



**Muema v Kariuki t/a Beatrice Kariuki & Associates (Appeal E124 of 2022)  
[2024] KEELRC 13384 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13384 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E124 OF 2022  
NJ ABUODHA, J  
NOVEMBER 29, 2024**

**BETWEEN**

**MARY MWENDE MUEMA ..... APPELLANT**

**AND**

**BEATRICE WAIRIMU KARIUKI T/A BEATRICE KARIUKI &  
ASSOCIATES ..... RESPONDENT**

*(Being an appeal arising from the entire Judgment of Honourable B.M KIMEMIA  
delivered in Milimani commercial courts, CMEL No. 1975 of 2019 on 24th June, 2022)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 21<sup>st</sup> July, 2022, the Appellant appeals against the whole of the Judgment of Honourable B.M Kimemia (PM) delivered on 24<sup>th</sup> June, 2022.
2. The Appeal was based on the grounds that:
  - i. The Honourable court erred in law and fact in finding that the Appellant had failed to prove her claim on a balance of probability despite overwhelming evidence on record in favour of the Appellant.
  - ii. The Honourable Court erred in law and fact in failing to find that the Respondent did not have any valid reasons to terminate the Appellant’s employment as the reasons for the Appellant’s suspension being the alleged missing file had been overtaken by events as at the time of the Appellant’s termination.
  - iii. The Honourable Court erred in law and fact in failing to find that the Respondent did not adhere to fair procedure when effecting the Appellant’s termination despite the Respondent’s witnesses admitting in cross examination that no disciplinary hearing was conducted before



the Appellant was terminated contrary to the Mandatory provisions of section 41 of the *Employment Act*.

- iv. The Honourable Court erred in law and fact in failing to find that the Respondent's failure to pay the Appellant's terminal dues was unfair and unlawful as the Respondent's witness admitted in cross examination that no terminal dues were paid to the Appellant at the point of her termination.
  - v. The Learned Magistrate erred in law and fact by failing to make a finding that the alleged letter of termination was an afterthought manufactured for the purposes of the case since the Appellant never received the said letter.
  - vi. The Learned Magistrate erred in law in failing to make a finding that the Appellant was not paid house allowance for the entire duration of her employment with the Respondent contrary to the Provisions of section 31 of the *Employment Act*.
  - vii. The Learned Magistrate erred in law and in fact in failing to award the Appellant gratuity in accordance with section 35 of the *Employment Act*.
3. The Appellant prayed that the Appeal be allowed with costs of this Appeal and the lower court; the Judgment delivered on 24<sup>th</sup> June, 2022 be set aside; this honourable court be inclined to order that the Appellant's termination was unfair and unlawful and she is entitled to reliefs sought in her claim.
  4. The Appeal was disposed of by written submissions.

#### **Appellant's Submissions**

5. The Appellant's Advocates Nyabena Alfred & Co. Advocates filed written submissions dated 16<sup>th</sup> September 2024. On the issue of whether the lower court erred by failing to make a finding that there was no valid reason to unfairly and unlawfully terminate the Appellant from her employment contrary to section 43 of the *Employment Act*, 2007, Counsel submitted that to determine this issue the question of validity of reasons for dismissal and procedural fairness. That it is the employer's duty to prove that the reason for dismissal of the Appellant was valid and the employee's duty to prove that procedural fairness was not adhered to in his/her dismissal.
6. Counsel submitted that the Appellant was dismissed due to disappearance of a client's file from the office which during cross examination it was admitted that the file was retrieved from the Respondent's office/ servant quarter and not from the Appellant's possession. The Appellant after the file was retrieved, was not notified and asked to resume employment which undermined the validity of the reason for the Appellant's termination.
7. Counsel further submitted that prior to the alleged disappearance of the file the Respondent had relocated offices from Greenspan Mall to the residential servant quarter where the files were in the process of rearrangement and some stored at warehouse along Mombasa Road. Counsel relied on the case of Peter Matata v Midland Energy Limited [2017] eKLR, while submitting that reasons for termination of an employee must be real and not merely imagined or based on suspicion.
8. Counsel submitted that the Appellant was suspended from employment by a WhatsApp message dated 13<sup>th</sup> April, 2019 due to the disappearance of Mr. Mworira's file. That the file was found hence the Respondent did not any ground to continue suspending the Appellant or take any disciplinary action against her since the file was found in the Respondent's offices to which she had been denied access while on suspension.



