



**Gathura Investments Limited v Musikali (Civil Appeal E090 of 2023)
[2024] KEELRC 13617 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13617 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E090 OF 2023**

**JW KELI, J
DECEMBER 18, 2024**

BETWEEN

GATHURA INVESTMENTS LIMITED APPELLANT

AND

JOSEPH MUSEE MUSIKALI RESPONDENT

*(eing an Appeal against the Judgment and Decree of Hon. P.K ROTICH
(MR)(SPM) delivered at Nairobi on 9th May 2023 in MCELRC Case No.
E1733 of 2021 Joseph Musee Musikali vs Gathura investments Limited)*

JUDGMENT

1. The Appellant herein Gathura Investments Limited being dissatisfied with the entire Judgment and Decree of the Hon. Paul K Rotich (MR) (Senior Principal Magistrate) delivered on 09/05/2023 in Nairobi Civil Case No. MCELRC E1733 OF 2021 Joseph Musee Musikali Vs Gathura Investments Limited filed a Memorandum of Appeal dated 6th June 2023 seeking the following reliefs:-
 - a. This Appeal be allowed.
 - b. The Judgment and Decree of the lower court be set aside.
 - c. This court do make its own review and directions based on the evidence adduced on record.
 - d. The Appellant be awarded the costs of this Appeal and those in the lower court.

Grounds Of The Appeal

2. That the whole finding and judgment of the Senior Principal Magistrate is against the pleadings, submissions and the law;



3. That the Learned Trial Magistrate erred in law and facts by not considering the weight of the evidence adduced by the appellant that clearly showed that the Respondent was not unlawfully terminated from his employment.
4. That the Learned Trial Magistrate erred in law and facts by not considering the uncontroverted evidence that the Respondent was employed as a night guard only and was not assigned any other duties.
5. That the Learned Trial Magistrate clearly erred in law and facts in expressing outright bias against the Appellant and wholly disregarded its evidence and arguments
6. That the Learned Trial Magistrate erred in law and facts and/or intentionally misinterpreted the admission by the Respondent during cross examination that he worked alongside a caretaker and an agent with each performing their respective duties.
7. That the Honorable Trial Magistrate erred in fact and law in failing to find that the Appellant had proved that the defendant had breached security guards' basic rules, duties, and regulations for which he was summoned to the office after complaints were raised of his complacency at the work station.
8. That the Honorable Trial Magistrate erred in fact and in law in using a higher standard of proof than on a balance of probabilities arriving at the determination as to whether the Respondent had proved his case.
9. That the Honorable Trial Magistrate erred in fact and in law in failing to find that the evidence presented by the Appellant was more credible than that given by the Respondent with regard to the operations in the security industry where the Respondent was expected to observe a high degree of discipline and self-control.
10. That the Honorable Trial Magistrate erred in law in failing to make take cognizance of the nature of the work entrusted to the Respondent and the level of discipline expected in the field.
11. That the Honorable Trial Magistrate erred in fact and in law in failing to consider the documentary evidence provided by the Appellant and the submissions adduced in support of the appellant's case.
12. That the Honorable Trial Magistrate erred in fact and in law in awarding the Respondent reliefs sought word for word without consideration of the Appellants rebuttal evidence and Respondents admissions in his evidence and cross examination.
13. That the Honorable Trial Magistrate erred in fact and in law in awarding reliefs that were not justifiable or proven during the trial and for failure to consider the Appellant's right as an employer.
14. That the Honorable Trial Magistrate erred in fact and in law in failing to balance the rights and obligations of the Appellant and Respondent based on their contractual relationship hence leaning wholly in favour of the Respondent unjustifiably.

Background to the appeal

15. The Respondent filed a Memorandum of Claim dated 22nd July 2021 in the Magistrate's court case No. MCELRC El733 OF 2021 Joseph Musee Musikali V Gathura Investments Limited, seeking judgment against the Appellant seeking the for Terminal and Contractual dues amounting to Ksh. 481,106.00; broken down as follows :-
 - i. Notice Pay Ksh. 15,500.00
 - ii. Compensation for unfair termination Ksh 186,000.00 (15,500 X 12 Months)



