



**Kiratu v Devkan Enterprises (Appeal E171 of 2023)
[2024] KEELRC 2831 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2831 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E171 OF 2023
NJ ABUODHA, J
NOVEMBER 14, 2024**

BETWEEN

MARY WAKANYI KIRATU APPELLANT

AND

DEVKAN ENTERPRISES RESPONDENT

*(Being an appeal arising from the Judgement of Honourable C. MBURU
(PM) delivered in SPMC, ELRC No. 27 of 2021 at KIKUYU on 18/08/2023)*

JUDGMENT

1. Through the Memorandum of Appeal dated 11th September, 2023, the Appellant appeals against the whole of the Judgment of Honourable C. MBURU (PM) delivered on 18th August 2023.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and fact when she made a determination that the Appellant had not provided sufficient evidence and dismissed the entire suit despite the Respondent acknowledging that the Appellant services were terminated.
 - ii. The Learned Magistrate erred in law and fact by rendering a decision that went against the weight of evidence rendered.
 - iii. The Learned Magistrate erred in law and fact by raising the standard of proof from that of a balance of probabilities to beyond reasonable doubt.
3. The Appellant prayed that the Appeal be allowed with costs and the Judgment dated 18/9/2023 be set aside in its entirety and substituted with orders sought in the Appellant claim.
4. The Appeal was disposed of by written submissions.



Appellant's Submissions

5. The Appellant's advocates Njeri Kuria & Company Advocates filed written submissions dated 15th December, 2023. Counsel submitted that the role of this court as the first Appeal was captured in the case of *Gitobu Imanyara & 2 Others -v- Attorney General (2016) eKLR*.
6. On the issue of whether the Claimant's employment was unlawfully and unfairly terminated, Counsel submitted that the Learned Magistrate made a finding that the Appellant did not provide sufficient evidence and her reliance was based on payslips which were never an issue between the parties. That the trial court disregarded the Respondent's acknowledgement that the Appellant's services were terminated despite the evidence adduced by the Appellant that pointed at unfair and un-procedural termination. That there was no justification for dismissing the Appellant's suit.
7. Counsel submitted that the Appellant produced documents which included pay slips and statements indicating the schedule of payments during the hearing at the trial court. The appellant stated that she received money as an employee up to the date of her unfair dismissal and that those facts were never disputed by the Respondent and the trial court erred by not taking into consideration the documentary and oral evidence adduced by the Appellant in the course of trial.
8. Counsel submitted that the Appellant and her fellow colleagues were never afforded an opportunity to be heard before their employment was terminated in an assembly. That it was confirmed that the Appellant and her colleagues were declared redundant as was rightfully put in the Respondent statement of response.
9. Counsel submitted that the Appellant's Statement of Claim expressly disputed the process of termination of the Appellants' employment by the Respondent which the trial magistrate disregarded.
10. It was counsel's submission that the Respondent in its response stated that it is the Appellants who absconded duty and were not unfairly dismissed yet during cross examination DW1 did not produce any evidence like attendance sheets or CCTV footage of the Appellants absconding duty which was sufficient reason for the trial court to issue a judgment that the Appellants were unfairly and unprocedurally dismissed. That the allegation that the Appellants were dissatisfied with new working arrangements of less working hours for the same money was ridiculous as no employee would turn down such an offer.
11. Counsel relied on among others the case of *Daniel Marua Chacha v Santram Hardware (2022) eKLR* while submitting that an employer claiming that an employee has deserted duty must demonstrate efforts were made towards getting the employee to resume duty. That the allegation that the Respondent reached to the Appellants with some resuming work without calling one now working for them to testify remains a hearsay.
12. It was the Counsel's submission that the Respondent admitted to having flaunted the disciplinary procedure which they were purporting to rely on as their back up. That the Human Resource Manager admitted that it did not adhere to the mandatory terms of Section 41 and procedure laid down in Section 45(sic) of the *Employment Act* when terminating the Appellant which factor the trial court did not take into consideration.
13. Counsel submitted that the Respondent admitted that the alleged offence that the Appellant committed was a minor offence yet it did not submit them to any form of disciplinary hearing while the *Employment Act* Section 43, 45(2) and 47(5) places the burden of proof of the reasons for termination on the employer. That the Respondent did not commence any disciplinary action against the Appellant as per section 41 of the Act after they absconded duty.



14. Counsel submitted that from the evidence tendered by its witnesses it did not believe in the reason for terminating the Appellants and kept alternating between redundancy and absconding duty.
15. Counsel submitted that the trial court raised the standard of proof from a balance of probabilities to beyond reasonable doubt. The Appellants (employees) were not given any notice but were called to an assembly and informed that they would no longer be working for the Respondent. That the procedure adopted by the Respondent in terminating the Appellant went against section 41 of the Act while relying on the case of National Bank of Kenya v Samuel Nguru Mutonya(2019) eKLR on the court scrutinizing the procedure adopted by employer before terminating an employee. Counsel Further relied on the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR on the section 41 of the Act being coached in mandatory terms.

Respondent's Submissions

16. The Respondent did not make any appearance or file its submissions as its advocates C& K Advocates LLP ceased acting on 7th October,2024 for lack of instructions.

