



**Lupra Manpower & Human Resources Management Services Limited & another v Kombo  
(Appeal E122 of 2023) [2024] KEELRC 13527 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13527 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E122 OF 2023  
JW KELI, J  
DECEMBER 18, 2024**

**BETWEEN**

**LUPRA MANPOWER & HUMAN RESOURCES MANAGEMENT SERVICES  
LIMITED ..... 1<sup>ST</sup> APPELLANT**

**KENDIA POLYPACKS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FREDRICK KOMBO ..... RESPONDENT**

*(An appeal against the judgment delivered on the 15th day of June, 2023 before  
Hon. J.A. Agonda PM at The Senior Principal Magistrates Court of Kenya at  
Ruiru Law Courts, in MCELRC E019 of 2023 between Fredrick Kombo vs Lupra  
Manpower & Human Resources Management Services Ltd, and Kendia PolyParks Ltd)*

**JUDGMENT**

1. The Appellants dissatisfied with the Judgment delivered on 15<sup>th</sup> day of June, 2023 by Hon. J.A. Agonda PM at The Senior Principal Magistrates Court of Kenya at Ruiru Law Courts, in MCELRC E019 of 2023 between Fredrick Kombo vs Lupra Manpower & Human Resources Management Services Ltd and Kendia PolyParks Ltd filed a Memorandum of Appeal dated 4<sup>th</sup> July 2023 and Record of Appeal dated 15<sup>th</sup> August 2023 seeking the following orders:-
  - a. This appeal be allowed and the judgment of the trial subordinate court be set aside with costs.
  - b. The costs and interests to this suit.
  - c. Such further and other orders that this Honourable court may deem just and expedient.



## **Grounds of the appeal**

2. That the learned Magistrate erred in both law and fact in awarding the Respondent 12 months' compensation when the Respondent had only worked for three and a half months, three months of which the Respondent was on probation.
3. That the learned magistrate erred in both law and fact in awarding one month salary in lieu of notice even when the Appellants clearly stated that the Respondent had absconded duty.
4. That the learned magistrate erred in law and fact when she failed to consider the evidence of the Appellants that the Respondent absconded duty.
5. That the learned Magistrate erred in law and fact when she determined that the Respondents salary was Kshs. 25,000/= when the Respondent never submitted any evidence of what his salary was.
6. That the learned Magistrate erred in both law and fact in awarding 1 months' salary as compensation yet the Respondent had contributed to his loss of employment.
7. That the learned Magistrate erred in law and fact when he awarded statutory deductions to the Respondent yet this are funds that are to be collected by the state and state agencies and are not awardable to the Claimant and it is not the mandate of the court to award the same.
8. That the learned Magistrate erred in law and fact when she awarded the Respondent payment in lieu of leave days yet the Claimant had not worked for a period of 12 months.
9. That the learned Magistrate erred in law and fact when she found that the Respondent had proved that he was an employee of the 1<sup>st</sup> Appellant yet the Respondent had clearly stated that he was not an employee of the 1<sup>st</sup> Respondent. The Respondent failed to prove who his employer was.
10. That the learned Magistrate erred in law and fact when he failed to consider the evidence of the Appellants that the Respondent had absconded duty.
11. That the learned magistrate erred in law and fact when she found that the Respondent had proved his case yet it fell short of the required standard.

## **Background To The Appeal**

12. The Respondent filed a claim before the Trial Magistrate Court alleging to have been employed by the 2<sup>nd</sup> Appellant from April 2022 and to have been summarily dismissed from service on the 18<sup>th</sup> July 2022. He sought for compensation for unfair termination as well as other reliefs which included statutory deductions not remitted (page 9-22 was the statement of claim and witness statement and documents). Defence was filed (page page 24-32).
13. The respondent testified on oath in his case and was cross-examined (page 62-65). The Appellant called as defence witness Moses Nyamanga Ayieka (RW) who testified on oath and was cross-examined (pages 65-67).
14. The parties filed written submissions. The trial court on the 15<sup>th</sup> June 2023 entered judgment in favour of the respondent/ claimant being:-
  - a. Declaration that the termination of the claimant's employment was unfair.
  - b. Compensation for unfair termination Kshs. 300000
  - c. One month salary in lieu of notice



- d. Payment in lieu of leave days Kshs. 9400
- e. NSSF,NHIF and PAYE deductions Kshs. 14000

### **Written Submissions**

15. The appeal was canvassed by way of written submissions. The appellant's written submissions drawn by Akolo Wanyanga & Company advocates were dated 29<sup>th</sup> July 2024. The respondent's written submissions drawn by CLO Advocates were dated 29<sup>th</sup> August 2024.

