



REPUBLIC OF KENYA



**Bridge International Academies Limited v Okubasu (Appeal E088 of 2022)
[2024] KEELRC 13232 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E088 OF 2022
AK NZEI, J
NOVEMBER 22, 2024**

**BETWEEN
BRIDGE INTERNATIONAL ACADEMIES LIMITED APPELLANT
AND
BEATRICE AYIETA OKUBASU RESPONDENT**

JUDGMENT

1. The Appellant herein was the Respondent (defendant) in Mombasa Chief Magistrate’s Court Employment Case No. 383 of 2021 whereby it had been sued by the Respondent herein seeking the following reliefs:-
 - a. A declaration that termination of the Respondent’s employment was unfair and unlawful.
 - b. Twelve (12) months (salary compensation for unfair and unlawful termination Kshs.229,296/=.
 - c. Payment in lieu of notice Kshs.19,108/=.
 - d. Service pay (9,554 x 5 years worked) Kshs.47,770/=.
 - e. Certificate of service.
 - f. Costs of the suit and interest.
 - g. Any other relief the Court deems fit to grant.
2. The Respondent had pleaded that she had been engaged by the Appellant as a teacher on 28th December, 2015, earning an initial salary of Kshs.19,108/= per month, and that she discharged her duties diligently until 9th December, 2020 when her services were terminated on account of absconding duty.



3. It was the Respondent's further pleading:-
 - a. that she was not given any show cause letter, and was not granted an opportunity to defend herself; and was condemned unheard.
 - b. that the Respondent's employment was terminated without just cause, that due process was not followed, that the Respondent was not given an opportunity to lodge an appeal, and that the Respondent's terminal dues were not paid.
4. The Respondent had further pleaded vide his Memorandum of Claim dated 10th June, 2021 and filed in Court on 15th June, 2021 that her salary had been unilaterally reduced by the Appellant from Kshs.19,108/= to a paltry sum of Kshs.1,317/= without engaging the Respondent and the Labour Officer before altering the said remuneration terms.
5. Documents filed alongside the Respondent's Memorandum of Claim included the Respondent's affidavit in verification of the claim, the Respondent's written witness statement dated 10th June, 2021 and an evenly dated list of documents listing 7 documents. The listed documents included copies of the Respondent's Identity Card, the employment contract, M-pesa statement, termination letter dated 9th December, 2020, Certificate of Service, NSSF statement and a demand letter dated 21st May, 2021.
6. The Appellant defended the Respondent's suit vide a Statement of Response dated 7th July, 2021, denying the same. The Respondent further pleaded:-
 - a. that the Respondent was issued with a show cause letter dated 8th December, 2020 requiring her to submit a written explanation on or before 9th December, 2020; and that she neither protested the timelines nor requested for more time to respond to the show cause letter.
 - b. that the Respondent did not provide any formal explanation for having absconded duty on 28th November, 2020 to 8th December, 2020, hence the decision to terminate the employment relationship.
 - c. that the Respondent's contractual monthly salary at the time of termination was Kshs.15,610/=, and that her daily rate for contractual partial months was Kshs.655/= per day.
 - d. that the Respondent absconded duty, and had no basis to claim unfair termination.
 - e. that the Respondent preferred an appeal against her termination within the stipulated time, and as was her right under the Appellant School's Staff Employee Handbook.
 - f. that the Respondent had no statutory or contractual entitlement to gratuity pay. That the Respondent was a registered member of, and a current contributor to the National Social Security Fund (NSSF).
7. Documents filed alongside the Appellant's said Response to Claim included a written witness statement of Samuel Odhiambo Gweyi and a list of documents dated 8th July, 2021, listing 17 documents. The listed documents included the Respondent's employment contract dated 28th December, 2015, an addendum to the contract of employment dated 28th December, 2015, notice to show cause dated 8th December, 2020 addressed to the Respondent, the Appellant's letter dated 9th December, 2020 terminating the Respondent's employment, certificate of service issued on 9th December, 2020, demand letter dated 21st May, 2020, response to demand letter dated 21st June, 2020, Respondent's provisional NSSF Statement dated 8th July, 2021, computation of the Respondent's dues, a bundle of the Respondent's payslips and the Appellant's School's Staff Employee Handbook.



