



**Rosemary v Kamongo Waste Paper (K) Limited (Appeal E194 of 2024)
[2024] KEELRC 13383 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13383 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E194 OF 2024
NJ ABUODHA, J
NOVEMBER 29, 2024**

BETWEEN

GICHERI ROSEMARY APPELLANT

AND

KAMONGO WASTE PAPER (K) LIMITED RESPONDENT

(Being an appeal arising from the Judgment and decree of Honourable Becky Cheloti delivered in Milimani Chief Magistrates Court, ELRC No. E415 of 2023 on 14th June, 2024.)

JUDGMENT

1. Through the Memorandum of Appeal dated 12th July, 2024, the Appellant appeals against the whole of the Judgment of Honourable Becky Cheloti delivered on 14th June, 2024.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and in fact in failing to find that the Appellant was unlawfully terminated from her employment.
 - ii. The Learned Magistrate erred in law and in fact in failing to appreciate the submissions of the Appellant.
 - iii. The Learned Magistrate erred in law and in fact in dismissing the Appellant's suit.
3. The Appellant prayed that the Appeal be allowed with costs and the Judgment delivered on 14th June, 2024 by the honourable court be set aside and/or varied and that the prayers be awarded as prayed in the statement of claim.
4. The Appeal was disposed of by written submissions.



Appellant's Submissions

5. The Appellant's advocates Ojienda & Company Advocates filed written submissions dated 25th October, 2024. Counsel appreciated circumstances under which this court as first appellate court will interfere with discretion of the trial court while relying in the case of Mbogo & Another versus Shah (1968) E.A 93 as cited with approval in Farah Awad Gullet v CMC Motors Group Limited (2018) eKLR.
6. On the issue of whether the trial court erred in failing to find that the Appellant was unlawfully terminated from her employment counsel submitted that there existed employment relationship between the parties through an appointment letter dated 3rd December, 2018. Counsel submitted that the Appellant worked for the Respondent as office clerk until March 2020 when her contract was unlawfully terminated.
7. Counsel submitted that the Respondent did not follow the correct procedure while dismissing the Appellant nor give justifiable reasons for her dismissal. That there were no probable warnings of prior misconduct on the part of the Claimant while relying on section 45 (5) (f) of the Employment Act on this assertion. That section 35 of the act required notice before termination but the Appellant was called on phone and notified that her employment contract was terminated. That this went against section 41 of the act on procedural fairness.
8. Counsel submitted that when the Appellant tried to reach out to the Respondent to find out why her employment was terminated she was blocked at the gate by the security officers. Counsel relied on among others the case of Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) (2021) KECA 95 on the requirement of procedural fairness even in cases of gross misconduct leading to summary dismissal.
9. Counsel submitted on importance of both procedural and substantive fairness while relying on the case of Ngari v Cargill Kenya Limited (Cause 31 of 2018) (2023) KEELRC. That the Respondent herein did not adhere to the procedural fairness or give the Appellant reasons for the termination but instead she was ambushed with a call from the Human Resource Manager informing her of her termination without giving her a fair hearing.
10. On the issue of whether the trial court erred in failing to appreciate the Appellant's submissions counsel submitted that the trial court did not give cognizance to the Appellant's weighty submissions which exhibited weighty issues on how her termination was carried out.
11. On the issue of whether the Appellant was entitled to prayers sought counsel submitted that the Appellant was entitled to one month salary in lieu of notice as per section 36 and 35(5) of the Act. Counsel relied on the case of Robai Musinzi v Safdar Mohamed Khan (2012 eKLR on this assertion.
12. On the compensation of 12 months for unlawful termination counsel submitted that the Appellant was entitled to the maximum compensation because the Appellant was unfairly terminated as provided for under section 49 of the act. Counsel relied on the case of Gas Kenya Limited v Odhiambo (Appeal E006 of 2022) (2022) KEELRC 3930 (KLRC) (22 September, 2022) (Judgment) on award of maximum 12 months based on long service. That the 12 months limit was even little compared to what an employee goes through after termination.
13. Counsel further submitted on the purpose of awarding any form of compensation in unfair termination while relying in the case of DK Njagi Marete v Teachers Service Commission (2020) eKLR as a compensation to offset financial loss resulting from the wrongful act.



