



**Motrex Limited v Sawe (Appeal E087 of 2023)
[2024] KEELRC 2784 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2784 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E087 OF 2023
AK NZEI, J
NOVEMBER 8, 2024**

BETWEEN

MOTREX LIMITED APPELLANT

AND

DAVID KIPLAGAT SAWE RESPONDENT

JUDGMENT

1. Vide an amended Memorandum of Claim dated 31st August, 2020 in Mombasa Chief Magistrate’s Court Employment Cause No. 200 of 2020, the Respondent herein sued the Appellant seeking the following reliefs:-
 - a. One month salary in lieu of notice Kshs.35,003/=.
 - b. Maximum compensation for wrongful dismissal and unlawful termination Kshs.420,036/=.
 - c. Any further entitlement/order that the court may deem fit to grant that may be proved at the hearing of the cause hereof and which counsel for the Claimant submits on in his final submissions.
 - d. Costs of the suit.
 - e. Interest on (a), (b) from the date of filing suit and on (d) from the date of Judgment until payment in full.
2. The Respondent had pleaded that he had been employed by the Appellant as a Long Distance Heavy Commercial Truck Driver on 6th February, 2015 to 24th April, 2019, earning a consolidated starting salary of Kshs.25,000/= which was later revised upwards to Kshs.35,003/=.
3. The Respondent had further pleaded:-



- a. that he was initially employed as a casual, but his employment status changed to term contract of employment. That he was not given a written contract, and that he worked from Monday to Sunday without any rest day and without compensation thereof.
 - b. that on 24th April, 2019, the Respondent returned from Uganda and parked the vehicle at the Appellant's premises and went for breakfast at a nearby canteen. That he was summoned from his breakfast by the Appellant's Receptionist to the office, whereat he was accused of carrying unauthorised goods. That the Respondent's truck was searched by the Respondent's supervisor and the Respondent's Managers, but no such goods were found therein.
 - c. that the Respondent's said Managers forced the Respondent to take a breathalyser test, which showed some small percentage of alcohol.
 - d. that the Respondent admitted having consumed a negligible amount of alcohol the previous night during his sleeping hours, upon which he was told by the Appellant's Human Resource Manager to write an apology for being drunk; which the Respondent did.
 - e. that the Respondent was orally terminated and was paid Kshs.26,648/=, less his advance salary of Kshs.5,000/=.
 - f. that the termination was unlawful, abrupt and in contravention of the provisions of the Constitution of Kenya 2010, rules of natural justice and International Labour Law Conventions and declarations.
 - g. that the Claimant was terminated without a valid reason, without being accorded an opportunity to be heard, without notice and without payment of his terminal dues.
 - h. that the Claimant was underpaid during the period of employment, and was not issued with a certificate of service.
4. Documents filed alongside the Respondent's amended Memorandum of Claim included the Respondent's written witness statement and a list of documents dated 31st August, 2020, listing two documents. The listed documents were copies of the Respondent's payslip and a demand letter.
 5. The Appellant entered appearance and filed a Response to the Respondent's claim, admitting having employed the Respondent as pleaded by him and at the salary pleaded, and also the fact that the Respondent worked from Monday to Sunday without any rest day.
 6. The Appellant denied having unlawfully terminated the Respondent's employment, and denied his claim. The Appellant further pleaded:-
 - a. that the Respondent was accused of being drunk while on duty, which was against the Appellant's policy, and not carrying unauthorised goods as alleged by him.
 - b. that the Respondent drank during the day time and not the previous night.
 - c. that termination of the Respondent's employment was done in accordance with procedure.
 7. Documents filed alongside the Appellant's response to the Respondent's claim were written witness statements of Ali Twalib and Thomas Muteti, both dated 12th July, 2021, and a list of documents dated 18th December, 2020, listing eight documents. The listed documents were a letter of appointment, dismissal letter, payslip, payment voucher, disciplinary proceedings, certificate of service, and an apology letter.



