



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ochieng v Edge & Motion Group Limited (Appeal E058 of 2023)  
[2024] KEELRC 2322 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2322 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E058 OF 2023  
NJ ABUODHA, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**KINGSLEY JAMES OCHIENG ..... APPELLANT**

**AND**

**EDGE & MOTION GROUP LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and orders of Hon C.A. MUCHOKI,  
SRM delivered on 31st May 2022 in Nairobi MCELRC/E940 of 2020)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 28<sup>th</sup> April, 2023, the Appellant appeals against the Judgement and of Senior Resident Magistrate in MCELRC/E940 of 2020.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law and fact in finding that the Appellant had not proved his case on a balance of probability contrary to the evidence on record.
  - ii. The Learned Magistrate erred in law and fact in finding that the Appellant had not proved that he was unfairly terminated by the Respondent despite the concrete and uncontroverted evidence on record.
  - iii. The Learned Magistrate erred in law and fact in making a finding not based on the evidence on record.
  - iv. The Learned Magistrate erred in law and fact by failing to grant judgment against the Respondent for unpaid salary arrears amounting to Kenya Shillings Two Hundred and Ten Thousand Six Hundred (Kshs 210,600/=) despite the admission made by the Respondent and the evidences as filed.



- v. The Learned Magistrate erred in law and fact in believing and relying on the Respondent's submissions without any evidential value attached to them.
  - vi. The Learned Magistrate erred in law and fact by failing to analyse the submissions of the Appellant and addressing the issues raised together with the evidence tendered thereby misleading herself on findings derived therein.
3. The Appellant prayed that:
    - a. The appeal be allowed, Judgment and decree of the Honourable Senior Principal Magistrate delivered on 31<sup>st</sup> May 2022 in MCELRC No. E940 of 2020 be set aside and Judgement be entered in favour of the Appellant against the Respondent with costs to the Appellant.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant filed written submissions dated 28<sup>th</sup> February, 2024. On the issue of whether the Learned Magistrate properly considered and analysed the evidence and arrived at a correct determination that is supported by law and evidence, the Appellant submitted that a reading of the Learned Magistrate's judgement revealed that she dismissed the Appellant's claim on the basis that he did not discharge the burden and standard of proof. The Appellant relied on the case of *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] and submitted that it was trite law that a claim can only succeed if the requisite evidentiary burden and standard of proof are satisfied. It was further the Appellant's submission that the *Employment Act* under Sections 43 and 47(5) is conclusive on the burden of proof in claims of unfair termination.
6. The Appellant submitted that the Learned Magistrate referenced the case of *Peter Wangai v Egerton University* in which it was held that it was the employee who bore the burden of proof in a claim for an unfair termination and it was upon the discharge of that evidentiary obligation that the employer could be called upon to justify the termination.
7. It was the Appellant's submission that the burden of proof must carry a reasonable degree of probability but not so high as required in a criminal case. Further, the Appellant submitted that it logically follows that in addition to adducing evidence to support his claim, in order to discharge the burden of proof such evidence must also be so cogent and sufficient so that the court is persuaded that compared to the alternative explanation, the Claimant's account of events underlying the claim are more likely to have occurred than not.
8. The Appellant relied on the case of *Walter Ogal Anuro v Teachers Service Commission* on both substantive justification and procedural fairness. The Appellant submitted that the learned Magistrate's finding that he did not discharge the burden of proof cast upon him and therefore did not prove his case on a balance of probabilities was demonstrative of the fact that she did not properly consider and analyse the evidence and therefore arrived at an incorrect determination that was not supported by law and evidence.
9. It was the Appellant's submission that had the Learned Magistrate properly considered and analysed the evidence placed on record, she would have come to the inescapable conclusion that the Appellant as an employee claiming unfair termination, not only discharged the burden of proof placed upon him but also adduced cogent and sufficient evidence to proof unfair termination on a balance of probabilities.



