



**Royal Garments Industries EPZ Limited v Wanyonyi (Appeal  
E202 of 2023) [2024] KEELRC 2480 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2480 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E202 OF 2023  
NJ ABUODHA, J  
OCTOBER 11, 2024**

**BETWEEN  
ROYAL GARMENTS INDUSTRIES EPZ LIMITED ..... APPELLANT  
AND  
NANCY NANJALA WANYONYI ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon S. Jalango delivered on  
19th May 2022 in Chief Magistrate Court at Mavoko CMEL No.80 of 2020))*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 8<sup>th</sup> June, 2022, the Appellant appeals against the whole of the Judgment delivered by Hon. S.Jalango on 19<sup>th</sup> May,2022 in Mavoko CMEL No. 80 of 2020.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law and in fact by finding that the termination from employment terms and conditions stipulated thereof was unlawful and thereby awarding judgment in favour of the Respondent.
  - ii. The Learned Magistrate erred in law and in fact by finding that the Appellant did not follow due process by not explaining the reason for termination to the Respondent despite the Appellant expressly providing reasons for termination and offering the Respondent an opportunity to be heard.
  - iii. The Learned Magistrate erred in law and in fact by awarding the Respondent the maximum twelve months salary as compensation without any justifiable ground despite evidence of lawful and just termination by the Appellant.



- iv. The trial court erred in law and in fact by finding that the Respondent was unprocedurally terminated from employment.
3. The Appellant prayed that:
  - a. The appeal be allowed, Judgment and decree delivered on 19<sup>th</sup> May 2022 by the Mavoko Chief Magistrate’s Court in CMEL No. 80 of 2020 be set aside and Judgment be entered in favour of the Appellant against the Respondent with costs being in the course.
4. The Appeal was disposed of by written submissions.

### **Appellant’s Submissions**

5. The Appellant’s advocates Naikuni, Ngaah & Miencha Company Advocates filed submissions dated 24<sup>th</sup> May, 2024. On the issue of whether the Learned Magistrate erred in law by finding that Respondent’s summary dismissal was unprocedural, unlawful and illegal counsel relied on Section 45 and 43 of the Employment Act on proof of reasons for termination. Counsel submitted that Section 44 of the Act allows the employer to summarily dismiss an employee on gross misconduct.
6. Counsel relied on the case of National Union of Water and Sewerage Employees v Meru Water & Sewerage Service Cause No 44 of 2012 on what amounts to gross misconduct. The Respondent was found fighting which was a serious gross misconduct to cause the Appellant to dismiss the Respondent immediately but she was issued with a notice to show cause on 10<sup>th</sup> July,2019. That the Respondent in her response to show cause letter admitted her gross misconduct and the Appellant found her response unconvincing and proceeded to summarily dismiss her on 11<sup>th</sup> July,2019. Counsel relied on the case of Evans Kamadi Misango v Barclays Bank of Kenya Limited on the burden placed on employer under section 43 of the Act.
7. Counsel submitted that the act of the Respondent engaging in a fight with a colleague was not only gross misconduct but criminal in nature. That the fight caused standstill in the Appellant company and that no activity went on causing the Appellant losses. That the dismissal was procedural, fair, lawful and legal.
8. On the issue of whether the Learned Magistrate erred in awarding the Respondent maximum pay of 12 months salary counsel relied on the cases of Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR and Cooperative Bank of Kenys Limited v Yator (2021) eKLR on discretion of the court to award damages under section 49 and their essence not to punish the employer.
9. Counsel submitted that the courts are required to justify the awards they make by providing the reasons for the award. He relied on the Court of Appeal of Kenya Broadcasting Corporation v Geoffrey Wakio(2019) eKLR. Counsel also relied on the case of Ol Pejeta Ranching Limited v David Wanjau Muboro Civil Appeal No.42 of 2015 on the court taking considerations like the conduct of the employee before awarding the maximum compensation. Counsel relied on the above case of Cooperative Bank of Kenya Limited v Yator
10. Counsel further submitted that the Appellant renewed the Respondent’s contract as a checker on 3<sup>rd</sup> January,2019 for a period of one year ending 21<sup>st</sup> December,2019. That she was summarily dismissed from employment on 11<sup>th</sup> July, 2019 months in her contract due to her gross misconduct. That the Respondent at the time was earning a basic salary of Kshs.10,410, house allowance of Ksh 1,562 and the Respondent was paid all her dues upon dismissal.



11. Counsel further submitted that the trial magistrate noted that despite the Respondent being dismissed Victori Nyaga secured her a job in the sister company to the Appellant after the Respondent through the shop steward approached her requesting for alternative opportunity. Counsel submitted that the trial court ought to have considered the evidence that the Respondent was involved in gross misconduct and the Appellant HR had secured the Respondent an alternative job hence the award of 12 months compensation was harsh and excessive without any explanation.

### **Respondent's Submissions**

12. The Respondent's Advocates Namada & Co. Advocates filed the Respondent's submissions dated 20<sup>th</sup> June, 2024 and on the issue of whether the termination of the Respondent's employment by the Appellant was procedural counsel relied on sections 43 of the Employment Act on the proof of reasons for termination. He submitted that the Appellant did not have reasons for terminating the Respondent who alleged that she reported her colleague who was not working well while the Appellant alleged she was fighting which fact was denied by the Respondent.
13. Counsel also relied on section 41 of the Act on procedural fairness while submitting that the Respondent was never invited for disciplinary hearing before her termination which was against this provision. Counsel placed reliance on the case of Walter Ogal Anuro v Teachers Service Commission (2013) eKLR on requirements for both substantive and procedural fairness. Counsel also relied on the case of Boniface Kyambo v DPL Festive on the essence of disciplinary proceedings.
14. Counsel further submitted that the trial court considered all the evidence on record and found out that the Appellant failed to follow due process in terminating the Respondent's employment.
15. On the issue of whether the Respondent was correctly awarded the damages by the trial court counsel submitted that remedies for wrongful dismissal and unfair termination of employment were governed under section 49 of the Act. Section 49(1) (c) provides for compensation of the 12 months' salary and further that section 12(3) (vi) and (vii) of the Employment and Labour Relations Court Act gives the court power to make award of damages in line with section 49 as well as section 50 of the Employment Act. The power is discretionary to be exercised judiciously and relied on the case of George Onyango Akuti v G4S Security Limited (2013) eKLR.
16. Counsel submitted that the Respondent was terminated by the Appellant without abiding with the laid down procedure hence unfair dismissal and she was entitled to the damages awarded to her by the trial court.

