



**Texas Alarms (K) Limited v Wanyonyi (Appeal E012 of 2024)
[2024] KEELRC 13503 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13503 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E012 OF 2024
M MBARŪ, J
DECEMBER 18, 2024**

BETWEEN

TEXAS ALARMS (K) LIMITED APPELLANT

AND

MICHAEL WANYONYI RESPONDENT

*(Being appeal from the judgment of Hon. D. O. Mbeja delivered
in Mombasa CMELRC No.421 of 2019 on 24 November 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 24 November 2023 in Mombasa CMELRC No.421 of 2019. The appellant seeks the judgment to be set aside and substituted with an order dismissing the claim with costs.
2. The background of the appeal is a claim filed by the respondent before the trial court. His case was that he was employed as a guard temporarily from 1 November 2014 until 31 October 2014, when he was employed permanently. On 24 May 2018, the supervisor gave him a day off, but he was later accused of absconding from duty. He reported to work on 25 and 26 May 2018 but could not sign the attendance sheet. On 3 November 2018, while the respondent was on the night shift, his supervisor accused him of sleeping during working hours. He was summoned to the office and issued a notice of summary dismissal on 16 November 2018. He claimed no justified reasons for summary dismissal or paid terminal dues. He claimed the following:
 1. Notice pay Ksh.12,000;
 2. 16 days' pay ksh.6,400;
 3. House allowances from January 2009 to 16 November 2018 Ksh.214,200;
 4. Underpayment of wages for 119 months Ksh.393,892.05;



5. 12 months compensation Ksh.181,703.40;
 6. Unpaid overtime for 119 months Ksh.568,701;
 7. Service pay for 9 years Ksh.68,138
 8. Costs of the suit.
3. In response, the appellant stated that the respondent absconded duty on 24 May 2018 without permission from his supervisor, Boniface Mumo Muthama and remained rude. On 3 November 2018, he was found asleep while at work at Pandya Hospital by the training officer, Patrick Oduor. He was summoned to the office, but he failed to attend until 9 November 2018, when Patrick Oduor directed him to write an explanation as to why he was sleeping on duty, but he refused to adhere to the summons and instead threatened to beat him up. The case was transferred to the operations manager, Amos Kangasu, but the respondent remained rude, and the matter was referred to the human resource manager, Bernard Aduda, together with Janet Kaloki; they listened to the case, and the respondent refused to tender an apology over his conduct. Following these meetings, a notice of summary dismissal was issued on 16 November 2018 for gross misconduct, and he was paid Ksh. 2,500 for uniform refund and Ksh.6, 984 for days worked and pro-rated leave days. The claims made are without merit and should be dismissed with costs.
4. The trial court delivered judgment on 24 November 2023. It held that there was an unfair termination of employment and that the respondent was entitled to the reliefs sought in the Memorandum of Claim. Hence, judgment was entered for the respondent against the appellant as sought in the Memorandum of Claim.
5. Aggrieved by the judgment, the appellant filed this appeal on 14 grounds. The appeal is that the trial court erred in law and fact in finding unfair termination of employment. In contrast, employment was terminated lawfully through summary dismissal through a letter dated 16 November 2018 for gross misconduct and upon compliance with Sections 41, 42 and 44 of the Employment Act. There were sufficient grounds for summary dismissal, including being absent from work without permission, poor work performance, and abusing seniors, which justified summary dismissal under Section 44 of the Employment Act.
6. Other grounds of appeal were that the trial court erred in failing to note that the appellant had issued the respondent several warning notices before the summary dismissal. A meeting was held with the respondent before dismissal, and he declined to tender an apology, leading to the notice dated 16 November 2018. The award of compensation and notice pay was not justified in procedural summary dismissal.
7. The award of 16 days worked in November 2018 was in error since the respondent had only worked for 3 days and was paid Ksh.6, 400. The salary paid was inclusive of house allowance, and it was an error to base this claim from January 2009 to 16 November 2018. The alleged underpayment was not justified since the wage due of Ksh.15, 141.95 was only approved on 1 May 2018 under Legal Notice No.2, and the respondent left employment on 3 November 2018.
8. The wage paid was Ksh.13, 900, not Ksh. 12, 000, as alleged. The award should have been based on the gross wage of Ksh.13, 900 per month. The award for overtime was without proof, and where there was overtime work, this was paid at the end of the month.
9. Service pay was not due since there were statutory payments under Section 35(5) and (6) of the Employment Act, and the appellant contributed to NSSF for the respondent.



