



**Ali v Hanz Petroleum Limited (Appeal E004 of 2023)
[2024] KEELRC 2772 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2772 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E004 OF 2023
AK NZEI, J
NOVEMBER 8, 2024**

BETWEEN

ALI MUSA ALI APPELLANT

AND

HANZ PETROLEUM LIMITED RESPONDENT

JUDGMENT

1. The Appellant herein was the Claimant in Malindi Senior Principal Magistrate’s Court ELR Case No. E20 of 2022 whereby he had sued the Respondent herein vide a Memorandum of Claim dated 25th March, 2022 and filed in the said court on even date, seeking the following reliefs:-
 - a. A declaration that termination of the Appellant’s employment by the Respondent was unprocedural and unfair.
 - b. One month salary in lieu of notice Kshs.17,600/=.
 - c. Accrued 63 leave days Kshs.64,680/=.
 - d. Overtime worked but not paid at 4 hours per day for 712 days Kshs.361,476.90.
 - e. Off-days per week for 156 weeks Kshs.183,040/=.
 - f. Gazetted public holidays for 3 years Kshs.38,720/=.
 - g. Maximum compensation for unfair termination Kshs.211,200/=.
 - h. Certificate of service.
 - i. Costs and interest from the date of filing suit till payment in full.
2. The Appellant had pleaded:-



- a. That the Appellant had been verbally engaged by the Respondent as a supervisor at the Respondent's Hanz Petroleum Station at Gongoni at a monthly wage of Kshs.17,600/= and that his employment was verbally terminated on 15th October, 2021 for gross misconduct.
 - b. That the Respondent had 3 working shifts which the Appellant used to supervise, to count the income and to deposit the same in the Respondent's account No. 0408637001 at DTB, Malindi for each sale.
 - c. That the Appellant was working extra hours, for which he was not paid, despite efforts by him to have the overtime paid for.
 - d. That the Appellant used to work on Sundays and on gazetted public holidays, but was not compensated for the same.
 - e. That the Appellant and other staff of the Respondent used to sign registers for time-in and time-out, but the same were withheld by the Respondent.
 - f. That on the night of 10th September, 2021, a former employee of the Respondent at the Respondent's Mavueni Branch stormed the Respondent's Gongoni Station where Respondent's director was at the time, demanding to be paid her dues which she alleged had not been paid to her upon termination of her employment; and caused chaos.
 - g. That the Appellant reported the matter at Gongoni Police Station and was issued with an OB Number; and that in a twist of events, the Appellant was issued with a show cause letter dated 13th September, 2021, and was coerced to admit the offence of the Respondent's said former employee on allegation that the former employee (Riziki Charles Nyairo) was the Appellant's ex-wife.
 - h. That left with no option, the Appellant obeyed the Respondent's demand in order to safeguard his employment; and wrote an apology letter dated 14th September, 2021.
 - i. That on 15th September, 2021, the Appellant's employment was verbally terminated by the Respondent through its Director, Mr. Hamsa.
 - j. That termination of the Appellant's employment was unfair in that the Appellant was not issued with a termination notice, was not accorded any hearing prior to termination, and his dues were not paid.
3. Documents filed alongside the Appellant's Memorandum of Claim were the Appellant's written witness statement dated 25th March, 2021 and an evenly dated list of documents, listing 8 documents. The listed documents included copies of the Appellant's identity card, statement of pay, M-pesa banking statements by the Appellant to the Respondent's account, video clip recorded live at the Respondent's premises, OB No. 02/11/9/2021 from Gongoni Police Station, a show cause letter dated 13th September, 2021, the Appellant's letter dated 14th September, 2021 and a letter by the Appellant's counsel dated 3rd March, 2022.
 4. The Respondent entered appearance and subsequently filed a statement of defence and admitted having verbally engaged the Appellant as a supervisor at a monthly wage of Kshs.17,600/= as pleaded by him; performing duties as pleaded. The Respondent, however, denied the Appellant's averment on 3 working shifts.
 5. The Respondent denied the Appellant's claim and pleaded that the Appellant was summoned for a meeting in the Respondent's Taru Office where it was resolved that the Appellant would be transferred



to a new work station to avoid further altercations with his estranged wife, Riziki Charles Nyairo, but the Appellant never reported to the assigned station despite being informed by the Respondent to do so.

