



**Afrimac Nut Company Limited v Kamande (Employment and Labour Relations Appeal E025 of 2023) [2024] KEELRC 2427 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2427 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E025 OF 2023  
ON MAKAU, J  
OCTOBER 4, 2024**

**BETWEEN**

**AFRIMAC NUT COMPANY LIMITED ..... APPELLANT**

**AND**

**PAMELA NJOKI KAMANDE ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of Hon. P.N.Maina (MR) Chief Magistrate delivered on 23rd November, 2023 in Murang'a MCELRC No.E005 of 2023)*

**JUDGMENT**

**Introduction**

1. The parties herein related as employer and employee until February 3, 2023 when they separated. The appellant's case is that the respondent absconded duty while the respondent's case is that she was verbally coerced to write a resignation letter and when she declined, she was ordered not to report to work again. The trial court found that the respondent had proved her case on a balance of probability and awarded salary in lieu of notice, severance pay plus maximum compensation for unfair termination totalling to Kshs 401,745.
2. The appellant challenged the decision vide a Memorandum of Appeal dated December 21, 2023 on the following grounds:
  - a. That the learned Trial Magistrate erred in law and fact by failing to appreciate the gravity of the Appellant's case and properly scrutinize and evaluate the evidence before the Honourable Court in contrast with the applicable law thereby arriving at a wrong decision.
  - b. That the learned Trial Magistrate erred in law and fact by finding that the Respondent had proved her case on a balance of probability when there was no such proof.



- c. That the learned Trial Magistrate erred in law and fact by finding that the Respondent had been constructively dismissed by the Appellant.
  - d. That the learned Trial Magistrate erred in law and fact by finding that the Respondent's termination of employment was due to redundancy when there was no such proof.
  - e. That the learned Trial Magistrate erred in law and fact by finding that the Respondent's employment had been terminated by the Appellant and further, that such termination of employment was unfair, when there was no such proof.
  - f. That the learned Trial Magistrate erred in law and fact by awarding the Respondent one-month salary in lieu of notice.
  - g. That the learned Trial Magistrate erred in law and fact by awarding the respondent severance pay when the same was neither pleaded nor claimed.
  - h. That the learned Trial Magistrate erred in law and fact by finding that the Respondent's termination was based on malice, discrimination or ulterior motive when there was no such proof.
  - i. That the learned Trial Magistrate erred in law and fact by awarding the respondent damages of unfair termination equal to 12 months pay, when there were no special circumstances warranting such an award.
  - j. That the learned Trial Magistrate erred in law and fact by failing to appreciate and evaluate the evidence tendered by the Appellant as well as the Appellant's filed submissions and case law and thereby arrived at a wrong decision.
3. The appeal seeks to partially quash the impugned judgment and substitute there with an order dismissing the respondent's suit with costs.

#### **Facts of the case**

4. During the trial, the respondent testified that she was employed by the appellant on 24<sup>th</sup> April 2018 as HR Personnel in the Administration Department. She was never given any written contract despite request but she was rotated to various departments without prior notice or review of Job Description and/or salary. She sometimes used to work past 5pm on Sundays and Public holidays without overtime pay.
5. She worked diligently without any complaint on her performance until 3<sup>rd</sup> February 2023 when Ms Elizabeth Nyawira, Ms Sylvia Njoki (Factory Manager) and Ms Annrose Wambui (Agricultural Manager) coerced her into writing a resignation letter because her position had been declared redundant. When she refused they told her not to report to work again. Subsequently, she texted Elizabeth via WhatsApp seeking payment of terminal dues but Elizabeth insisted that a resignation letter must be written. Further, Elizabeth demanded for the resignation within 7 days or else she would be deemed to have absconded work.
6. As a result, the respondent instructed a lawyer to serve a demand letter on the appellant which was responded to by payment of Kshs.19,156 contrary to the amount demanded. She contended that the termination of her employment has affected her.
7. On cross examination, she contended that she was in charge of personnel majority dealing with engaging of casuals. However, she admitted that she was not a qualified HR Officer nor did she have HR Practicing Certificate. She admitted that she was doing general duties in the HR Office.