10. The Appellant submitted that he discharged the requisite burden of proof by adducing and placing on record the email correspondence through which the termination of his contract was communicated by the Respondent. It was the Appellant's submission that the Respondent communicated its decision to terminate all permanent employment contracts through the said email and not an invitation to a deliberation on the same or to accord him a hearing prior to terminating his employment.
11. The Appellant submitted that the email was sent out on 17<sup>th</sup> June 2020 communicating the termination of the Appellant's employment contract with effect from 19<sup>th</sup> June 2020 which state of affairs was an explicit proof that the Respondent fell way short of the requirements of procedural fairness.
12. The Appellant submitted that the Learned Magistrate did not properly consider and analyse the evidence in that the Respondent did not adduce any evidence whatsoever to substantiate any of its allegations and did not in any way discharge the evidentiary burden of proof placed upon it on justification for unfair termination.
13. It was the Appellant's submission that the events described by the Appellant remain uncontroverted and retain their status as the more likely occurrence thus qualifying as sufficient proof on a balance of probabilities.
14. The Appellant submitted that the Learned Magistrate declined the Appellant's prayer for payment of unpaid salary arrears to the tune of Kshs. 210,600/= notwithstanding that there was explicit admission by the Respondent to that effect.
15. On the issue of whether the Learned Magistrate erred by failing to discharge her judicial obligations in rendering the judgment, the Appellant submitted that Judicial officers are bound by certain obligations in their determination of matters before them among them being the duty to weigh and consider all evidence placed on record objectively and dispassionately as confirmed in *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others*.
16. It was the Appellant's submission that a judicial officer is under an obligation to ensure that judgment is rendered on the basis of evidence on record and not other extraneous factors.
17. The Appellant submitted that an appellate court can interfere with the conclusion and findings of a trial court if the said findings and conclusions are not supported by evidence or are premised on wrong principles of law.
18. It was the Appellant's submission that the Learned Magistrate's conclusion that the particulars of termination were not very clear from the statement shows that the Learned Magistrate did not weigh and consider his statement because the said particulars were set out under paragraph 5 of the Memorandum of Claim.

### **Respondent's Submissions**

19. The Respondent did not file its submissions or any other documents in opposition to the Appeal.

### **Determination**

20. The court has considered the grounds of appeal, the record and submissions by the appellant and observes that the principles which guide the court in an appeal from a trial court are now well settled and were clearly captured in the case of *Selle & Another v Associated Motor Boat Company Ltd & Others*,



[1968] EA 123 where Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a 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, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

21. The court considers the main issue in this appeal to be whether the trial learned Magistrate arrived at the wrong conclusion when he dismissed the appellant’s claim before the trial Court.
22. The court wishes to first deal with the burden of proof in a claim for unfair termination. Employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to the extent that the termination is unfair if ‘(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’.
23. The Burden of proof is prescribed under section 47(5) of the *Employment Act* while Section 43 of the *Employment Act, 2007* provides that the Employer must prove the reason for termination to be fair and valid which matters the employer must genuinely believe to exist at the time of termination. Failure to prove the reasons as provided amounts to unfair termination as per section Section 45 of the *Employment Act*. Thus in the first instance the burden of proof is on the employee to prove occurrence of unfair termination or wrongful dismissal. It is upon discharge of that burden that the burden shifts to the employer to justify the reasons of the dismissal.
24. The reasons for the Appellant’s dismissal were set out in the email correspondence between the Appellant and the Respondent which the Appellant included in page 17 of its record of Appeal. In the said email dated 17<sup>th</sup> June 2020, the Respondent is seen to allege tough economic times and a directive to dissolve all permanent employment contracts effective Friday 19<sup>th</sup> June 2020. The Appellant argued that the said reasons were never substantiated.
25. The court notes that any change of employment contract entered into under section 10 of the *Employment Act*, shall be in consultation with the employee and the employee notified of such changes ( section 10(5)). This was held in the Court of Appeal case of *Oshwal Academy (Nairobi) & another v Indu Vishwanath* [2015] eKLR where it was stated:

Section 13 of the *Act* provides for change of initial employment particulars, and the employer is obligated to give the employee a statement indicating such change within a prescribed time frame. Failure to issue such a statement of change is an offence under section 16 of the Act. Similarly, an employee is free to challenge and complain of any provision that he finds detrimental as a result of the change.
26. The court notes that the Respondent promised to calculate employees’ final dues as well as recommendation letters in case the employees got permanent jobs. In the Court’s view, this was a disguised termination in the name of change of permanent jobs to contractual basis without the Appellant being heard on the same. To the very least if the Respondent was having financial issues and



had no work for the Appellant the best would have been to restructure its organization and declare the Appellant redundant following procedure laid down in law.

27. The court also notes that the Appellant disputed the salary cuts as well as the change to contractual basis. The email attached show the Respondent admitting to the modalities of payment of the arrears to the Appellant. The court is therefore of the view that the burden of proof of the unfairness of termination was discharged by the appellant when the Respondent changed his contractual term. It was therefore left for the Respondent to prove the reasons for the said change. The trial magistrate therefore erred by holding that the Appellant did not discharge his burden of proof.
28. On the reason given by the Respondent that they were undergoing financial difficulties the court notes that the Respondent did not produce any financial documents to show it was affected by Covid-19 to justify it as a reason for termination of the Appellant as was held in *Daniel Mburu Muriu v Hygrotech East Africa Ltd* [2021] eKLR that;

There was no evidence from the Respondent to confirm that it was experiencing financial difficulties. The Respondent would have done this by way of producing audited financial statements to dislodge the allegation by the Claimant.

29. It is therefore the finding of this court that the Learned Magistrate erred in law and fact in believing and relying on the Respondent's submissions without any evidential value attached.
30. The Respondent through its email correspondence at page 17 of the Record of Appeal is seen to admit that the Appellant's employment together with others was terminated due to financial difficulties which was not a fault on the part of the Appellant. The termination was done without any notice since the email of 17<sup>th</sup> June,2020 was to take effect on 19<sup>th</sup> June,2020 without any consultation done with the Appellant. Accordingly, the Respondent did not follow a fair procedure contrary to section 41 of *Employment Act*. The court finds that the termination was unfair and a violation of sections 41, 43 and 45 of the *Employment Act*, 2007.

#### **Whether the Appellant was entitled to reliefs sought.**

31. The Appellant is entitled to compensation in terms of section 49(1) (c) of the *Act* as read with sub section 49(4). In this respect, the Appellant had served for 3 years and had expectation of continuing to work. The termination was without notice and the Appellant did not contribute to the termination. Considering the period served and previous awards in similar cases, the court awards the Appellant three (4) months' salary as compensation for unfair termination.
32. The Appellant's prayers in the lower court included an outstanding salary arrears amounting to the total of Kenya Shillings Two Hundred and Ten Thousand, Six Hundred (Kshs 210,600) to the Appellant. This prayer is successful owing to the Respondent's admission. The trial court erred by not awarding the same which was admitted by the Respondent.
33. The Appellant is further entitled to payment of one-month salary in lieu of notice in the sum of Kshs.50,726, which the court hereby awards.
34. In conclusion the Appellant's Appeal is hereby allowed by setting aside the judgment of the lower court dismissing the appellant's claim and substituting therewith judgment in favour of the appellant as follows:
- a. One Month's salary in lieu of notice .....50,726
  - b. Salary arrears.....210,600



- c. Four month's salary as compensation for unfair termination  
.....202,904
- d. Total.....456,534
- e. Costs of the suit.
- f. Items (a), (b) and (c) shall be subject to taxes and statutory deductions but shall attract interest at Court rates from the date of Judgment until payment in full.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024 DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**ABUODHA NELSON JORUM**

**Presiding Judge-Appeals Division.**

