



**H Young & Company (EA) Ltd v Wambui (Appeal E077 of 2021)  
[2023] KEELRC 393 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 393 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E077 OF 2021  
B ONGAYA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**H YOUNG & COMPANY (EA) LTD ..... APPELLANT**

**AND**

**NICHOLAS MWANGI WAMBUI ..... RESPONDENT**

*(An appeal from the Judgment and decree of the Hon. E. Wanjala (Mrs), Principal Magistrate delivered on 18.03.2021 in Milimani Employment Cause No. 300 of 2019)*

**JUDGMENT**

1. The appellant filed the memorandum of appeal dated July 28, 2021 through Macharia, Burugu & Company Advocates. The appeal was against the entire decision of the trial court. The grounds of appeal are that the learned trial Principal Magistrate erred in law and fact as follows:
  - a. By holding that the appellant terminated the employment of the respondent without following due procedure.
  - b. By holding that the respondent was not offered a sufficient opportunity to give an explanation for the misconduct he was accused of yet he admitted during hearing that he was issued with a show cause letter which he declined to receive and respond to.
  - c. By raising the employer's standard of proof for an employee's misconduct to higher than proof on a balance of probabilities.
  - d. By holding that suspicion is not a valid ground for summary dismissal yet the *Employment Act* at section 44(4) (g) expressly provides otherwise, as long as suspicion is based on reasonable and sufficient grounds which in the current case were firmly established by the appellant.
  - e. By holding that the termination of the respondent's contract of service was unlawful, wrongful and unfair.



- f. By failing to give weight to, fathom or to consider the appellant's written submissions.
  - g. In awarding the respondent 3 months' pay in compensation or any compensation at all in light of appellant's adduced evidence.
  - h. In awarding the respondent notice pay at Kshs 64, 233.00 when the evidence was that the appellant earned Kshs 42, 043.00 plus house allowance of Kshs 8,409 giving a total of Kshs 50, 452.00.
  - i. In awarding interest to the respondent at all.
  - j. In awarding costs of the suit to the respondent.
  - k. By finding that the respondent had proved his case on a balance of probabilities.
2. The appellant prayed for orders:
- a. That the appeal is allowed and the judgment of the lower court be set aside.
  - b. That the suit against the appellant in the lower Court be dismissed in its entirety.
  - c. The appeal be allowed with costs to the appellant.
  - d. That costs of the appeal and the lower Court be borne by the respondent.
3. The respondent (claimant before the trial court) had filed a statement of claim on March 8, 2019 through Kahuthu & Kahuthu Advocates. He pleaded as follows. He was employed by the respondent as an Excavator Operator from May 2017 at Kshs 64, 233.00 per month. On November 27, 2018 he was sacked at the age of 28 years without any good cause or reason. By letter dated November 28, 2019 he was summarily dismissed unlawfully and wrongfully after false accusations of siphoning fuel. He was not given a notice or an opportunity to be heard and no evidence was given to prove the allegations. His case was that no fuel had been siphoned from the excavator (Tex-02) he was operating and as was alleged because there was company security at the operation site and fuel tanks always had a seal. It amounted to breach of contract as no terminal dues were paid; no one month in lieu of notice was paid; one-month salary for each year served was not paid; termination procedure was unfair as natural justice and *Employment Act* not followed; and there was no valid reason or due procedure. The respondent prayed for judgment against the appellant for:
- a. Issuance of a certificate of service.
  - b. 3-months' salary in lieu of notice Kshs 64, 233 x 3 = Kshs 192, 699.00.
  - c. 2 months' service pay at 16 months worked Kshs 128, 466.00
  - d. Leave days earned and not taken Kshs 44, 963.00.
  - e. 12-months' salaries compensation Kshs 64, 233 x 12 = Kshs 770, 796.00.
  - f. House allowance for 3 months in lieu of notice Kshs 8, 409.00 x 3 = Kshs 25, 227.00.
  - g. Damages for wrongful termination of employment Kshs 64, 233.00.
  - h. Total claim Kshs 1, 226, 384.00.
  - i. Costs of the suit plus interest.
  - j. Any other relief that the Court may grant.