### **DETERMINATION**

16. The Court is sitting on the first appeal. The duty of the court sitting as the first appellate court is as stated in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)*' 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**

17. The Appellants in written addressed the following issues in the determination: -
- a. Whether the respondent was entitled to Kshs. 300,000 as an award of 12 months' compensation for unfair termination
  - b. Whether the respondent was entitled to an award of one month's salary in lieu of notice.
  - c. Whether the respondent is entitled to payment on lieu of leave days.
  - d. Whether the trial court erred in mandating itself in awarding the respondent statutory deductions.
  - e. Whether the trial court erred in failing to consider the evidence tendered by the appellants.
  - f. Whether the trial court erred in pronouncing that the respondent had proved that he was an employee of the 1<sup>st</sup> Appellant.
18. The Respondent in written submissions submitted on new evidence produced on appeal being warning letter dated 22<sup>nd</sup> May 2022 and a dispute of monthly salary. The court finds outside the new evidence issue, the other prayers would be same as those raised by the claimant thus the issues for determination in the appeal are as framed follows:-
- a. Whether the termination of employment of the claimant was lawful and fair.
  - b. Whether the claimant was entitled to the reliefs granted.

### **Whether the termination of employment of the claimant was lawful and fair.**

19. The Respondent pleaded that he was unfairly terminated from employment without valid reasons and hearing. At trial he told the court that he was he taken to Kendia (2<sup>nd</sup> Appellant) by one Moses and was employed by Kendia. That it was Moses who told him his employment had been terminated. He was paid Kshs. 25,000 and no payslip was issued (page 64).



20. The Appellants had its witness as Moses Nyamanga Ayieka who stated he worked at Lupra Manpower stationed at Kendia, their client. He knew the claimant who was employed by Lupra Manpower and stationed at Kendia Plant and cutting plant. That the claimant was employed on the 14<sup>th</sup> April 2022 and on probation for 3 months. That the Claimant was problematic and absconded work having not been at work on the 17<sup>th</sup> July 2022 and was questioned on the same and did not respond. On cross-examination the appellants' witness told the trial court that Lupra Manpower (1<sup>st</sup> Appellant) had been outsourced to provide workers to Kendia (2<sup>nd</sup> Appellant) but had no evidence of the contract. He told the court they do not work on Sunday and Saturdays. They pay overtime. They paid employees through cash and the payroll is signed by employees. That the 17<sup>th</sup> July 2022 was a Sunday. He retracted his statement regarding 17<sup>th</sup> July 2022.
21. The Trial Court found that the termination was not based on valid reasons as the alleged poor performance was not based on documentation like warning letters and there was no show cause hence unfair termination.
22. Having evaluated the evidence before the trial court I find there was no prove of the alleged reasons of poor performance and the reason of absconding duty was retracted by the witness(RW1) who noted the admitted the date of 17<sup>th</sup> July 2022 fell on Sunday and the claimant was not expected to work. Section 41 of the Employment Act is couched in mandatory terms to wit:- "Notification and hearing before termination on grounds of misconduct
- (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 provision 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." There was total none compliance with the procedural fairness. The reasons were not proved as provided under section 43 of the Employment to wit:-
 

"Proof of reason for termination

    - (1) In any claim arising out of termination of a 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.
    - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."
23. Further, for termination of employment to be held as fair the reasons for termination related to poor performance must be valid and there should be procedural fairness as stated in section 45(2) of the Employment Act to wit: " 45(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—



- (i) related to the employees conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure”

23. In the upshot Court finds no basis to disturb the determination by the Trial Court of unfair termination which is hereby upheld.