8. She maintained that after interview, she was not given appointment letter and every time she requested for the same she was told to wait. Her salary as at December 2022 was Kshs.28,875. She reiterated that she was posted to various departments but no performance review was done. She denied that she absconded work and maintained that she was told to write a resignation letter or be assumed to have absconded duty. She contended that she was told that her position was being declared redundant but no notice for redundancy was served on her. She maintained that her services were terminated without being given a hearing.
9. The appellant was represented by its Chief Accountant, Elizabeth Nyawira Mwangi who testified as RW1. She stated that the appellant employed the respondent in the account's department but her performance was questionable. She denied that the respondent was laid off and maintained that she absconded duty.
10. She clarified that the respondent was a general employee dealing with daily attendance of employees and that did not make HR Officer. She admitted that she was the respondent's supervisor and reiterated that the quality of claimant's work was questionable. She denied that she told the respondent to resign. She further denied the alleged redundancy. She contended that the respondent absconded and she followed her up.
11. After the hearing, the counsel for both parties filed written submissions and court made the impugned decision.

### **Submissions on the appeal**

12. It was submitted for the appellant that the respondent did not plead constructive dismissal but prayed for declaration that the appellant had constructively dismissed her. It was further submitted that the instant case did not meet the requirements of constructive dismissal because the respondent contended that the employer expressed the desire to terminate her employment. Reliance was placed on the case of *Godfrey Allan Tolo v Tobias O.Otieno & another* (2022) eKLR.
13. It was further submitted that the respondent did not prove the alleged redundancy as required under Section 47 (5) of the *Employment Act*. Consequently, it was argued that the award of severance pay was an error because redundancy not proved and severance pay was not pleaded. For emphasis, reliance was placed on the case of *Centre for African Family Studies (CAFS) v Jonathan Spangler* (2019) eKLR and *Gas Kenya Ltd v Odhiambo* (Appeal E006 of 2022) (2022) KEELRC 3930 (KLR) (22 September 2022).
14. It was further submitted that the claim for unfair termination was hinged on constructive dismissal and/or redundancy and therefore since the respondent did not prove the same the award of compensation for unfair termination was not only undue but also excessive. Likewise, the award of salary in lieu of notice cannot stand. Consequently, the court was urged to allow the appeal as prayed and award costs.
15. On the other hand, it was submitted for the respondent that her employment was terminated by the appellant without valid reason and without giving her a hearing. It was argued that the respondent was required to write a resignation letter and when she refused she was fired. It was urged that the reason for the termination was not due to absconding of duty but her refusal to write a resignation letter.
16. It was submitted that the appellant did not prove what steps it took if at all the respondent had absconded work. It was argued that an employer is required to follow up an employee who has absconded by issuing a show cause letter but in this case no show cause letter was issued to the



respondent. For emphasis reliance was placed on *Boniface Francis Mwangi v BOM Iyego Secondary School* (2019) eKLR among others.

17. It was submitted that the respondent was constructively dismissed because the appellant made her work environment hostile by rotating her to various departments without justification and coercing her to write a resignation letter on 3<sup>rd</sup> February 2023 and when she refused she was told never to return to work. It was argued that, the respondent was forced to leave work due to the employer's conduct on 3<sup>rd</sup> February, 2023. Reliance was placed on *Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited* (2015) eKLR.
18. It was further submitted that unlawful redundancy was proved because there is evidence that the respondent was informed that her position was declared redundant. However, instead of following the procedure under section 40 of the *Employment Act*, she was coerced to write a resignation and when she refused, she was told not to attend work again.
19. It was submitted that the alleged questionable performance was not a lie since her performance was never evaluated nor was she accorded any hearing on the same. For emphasis, reliance was placed on the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* (2010) LLR 255 (ICK) (September 2013).
20. In view of the foregoing matters, it was submitted that the respondent is entitled to the reliefs awarded by the trial court and the same ought to stand. Consequently, the court was urged to dismiss the appeal with costs.

### **Analysis and determination**

21. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own independent conclusion, while warning myself that I did not see the witness while giving the evidence. I am guided by the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 where the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate 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, the 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.”

22. Having considered the evidence on record and the submissions herein, the following issues fall for determination: -
  - a. Whether the respondent absconded duty or she was unfairly and unlawfully dismissed by the appellant.
  - b. Whether the award of damages by the trial court should be disturbed.