4. The appellant opposed the suit by filing the memorandum of response on September 5, 2019 through Macharia Burugu & Company Advocates. The appellant admitted employing the claimant (respondent in appeal) as pleaded for the respondent. The appellant further pleaded as follows. The appellant had installed systems to monitor in real time and to record fuel use and consumption by its vehicles including the one assigned to the respondent. On November 24, 2018 it was reasonably suspected that the claimant siphoned fuel from assigned excavator Tex-02. Siphoning of fuel was frequently reported and may lead to surcharge, dismissal or warnings. The investigations implicated the claimant as having attempted theft of fuel and attempted to conceal the same by refuelling the excavator. On November 25, 2018 he was called upon to explain the incident. His explanation at the hearing was found wanting and so he was summarily dismissed on November 26, 2019 for gross misconduct. He returned and asked for final dues which were paid in full and final settlement. The suit was therefore an abuse of court process. The appellant prayed that the suit is dismissed with costs to the appellant.
5. The appellant filed the submissions on the appeal and the respondent failed to do so.
6. This being a first appeal the Court will re-examine the facts and arrive at its own conclusions bearing in mind that it did not by itself take the evidence as was done by the trial Court.
7. The Court has considered the grounds of appeal. The 1<sup>st</sup> issue related to ground (f) is whether the trial Court erred in finding the monthly salary was Kshs 64, 233.00 instead of a gross of Kshs 50, 452.00. The statement of response does not contain an express denial of the respondent's pleading in paragraph 3 of the statement of claim that the gross salary was Kshs 64, 233.00. However, the appellant denied all claims as computed based on that figure of Kshs 64, 233.00. The respondent's November, 2018 pay slip shows the respondent's last gross pay as Kshs 64, 233.00 inclusive overtime, house allowance of Kshs 8, 400.00, basic pay Kshs 42, 043.00 and deductions of absent days. The Court finds that the regular or fixed gross pay would be per appellant's submission at Kshs Kshs 50, 452.00 but the actual last gross pay inclusive overtime was indeed Kshs 64, 233.00 as pleaded for the respondent. Did the trial Court err by awarding the notice pay at the actual gross pay for November, 2018? The trial Court found that the contract had not provided for the notice period and awarded the Kshs 64, 233.00 as envisaged in section 35 of the *Employment Act, 2007*. Section 36 of the *Act* refers to payment of remuneration the other party would have earned if termination notice prescribed in section 35 of the Act is not issued as prescribed. The Court considers that remuneration entails the sum of all payments to an employee - in the instant case including the overtime payment. By the payslip of November 2018, the parties understood the gross pay, meaning remuneration, as Kshs 64, 233.00. The Court returns that the trial Court did not err in awarding the notice pay at that rate. Ground (h) of the appeal will collapse.
8. The 2<sup>nd</sup> issue is whether the procedure adopted to dismiss the respondent was unfair. As submitted for the appellant, the evidence was that the respondent, when served with the letter to show cause dated November 25, 2018, he refused to sign the same. The trial Court found as much. Did refusal to so sign amount to frustrating the due procedure as prescribed in section 41 of the *Employment Act, 2007*? The Court finds that as submitted for the appellant, an employee is required to cooperate and subject himself to the due process and failing to do so defeats the employee's claims of denial of due process. The trial Court in finding that the procedure was unfair considered that a response was demanded by 2.00pm on the same November 25, 2018, with a hearing scheduled at the same time at 2.00pm. The Court considers that under section 44(1) of the Act, an employer is entitled to dismiss with no or shorter notice than the contractual notice in cases where gross misconduct is in issue. Thus, the letter to show cause with short timelines for response and hearing appear to have been saved by that section and as the appellant designed to proceed in the instant case. The legitimate thing was for the claimant to receive the letter and reply and be heard in his defence that he was not culpable as charged. He instead



got annoyed and refused to submit to the process thereby frustrating the due process. The Court considers that in the circumstances of the case, the trial court deviated to extraneous consideration that the time to respond and attend the hearing was too short whereas clearly, the claimant had frustrated the disciplinary process by rejecting to accept the show cause letter on grounds he judged himself innocent – and whether that judgment was correct or wrong, the legitimate step was to submit by accepting the letter, responding, and being heard in self-exculpation. Grounds (a) and (b) of appeal will succeed.

9. The 3<sup>rd</sup> issue is whether the trial Court erred by finding that the reason for termination was invalid and unfair. The trial Court found that there were contradictions in the evidence given for the appellant because there was no established basis for suspecting the respondent when the investigation report showed that the respondent was not at the scene of the alleged theft or siphoning of the fuel. In particular, the trial Court found that there was nothing to show that the respondent had sneaked at night and colluded with guards to refill the tanker to cover up for the otherwise alleged theft. The trial Court then found that mere suspicion led to the dismissal of the respondent because, from the investigation report, the fuel attendant and guards (the respondent may have lured in the alleged refilling of fuel to conceal the alleged theft or conspiracy) were not questioned at all. Further, there was no investigation finding that the respondent had tampered with the seals and that he was in possession of the keys to the fuel tank. In view of the findings and the gaps, the trial Court found that the respondent's summary dismissal was not based on valid reasons. The Court considers that the trial Court's analysis of the evidence before it has not been faulted in any material or principle respect. Nowhere did the trial Court lift the test to one above the balance of probability as submitted for the appellant. The Court returns that the trial Court did not err in finding that the appellant had failed to establish that the reason for termination was valid per section 43 of the Act and was fair per section 45 of the Act. Grounds (c), (d), (e), (f) will collapse. The Court finds that the summary dismissal was unfair for want of valid reasons though, by his own actions, the respondent had defeated due process as had been accorded and initiated. There was no procedural unfairness.
10. The Court returns that the ground (g) of appeal will fail and the award of 3 months' salaries is found to have been fair in the circumstances. The trial Court awarded Kshs 192, 699.00. No reasons as per section 49 of the Act were referred to. However, the Court has considered the period the respondent had served the appellant and further considered that the respondent substantially contributed to his dismissal when he refused to receive the letter to show cause and to submit to the disciplinary process as had been initiated. The award by the trial Court is found just and fair.
11. The residual grounds of appeal on costs and interest will therefore collapse as unjustified.
12. The findings do not vary the final orders in the decree following from the trial court's judgment which as well awarded certificate of service, costs and interest. As the respondent failed to file submissions on the appeal as was directed by the court, each party to bear own costs of the appeal.

In conclusion, the appeal herein is determined with orders:

1. The appeal is dismissed with orders each party to bear own costs of the appeal.
2. The final orders in the judgment by the trial Court herein and the decree therefrom are hereby upheld.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 16<sup>TH</sup> FEBRUARY, 2023**

**BYRAM ONGAYA**



**PRINCIPAL JUDGE**

