



**Berlin Equipment Limited v Ojwang (Appeal E083 of 2024)
[2024] KEELRC 13502 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13502 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E083 OF 2024
M MBARÚ, J
DECEMBER 18, 2024**

BETWEEN

BERLIN EQUIPMENT LIMITED APPELLANT

AND

JOSEPH SHIKUKU OJWANG RESPONDENT

*(Being an appeal from the judgment of Hon. R. Noelyne delivered
on 4 April 2024 in Mombasa CM ELRC No.439 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 4 April 2024 in Mombasa CM ELRC No.E439 of 2021. The appellant is seeking orders that the judgment be set aside and substituted with an order dismissing the claimant with costs.
2. The respondent, Joseph Shikuku Ojwang filed a claim before the trial court on the basis that the appellant employed him as a haulier tractor driver on 4 March 2015 at a wage of Ksh.25, 000 per month. On 22 March 2021, he was issued a notice to show cause why disciplinary action should not be taken on the basis that on 9 March 2021 while assigned to tractor No.KTCB 079P to collect and deliver cane for processing, he abetted and conspired with a stranger and fuel dealers to siphon fuel from the tractor and also engaged in criminal activities to the detriment of the appellant. The claim was that employment was terminated unfairly and he claimed the following dues;
 - a. compensation Ksh.500,000;
 - b. notice pay ksh.25,000;
 - c. service pay for 5 years Ksh.75,000;
 - d. unpaid public holidays ksh.91,666;



- e. overtime for 3 hours for 5 years Ksh.674,875;
 - f. unpaid NSSF and NHIF for 5 years Ksh.15,400;
 - g. certificate of service;
 - h. Costs of the suit.
3. In response, the appellant acknowledged that the respondent was employed as a tractor driver at a wage of Ksh.25, 000 and was expected to be diligent in his duties. On 8 March 2021, he was tasked with transporting harvested cane from Churchyard 3 to the factory for crushing. On this day, the general manager and the agriculture manager, during their official field visits, discovered the respondent within the Mwangwei area. He had descended from the tractor, left the engine running, and was in conversation with an unknown person while holding two jerricans and a pipe. The unknown person fled. The circumstances suggested a plan to siphon fuel from the tractor, as the 20-litre jerricans and a pipe were not part of the haulage tools of work. The respondent had no obligation to stop at Mwangwei, leading the appellant to reasonably suspect the respondent's involvement in a conspiracy to siphon fuel from his tractor. The matter was promptly reported to the security department and Ramisi Police Station for further action. The respondent wrote his statement on 9 March 2021, and a thorough investigation was conducted.
 4. On 22 March 2021, the appellant issued the respondent with a notice to show cause over his alleged action of conspiracy to commit a felony through the siphoning of fuel from his allocated tractor. The respondent responded on 23 March 2021, and his response was reviewed. He was then invited to a disciplinary hearing on 25 March 2021, where he was allowed to make his representations. After a fair hearing, he was found liable, and through a notice dated 12 April 2021, his employment was terminated by summary dismissal. The appellant followed due process, and the claims made were not justified.
 5. The learned magistrate delivered judgment on 4 April 2024 and held that there was an unfair termination of employment and awarded the claims as pleaded, less service pay Ksh.Ksh.75,000, a certificate of service and costs of the suit from the date of being instituted plus interests from the date of judgment at court rates.
 6. Aggrieved, the appellant filed this appeal because the learned magistrate erred in law and fact in finding that the dismissal was unfair contrary to the weight and evidence submitted. The court failed to find that the respondent was involved in siphoning fuel, which violated the essential conditions of his contract to employment, and there existed valid and fair reasons under Section 43 of the Employment Act to justify termination of employment. There was due process adhered to under Section 41 of the Employment Act. The respondent was issued a show cause notice, but the trial court failed to appreciate the admission of facts forming the basis of the allegations against him. The awards of unpaid public holidays were not justified, were speculative and time-barred and without proof. There was no proof of overtime work. The respondent admitted that he was not at work due to sickness and that he took 27 leave days. There was a fire incident when the factory closed, and he was not at work; hence, the leave award was unjustified.
 7. Other grounds of appeal are that the trial court erred in awarding 12 months' compensation without any basis and that the award of NSSF and NHIF was in error as these are statutory payments.
 8. Both parties attended and agreed to address the appeal by way of written submissions.
 9. The appellant submitted that on 8 March 2021, the respondent was assigned tractor No. KTCB 047P to transport the cane from Churchland 3 to the factory. While on a field visit to Mangwei, the general manager and the agriculture manager found the respondent with an unknown person holding two