**Whether the claimant was entitled to the reliefs granted.**

24. The Trial Court granted the following reliefs-
- a. Compensation for unfair termination Kshs. 300,000
  - b. One month salary in lieu of notice
  - c. Payment in lieu of leave days Kshs. 9,400
  - d. NSSF,NHIF and PAYE deductions Kshs. 14,000

**On Compensation for unfair termination Kshs. 300000 and notice pay of Ksh 25000**

25. The appellants submitted that the award of 12 months was unjustified the Respondent having worked for only 4 months and was contrary to the guide under section 49 of the Employment Act. The Appellant relied on the decision in Ol pejeta ranching limited v David Wanjau Muhoro (2017) e KLR where it was stated:-“The trial judge must justify or explain why a claimant is entitled to the maximum award “. The Appellants submitted that the exercise of discretion must not be capricious or whimsical. The appellants submitted that the compensation was excessive and based on salary not proved.
26. The respondent submitted that the amount of salary was as pleaded, that at cross-examination RW1 told the court there were no payslips and failed to produced evidence to rebut the pleaded salary and relied on the decision in Abigael Jepkosgei Yator & another v China Hanan international Co. Ltd (2018 ) e KLR where the court placed the burden on the employer to prove correct salary when the employee claims otherwise. On the compensation the respondent submitted that based on the finding of wrongful dismissal or unfair termination the compensation was justified and relied on the decision in Mary Chemwono Kiptui v Kenya Pipeline Company Limited where the court awarded compensation on finding unfair termination.

**Decision**

27. The Trial Court in its decision stated that it awarded the claimant twelve (12) months’ salary in compensation of Kshs.300,000. The Trial Court stated that in arriving at the decision it considered the claimant length of service since 14<sup>th</sup> April 2022 to 18<sup>th</sup> July 2022 when his employment was terminated as well as the callous conduct in the termination process. The court further awarded one month notice pay under section 36 of the employment act to wit:-“ 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.”

28. The Court in awarding compensation for unlawful and unfair termination is guided by the provisions of section 49 of the Employment Act as follows:- “49(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;
  - (b) b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
  - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.”

29. The trial court awarded all the three remedies under section 49(1)(supra). The Court having upheld the determination of unprocedural fairness the notice pay is upheld. The court agreed with the respondent, for lack of production of the payroll to prove contrary salary was paid, the amount pleaded by the respondent stood uncontroverted and the notice pay of Kshs. 25000 is upheld.
30. On the compensation under section 49(1)(c) of the *Employment Act*, the Court is required under section 50 of the Act to apply the criteria under subsection 4 of section 49 of the Act which provides:-

“ 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) 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) 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.”

31. The Trial Court stated it considered the length of service and the circumstances of the termination of the service. The Court finds the respondent was not found to have contributed to his termination. The issue is the length of service. The respondent was employed on the 14<sup>th</sup> April 2022 and terminated on 18<sup>th</sup> July 2022. The Respondent had worked in total 3 months plus 4 days or so. It is the finding of this Court that the Trial Court did not take the length of service into account in awarding notice pay and the equivalent of 12 months' salary. That award was excessive compensation amounting to approximately four times the period worked. The award is unjustified and is set aside. The Court taking into account the length of service and lack of blame of the Respondent for the termination finds that the Notice pay of Kshs. 25,000 and compensation for unlawful termination of 2 months being Kshs. 50,000 was adequate compensation in the circumstances. It is so held.

#### **Payment in lieu of leave days Kshs. 9,400**

32. The appellants relied on the provisions of section 28 of the *Employment Act* to state that annual leave was not due. The respondent relied on the decision in *Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute (2016)* e KLR to effect that annual leave was due even when employee was on probation . The Trial Court held the Respondent was entitled to leave for April , May and June and awarded Kshs. 9400.