8. At the trial before the lower court, the Respondent adopted his filed witness statement, which replicated the averments made in his amended memorandum of claim, as his testimony. He also produced in evidence the documents referred to in paragraph 4 of this Judgment. Cross-examined, the Respondent admitted having been drunk as confirmed by the breathalyser, and having written an apology. He further testified that he was terminated without notice, that he was unionised, and that he attended a disciplinary hearing without any one accompanying him. He admitted that he was issued with a termination letter.
9. The Respondent called two witnesses, Thomas Muteti (DW-1) and Ali Twalib (DW-2). DW-1 adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 7 of this Judgment.
10. DW-2 adopted his filed witness statement as his testimony. Cross-examined, DW-2 testified that the Respondent's return (from Uganda), the disciplinary proceedings and the termination were done on the same date. That there was no notice to show cause.
11. The trial court delivered its Judgment on 28th July, 2023; making a finding that the Respondent's employment was unprocedurally and unlawfully terminated, and awarding the Respondent a total of Kshs.350,030/=, made up as follows:-
 - a. One month salary in lieu of notice ... Kshs.35,003/=
 - b. Nine months' salary Kshs.315,027/=
12. The Respondent was also awarded costs of the suit and interest.
13. Aggrieved by the said Judgment, the Appellant preferred the present appeal and set forth six grounds of appeal, which I summarise as follows:-
14. The learned trial Magistrate erred in law and in fact:-
 - a. In holding that the Respondent's termination of employment by the Appellant was both unprocedural and unlawful.
 - b. In failing to uphold that the Respondent admitted that he had committed gross misconduct that warranted summary termination of employment.
 - c. By failing to find that all dues payable (if any) were paid in full, and that the Respondent acknowledged receipt of the same.
 - d. By taking into account irrelevant factors and in the circumstances arriving at a wrong decision.
15. This is a first appeal, and the evidence adduced before the trial court is before this court for fresh evaluation. This court, however, takes cognizance of the fact that it never saw or heard the witnesses first hand. The duty of a first appellate court was stated in the case of Peters – vs – Sunday Post Ltd (1958) E.A Page 424, among other cases.
16. I will consider the grounds of appeal together. Having considered the pleadings filed in the trial court and the evidence thereon, issues that present for determination, in my view, are as follows:-
 - a. Whether termination of the Respondent's employment by the Appellant was unlawful and therefore unfair.
 - b. Whether the reliefs granted by the trial court were merited.



17. Unfairness in termination of an employee's employment may be either procedural or substantive or both. The Court of Appeal stated as much in the case of *Naima Khamis – vs – Oxford University Press (E.A) Limited (2017) eKLR*.
18. It was stated 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.”
19. On substantive justification in the instant case, it was a common ground that the Respondent, who was employed by the Appellant as a Long Distance Truck Driver, was found drunk on 24th April, 2019 during working hours. The fact of the Respondent being drunk was scientifically established through the taking of breathalyser by the Respondent at the behest of the Appellant. The Respondent admitted this fact in his pleadings. Further, the Respondent wrote a letter to the Appellant on 24th April, 2019, admitting having been caught drunk, and tendering an apology.
20. Being drunk during working hours is a gross misconduct, for which an employee can be summarily dismissed. Section 44(4)(b) of the *Employment Act* states as much. I find and hold that the Appellant terminated the Respondent's employment on account of a valid reason; and that the termination was substantively fair.
21. On procedural fairness, the Appellant did not adhere to the mandatory provisions of Section 41 of the *Employment Act*; which must be adhered to even in cases of summary dismissal. Any purported disciplinary hearing by the Appellant on 24th April, 2024, the same day on which the Respondent became intoxicated during working hours and his employment was terminated, was a sham as there was no compliance with Section 41 of the Act which provides, in mandatory terms:-
 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.”
22. It is my finding that termination of the Respondent's employment was procedurally unfair, and to that extent, I uphold the trial court's finding of unfairness in the termination of the Respondent's employment.
23. On the second issue, and having found that the Appellant had a valid reason for terminating the Respondent's employment and only failed to adhere to the laid down mandatory procedure, I award the Respondent the equivalent of three months' salary, which is Kshs.35,003 x 3 = Kshs.105,009/=; being compensation for unfair termination of employment. The award of nine months' salary in compensation for unfair termination of employment is hereby set aside.



- 24. The award of Kshs.35,003/= being one month salary in lieu of notice is upheld. The Respondent was not shown to have been paid in lieu of notice pursuant to Section 35(1)(c) of the Employment Act . What was paid was his salary for the month of April 2019, less salary advance.
- 25. In sum, and having considered written submissions filed on behalf of both parties herein, Judgment is hereby entered for the Respondent against the Appellant as follows:-
 - a. One month salary in lieu of notice Kshs.35,003/=
 - b. Compensation for unfair termination of employment Kshs.105,009/=

Total = Kshs.140,012/=
- 26. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 27. The Respondent is awarded interest on the sum awarded herein, to be calculated at court rates from the date of the trial court’s Judgment.
- 28. Each party shall bear its own costs of the appeal, but the Respondent is awarded costs of proceedings in the court below.

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:

.....Claimant

.....Respondent