jerricans and a pipe. When they approached them, the unknown person ran away. The respondent was not assigned to be in this area, and the jerricans and pipe were separate from his work tools. The officers believed that he was conspiring to siphon fuel from the tractor. The matter was reported to security for investigations and to Ramisi Police Station. The respondent was issued a notice to show cause over his conduct on 23 March 2023, and he responded but did not give satisfactory explanations. He was invited to a disciplinary hearing and found culpable of conspiracy to commit a criminal offence. This justified grounds for summary dismissal under Section 44(g) (g) of the *Employment Act*.

10. The appellant submitted that despite the evidence before the trial court, there was a finding that there was an unfair termination of employment. That the respondent was denied a fair hearing before termination of employment. There is evidence of the respondent being invited to a disciplinary hearing. He attended and made representations. In the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 8 others [2019] eKLR, a case with similar circumstances, the court held that the standard of proof is on a balance of probabilities and not beyond a reasonable doubt. The employer must prove that it genuinely believed to exist reasons which justified termination of employment.
11. In the case of Wanyonyi v Principal Kamusinde Secondary School & another [2024] eKLR, a case that dealt with similar issues, the court held that section 47(5) of the *Employment Act* places the burden of proving unfair termination of employment on the employee while the employer has the burden of justifying the reasons for termination of employment. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.
12. In this case, the appellant had valid and fair reasons for terminating his employment. The appellant took the respondent through due process and allowed him to show cause and attend the disciplinary hearing before terminating his employment, as held in Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR.
13. The awards by the trial court are not justified. Notice pay and compensation are not due when summary dismissal is justified. Public holidays are claims in their nature, specific, and should be particularized. Overtime pay must not be speculative and without evidence. The respondent admitted that he took his annual leave of 27 days. The factor was closed for 3 years following a fire incident, and cumulatively, he had no basis to claim overtime for 5 years.
14. The claim for NHIF and NSSF is not due to the employee but to the statutory body. The appeal should be allowed with costs.
15. The respondent filed written submissions for an application dated 11 July 2024 and not the appeal.

Determination

16. the role of a first appeal court as restated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA as follows:

...An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are; that this court must reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance to this respect, in particular, this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally.



17. The entire appeal revolves around the termination of employment of the respondent through summary dismissal on 12 April 2021.
18. The appellant issued the respondent with a show cause notice dated 22 March 2021 on the basis that following investigations, it was revealed that on 8 March 2021 while he was assigned tractor No. KTCB 074P to transport harvested cane from Churchland 3 to the factory, he stopped at Mangwei to speak to an unknown person. The general manager and agriculture manager came across the respondent and the unknown person ran away. The respondent was found holding 2 jerricans and a pipe. These were not part of his tools of work. The charge was that he had no obligation to stop at Mangwei. He had no particular reasons why he had 2 jerricans and a pipe. The unknown person who ran away created an impression that the two were conspiring to commit a felony, siphon fuel from the tractor.
19. On this basis, the respondent was allowed to respond and he denied the allegations. He was invited to the disciplinary hearing in the presence of another employee of his choice. The invitation is long and detailed with the allegations made and the protections necessary during the disciplinary hearing including the right to be accompanied by another employee of his choice.
20. Ultimately, the appellant found the respondent culpable of conspiring to commit a felony, abetting and conspiring to commit a criminal act, giving misleading information to deceive management, and that he misused his position as a tractor driver to advance personal gain. He was issued with a notice of summary dismissal on 12 April 2021.
21. An employer is allowed to terminate employment by summary dismissal under the provisions of Section 44 of the *Employment Act* where the employee has committed a fundamental breach of the employment contract through his conduct. The protection to the employee is that the employer must adhere to the provisions of Section 41(2) of the *Employment Act*. Issue notice to the employee to attend and address in the presence of another employee of his choice.
22. In this case, the court finds that the appellant issued the respondent with a show cause notice upon investigations into his conduct and established that on 8 March 2021, he was found outside his ordinary course of workplace at Mangwei with an unknown person and when approached by senior officers of the appellant, the unknown person ran away. The respondent was found holding 2 jerricans and a pipe which were not part of his tools for work and this created the impression that he was conspiring to siphon fuel from his allocated tractor.
23. Indeed, as submitted by the appellant, under Section 43 of the *Employment Act*, the employer who genuinely believes that there exists a valid reason to justify termination of employment is allowed to proceed and do so. In the case of *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 8 others* [2019] eKLR the Court of Appeal held that the employer who finds the conduct of the employee to be contrary to the internal policy is justified in terminating employment.
24. The question then is whether the appellant had a genuine reason to warrant the respondent's summary dismissal and whether in reaching its decision the appellant employed fair procedure.
25. As outlined above, the respondent as a tractor driver had specific duties assigned to him on 8 March 2021. To transport harvested cane from Churchland 3 to the factory. He was not required to stop at Mangwei. He had no reason why he was holding discussions with a stranger while holding 2 jerricans and a pipe. Two senior officers of the appellant found him and the stranger opted to run away. The respondent was put to task during the hearing and could not explain why he was at this location of Mangwei and why he was holding the 2 jerricans and a pipe.