Determination

17. 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”

18. It was the Appellant's case that she had been employed by the Respondent as from 2019 and in July 2021 she was verbally terminated without payment of her terminal dues. It was the Respondent's case that its work load reduced when it mechanized its packaging process leading to reduced work load and the Appellant's employment came to an end because she and her fellow employees absconded duties. The trial Court after hearing the parties and considering evidence came to the conclusion that the claim lacked merit and dismissed the same.
19. The issue before the Court is whether the trial court erred in finding that the termination of the appellant was not unlawful and unfair and therefore dismissing the suit and whether the appellant was entitled to the reliefs sought.
20. Having considered the evidence as presented, it is clear that the Appellant was an employee of the Respondent as evidenced by the pay slip on record as late as April 2020 and a statement of account of May 2021. The trial court raised an issue over the payment of salary for June,2021 which to this court was never an issue before that Court as the documents on record showed the Respondent acknowledged that the Appellants absconded duties from 7th July, 2021 and were called back to work on 17th July,2021 and they refused while some resumed work on the said 17th July, 2021.
21. It is therefore clear that the issue arose on 7th July 2021 the same date the Respondent mechanized its packaging operations. This supports the Appellants' assertions that they were terminated orally in July as the Respondent never stated that the Appellants absconded duties from June 2021 after their pay of May 2021. The Respondent who is the custodian of employment records mentioned about the Appellants' pay slips without producing them to show that they were never paid for the June salary.



22. 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.
23. As to whether the Appellant was declared redundant, the court finds that Section 40 of the [Employment Act](#) caters for the procedure to be adopted by an employer who intends to terminate an employee on account of redundancy and various Court decisions are available on the substantive and procedural fairness on termination on account of redundancy. Section 40(1) (b) of the [Employment Act](#) provides that the employer must notify the employee personally and in writing of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect.
24. The court finds that Appellant was never issued with any written notification as required under Section 40(1) (b) of the [Employment Act](#). The Respondent submitted that when it introduced the mechanized packaging it grouped the Appellants in shifts who refused to take up the role. This court is curious to know which employee would refuse to take a role of fewer hours for the same pay.
25. In the case of Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR it was held that termination of the Claimants on account of redundancy and retrenchment without justification is procedurally wrong amounting to unfair termination. In essence it means that the Respondent after mechanizing its operations instead of declaring the Appellants officially and lawfully redundant chose to frustrate them so that it may rely on the ground of absconding of duty.
26. As to whether the Appellant absconded duty, it was the Respondent's case that after it mechanised the packaging process on 7th July, 2021 when it acquired packaging equipment and due to the prevailing CBA, the Respondent opted to retain the Appellants and organise them in shifts with the conditions of service unaffected but the Appellant and other employees were dissatisfied with the new arrangement and deserted duty.
27. The Appellant in her submission stated that the allegations that the Appellant was dissatisfied with the new working arrangement meant working less hours for the same money was unfounded.
28. 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 Respondent did not demonstrate that it commenced any disciplinary action against the Claimant under Section 41 of the [Employment Act](#) after the appellant allegedly failed to report on duty. The Respondent claims to have called them on 17th July, 2021 ten days after with no evidence of the calls made. No attendance registers were produced to show that, indeed, the Appellant absconded duty or absented himself from work at any given time. The employees who are said to have resumed work on the said 17th July, 2021 were never called in court to testify and support the Respondent's testimony.
29. In Joseph Nzioka v Smart Coatings Limited [2017] eKLR Nduma J. observed that

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a 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.”
30. Applying the foregoing propositions to the present case, the Court is not satisfied that the Respondent had on a balance of probabilities discharged its onus of proof establishing that the Appellant absconded duty.



31. On the procedural fairness as provided for under section 41 of the *Employment Act* this court notes that the same was never adhered to as the Respondent did not issue any show cause letter to the Appellant. The Appellant was not invited for any disciplinary hearing hence the Respondent violated the clear provisions of section 41 of the Act. This 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.
32. In conclusion the Appellant's termination was both substantively and procedurally unfair and unjustified and the trial court based its finding on irrelevant issues that were not before it and ended up with an error of judgment by dismissing the appellant's claim.
33. On the issue whether the trial court erred by finding that the Appellant was not entitled to the reliefs sought, the answer is in the affirmative since the Court has reached the conclusion that the trial Court erred in finding that the appellant was not unfairly terminated. The Court will therefore assess the amount of compensation and statutory entitlements as hereunder.
34. The salary the Appellant was earning as at the time of termination can be found from the payslip of April, 2021 which was for Kshs. 17,003/= as basic salary without house allowance. The CBA provided housing allowance at Kshs 3,187/= hence the total gross salary to be Kshs 20,190/=
35. In considering the Appellant's prayers and on the appropriate compensation, the 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 giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances.
36. On the prayer for one month salary in lieu of notice of termination, this is a statutory requirement under section 35 of the Act and is awarded at Kshs. 20,190/-
37. On accrued leave days not taken by the Appellant while in employment, section 28 of the *Employment Act*, 2007 gives every employee a right to take annual leave. The employer has the duty to ensure every employee has taken annual leave as at and when due. The Appellant did not illustrate how many leave days she took and what was pending for this court to interrogate it. In any event the CBA in place provided under clause 14(d) that leave shall not be cumulative and shall be taken each year when due and arranged. This prayer therefore fails.
38. On the prayer for compensation for unfair termination, this court relies on the provisions of Section 49(4)(b) of the *Employment Act* while considering the circumstances in which the termination took place. The Court of Appeal in the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR held that the Court's discretion when assessing compensation under section 49(4)(b) must be applied judiciously and not capriciously. It is the court's opinion that considering the length service the appellant had given to the respondent and the fact that she was a general worker with no special skills hence could perform any general work anywhere, 6 months' salary would be adequate compensation for unfair termination.
39. The Appellant is also awarded costs of this appeal as well as costs in the trial Court.
40. In the upshot the Appeal partially succeeds as follows;



- a. One- month salary in lieu of notice.....Kshs 20,190/=
- b. Accrued leave.....NIL
- c. 6 months' compensation..... Kshs 121,140/=
- d. Certificate of Service
- e. Costs of the suit

TotalKSHS 141,330/= this award shall where applicable be subject to taxes and statutory deductions but shall attract interest from the date of judgment until payment in full.

41. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