- iii. Unpaid off days Ksh. 144,000.00 (596X41 daysX6years)
 - iv. Gratuity Ksh. 64,398.00 (596X 18 days X 6 years)
 - v. Overtime Ksh. 46,176.00 (4 hrs per day at the rate of Ksh.74 per hour X 6 months) TOTAL Ksh.481,106.00
 - b. Costs of the claim and interest thereon at court rates:
 - c. A declaration that termination of the claimant's employment was unfair, unjust and wrongful.
 - d. Any other relief that the Honourable court may deem just and fit to grant (pages 5 and 6 of the record).
16. The Appellant filed a response to the memorandum of claim dated 16th December 2021 through the firm of Maina Makome & Company Advocates. The Appellant admitted the contract of employment between the parties but denied the terms of employment. The Appellant averred that it was the Respondent who absconded duty and pleaded that the claim be dismissed with costs.
17. The Trial Court delivered judgment on 9th May 2023 and held that the allegation that the claimant absconded duty was not proved, the reasons for termination were not fair, due process in termination of the Respondent's employment was not followed and the Respondent (Claimant) was entitled to the reliefs sought. The Trial Court awarded the Respondent as follows:-
- a. Terminal and Contractual dues of Ksh. 481,106.00.
 - b. Costs.
 - c. Interest (a) at court rates.
 - d. A declaration that the termination of the Respondent's employment was unfair and wrongful (page 83 of the Record of Appeal).

Written Submissions

18. The appeal was canvassed by way of written submissions The appellant's written submissions drawn by Geoffrey Maina of Maina Makome & Company Advocate were dated 23rd July 2024. The Respondent's written submissions drawn by Mmbone Osore & Associates Advocates were dated 18th April 2024.

Determination

19. The duty of the first Appellate Court is stated in Abok James Odera t/a AI Odera & Associates v John Patrick Machira t/a Machira eKLR, where the Court of Appeal stated as follows 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."

Issues for determination

20. The appellant addressed the following issues in written submissions: -



- a. Whether the respondent was unlawfully terminated and who carries the burden of proof in this matter.
 - b. Whether the appellant is entitled to the reliefs sought in this matter.
21. The respondent addressed the following issues in written submissions: -
- i. Whether the Respondent's employment was terminated.
 - ii. Whether the Respondent was unfairly terminated from employment
 - iii. Whether the Respondent is entitled to the reliefs sought.
22. Having perused the written submissions by the parties, the Court finds the issues for determination in the appeal are as follows: -
- a. Whether the Respondent's employment was terminated.
 - b. Whether the Respondent was unfairly terminated from employment.
 - c. Whether the Respondent was entitled to the reliefs granted.

Whether the Respondent's employment was terminated.

23. The appellant submits that the respondent was given a warning and told to go back to work but instead, he went and parked his belongings and disappeared. That he was not terminated. The appellant relied on the decision in *Monica Wanza Mbavu V Roofspec & allied works Co Ltd (2021)e KLR* where the employer had alleged that the employee was not terminated and failed to report to work and prematurely filed the claim. In that case the area Chief had intervened and suggested a temporary separation following which the employee was paid Kshs. 10000. There was no communication between the claimant and her employer on the status of her employment after the Chief's intervention. The court found no proof of dismissal.

The Respondent's submissions

24. The Respondent submitted as follows: - Appellant alleged that the Respondent absconded duty. The Appellant further claimed that the Trial Court disregarded its evidence. There was however no evidence produced by the Appellant that the Respondent absconded duty. The Appellant's witness testimony was uncorroborated. On the other hand, the Respondent's evidence was unshaken that he was called by the manager and asked to hand over his uniform and leave the company house. The Appellant's evidence was unclear as to whether the reason for termination was absconding duty, drunkenness at work or complacency at work. The Respondent relied on the decision in *Rebecca N. Nyangolo v Prashant Raval (2021) eKLR*, where the Court held; "54. The common denominator in all forms of dismissal is that all of them are ultimately caused by the employer. Dismissal, by its definition, is not initiated by the employee, nor is it something which merely happens- *Schmahm v Concept Communications Natal [pty] Ltd [997] 8 BLLR 1098 [LC]*. In essence, some overt action by the employer must be present to bring the employment into termination." In this case, the overt act by the Appellant was calling the Respondent and informing him that he was no longer employed and should hand over his uniform and leave the company house. The Respondent was therefore dismissed from employment.