26. In the case of Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] KECA 446 (KLR) the court held that;

Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons. There were.

27. In this case, the employee was found to have attempted to steal cable wires that were being removed from the store. The court held that the employer didn’t need to conduct a near forensic audit to establish the gross misconduct. The fact that the employer, in acting in the manner it did, genuinely believed to exist valid and justified reasons was sufficient cause.

28. This position is reiterated in the case of Matsesho v Newton [2022] KEELRC 1554 (KLR) that;

It should be noted that in proving the reasons for termination under section 43 of the *Employment Act*, the employer is entitled to plead matters that he genuinely believed to exist and which would, if they were in fact in existence, provide valid grounds for terminating the employee. In other words, situations may arise where the employer genuinely believes that a ground for terminating an employee has arisen when in actual fact it has not. For example, the employer may have strong preliminary evidence pointing to the employee having committed an offense against the property of the employer only for subsequent investigations to clear the employee. If the employer shows that he acted on such evidence out of a genuine belief that the employee had committed the act, the termination would be on valid grounds.

29. In light of the foregoing, I find that the appellant had a genuine reason for terminating the respondent’s employment as required under Section 43 of the *Employment Act*. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

30. In this case, the respondent was invited to show cause why his employment should not be terminated for gross misconduct and incidents on 8 March 2021. His explanations did not meet the required threshold. He was hence invited to a disciplinary hearing. He did not exonerate himself.



31. The court found the summary dismissal was procedural, lawful and justified.
32. The trial court failed to address the core issue at hand. The respondent was found guilty of gross misconduct. He was taken through the procedures under Section 41 of the [Employment Act](#), and his case justified summary dismissal.
33. The respondent is not entitled to compensation and notice pay, which the trial court awarded based on erroneous findings of unfair termination of employment.
34. On the other claims, service pay is due under Section 35(5) and (6) of the [Employment Act](#). The respondent filed his payment statement together with the Memorandum of Claim. These are for April and March 2021. His statutory dues are remitted. He is removed from a claim of service pay.
35. The claim for work during public holidays is for 5 years. Public holidays are special days published by the Minister through a Gazette Notice. The employee must particularize these to allow the employer a fair chance to interrogate and address whether the employee was at work at all. They cannot form a general claim. The award is in error.
36. On the claim for overtime work, overtime is a continuing injury. It must be addressed within Section 89 of the [Employment Act](#) and 12 months from the date of cessation. See *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR).
37. In this case, the respondent claimed overtime of 3 hours each day for 5 years. The appellant's evidence that the respondent took his annual leave and had 27 days away from work and the factor had closed for 3 years was not challenged in any material way. The Memorandum of Claim does not specify the reasons for the overtime of 3 hours each day. If there was such work, under the continuing injury, these were not addressed. On the evidence submitted, this claim is exaggerated and without merit.
38. Indeed, as submitted by the appellant. NSSF and NHIF dues are payable to the statutory body, not the employee. The respondent submitted his payment statements, and there are remittances to these statutory bodies. His claim for such payments is not lawful.
39. A certificate of service is due at the end of employment. Upon clearance, the respondent should be issued a certificate under Section 51 of the [Employment Act](#).
40. On costs, the appeal is successful. The appellant is entitled to the costs of the appeal.
41. Accordingly, judgment in Mombasa CM ELRC E439 of 2021 is hereby set aside. The appellant is awarded the costs of this appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

