC 1377 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1377 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E005 OF 2024**

**S RADIDO, J  
JUNE 12, 2024**

**BETWEEN**

**SINOHYDRO CORPORATION LTD ..... APPELLANT**

**AND**

**STEPHEN OTIENO ODUOR ..... RESPONDENT**

*(Being an Appeal from the judgment/decree of the Chief Magistrate  
Court of KENYA at Siaya by Honourable Limo B. Benjamin delivered  
on the 30th January 2024 in the Siaya CMC ELRC No. E003 of 2023)*

**JUDGMENT**

1. Stephen Otieno Oduor (the Respondent) sued Sinohydro Corporation Ltd (the Appellant) before the Principal Magistrates Court alleging unfair termination of employment.
2. After hearing, the Principal Magistrate found for the Respondent.
3. The Appellant was dissatisfied and it lodged a Memorandum of Appeal with the Court on 20 February 2024, contending:
  - i. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the fact that evidence of the case if this (sic) framing issues for determination that are not supported by pleadings and evidence adduced by both the Claimant and the Respondent.
  - ii. That the Learned Trial Magistrate erred in law and fact by treating an alleged case of unfair termination under section 41 of the Employment Laws of Kenya thus arriving at a manifestly erroneous conclusion.
  - iii. That the Learned Trial Magistrate erred in law and fact by awarding general damages for harassment, an award which is alien to the provisions of the [Employment Act](#) in a clear alleged



case of unfair termination thus violating the express and explicit provisions of section 49 of the *Employment Act*, 2007.

- iv. That the Learned Trial Magistrate erred in law and fact by failing to appreciate guiding principles for the compensation under section 49 of the *Employment Act* thus awarding manifestly high amount given the length of service of the Claimant.
  - v. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that concept of desertion as pleaded by the Appellant and completely failed to address the issue in judgment thus arriving at a manifestly unfair decision.
  - vi. That the Learned Trial Magistrate erred in both law and fact in failing to appreciate the law and the facts of the case thus arriving at a manifestly erroneous decision not supported with evidence, fact and law.
4. The Record of Appeal was filed on 2 May 2024 and the Court gave directions on 7 May 2024.
  5. The Appellant filed its submissions on 23 May 2024, and the Respondent were not on record (advocate for Respondent informed the Court after commencement of Court session that he had just filed the submissions. The delay was attributed to the Appellant having served its submissions late).
  6. The Court has considered the Record of Appeal and submissions.

#### **Role of the Court on a First Appeal**

7. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
8. This Court will keep the interdict in mind.

#### **Unfair termination or desertion?**

9. One of the causes of action advanced by the Respondent before the Subordinate Court was unfair termination of employment.
10. The Respondent had testified that his supervisor had informed him that his services were no longer required on 26 April 2023. He also produced what he called a termination notice.
11. The Appellant made a general denial of the Respondent's averments and asserted that the Respondent was involved in theft of fuel which he admitted in writing, and that upon issuance of a written warning, the Respondent sought to resign but did not give a written resignation.
12. The Appellant further contended that the Respondent had a change of mind but did not turn up for work after 28 April 2023. The Appellant's case on this limb was that the Respondent had absconded work.
13. The Appellant disowned the termination notice produced by the Respondent because it was not on its letterhead.
14. In finding that the Appellant had unfairly terminated the Respondent's employment, the Principal Magistrate reasoned that the Appellant had failed to lead evidence from the Respondent's Supervisor who allegedly instructed him not to report to work.



15. Under section 47(5) of the *Employment Act*, 2007, it is the employee who must discharge the burden of demonstrating that an unfair termination of employment occurred before the employer is called upon to justify the validity and fairness of the dismissal.
16. The Respondent pleaded that his supervisor informed him of summary dismissal. The Supervisor was not named in the Statement of Claim.
17. The Respondent adopted his written witness statement as part of his evidence-in-chief. The name or other particulars of the Supervisor were not disclosed in the statement.
18. During oral testimony, the Respondent named his Supervisor as Charles (not at the fueling station) and stated that he had no disagreements with him during the month of April 2023.
19. The Appellant was involved in an irrigation project and in all probability, it had several employees. Since, it is the Respondent who alleged unfair termination of employment, to satisfy the statutory burden, it was necessary for him to disclose the particulars of the Supervisor who dismissed him to enable the Appellant to defend itself.
20. Further, all the exhibits produced before the Principal Magistrate save for the termination notice were on the Appellant's letterhead. The termination notice was not signed by any of the Appellant's Managers or Supervisors.
21. In this Court's view, the termination notice was of doubtful origin and therefore not impactful as evidence.
22. The Respondent failed to discharge the burden imposed on him by section 47(5) of the *Employment Act*, 2007 and therefore it was legally erroneous for the Principal Magistrate to fault the Appellant for not leading evidence from an unnamed Supervisor who allegedly dismissed the Respondent.
23. The Principal Magistrate did not properly evaluate and appreciate the evidence and applicable law and fell into error of both law and fact in finding unfair termination of employment.

#### **Unfair labour practices/harassment**

24. The Principal Magistrate awarded the Respondent Kshs 1,500,000/- on account of harassment.
25. The Principal Magistrate found harassment because the Appellant had allegedly been instructed by his Supervisor to help fix a driver/colleague for a non-existent allegation of fuel shortage.
26. The only Supervisor named by the Respondent was one Charles. The Respondent testified that he had no disagreements with the said Charles and that he was not his Supervisor at the fuel station.
27. The question, therefore, arises whether the Respondent discharged the burden of proving unfair labour practice or harassment in the workplace.
28. This Court sees and finds no evidence on record which could lead to a finding that the Respondent was harassed by his Supervisor in an attempt to implicate a colleague.
29. It is noteworthy that the Respondent did not disclose the name of the colleague or call him to buttress his case.
30. The Principal Magistrate fell into errors of both law and fact in finding harassment. The evidence on record was not sufficient to lead to such a conclusion.



### **Conclusion and Orders**

31. Arising from the above, the Court finds merit in the Appeal and the judgment of the Principal Magistrate is set aside and vacated and substituted with judgment dismissing the Cause.
32. The Appellant to have costs of the Appeal and before the Subordinate Court.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF JUNE 2024.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

Appearances

For Appellant Omondi Abande & Co Advocates

For Respondent E.S. Ochieng & Co. Advocates

Court Assistant Chemwolo