9. Counsel further submitted that the summary dismissal letter presented was manufactured by the Respondent for the purposes of this case, as it contained allegations unrelated to the alleged loss of Mr. Mworira's file. The witnesses confirmed that there was no other reason for the Appellants dismissal other than the disappearance of file.
10. Counsel relied on the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR and submitted that Section 45 of the Act makes provision that no employer shall terminate the employment of an employee unfairly.
11. Counsel submitted that the Appellant's termination appears to have been a scheme by the Respondent to terminate the Appellant's services without reasonable cause. That the Respondent purportedly manufactured a letter of dismissal backdated to 7<sup>th</sup> May 2019, the letter also introduced new grounds for termination and the Appellant denied receiving such a letter.
12. Counsel submitted that the Respondent and the Appellant used to correspond via email, SMS, or WhatsApp, yet the Respondent did not notify the Appellant to collect the dismissal letter if it were genuine. There was no evidence of notification to the Appellant to collect the letter.
13. On the issue of whether the lower court erred by failing to make a finding that the Respondent did not observe procedural fairness in dismissing the Appellant from her employment contrary to section 41 of the *Employment Act*, 2007, Counsel submitted that the Appellant was neither issued a notice to show cause why her services should not be terminated nor was she called to any disciplinary hearing. That after her suspension she was never called back or disciplinary processes preferred against her which the Respondent's witnesses confirmed at trial.
14. Counsel relied on among others the case of Kenya Ports Authority v. Fadhil Juma Kisuwa [2017] eKLR and submitted that the Respondent's failure to afford the Appellant a disciplinary hearing was a clear violation of Section 41, read together with Section 45 of the *Employment Act*.
15. On the issue of whether the lower court erred in by failing to award the Appellant terminal dues and compensation sought, Counsel submitted that the Respondent testified that the Appellant was entitled to some dues which the lower trial court did not consider when giving its Judgment.
16. Counsel submitted that this court should find the termination unfair and award the Appellant terminal dues as claimed in her claim in heads of one-month salary in lieu of notice, Salary for 6 months the Claimant was on suspension, Service gratuity, house allowance and 12 months compensation for unfair termination.

### **Respondent's Submissions**

17. The Respondent's Advocates Nchoe, Jaoko & Company, filed written submissions dated 22<sup>nd</sup> November 2024. Counsel submitted that trial court rightly held that the Appellant failed to prove her case on a balance of probability. That the record of appeal demonstrates several incidences when the Appellant was involved in acts of gross misconduct and insubordination and at some stage wrote an apology letter with a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.
18. Counsel further submitted that the Appellant engaged her manager or supervisor either directly or indirectly in an inappropriate verbal confrontation and that wilful disobedience of an order would justify summary dismissal. Counsel also relied on section 44(4)(d) and (e) of the *Employment Act* on insubordination and disobedience of lawful and proper commands from an employer which amounted to gross misconduct leading to summary dismissal.



19. Counsel relied on among others the case of *Ndiritu -vs Ropkoi & Another* EALR 334 and submitted that the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law.
20. Counsel submitted that the Appellant was terminated due to misconduct. That the Appellant was sent on suspension on 13<sup>th</sup> April 2019 on account of a client's file that she had handled and went missing from the law firm's offices at the Green house which the Appellant admitted to having seen. That the file went missing on 19<sup>th</sup> February, 2019.
21. Counsel submitted that on 14<sup>th</sup> April, 2019 the Respondent asked her Personal Assistant, Nancy Kimirei, to instruct the Appellant to hand over to the Personal Assistant her court diary, an affidavit of service for matter that was coming up in court on 8<sup>th</sup> May 2019, alongside other official documents which were in the Appellant's possession which she declined.
22. Counsel submitted that that in terms of section 44 of the *Employment Act* the Appellant by her conduct fundamentally breached her obligations under the contract that entitles the employer to summarily dismiss her employee because she failed and or refused to obey lawful commands issued within the scope of her employment by her employer or a person placed in authority over her.