6. Documents filed alongside the Respondent's statement of defence included a written witness statements of Salim Mswabahi, Jerry Opondo and Ronald Ngala, all dated 24th August, 2022, and a list of documents dated 14th October, 2021, listing 7 documents. The listed documents included a letter of authority dated 1st September, 2022, a contract of employment letter dated 13th September, 2021, a letter dated 14th September, 2021, letter dated 15th September, 2021, minutes of a meeting held on 16th September, 2021, and a letter to the County Labour Officer (Mombasa) dated 14th October, 2021.
7. At the trial, the Appellant, being the Claimant (plaintiff) in the primary suit, adopted his filed witness statement, which replicated the averments made in the Memorandum of Claim, as his testimony; and produced in evidence the documents referred to in paragraph 3 of this Judgment.
8. The Appellant further testified that a lady called Riziki went to his place of work on 10th September, 2021 complaining about a grievance with the employer and prevented the Appellant from working. That the Appellant reported the matter to the police, and wrote an apology at the behest of the Respondent. That the Appellant was told to wait for a call, but was never called. It was the Appellant's evidence that he did not receive any letter and was not told to get a witness. That Salim went and took him, and he went alone. That NO minutes were given to him, and that the minutes were fake. The Appellant denied having been told (anything) about transfer, and that no letter was given. That he was sacked on 15th September, 2021, and was stopped from going to work. That he was not given a certificate of service.
9. Cross-examined, the Appellant testified that he was paid Kshs.17,600/=, that he worked overtime throughout, though he had not indicated the years, and that he worked during public holidays.
10. The Respondent called two witnesses. The first witness, Salim Mswabahi (RW-1) adopted his filed witness statement as his testimony. Cross-examined, RW-1 testified that the Appellant was not given a transfer letter, that the Appellant was the only supervisor at Gongoni filling station which operated 24/7; and that the Appellant never went on leave.
11. RW-2, Opondo Jerry, adopted his filed witness statement as his testimony and produced in evidence the Respondent's documents referred to at paragraph 6 of this Judgment. Cross-examined, RW-2 testified that the Appellant worked at Gongoni, and was not issued with a transfer letter.
12. The trial court delivered its judgment on 28th March, 2021, making a finding that the Appellant had not been terminated at all, that the Appellant had not proved his claim; and ordering each party to bear their own costs.
13. Aggrieved by the said Judgment, the Appellant preferred the present appeal and set forth ten grounds of appeal, which I summarise as follows:-

That the learned trial Magistrate erred in law and fact:-

- a. by failing to determine the reliefs sought in the memorandum of claim dated 25th March, 2022.
- b. by not finding that there was no way the Respondent could have written to the County Labour Office – Mombasa when the cause of action took place at Gongoni in Malindi Sub-County in Kilifi County; and that the Respondent's



letter dated 14th October, 2021 was an afterthought aimed at misleading the Court.

- c. by finding that termination of the Appellant's employment was procedural and fair; and by not considering that the Appellant had reported the matter of one Riziki Charles Nyairo as a security threat occasioned by none-engagement of security by the Respondent to man its premises at right.

14. The Appellant sought the following reliefs on appeal:

- a. That the appeal be allowed.
- b. That the trial court's Judgment delivered on 28th March, 2023 be set aside.
- c. That costs of the appeal be awarded to the Appellant.

15. This is a first appeal. As stated in the cases of *Selle & another –vs – Associated Motor Boat Co. Ltd & Another* (1968) E.A 123 and in *Peters – vs – Sunday Post Ltd* (1958) E.A 424; cited in *Mursal & another – vs – 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.”

16. I will handle the grounds of appeal set out by the Appellant together. Having considered pleadings filed in the primary suit and evidence presented by both parties, issues that present for determination, in my view, are as follows:-

- a. Whether the Appellant's employment was terminated by the Respondent, and if so,
- b. Whether the termination was unfair.
- c. Whether reliefs sought by the Appellant in the trial court were merited.