### **Determination**

17. The principles which guide this court in an appeal from a trial court are now well settled. In Selle And Another v Associated Motor Boat Company Ltd & Others, [1968] EA 123, 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.”

18. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent as follows:-
- a. 12 Months Compensation for unfair termination Kshs 180,000/=
  - b. Notice Pay of Kshs 15,000/=
  - Total.....KSH 195,000/=
  - c. Costs
- a. The court finds that the issues placed by the parties for determination in the appeal are with regard to the court finding the termination unfair and the award by the trial court.

**Whether the trial learned Magistrate erred in finding that the Respondent was unprocedurally terminated.**

19. The Respondent alleged that she went to report a colleague who was not working well while the Appellant alleged that the Respondent was engaged in a fight with a colleague causing a stand still in the company and loses since no work went on that day. That this amounted to gross misconduct warranting immediate summary dismissal under section 44 of the Act. The Respondent denied that she was involved in any fight.
20. The trial court on the other hand found that the Appellant did not prove the reasons for the dismissal. This court notes that the burden of justifying the grounds of termination lies with the employer under section 47(5) of the Act. The employer must prove the reasons for termination which must be valid and fair under section 43 of the Act which if not proved amounts to unfair termination under section 45 of the Act.
21. The court notes that the Respondent responded to the show cause letter admitting that she was involved in the said fight and apologizing for the same. Upon her own admission it was clear to the court that the Respondent was dismissed for such gross misconduct of fighting as provided for under section 44 of the *Employment Act*. To that extent the trial court erred in finding that the Respondent was unfairly terminated. The Appellant had a valid reason of dismissing the Respondent.
22. The trial court also found that the Appellant did not follow the laid down procedure in dismissing the Respondent who was given a show cause letter on 10<sup>th</sup> July,2019, responded to the same, the Appellant found the response unsatisfactory and dismissed the Respondent on 11<sup>th</sup> July,2019. The court fully agrees with the trial court that due procedure was not followed as provided for under section 41 of the *Employment Act*. The courts have always held that even in cases of gross misconduct warranting dismissal an employee must be heard. This was the position in the case of *Prof. Macha Isunde v Lavington Security Guards Limited* [2017] eKLR, where the Court of Appeal stated:

“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”



23. The court agrees with the above proposition in as much as section 44 provides for summary dismissal and the Appellant's CBA provided for the same once the Appellant gave the show cause letter which marks the start of disciplinary process. The Respondent ought to have been heard on the allegations of fighting.
24. In conclusion this court finds that the Appellant had a valid reason to dismiss the Respondent but failed on the procedural part under section 41 of the Act hence this amounted to unfair termination under section 45 of the Act.

**Whether the trial learned Magistrate erred in awarding the Respondent maximum compensation of 12 months' salary**

25. The trial court awarded the Respondent 12 months, compensation for wrongful dismissal which the Appellant faults as harsh and excessive because the trial court did not justify the reasons and the Appellant HR had found the Respondent an alternative job. The court asks itself if it should interfere with the trial court discretion on the award of damages. The 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.

26. The court will therefore disturb the awards herein if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the award of 12 months compensation is discretionary but the court should be guided by considerations set out under Section 49(4) of the Employment Act in awarding the damages herein. The Appellant was aggrieved by the lower court discretion to award the Respondent maximum compensation yet she was just months in to a contract expiring in December, 2019, an author of her own misfortunes and she had secured an alternative employment through the assistance of its HR.
27. The trial court did not justify the reasons for the maximum compensation as was held in the Court of Appeal in Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR that;
  - (22) This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited v. David Wanjau Muhoro [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
28. In this case the trial court stated that the reason they were awarding the maximum compensation was because the Appellant terminated the Respondent unfairly and did not follow the prescribed procedure in the Act. The trial court ought to have explained why apart from the Respondent being unfairly terminated why she was entitled to the maximum compensation. The court takes note of the fact that the Respondent was unfairly terminated but notes that she contributed to her own misfortune since she was involved in fighting and also considers that the Respondent was months in to one year contract ending in December, 2019.



29. In addition, the trial court ought to have considered that the Respondent had secured an alternative employment with assistance of the Appellant's HR and should not penalize such a party who tried to help a former employee. These are some of the considerations under the Act provided for under section 49 of the Act.
30. The court therefore consider the maximum award of 12 month's salary as too high and in the circumstances taking into account that the appellant had justifiable reasons to dismiss the hereby substitutes the 12 months compensation with one month's salary as compensation for unfair termination.
31. The Appellant did not challenge Notice pay payment hence this court will not dwell on the said issue but the Court having found that there were justifiable grounds for summary dismissal, payment in lieu of notice will not be awarded.
32. In the upshot the Appeal partially succeeds as follows; \_
  - a. One months' salary as compensation for unfair termination Kshs 15,000/=.
33. The appeal partially succeeds hence each party shall bear their own costs of this Appeal.
34. It is so ordered.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024 DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION.**