### **Absconding or termination**

23. The respondent's case is that on 3<sup>rd</sup> February 2023 she was told by RW1 and two other Managers not to report to work again after she failed to write a resignation letter. RW1 stated that the respondent



absconded duty in February and she was advised to write a resignation letter in order to be paid terminal dues.

24. I have considered the evidence on record and noted that there is evidence that the respondent was rotated from one department to another. RW1 confirmed that the employer was not happy with the respondent's performance. It is also a fact that the respondent was asked by RW1 to write a resignation letter. Although RW1 alleged that the demand for resignation came after the respondent absconded duty, the respondent's testimony carry more weight considering the conduct of the parties.
25. If indeed the respondent had absconded, the employer would have stated the date when it occurred, and it could have conducted her for explanation of the absence from work without leave. I gather support from [Joseph Nzioka v Smart Coatings Limited](#) (2017) eKLR where Abuodha J held that: -
- “Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer (sic) concerned and that 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.”
26. In the instant case, the respondent was not served with a show cause letter or contacted in any other manner before 3<sup>rd</sup> February 2023 when she alleges that she was told that her position had been declared redundant and that she ought to write a resignation letter. On the contrary, she is the one who reacted to the request to write a resignation by refusing to comply with the same and thereafter she pursued the employer for her dues through phone, then demand letter through her lawyer and thereafter filed this suit.
27. In view of the foregoing matters, I find that the respondent has proved on a balance of probability that the appellant terminated her employment verbally on 23<sup>rd</sup> February 2023. To that extent, I agree with the trial court that the respondent never absconded duties but rather she was dismissed by the appellant on 3<sup>rd</sup> February 2023.
28. Section 45 (1) and (2) of the [Employment Act](#), 2007 provides that: -
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
- b. That the reason for the termination is a fair reason -
- i. Related to the employee's conduct, capacity or compatibility, or
- ii. Based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.”
29. The reason for dismissing the respondent was her refusal to write a resignation letter as requested by the employer who allegedly had declared her position redundant. The said reason was not valid reason related to the respondent's conduct, capacity or compatibility as required under section 45 (2) (b) of



the *Employment Act*. The respondent was also not accorded disciplinary hearing before the dismissal as required by section 41 of the *Employment Act* which provides that: -

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

30. It is evident that termination of employment by the employer is unfair and unlawful if the same is not grounded on a valid reason or done in accordance with a fair procedure. Since the dismissal herein did not meet the said requirements, the same was unfair and unlawful within the meaning of section 45 of the *Employment Act*, 2007. I gather support from the Court of Appeal decisions in *Pius Machafu Isindu case* and *the Kenfreight E.A Limited case* supra.

### **Reliefs**

31. In view of the foregoing, I am satisfied that the respondent is entitled to salary in lieu of notice and compensation for unfair termination under section 49 (1) of the *Employment Act*. She was receiving salary in intervals of one month and therefore a notice of one month or salary in lieu of notice was due to her by dint of section 35 (1) (c) of the *Employment Act*.
32. The trial court awarded the respondent twelve (12) months salary compensation as prayed taking into account the ground for termination, the respondent’s expertise, age, the period served by the respondent, and chances of her getting another employment. Evidently, trial court gave justification for awarding 12 months salary equalling to Kshs.321,396.
33. The appellate court is not supposed to interfere with a discretionary award unless the trial court failed to take into account a relevant factor or took into account irrelevant factor and thereby arrived at a manifestly too high or too low quantum of damages. In the instant case, the trial court took into account relevant factors which are provided under section 49 (4) of the *Employment Act*, 2007. It considered the length of service by the respondent, the reason for the termination, (no offence) and chances of securing alternative job. Consequently, I will not interfere with the lower court’s award of compensatory damages.
34. However, the award of severance pay must give way because the termination was not through redundancy. The termination was on ground that the respondent refused to write a resignation letter. It follows that the award was not supported by evidence and therefore this court has the mandate to set it aside.

### **Conclusion**

35. I have found that the respondent did not abscond duty but she was dismissed by the appellant. I have also found that only for the award of severance pay should be set aside while the rest of the awards must stand. Consequently, I partially allow the appeal and vary the lower court judgment by setting



aside the award of severance pay of Kshs.53,566. The rest of the damages awarded on the impugned judgment remains unchanged. Each party shall bear own costs in the appeal.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF OCTOBER, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