10. The award of costs and interests from the date of filing suit was not justified, and the appeal should have been allowed.
11. Parties attended and agreed to address the appeal by way of written submissions.
12. The appellant submitted that there was no unfair termination of employment as alleged. The respondent was absent from duty, was found sleeping while on duty, and remained rude to his supervisors. He was invited to address but declined, and when the operations and human resources officers invited him to a meeting to address, he refused to tender an apology. He had committed gross misconduct, which justified summary dismissal, which was issued through a notice dated 16 November 2018. During the hearing, the appellant called two witnesses to support its case and submitted evidence that the respondent was taken through due process.
13. Under Section 44(4) of the *Employment Act*, summary dismissal is allowed for gross misconduct. This occurs when the employee is absent from duty without permission, neglects to do his duties properly, or uses abusive language. Such conduct is defined as gross misconduct and justifies summary dismissal, as held in the case of *Toliver Gambo Nuri v Texas Alarms (K) Limited Cause No.632 of 2017*.
14. The appellant submitted that the notice pay and compensation award was not justified in a case of summary dismissal.
15. The award of unpaid wages should have been for 3 days, not 16, since the respondent only worked for 3 days in November 2018.
16. House allowances were consolidated under the monthly wages paid at ksh.13, 900.
17. There were no underpayments, as alleged, and the respondent relied on a rate that was not applicable at the time of his employment. All overtime worked was paid monthly, and there was no proof that overtime was worked at the time his employment was terminated.
18. Service pay is not due when the employer has paid statutory dues. There was evidence that the appellant made statutory remittances to NSSF.

Determination

19. As this is a first appeal, the court's mandate is broad. It involves a fresh and exhaustive examination, re-evaluation, and re-analysis of the entire record to an independent conclusion. However, the court recognizes that it should pay a measure of deference to the trial court's findings that heard the witnesses.
20. The respondent, through his Memorandum of Claim filed on 9 May 2019, claimed that the appellant temporarily employed him until the letter dated 31 October 2014. He filed this letter issued by the appellant, which gave him annual leave, NSSF, NHIF, and other benefits. The wage paid is not stated.
21. The employer can convert casual/temporary employment into a written employment contract. The written contract starts the formal employment relationship as required under Section 10(3) of the *Employment Act*. Any claim(s) going back to the letter dated 31 October 2014 should have been addressed under the provisions of Section 90 of the *Employment Act*.
22. In this case, employment started on 1 November 2014.
23. Through notice dated 16 November 2018, the appellant terminated the respondent's employment by summary dismissal. The reasons were that on 24 May 2018, he absconded from duty and became rude when his supervisor questioned him.



24. The notice also indicated that on 3 November 2018, the respondent was found asleep while at work. When he was summoned to the office, he declined to report and then appeared on 9 November 2018. The notice also indicated that on 3 November 2018, the respondent was asleep at work. When summoned to the office, he declined to report and appeared on 9 November 2018. He refused to apologize and instead threatened to beat up the supervisor. He was referred to the operations and human resources officers, where he admitted to his mistakes but refused to tender a written apology and remained rude to his supervisors, leading to summary dismissal.
25. He refused to apologize and instead threatened to beat up the supervisor. He was referred to the operations and human resources officers, where he admitted to his mistakes but refused to tender a written apology and remained rude to his supervisors, leading to summary dismissal.
26. Indeed, the respondent filed his handwritten note dated 15 November 2018, in which he observed that when he was summoned to the office, Patrick treated him as a criminal, and hence, he could not tender an apology.
27. Whereas the employer is allowed to terminate employment through summary dismissal for gross misconduct where the employee is absent from duty, neglects to attend to his duties or uses abusive language and is found sleeping at work, the due process of Section 44 of the *Employment Act* must go hand in hand with the provisions of Section 41(2) of the *Employment Act* as held in the case of *John Muneeni Makau v Charity Kaluki Ngilu, Governor Kitui Government & County Government of Kitui* [2021] KEELRC 2353 (KLR).
28. The motions of Section 41(2) of the *Employment Act* are mandatory. Even where the employee is alleged to be of gross misconduct, notice must be issued and the employee allowed to attend and make his representations in the presence of another employee of his choice. The option of inviting the respondent to attend before various appellant managers was not sufficient. The due process under Section 41(2) of the *Employment Act* required that;
- (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.
- 2.9 There is no record of the respondent being issued a notice to attend with another employee of his choice before the notice dated 16 November 2018.
30. In *Francis Mathina Kyule v Lavington Security Limited* [2019] KEELRC 15 (KLR), the court held that section 41 (2) of the *Employment Act* required the employer to give the employee a fair hearing. Where that lapse occurred, termination of employment was deemed unfair for failing the test outlined in section 45 (2) of the *Employment Act*.
31. In this regard, the findings by the trial court cannot be faulted.
32. Notice pay and compensation are due.
33. However, these should be assessed based on the law and the record. The general awards by the trial court under the sentence were entitled to the reliefs sought in the Memorandum of Claim, which is not in tandem with the law or the provisions of Section 49 of the *Employment Act*. Each claim should be assessed, and justification should be given.