14. Counsel submitted that the Appellant was entitled to certificate of service as per section 51 of the [Employment Act](#) while relying on the case of *Isadora Rachuonyo v Brva Industries Limited* (2021) eKLR.

Respondent's Submissions

13. The Respondent's Advocates O & M Law LLP filed written submissions dated 12th November, 2024. Counsel submitted on the duty of the first appellate court as to analyze, reconsider and re-evaluate the entire evidence on record of the trial court. Counsel relied on among another the case of *Peters v Sunday Post Limited* (1958) EA 424.
14. On the issue of whether the trial court erred in finding that the Appellant was not unfairly terminated counsel submitted that the trial court correctly determined this issue as per the facts and evidence on record. That while the Appellant claimed she was unfairly terminated by the Respondent there was no evidence produced in the trial court to substantiate the same which was against the established principle regarding burden of proof and relied on the case of *Kipkepe Limited v Peterson Ondieki Tai* (2016) eKLR on who asserts to prove.
15. Counsel submitted that upon the Appellant failing to discharge her burden of proof that she was unfairly terminated the trial court was unable to shift the burden to the Respondent as per section 47(5) of the [Employment Act](#). Counsel relied on the case of *Julius Malonza v Ruth Osolo t/a Eraeva Catering Services* (2021) eKLR on this evidential burden of the employee to illustrate termination occurred.
16. Counsel submitted that the Respondent did not terminate the Appellant but she stopped coming to work without providing a justifiable reason to the Respondent. That she later filed the claim in the lower which took the Respondent by surprise which claim she lost. Counsel relied on the case of [Wanyonyi v Principal Kamusinde Secondary School & Another ELR Appeal E010 of 2023](#) (2024) that an employee after leaving work without notice they must resign within reasonable time to prevent assertion by employer that employee breached contract.
17. Counsel submitted that the Respondent unsuccessfully attempted to contact the Appellant regarding her absence from work and her whereabouts as evidenced in the Respondent's letter dated 19th June, 2023. That the trial court deduced that this attempt satisfied the legal requirement bestowed upon the employer to make attempts to establish whereabouts of their employee before dismissal. Counsel relied on among others the case of *Joseph Nzioka v Smart Coatings Limited* (2017) eKLR on this assertion.
18. Counsel submitted that in the claim the Appellant alleged she worked up to March 2020 yet in her undated witness statement she stated that she worked up to July, 2020. That the Appellant gave contradicting statements regarding when her last day with the Respondent was hence she came to court with unclean hands. Counsel relied on the case of *Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mule & 3 Others* (2014) eKLR on parties been bound by their pleadings.
19. Counsel submitted the Appellant on 19th August, 2020 absconded work and completely failed to pick calls from the Respondent and colleagues. That she failed to do any handover or disclose her whereabouts. That after trying to reach the Appellant for over a week through her phone the Respondent deemed her to have absconded work and had since been waiting for her to return to work so as to face a disciplinary hearing.



20. Counsel further submitted that the Appellant did work up to August 2020 despite alleging she was terminated in March, 2020 and was paid salary for August 2020. That after absconding work she decided to file the frivolous claim to play lottery with legal system.
21. On the issue of whether the Appellant was entitled to the reliefs sought at the trial court counsel submitted that the Respondent could not be liable to pay the Appellant notice pay since it never terminated the Appellant but she is the one who terminated her contract. That it is the Respondent who should be paid the notice pay. That the Appellant is not entitled to reliefs sought in the Appeal since she failed to establish that she was unfairly terminated.

Determination

22. The court has considered the pleadings and submissions filed by the both parties herein and proceeds to analyse them as follows. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
23. In this case, the Judgment of the trial court was that the Claimant's claim was dismissed for lack of merit. The Appellant appeals on the whole of the Judgment. 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 Respondent was fairly terminated and if she was entitled to reliefs sought.
24. This court has therefore come up with two main issues;
 - i. Whether the trial court erred by finding that Respondent's termination of employment was fair and lawful
 - ii. Whether the Appellant was entitled to reliefs sought at the trial court.

