



**Wairimu v China Road & Bridge Corporation (K) Limited (Appeal E136 of 2023) [2024] KEELRC 2382 (KLR) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2382 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E136 OF 2023  
NJ ABUODHA, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**MOSES KIONGE WAIRIMU ..... APPELLANT**

**AND**

**CHINA ROAD & BRIDGE CORPORATION (K) LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Ms G. Omodho issued in Milimani Commercial Courts Court Employment Cause No. E1305 of 202 between Moses Kionge Wairimu vs China Road & Bridge Corporation(K) Limited delivered on 29th June, 2023)*

**JUDGMENT**

2. Through the Memorandum of Appeal dated 17<sup>th</sup> July, 2023, the Appellant appealed against the whole of the Judgment of Hon. G.Omodho (P.M) delivered on 29<sup>th</sup> June, 2023 in Milimani Chief Magistrates Court Employment Cause No.E1305 of 2021 between Moses Kionge Wairimu vs China Road & Bridge Corporation(K) Limited.
3. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law and fact by finding that the Respondent was paid one month salary in lieu of notice.
  - ii. The Learned Magistrate erred in law and in fact by finding that the Respondent was paid his salary for the month of June, 2020.
  - iii. The Learned Magistrate erred in law and in fact by finding that the Respondent's employment was terminated on grounds of misconduct during his employment.
  - iv. The Learned Magistrate erred in law and in fact by finding that the Respondent was the author of his own misfortune and is not justified to get compensation for wrongful dismissal.



- v. The Learned Magistrate erred in law by finding that the termination of the Respondent employment was unfair but failing to grant him damages for unfair and unlawful termination.
4. The Appellant prayed that the appeal be allowed with costs and the Judgment of the trial court dismissing prayers (b) & (c) on the Appellant's memorandum of claim be set aside and replaced with order allowing them while granting the Appellant general damages at Kshs 482,378 plus costs and interests.
5. The Appeal was disposed of by written submissions.

### **Appellants' Submissions**

6. The Appellant filed written submissions dated 18<sup>th</sup> April, 2024 and submitted that the Respondent did not follow the procedure provided for under section 41 of the *Employment Act* while dismissing him from employment. He relied on the case of Alphonse Maghanga Mwachanya vs Operation 680 Limited ELRC Cause no 148 of 2012.
7. The Appellant submitted that he was never given a right to be heard, no show cause letter and there was no disciplinary hearing conducted. That since no procedural fairness was followed his termination was unfair and unlawful.
8. The Appellant submitted that the trial court found in its judgment that his termination was unfair going by the procedure followed but the trial court did not award damages provided for under section 49(1) (c) of the *Employment Act* or take the conditions provided for under section 49(4) of the Act on awarding the damages.
9. The Appellant submitted that he was entitled to 12 months compensation at Kshs 37,106/= per month totaling to Kshs 445,272/=

### **Respondent's Submissions**

10. The Respondent filed his submissions dated 24<sup>th</sup> May, 2024 and submitted on main issue of whether the trial court judgment should be upheld. The Respondent relied on section 49 and 50 of the *Employment Act* on the remedies for wrongful and unfair dismissal. The Respondent submitted that the trial court found the Appellant to be the author of his own misfortunes and having been paid one month pay in lieu of notice, salary for June 2022 and issued with certificate of service the Appellant was not justified to further damages.
11. The Respondent submitted that the trial court being the first instance court exercised its discretion properly and lawfully in rendering its judgment. The Respondent relied on among other cases the case of Mrao Limited v First American Bank of Kenya Limited & 2 others (2003) eKLR on when this court may interfere with the discretion of the trial court.
12. The Respondent submitted that the grounds relied upon by the Appellant had no merit and were addressed by the lower court diligently. The Respondent relied on the case of Musera vs Mwechelesi & Another (2007) KLR 159 on the duty of the first appellate court.
13. The Respondent submitted that the trial court held that the Appellant negligently performed his duties and work despite signing an employment agreement that explicitly provided for instant dismissal in the given circumstances. That the trial court found that the Appellant had been warned severally of his conduct relating to his performance at work hence a legitimate ground for dismissal.