34. The appellant admitted that the gross wage was Ksh. 13, 900, but the notice pay should be based on the last gross wage earned under the provisions of Section 49(2) of the *Employment Act*. In this case, as of November 2018, the total gross wage due was Ksh.15, 607.90 due in notice pay.
35. When assessing compensation, the general award as claimed should not apply. The respondent claimed for 12 months compensation. Before making the maximum allowed, the trial court should have been guided under Section 45(5) of the *Employment Act*. The appellant filed work records that the respondent did not contest. Indeed, he had a warning letter dated 31 May 2018 and a final warning dated 15 November 2018. These are related to gross misconduct. Taking these notices into account, the award of 12 months is without justification, and although discretionary, the reasons still need to be given. Hence, the court is allowed to interfere with the award.
36. The respondent worked for the appellant from 1 November 2014 to November 2018, a period of 4 years. Considering the records filed, an award of 4 months' compensation is hereby found appropriate. On the wage of Ksh.15, 607.90 x 4, total compensation is Ksh.62, 431.60.
37. On the claim for house allowances, save for the payment statement for November 2018; the appellant did not file other records to confirm how the due house allowances were allocated. The case was that the wage paid included the House Alliance. The letter dated 31 October 2014 does not state such a fact.
38. In November 2018, a security guard working in Mombasa earned a basic wage of Ksh.13, 572.90 and a 15% house allowance; the total gross is Ksh.15, 607.90. The payment of Ksh.13, 900 was an underpayment of Ksh.1, 707.
39. From 1 May 2018 to October 2018, the underpayment is Ksh.1, 707 x 5, and the total due is Ksh.8, 535.
40. From 1 May 2017 to 30 April 2018, the basic wage due was ksh.12, 926.55 and the 15% house allowance due was Ksh.1, 938 gross Ksh.14, 864.90 and the underpayment from Ksh.13, 900 id Ksh.964.90. From 12 months, the underpayment is Ksh.11, 578.80.
41. From 1 May 2015 to 30 April 2017, the wage due was Ksh.10, 954.70, and the 15% house allowance was Ksh.1, 643.10. The total owing was Ksh.12, 597.10, and there was no underpayment.
42. Total underpayment is ksh.20, 113.80
43. The claim for house allowances is addressed with the underpayment of wages.
44. On the overtime claims, the respondent made a general claim for working overtime without giving particulars of overtime worked in the Memorandum of Claim. He did not address such a matter in his evidence in court on 25 February 2021.
45. Service pay for a security guard is regulated under the Regulation of Wages (Protective Security Services) Order as a benefit for security guards over and above the protections of Section 35(5) and (6) of the *Employment Act*. The subject employee is entitled to a minimum of 15 days' pay for every full year worked in service pay. In this case, on the gross wage due at Ksh.15, 607.90 for the four full years worked, the respondent is entitled to Ksh—31,215.80 in service pay.
46. For days worked, the appellant issued a notice of summary dismissal on 16 November 2018, not 3 November 2018. The employment relationship ceased on 16 November 2018, and the wage for days worked is 16, not 3.
47. The respondent is entitled to Ksh. 8 324.20 on the wage of Ksh.15, 607.90 for 16 days, and he was cleared and paid Ksh. 6, 984. This amount included Ksh.2 500 for uniforms and leave days pro-rated.



- 48. The pay is due at ksh.8, 324.20 for 16 days and shall be rationalized, tabulated, and paid accordingly.
- 49 The appeal is partially successful on costs, and each party should pay its costs. The claims for the lower court proceedings were partially successful. The respondent is entitled to 50% of his costs from the date of the judgment until paid in full.
- 50. Accordingly, the judgment in Mombasa CMELRC Cause 421 of 2019 is hereby reviewed in the following terms;
 - 1. Employment terminated unfairly;
 - 2. Compensation ksh.62, 431.60.
 - 3. Notice pay Ksh.15,607.90;
 - 4. Underpayment is ksh.20,113.80
 - 5. Service pay Ksh.31,215.80;
 - 6. Pay for 16 days worked in November 2018 to be tabulated based on what is already paid;
 - 7. For the appeal, each party is to bear its costs; for the lower court, the respondent is awarded 50% of his costs from the date of the judgment.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