Decision

25. The reason(s) for termination of employment are to be proved by the employer under section 43 of the *Employment Act*. In this case the Appellant through its witness Mwendwa told the court that the claimant had a drinking issue with students. He left on his own, was paid all his dues, and did not return his uniform and he deserted because of his drunkenness. He further told the Trial Court that he called the Respondent to return the uniform but he was not picking up his calls (Page 74 of the Record of Appeal was the RW1 cross-examination and re-examination). The Respondent admitted to the Trial Court to have been drinking at work. He had no proof that he returned the uniform. He told the court he was informed by Mwendwa to remove his things and leave. He was told his employment was over (pages 72-73 of the Record of Appeal was the claimant's examination in chief, cross-examination and re-examination).
26. The Trial Court relied on the decision in *Smith Mbithe Mbane v Intersecurity services* (2018) e KLR where it was held that if the act of absconding duty is pleaded by an employer, it must demonstrate reasonable efforts to contact the employee made but unsuccessful and that a show cause was issued. The Trial Court found no evidence of effort to reach out to the respondent or notice to show cause issued.
27. The court holds that for failure to prove efforts to reach out to the Respondent by the Appellant, the Trial Court was right to find the services of the claimant were terminated.

Whether the Respondent was unfairly terminated from employment

28. The Appellant relied on the same submissions outlined above to submit that the Trial Court erred in finding the Respondent was unfairly terminated.
29. An employer must prove procedural and substantive fairness in termination of an employee's employment.

Procedural Fairness

30. In *Festo v Mars Security Guards Limited* (Cause 823 of 2017) [20221 KEELRC 42 KLR] (28 April 2022) (Judgment), the Court stated as follows on procedural fairness:-

“Section 41 of the *Employment Act*, 2007 provides the mandatory procedure that an employer intending to terminate an employee must follow. The procedure has three components, the information component- the employer must inform the employee of the grounds on which he contemplates the termination, the hearing component- the employer must give the claimant an opportunity to make representations on the grounds, lastly the consideration component- the employer has to consider the representations before making a decision to terminate. It is incumbent upon the employer to prove that the procedure was adhered to.”
31. The Court finds that the Respondent was not informed of the grounds on which his employer was contemplating termination, he was not accorded an opportunity to make representations on the grounds of termination and no consideration was made before his termination. The Court holds there was no procedural fairness in the termination of the Respondent's services as held by the Trial Court.



Substantive Fairness

32. The Respondent was accused of not ensuring silence among the students in the hostel he was guarding. He told the Trial Court that it was not within his job description to ensure silence among the students. The Trial Court held that it was unreasonable to ask the Respondent to ensure silence of adult students.
33. The Respondent submitted that the appellant did not come out clearly as to whether the reason for termination of employment was the failure to ensure students' silence, drunkenness or complacency at work. On the drunkenness, no evidence was tendered to show that the Respondent was ever drunk at the workplace, or so drunk that he was incapable of performing his duties. In *AVC Management Company Ltd t/a Mnarani Club v Washe* (Employment and Labour Relations Appeal O3 of 2022) [20221 KEELRC 4153 (KLR) (27 September 2022) (Judgment)], the court held as follows; "Section 44 of the *Employment Act* entitles an employer to terminate an employee if the employee is shown to have committed acts of gross misconduct while on duty. Under section 44 (4) (b) of the Act, one of the acts that comprise gross misconduct is if an employee gets intoxicated while at work. However, mere intoxication is not a sufficient reason to terminate an employee. Intoxication becomes a ground for gross misconduct only when it is shown to have rendered the employee incapable of performing his duties."
34. The Respondent submitted that the Appellant produced an apology letter from the Respondent completely unrelated to this employment dispute. The handwritten apology letter was dated 29th April 2019 which is 2 years before the Respondent's termination from employment.

Decision

35. The Trial Court on substantive reasons held that the task given to the claimant of ensuring the silence of students who were adults was unachievable and unreasonable, there was no proof that the claimant shared alcohol with students while at work and that there was no proof the claimant being intoxicated during working hours and that such intoxication made the claimant unwilling or incapable of performing his duties and relied on the decision in *John Roba v Riley Falcon Security Limited* (2016)e KLR.
36. Section 43 of the *Employment Act*, 2007 provides for substantive fairness and requires employers to give reasons for the termination of employment where an employment dispute arises. The law places the burden of proof of the validity of reasons for the termination of employment on the employer according to section 47(5) of the *Employment Act* to wit:-¹⁷ (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." (emphasis given)
37. The Claimant in evidence in chief told the trial court that he was not called for disciplinary action before his services were terminated. He told the court he drank at his place of work. He had earlier in 2019 written to tell his employer he would stop drinking at work. During cross-examination, the respondent denied drinking with students and stated his role was not to control the students but to guard at the gate. He stated that he was called by Mwendwa and told to remove his things and leave.
38. The Appellant's witness told the court he knew the claimant. The claimant had a drinking problem and had been warned. He did not return to uniform and deserted work because of drunkenness. On cross-examination, the witness for the appellant stated that he did not record the complaint for drunkenness



and the claimant was not given a warning letter. That he called him to return the uniform but he was not picking up calls.