14. The Respondent submitted that the trial court took the Appellant's conduct under Section 49(4) of the *Employment Act* in holding that he was not entitled to further damages. That this goes to the discretion of trial magistrate to determine if or not to award further damages.
15. The Respondent submitted that the trial court exercised its discretion properly and this court should uphold the Judgment of Hon. G. Omodho PM as she took account of all the circumstances and evidence tendered before her and she did not err in finding that the Appellant was not entitled to any more than what the Respondent had already paid the Appellant.
16. The Respondent submitted that this court should find the Appellant's Appeal lacking merit and dismiss it with costs to the Respondent.

### **Determination**

17. This court has considered the pleadings and submissions by the parties and this being a first Appeal the court will proceed to reanalyze the evidence before it as was held in the case of *Selle vs Associated Motor Boat Company Limited* [1968] E.A 123 thus:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. In this case, the Judgment of the trial court was that: the circumstances under which the Claimant left service were based on misconduct in the short period he worked. That he was the author of his own misfortunes and is not justified to get more than what the Respondent already paid. Prayers (b) & (c) are dismissed.
19. From the pleadings and proceedings herein, this court has come up with two main issues;
  - a. Whether the trial court correctly found that the Appellant was the author of his own misfortunes.
  - b. Whether this court should interfere with the trial court's discretion on the award of damages.

### **Whether the trial court correctly found that the Appellant was the author of his own misfortunes.**

20. This court agrees with the trial court that the Appellant herein served the Respondent for a period of one year yet he admitted to having caused accidents with the Respondent's vehicles causing damages to the Respondent's vehicles as well as third parties.
21. The Appellant admitted that he received three warning letters. To this court those three warning letters on his performance would lead to summary dismissal on his part. The court agrees with the Lower court that the Appellant was not given a right to be heard in a formal disciplinary hearing as required by section 41 of the *Employment Act*.



22. It is now an established requirement that even in cases of summary dismissal an employee must be heard before dismissal. In the case of *Kenya Union Of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR the court observed that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

23. Whereas this court appreciates that for termination to pass fairness test there must be both Procedural and substantive fairness; on the substantive fairness this court is guided by the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the court held as follows: -

Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity.

24. In this case the reason for the dismissal of the Appellant on account of the poor performance of his duties passed the fairness test set out under Section 43 of the *Employment Act*. This amounted to gross misconduct on his part which could lead to summary dismissal. The Appellant admitted to causing the accidents which caused damages to the Respondent's vehicles in a short span of time which was one year.

25. The court notes that the Appellant admitted during hearing that he was given a chance to explain how the Accidents happened which explanations were not sufficient to the Respondent. The Respondent only failed to issue the Appellant with a show cause letter and initiate the disciplinary proceedings in order for the dismissal to pass the procedural fairness.

**Whether this court should interfere with the trial court's discretion on the award of damages.**

26. The court having agreed with the lower court asks itself if it should interfere with the trial court discretion on the award of damages. This court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

27. In this case the Appellant admitted that he was paid one Month in lieu of notice, salary for June 2020, leave pay and he was issued with a certificate of service. The Respondent produced evidence of the payment of the said dues. This court notes that the Appellant signed for the dues which stipulated that he will have no claim against the Respondent. He did not protest receiving the amounts, he received them, signed and turned around that he was unfairly dismissed.

28. Section 49(4) of the *Employment Act* guides this court on the considerations this court ought to take in awarding the damages herein. This court takes in to consideration the short period the Appellant worked with the Respondent of one year, that he was dismissed for valid reasons of poor performance and he admitted causing the accidents.



29. In the circumstances this court does not find any reason to disturb the award by the trial court as the Appellant was not entitled to more than what the Respondent had already paid to him.
38. In the upshot the Appeal is found unmerited and is hereby dismissed with costs.
39. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