8. At the trial, the Respondent adopted her filed witness statement, which replicated the averments made in her Memorandum of Claim, as her testimony and produced in evidence the documents referred to in paragraph 5 of this Judgment. The Respondent denied having absconded duty and having received the show cause letter dated 8th December, 2020.
9. The Respondent further testified that her basic salary was Kshs.13,574/= plus a house allowance of Kshs.2,036/=. That she got an increment every time the government increased salaries. That she got Kshs.19,108/= as at 2nd March, 2020. That she was a registered NSSF contributor; and was a regular contributor, having been employed as a permanent teacher.
10. The Appellant called one witness, Samuel Odhiambo Gweyi (RW-1); who adopted his filed witness statement as his testimony and produced in evidence the Appellant's documents referred to in paragraph 7 of this Judgment.
11. The trial Court delivered its Judgment on 14th November, 2022, making a finding that termination of the Respondent's employment was unfair and awarding her a total of Kshs.133,746/= made up of the equivalent of six months' salary as compensation for unlawful/unfair termination of employment and one month salary in lieu of notice. The Respondent was also awarded costs of the suit and interest at court rates from the date of filing suit.
12. Aggrieved by the said Judgment, the Appellant preferred the present appeal and set forth grounds of appeal stating that the learned trial Magistrate erred in law and in fact:-
 - a. In finding that it was not disputed that the Respondent was terminated without having been invited to show cause why termination could not ensue, and consequently arrived at an erroneous finding.
 - b. In finding that no reasons were given by the Appellant for the decision to terminate the Respondent, and consequently arrived at an erroneous finding.
 - c. In failing to consider the evidence adduced by the Respondent during cross-examination, and hence arrived at an erroneous finding.
 - d. By making a palpable and overriding error in the court's assessment of the facts and evidence on record, thus arriving at an erroneous finding.
 - e. By ignoring and/or failing to consider the Appellant's submissions dated July 22, 2022.
 - f. By ignoring the Appellant's evidence and relying on the evidential standard of preponderance of evidence in the face of clear and convincing evidence.
 - g. The trial Court's Judgment is not supported by the evidence on record, which evidence falls short of proving a claim of unfair termination.
13. The Appellant sought the following relief on appeal:-
 - a. That this court sets aside the trial Court's Judgment and substitutes it with its Judgment.
14. For record purposes, I have noted from the pleadings and all documents filed herein, and the proceedings taken in the trial court, that termination of the Respondent's employment occurred during the Covid-19 Period in 2020. Indeed, there is a mention of the words "recall" (of academic staff) and "during Covid" in RW-1's evidence under cross-examination, though the trial court recorded the said evidence in short form. I have, in particular, noted the contents of the witness statements filed



and adopted as testimony by the Respondent and RW-1 respectively, and the evidential documents produced in evidence by them.

15. This is a first appeal, and the pleadings filed in the trial Court and evidence presented thereon are before this Court for fresh evaluation. This court, however, takes cognisance of the fact that it did not see or hear the witnesses first hand.

16. It was stated as follows on *Mursal & Another – vs – Munene & others* (suing a legal administrators of Dalphine Kanini Manesa [2022] eKLR:-

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.

17. I will handle the grounds of appeal together, and in my view, issues that present for determination as are follows:-

- a. Whether termination of the Respondent’s employment by the Appellant was unfair.
- b. Whether the reliefs granted in the trial Court were deserved by the Respondent.