### **Determination**

23. The court has considered the pleadings and submissions filed by the parties herein and states that the principles which guide this court in an appeal from a trial court are now well settled. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same stated with regard to the duty of the 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 reanalyze 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”
24. This court sitting as a first appellate court did not have the benefit of hearing the witnesses. The Court will however carefully consider and reanalyse the evidence relied on by the trial court in arriving at its decision herein. The Judgment of the trial court was entered as against the Appellant to the extent that the Claimant failed to prove her claim on a balance of probability therefore it was dismissed hence this appeal.
25. The court finds that the issues placed by the parties for determination in the appeal are with regard to whether the trial court was right when it held that the Appellant was not illegally and unfairly terminated and that she was not entitled to reliefs sought.

### **Whether the trial court erred by finding that Appellant's termination of employment was fair and lawful**

26. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. This court refers to the holding in *Janet Nyandiko versus Kenya Commercial Bank Limited* (2017) eKLR among others.
27. On the substantive fairness this court having considered the evidence as presented, it is clear that the Appellant was an employee of the Respondent as acknowledged by the Respondent that she started



working for her in 2011 as a messenger and later as a clerk although she never issued her with any appointment letter or payslip.

28. It was the Appellant's case that she had been employed by the Respondent as from 2011 and on 13<sup>th</sup> April, 2019 she was sent a message not to resume work due to missing files. That she never received any updates from the Respondent despite the same files having been found at the Respondent's office/servant quarter after her suspension. The Respondent on the other hand acknowledged finding the lost files and alleged that she dismissed the Appellant for insubordination and failure to obey her orders to return the office dairy and court documents.
29. The Appellant denied receiving the termination letter of May 2019 and maintained she was suspended due to the missing files and never called back when the same were found. This court notes the several apologies the Appellant wrote to the Respondent. The apologies were justified and an acknowledgment of an employee's mistake. The court is of the view that if the said mistakes were grievous nothing stopped the Respondent from undertaking disciplinary action against the Appellant.
30. The court further takes the view that the Appellant was dismissed due to the missing files which were later found on the Respondent's offices while she was on suspension. The Respondent acknowledged sending the Appellant the suspension message but she did not send any letter or message asking her to resume work after finding the files. The Respondent also confirmed that she did not have proof that the Appellant received the termination letter.
31. The Respondent's allegations that the Appellant went to her house unannounced on 30<sup>th</sup> April, 2019 were justified because the Appellant never received any communication from the Respondent and her residence was also where her offices were relocated. The Appellant also apologized for showing up unannounced to show she was concerned about her return to work. The Respondent's allegations of insubordination and failure to obey her orders to return the office dairy and other documents were denied by the Appellant.
32. The Respondent was under a duty to prove that the reasons for the dismissal were valid as provided for under section 43 of the *Employment Act*. The burden of proof of the reasons for termination under section 47(5) of the act lies with the employer while the employee needs to illustrate that unfair termination has occurred. The courts have emphasized in among other cases the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR that-

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.

33. This court is convinced therefore that the Respondent failed to prove the reasons for dismissal of the Appellant hence unfair termination.
34. On the procedural fairness as provided for under section 41 of the *Employment Act* this court notes that the Respondent acknowledged never adhering to the same stating that the Appellant was dismissed for gross misconduct hence she was not entitled to any notice. This court disagrees with this assertion as guided by the case of *Pius Machafu Isindu vs 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.”