#### **Decision**

33. Section 28 of the *Employment Act* provides for annual leave as follows:-“28 (1) An employee shall be entitled—

- (a) after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay;
- (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively”. The Respondent completed three months of service. The court granted leave for three months in compliance with section 28(1)(b). The Court upholds the award of Kshs. 9,400/-

#### **NSSF, NHIF and PAYE deductions Kshs. 14000DIVISION -**

34. The appellants submitted that the Trial Court erred in law and fact in awarding the respondent statutory deductions yet the same are collected by the state agencies hence outside the court mandate. They relied on the decision in *Mzee Muthama Mutie V Sanghani & Sons (2023)*e KLR where Justice Nzei held:- “The claim for unremitted statutory deductions cannot be allowed, and is hereby declined. Once deducted from an employee’s salary, statutory deductions cease being the employee’s entitlement and become a legal entitlement of the statutory body for which the deductions are done. Statutory bodies such as NSSF, NHIF and KRA have elaborate statutory mechanisms on recovery of deductions



from employers who may attempt to hold onto such deductions. I have severally stated this position which, in my view, is in tandem with the relevant statutes.”

35. The respondent on the issue submitted that the amounts were not remitted as admitted at trial hence no basis to challenge the award.

### Decision

36. The Trial Court held that the NSSF, NHIF and PAYE were dues to an employee who had not enjoyed benefit of statutory deductions and thus covered under section 35(5) and (6) of the *Employment Act* which state:- “(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.

(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.”

37. The Trial Court held that the Appellant did not demonstrate they had, as the employer, complied with statutory requirements and regulations to deduct and remit the applicable statutory dues to the authorities as required by law. The Trial Court then noted the amounts that had been deducted for NSSF and NHIF were Kshs.4000 and PAYE Kshs. 10000 and awarded the claimant/Respondent under the award.

38. The Court holds that the remedies available to an employee under section 49 of the *Employment Act* do not include refunds of unremitted statutory dues even if that was true. Indeed section 49 (2) states:- “(2) Any payments made by the employer under this section shall be subject to statutory deductions.” I find the Court has no mandate to determine the fate of deducted statutory dues and whether remitted or not is not within the purview of the court to decide unless invited to do so by the said state agencies. Indeed there was no evidence by the said agencies on the deductions. I uphold the decision in *Mzee Muthama Mutie V Sanghani & Sons (2023)* e KLR where Justice Nzei held:- “The claim for unremitted statutory deductions cannot be allowed, and is hereby declined. Once deducted from an employee’s salary, statutory deductions cease being the employee’s entitlement and become a legal entitlement of the statutory body for which the deductions are done. Statutory bodies such as NSSF, NHIF and KRA have elaborate statutory mechanisms on recovery of deductions from employers who may attempt to hold onto such deductions. I have severally stated this position which, in my view, is in tandem with the relevant statutes.” The award of NSSF, NHIF and PAYE deductions Kshs. 14000 is set aside.

### Conclusion

39. The appeal is held as partially successful. The judgment delivered on the 15th day of June, 2023 and consequential Decree by Hon. J.A. Agonda PM at The Senior Principal Magistrates Court of Kenya Ruiru Law Courts, in MCELRC E019 of 2023 between Fredrick Kombo vs Lupra Manpower & Human Resources Management Services Ltd and Kendia PolyParks Ltd is set and instead substituted as follows:-

Judgment is entered in favour of the claimant against the Respondents as follows:-



- a. A declaration that the termination of the claimant's employment was unfair.
  - b. Compensation for unfair termination equivalent of 2 months salary is awarded for the sum of Kshs. 50000
  - c. One month salary in lieu of Notice for Kshs. 25000.
  - d. Payment in lieu of leave for Kshs. 9400 (Amounts in b,c,d above payable subject to Statutory deduction of PAYE )
  - e. The claimant is awarded costs of the suit and Interest at court rates from date of judgment until payment in full.
40. Each party to bear own costs in the appeal.
41. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>th</sup> DAY OF DECEMBER, 2024.**

**JEMIMAH KELI,**

**JUDGE**

IN THE PRESENCE OF:

Court Assistant: Caleb

Appellant : - Ondicho

Respondent: Nderitu h/b Nechesa