18. On the first issue, for termination of employment to pass the fairness test, there must be both substantive and procedural fairness in terminating the employment. It was stated as follows in the case of *Walter Ogal Anuro – vs – Teachers Service Commission* (2013) eKLR:-

“... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

19. Section 43(1) of the *Employment Act*, 2007 provides as follows:-

“(1) In any claim arising out of a termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

20. The Respondent’s employment was terminated by the Appellant on account of absconding duty. The Appellant (RW-1) stated as follows in his filed witness statement which he adopted as his testimony at the trial:-

4. The Claimant did not report to work between November 28, 2020 to December, 2020, and consequently, did not participate in the Outreach Marketing Programme the Respondent had scheduled for its academy staff.
5. Despite several attempts by the Respondent’s Mishomoroni Academy Manager to reach the Claimant on phone and provide her an opportunity to explain her absence, the Claimant was unreachable for the entire duration of the Outreach Programme and consequently, the Respondent determined



the Claimant to have deserted work and to have effectively resigned from employment with the Respondent.”

21. RW-1 stated as follows in evidence at the trial:-

“ . . . The Claimant made an attempt to report back to work. Schools opened on 4th January. She received communication letter. She was not aware. I am not able to confirm. I have no other proof. The Claimant’s salary was released during Covid. There were several emails. . . . The reason for the recall was that they come for academic outreach. . . . It is part of their contract.”
22. The Respondent (who was the Claimant in the primary suit) stated as follows in evidence:-

“I did not see the email I did not see the correspondence. . . . I live in Mishomoroni. I am married in Uganda We don’t access email in that country. It was the company’s fault Schools were to re-open on 3rd January.”
23. The Respondent employee’s foregoing evidence was not rebutted by the Appellant. The Appellant did not demonstrate that the alleged emails recalling the teachers (including the Respondent) back to school for the academic outreach programme were indeed delivered to the Respondent. It was not demonstrated that phone calls were indeed made to the Respondent and that she was reached and informed of the academic outreach. Further, the Appellant did not demonstrate that its regular school programme was running prior to 28th November, 2020, and that the Respondent was supposed to be in school as at 28th November, 2020.
24. Both parties testified that schools were to re-open in January, and that when they did, the Respondent reported back to school.
25. The allegation of absconding duty was not proved against the Respondent, and as such the Appellant did not demonstrate that termination of the Respondent’s employment was founded on a valid reason.
26. On procedural fairness, the show cause letter dated 8th December, 2020 was not shown to have been served on the Respondent. The Respondent denied having received it. A show cause letter in employment matters ordinarily communicates to an employee charges levelled against him or her by the employer, and calls upon the employee to formally respond to such allegations/charges. A disciplinary hearing will ordinarily be subsequently convened and the employee given an opportunity to be heard pursuant to Section 41 of the *Employment Act*.
27. Termination of an employee’s employment before service of formal charges upon him and granting of a fair opportunity for the employee to be heard on those charges as by law provided is unfair.
28. I find and hold that termination of the Respondent’s employment was procedurally and substantively unfair; and I uphold the trial Court’s findings in that regard.
29. On the second issue, I uphold the award of one month salary in lieu of notice pursuant to Section 35(1) (c) of the *Employment Act*. The Appellant did not demonstrate that the Respondent was served with a termination notice as by law provided, or was paid in lieu thereof.
30. The award of an equivalent of six month’s salary as compensation for unfair termination of employment was fair, in view of the circumstances in which the Respondent’s employment was terminated, and the number of years that she had worked for the Appellant. It was not demonstrated that the Respondent in any way contributed to the termination of her employment. I uphold the total award of Kshs.133,746/= made by the trial Court.



31. The Order awarding interest on the awarded sum from the date of filing the primary suit is hereby set aside. Quantum of the sum awardable to the Respondent was determined by the trial court upon conclusion of the trial, and interest could only be awarded from the date of the trial Court's Judgment.
32. In sum, and having considered the submissions filed, the appeal partly succeeds to the extent set out in this Judgment. For avoidance of doubt, the award of Kshs.133,746/= is hereby upheld, and interest on the said sum shall be calculated at court rates from the date of the trial Court's Judgment.
33. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
34. Each party shall bear its own costs of the appeal, but the Respondent will have costs of the suit in the Court below.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