39. The court having evaluated the evidence before the trial court finds that he Appellant had not proved the reasons for termination but its witness inferred the services stood terminated by stating the Respondent was paid dues and did not return the uniform. The court agreed with the Trial Court that it was not clear on the reasons for termination. If the claimant absconded the respondent ought to have produced evidence of effort to reach the claimant as held in *Simon Mbithi Mbane v Inter Security Services Limited* [2018] KEELRC 2234 (KLR) that : “8 An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.” There was no written warning or hearing. In the upshot, the Court upheld the finding that the termination was unlawful and unfair.

Whether the Respondent was entitled to the reliefs granted

40. The Trial Court entered judgment for the Claimant/Respondent against the Appellant as follows:-
- a. . Terminal and Contractual dues of Ksh. 481,106.00
 - b. Costs
 - c. Interest (a) at court rates
 - d. A declaration that the termination of the Respondent's employment was unfair and wrongful. (Page 83 of the Record of Appeal)
41. The award sum of Ksh. 481,106.00 comprised of the following:-
- i. Notice Pay Ksh. 15,500.00
 - ii. Compensation for unfair termination Ksh 36,000.00 which is stated as salary for 12 months (page 82) the Court noted the tabulation was incorrect and ought to read 186000
 - iii. Unpaid leave days (596X7 days X 6 years) Ksh.25,032.00
 - v. Gratuity (596X 18 days X 6 years) Ksh. 64,398.00
 - vi. Overtime Ksh.46,176.00
42. The court noted an error in total sum which the addition of the items awarded in the judgment was Kshs. 337,106 and not 481,106 as stated in total sum awarded. The court finds the trial court erred in the tabulations on the face of the record.
43. The appellant submits that notice pay was not due as Respondent absconded duty. The court having found the termination was unlawful and unfair notice pay is upheld as it was payable under section 36 and section 49(1)(a) of the *Employment Act*. Section 36 reads:- “Payment in lieu of notice

Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.”

Section 49(1)(a) reads:- “1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—



- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;”

44. The notice pay award of Kshs. 15500 is upheld.

Compensation for unfair termination

- 45. Compensation for unfair termination was awarded for the sum of Ksh 36,000.00 stated as salary for 12 months (page 82) The Court noted the tabulation was incorrect and ought to read Kshs. 186000. The appellant submits that based on the desertion of duty the claimant was not entitled to the compensation. The court having held the termination to have been unlawful and unfair then re-evaluated the justification for the maximum compensation award by the Trial Court.
- 46. The Respondent submits that the awarded Compensation for unfair termination Ksh 186,000.00 (15,500 X 12 Months) was justified. Section 49(1)(c) and 50 of the Employment Act gives the Court discretion to award up to 12 months' salary for unfair termination. The Trial Court exercised its discretion by awarding 12 month's salary.
- 47. The trial court justified the maximum compensation for the casual nature of the termination. Section 49(4) of the Employment Act provides for the applicable criteria in the award of remedies in the event of unfair termination to wit:- ‘A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
 - (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee's length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) h) the value of any severance payable by law;
 - (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - (j) any expenses reasonable incurred by the employee as a consequence of the termination;
 - k) any conduct of the employee which to any extent caused or contributed to the termination;
 - (l) l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”