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

25. It is not in dispute that the Appellant was an employee of the Respondent from 2018 and what this court finds unclear is when the relationship ended and how. The Appellant alleged that she was terminated over a phone call by the Respondent's Human Resource in March, 2020 and not July 2020 as per her claim and witness statement respectively.
26. On the other hand, the Respondent alleged that the Appellant absconded duties from 19th August, 2020 and she was paid salary for the month of August. The trial court relied on the letter dated 19th June, 2023 to show that the Respondent made efforts to reach the Appellant.



27. 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 and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR among others.
28. This court appreciates that in as much as the Appellant had a duty under section 47(5) of the Employment Act to prove that unfair termination occurred, whenever a defence of absconding or desertion is raised, the burden shifts to the employer to prove it. The Appellant claimed she was terminated over the phone while the Respondent claimed that the Appellant deserted work on 19th August, 2020. The trial court relied on the letter dated 19th June, 2023 which was a response to the Appellant's demand letter where the Respondent stated that the Appellant had absconded duties three years down the line.
29. The court disagrees with the lower court because no evidence was presented by the Respondent on the efforts it made to reach the Appellant like the call logs or letters to that effect. It is common practice that whenever an employee absconds duty the employer ought to make an effort to know their whereabouts and inform the employee that they were contemplating disciplinary action due to the Absconding/ desertion.
30. Under Section 44(4) (a) of the Employment Act 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Appellant relied on the defence of desertion and that the Respondent had no intention of returning to the place of work.
31. It was held in the case of Richard Kiplimo Koech Vs Yuko Supermarket Ltd [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the Employment Act obtain.
32. This court in Simon Mbithi Mbane vs Inter Security Services Ltd (2018) eKLR held that;

An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.
33. In this present case, the Court is not satisfied that the Respondent has on a balance of probabilities discharged its onus of establishing that the Appellant absconded/deserted duty. The Respondent did not prove the reason for termination was fair and valid as required under section 43 of the Employment Act hence unfair under section 45 of the Act.
34. On the procedural fairness as provided for under section 41 of the Employment Act the court notes that the same was never adhered to as the Appellant did not issue any show cause letter to the Respondent on the issue of deserting/absconding of duties, the warning letter dated 19th June, 2020 was never confirmed if it was received by the Appellant who denied ever receiving any warning letter in her employment; the Appellant was never invited for any disciplinary hearing hence the Respondent violated the clear provisions of section 41 of the Act.
35. In conclusion this court overturns the trial court finding dismissing her claim and finds that her termination was for invalid reasons and that it was carried out through an unfair procedure.

Whether the Appellant was entitled to reliefs sought at the trial court.
36. The court having found that the Appellant was unfairly terminated proceeds to find that she was entitled to damages for the same as provided for under section 49 of the Act. The Appellant claimed she



was earning Kshs 20,500/= per month while the Respondent alleged that the Appellant was earning basic monthly salary of Kshs 20,500/= and a house allowance of Kshs 2,562/=

37. The court notes that from the payslip of July and August 2020 that the basic salary was Kshs 20,500/= with a house allowance which was different in the two payslips. The court maintains that parties are bound by their own pleadings and since the Appellant opted to go by the basic salary omitting the house allowance so be it.
38. The Appellant was entitled to one month notice as per her contract and as per section 36 of the Act. On the compensation for unfair termination the court is guided by provisions of section 49(4) considerations. The court notes that the Appellant was unfairly terminated and she worked for the Respondent for around 2 years which was not a long time and awards the Appellant Four months' salary as compensation.
39. The Appellant is entitled to certificate of service as provided for under section 51 of the Act.
40. In the upshot the Appeal succeeds as follows;
- i. One- month salary in lieu of notice
.....Kshs 20,500/=
 - ii. 4 months' compensation..... Kshs 82,000/=
 - iii. Certificate of service
 - iv. Costs of the suit and this Appeal.
- TotalKSHS 102,500/=

35. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024 DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

Presiding Judge-Appeals Division