17. On the first issue, it was a common ground that the Appellant was employed by the Respondent, working as a supervisor at the Respondent's petroleum filling station at Gongoni in Kilifi County, and earning a monthly salary of Kshs.17,600/=. It was also a common ground that on the night of 10th September, 2021, a third party by the name Riziki Charles Nyairo, went to the Appellant's place of work and caused a scene thereat, thereby disrupting operations thereat. From the evidence on record, the said third party was the Appellant's estranged wife. The Appellant was on 13th September, 2021 issued with a show cause letter (dated 13th September, 2021), vide which the Respondent accused the Appellant of not taking action against the said third party, and required him to show cause why he could not be dismissed for gross misconduct.

18. Vide a letter dated 14th September, 2021, the Appellant apologised to the Respondent for the incident and further stated that he had reported the matter to the police and that the police had issued a letter barring the said person from accessing the Appellant's place of work.

19. The Appellant had pleaded and testified in the primary suit that his employment was verbally terminated by the Respondent on 15th September, 2021. The Respondent testified that it did not terminate the Appellant's employment. That it transferred the Appellant to its station at Maungu, but he failed to report there. The Appellant had denied having been transferred as alleged by



the Respondent. Cross-examined, the Respondent's witnesses (RW-1 and RW-2) admitted that the Appellant was not issued with any transfer.

20. I have noted that a letter dated 15th September, 2021 written by the Respondent purportedly inviting the Appellant for a disciplinary hearing at Taru on 16th September, 2021 is not shown to have been served on the Appellant and/or to have been received by him. These facts cast doubt on the validity and legality of the alleged minutes of an alleged disciplinary meeting allegedly held at Taru on 16th September, 2021, just hours after the issuing of the aforesaid alleged invitation letter. The situation is made even more doubtful by the Respondent's letter to the County Labour Officer – Mombasa dated 14th October, 2021. Why would the Respondent write to Mombasa County Labour Officer concerning the Appellant whose area of employment was Malindi Sub-County in Kilifi County." The more this court scrutinises the issue of the alleged transfer, the more the same appears doubtful.
21. On a balance of probability, I find and hold that the Appellant's employment was terminated by the Respondent.
22. On the second issue, for fairness to be attained in termination of employment, there must be both procedural and substantive fairness in effecting the termination. It was held as follows in the case of Walter Ogal Anuro – vs – Teachers Service Commission (2013) eKLR:-

“ . . . For a 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.”

23. The show cause letter dated 13th September, 2021, which set out the allegations/charges levelled by the Respondent against the Appellant, stated in part:-

“I have reasons to believe that on the night of 10th September, 2021 at Hanz Petroleum (gongoni) in which you were the supervisor, a lady perceived to be your wife stormed the petroleum station and caused the following:-

- a. She attacked our staff.
- b. She used abusive language.
- c. She took control of the petrol station for 4 hours and paralysed all the operations.
- d. She used fuel dispensing machine to shower fuel to our staff.
- e. Among other damages known to yourself.

All these were done at your presence and you never took any action to stop her. Instead, you chose to leave the station on the hands of the aggressive lady.

The above communicated offences are of gross misconduct in nature in accordance with the [Employment Act](#) 2007, calling for summary dismissal.

You are required to explain to us in writing within 48 hours why such action should not be taken against you . . .”

24. It is clear from the foregoing that the acts of breach of peace and security at the Appellant's place of work were committed by a third party who “stormed” the petrol station where the Appellant worked.