48. The claimant was employed in 2014 and his services were terminated on 2nd January 2021 as per his witness statement. He produced his NSSF statement which indicated that his dues were paid for the entire period of work (page 14 of the record of appeal). The employer produced a letter dated 29th April 2019 by the Respondent apologising for being drunk at work (page 21). The claimant stated he was drinking at work in evidence in chief. He told the court “I do drink at my work place”. (page 72 of the record of appeal) The Respondent served for 6 years. The court finds that the Trial Court only used one criteria being, the casual nature of the dismissal to award the maximum award. The court holds that by being drunk at work the claimant contributed to his termination of services. In the circumstances the maximum award was unjustified and the same is reduced to 6 months thus Kshs. 15500x 6 thus Kshs. 93000.
49. On the award for unpaid leave days (596X7 days X 6 years) Ksh. 25,032.00, the court noted there was no finding on unpaid off days but on leave. At page 14 of the judgment under the title Unpaid off days the Trial Court addressed the question of leave only and found the Respondent had taken 14 days instead of 21 days. The 14-day leave evidence was by the Respondent's witness. That is then taken to mean the claimant took less than 21 days of leave contrary to 21 days of statutory leave under section 28 of the *Employment Act*. The court upholds the untaken leave granted by the Trial Court of Kshs. 25,032 (page 82 of the record). There was no finding on unpaid off days. There being no cross-appeal I say no more on the issue.
50. On gratuity- The Trial Court held there was no proof the Appellant having remitted the NSSF dues as the basis for grant of gratuity. The court finds that the Trial Court erred in fact, the claimant having produced the NSSF statement which reflected the remittances (page 14 of the Record was the NSSF statement). Further, even if there was no NSSF, the Trial Court had no power to grant gratuity but service pay under section 35(5) of the *Employment Act* which reads:- “(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

Where the employer is a member of NSSF and remits the dues then service pay is not due as follows:-

- “(6) This section shall not apply where an employee is a member of—
- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.”

51. The court holds that the award of gratuity was erroneous and the same is set aside.
52. On the overtime, the Respondent testified before the Trial Court that he reported to work at 6 pm and left at 6am. Overtime was awarded for Ksh.46,176.00(4 hrs per day at the rate of Ksh.74 per hour X 6 months)The Respondent relied on the decision in in Yaa v SGA Security Solutions Limited (Employment and Labour Relations Appeal E002 of 2022) KEELRC 1553 KLR) (29 July 2022. The appellant in the case had pleaded overtime of 4 hours every day as she had worked 12 hours every



day. The trial court had awarded her 2 hours of overtime. The Court cited the Regulation of Wages (Protective Security Services) Order, 1998 which provides for fifty-two (52) working hours every six (6) days of a week. This means that a security guard is required to work approximately eight (8) hours a day and not the ten (10) hours the trial court had alluded to. As the Appellant was working 12 hours a day as demonstrated by her payslip, the court held that she was entitled to 4 hours overtime pay as evidenced by her payslip.

53. The Respondent contended that in his case he was also working 12 hours a day, a fact that was not disputed by the Appellant. The Appellant ought to have produced evidence to the contrary pursuant to section 10(7) of the *Employment Act*. The Respondent was therefore entitled to 4 hours overtime pay per day, for the 6 years he had worked in 2021 before his employment was terminated.
54. The Court finds that Trial Court erred by reference to extraneous issues of the Respondent having worked as a property agent not supported by the evidence. On re-evaluation of the evidence the court found that the claimant worked 4 extra hours and as held in *Yaa v SGA Security Solutions Limited* (Employment and Labour Relations Appeal E002 of 2022) t20221 KEELRC 1553 KLR) (29 July 2022). The Court finds that, despite the error on working hours proved, the award tabulation was based on the 4 hours and upholds the award of Kshs. 46,176 by the Trial Court.

Conclusion

55. In the upshot the appeal is held as partially successful. The Judgment and Decree of Hon. P.k Rotich (MR)(SPM) delivered at Nairobi on 9th May 2023 in MCELRC Case No. E1733 of 2021 Joseph Musee Musikali vs Gathura investments Limited is set aside and in place substituted as follows:-

Judgment is entered in favour of the claimant against the respondent in the following terms:-

- a. Notice pay of Kshs. 15500
 - b. Compensation for unfair termination equivalent of 6 months' salary is awarded(15500x6) for the sum of Kshs. 93000
 - c. Untaken annual leave is awarded for Kshs. . 25,032
 - d. Overtime payment of Kshs. 46,176.00
(Total award of Kshs 179,708 payable subject to statutory deduction of PAYE only)
 - e. Costs of the suit to the claimant and interest at court rates from the date of judgment until payment in full.
56. The appeal being partially successful, the court orders each party to bear their own costs on appeal.
57. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF DECEMBER, 2024.

JEMIMAH KELI,

JUDGE.

In The Presence Of:

Court Assistant: Caleb

Appellant : - Maina



Respondent: Osore