35. This therefore means that even if the Appellant was guilty of gross misconduct leading to summary dismissal she still had to be taken through the disciplinary process. It is clear before the court that the Appellant was never given any show cause letter, any hearing or notice and she denied even receiving any dismissal letter as alleged by the Respondent who could not demonstrate if the same was received by the Appellant.
36. The Respondent violated the clear provisions of section 41 of the Act. In this respect, the court is guided by the holding in the case of *Kenya Union Of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR 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.
37. In conclusion the Appellant’s termination was both substantively and procedurally illegal, unfair and unjustified and the trial court erred on its finding that the Appellant did not prove her case on balance of probability and hence this court overturns its finding.

**Whether the trial court erred by finding that the Appellant was not entitled to the reliefs sought.**

38. This court having found that the Appellant was unfairly dismissed from employment proceeds to analyse the reliefs entitled to the Appellant as prayed in her claim. It was not in dispute that the Appellant’s last salary was Kshs 35,000/=. The Respondent admitted never paying the Appellant for the days worked in April, 2019 stating the same would be paid upon handover. The Appellant however maintained that she did not have the office dairy or any court documents with her.
39. The Appellant was suspended on 13<sup>th</sup> April, 2019 and later allegedly dismissed in 7<sup>th</sup> May, 2019. She was therefore entitled to salary during suspension since an employee on suspension still remains an employee until terminated. The Appellant was further entitled to one-month salary in lieu of notice of termination as provided under section 35 of the *Employment Act*..
40. On the issue of service gratuity, the Respondent acknowledged only remitting NHIF and not NSSF. The Appellant was therefore entitled to service gratuity as provided for under section 35(5) of the *Employment Act* at 15 days for each complete year of service being 8 years.
41. On the issue of house allowance the Appellant claimed her salary was exclusive of house allowance while the Respondent claimed that the same had a house allowance of Kshs 5,000/= but the Respondent did not issue the Appellant any payslip or appointment letter to show the Appellant’s salary tabulations. The Appellant was therefore entitled to the house allowance as provided for under section 31 of the *Employment Act* and at 15% of the basic salary.
42. Failure to pay an employee house allowance which is a statutory requirement is a continuing injury which is claimable within 12 months after cessation thereof. The injury ceased when the appellant was terminated. She filed her claim within the year she was terminated hence within the stipulation of



section 90 of the Employment Act. In Paul Mwasatu Maganga & 2 others v G4S Kenya Limited [2015] eKLR the court held that;

The first claimant is awarded house allowance for the 3 years immediately before filing of the suit in line with the time bar constructed by Section 90 of the E A. The said Section limits the time for lodging suit in respect of a right under the Act to 3 years.

The appellant is therefore entitled to house allowance for the 8 years she worked for the respondent at 15% of her basic salary.

43. On the claim for 12 months compensation for unfair termination this court is guided by section 49 of the Employment Act where under subsection 4 there are factors to take in to account while awarding the compensation to the Appellant. In addition, when making an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion over what is fair in the circumstances. The Court of Appeal in the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR held that the Court's discretion must be applied judiciously and not capriciously in awarding of damages.
44. The Court has come to a finding that there existed no valid grounds for terminating the appellant's service. The file she allegedly lost was later found in the respondent premises where she relocated. The respondent never recalled the claimant to work and even got upset that the appellant visited her private residence without prior notice to enquire about her work yet she relocated her work place to the very place. The respondent never subjected the appellant to procedural fairness prior to the termination of her service even if she had valid reasons for doing so. It is therefore the court's opinion that 8 months' salary would be reasonable compensation for the unfair termination in the circumstances.
45. The Appellant is also awarded costs of this appeal as well as costs in the trial Court.
46. In the upshot the Appeal partially succeeds as follows;
- a. One- month salary in lieu of notice .....Kshs 35,000/=
  - b. Salary for the month of April, 2019.....35,000/-
  - c. Salary for 7 days in May.....8,166/-
  - d. Service gratuity for 8 years .....Kshs 140,000/=
  - e. House allowance for 8 years .....Kshs 504,000/=
  - f. 8 months compensation for unfair termination.....Kshs 280,000/=
- TOTAL .....1,002,166
- g. Costs of the suit and the Appeal.
  - h. This award shall be subject to taxes and statutory deductions but shall attract interest at Court rates until payment in full.
1. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024**

**DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