- It was not demonstrated, or even alleged by the Respondent, that the said third party had been invited by the Appellant at the petrol station, or that she committed the acts complained of at the Appellant's prodding or instigation. She "stormed" the petrol station.
25. The Appellant stated in his response to the show cause letter that he reported the matter to the police, and that the police wrote a letter barring the said third party from accessing the Appellant's work place. The Appellant even gave the Police OB Number in evidence; facts which the Respondent never rebutted. The trial court was not told that the Appellant was either a security guard, a security officer or a security supervisor. What was the Appellant expected to do in the face of a security breach and breach of the peace by a third party." The Appellant could not reasonably be held liable for culpable acts of a third party. The fact that he wrote an apology did not make him liable. He testified that he apologised because the Respondent pushed him to do so. The Respondent did not demonstrate that it had a valid and fair reason to terminate the Appellant's employment.
26. Section 43 (1) of the *Employment Act*, 2007 provides as follows:
- “(1) In any claim arising out of a termination of 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.”
27. On procedural fairness, Section 45(2)(c) of the *Employment Act* provides that termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure. The fair procedure is set out in Section 41 of the Act, which provides as follows:-
- “(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 provisions 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.”
28. The Respondent did not demonstrate compliance with the foregoing mandatory provisions of the statute. The reasons for the intended termination are not shown to have been explained to the Appellant in a language that he understood, and in the presence of a fellow employee or a shop floor union official. The purported letter of invitation (dated 15th September, 2021) to attend a disciplinary hearing on 16th September, 2021 was not shown to have been served on the Appellant. The Appellant denied having received it.
29. For record purposes, an employee on whom a show cause letter has been served ought to be given a reasonable number of days, depending on the circumstances of the case, to respond to that letter in writing. If the employer, upon receiving the employee's response deems it fit to invite the employee for a disciplinary hearing, the employee ought to be given a reasonable number of days to prepare for the hearing and to get a witness as contemplated in Section 41 of the *Employment Act*. The employee must



be informed of his right to be accompanied by the persons specified in the said Section, either a fellow employee or a shop floor union official; not just “someone” as stated in the Respondent’s purported invitation in the case herein.

30. I find and hold that termination of the Appellant’s employment was substantively and procedurally unfair. It was not done in accordance with justice and equity.

31. The Court of Appeal stated as follows in the case of Kenfreight (E.A) Limited – vs – Benson K. Nguti (2016) eKLR:-

“ Apart from issuing a proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contact.

32. The Court further stated in the Kenfreight (E.A) Limited case (Supra):-

“ . . . It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, and that the reason related to the employee’s conduct, capacity, compatibility or is based on operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure . . . ”

33. On the third issue, and having made a finding of unfair termination, and taking into account the period that the Appellant had worked for the Respondent, and the manner in which his employment was terminated, I award the Appellant the equivalent of seven (7) months’ salary being compensation for unfair termination of employment. It was a common ground that the Appellant was earning Kshs.17,600/= per month at the time of termination. The equivalent of seven months’ salary is Kshs.17,600/= x 7 = 123,200/=, which I award the Appellant.

34. The claim for Kshs.17,600/= being one month salary in lieu of notice is disallowed as the Appellant admitted, under cross-examination, that he was paid (“wired”) Kshs.17,600/=.

35. The claim for leave pay Kshs.64,680/= being accrued leave pay is allowed. The Respondent (RW-1) admitted in evidence (under cross-examination) that the Appellant never used to take leave. The Respondent did not dispute the Appellant’s computation of the claim.

36. The claims for overtime pay, public holidays and rest days worked were not proved, and are declined. Such claims are in the nature of special damages and must always be specifically pleaded, complete with the specific dates worked, and strictly proved. The Appellant herein did not do that.

37. The prayer for issuance of a certificate of service is allowed pursuant to Section 51(1) of the [Employment Act](#).

38. Having considered the written submissions filed herein on behalf of both parties, I hereby set aside the trial court’s Judgment delivered on 28th March, 2023, and do hereby enter Judgment for the Appellant against the Respondent as follows;

- a. Compensation for unfair termination of employment Kshs.123,200/=.
 - b. Unpaid accrued leave days Kshs.64,680/=
- Total = Kshs.187,880/=



39. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
40. The Respondent shall issue the Appellant with a certificate of service pursuant to Section 51(1) of the *Employment Act*.
41. The Appellant is awarded interest on the awarded sum, to be calculated at court rates from the date of the trial Court's Judgment.
42. The Appellant is awarded costs of the appeal, to be taxed on the lower scale.
43. The Appellant is also awarded costs of proceedings in the trial court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH 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

