



REPUBLIC OF KENYA



**Cheptorus v Miral Welfare Foundation Kenya (Appeal E018 of 2022)
[2023] KEELRC 259 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 259 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E018 OF 2022
S RADIDO, J
FEBRUARY 1, 2023**

BETWEEN

MESHACK KIPLAGAT CHEPTORUS CLAIMANT

AND

MIRAL WELFARE FOUNDATION KENYA RESPONDENT

*(Being an appeal from the judgment of Honourable J.N. Wambilianga delivered on 30/5/2022
in the ELRC Cause No. E29 of 2020 at the Senior Principal Magistrates Court at Kisumu))*

JUDGMENT

1. Meshack Kiplagat Cheptorus (the Appellant) sued Miral Welfare Foundation Kenya (the Respondent) before the Senior Principal Magistrates Court, alleging unfair termination of employment and breach of constitutional rights.
2. In a judgment delivered on 30 May 2022, the trial Magistrate dismissed the Cause with costs.
3. The Appellant was dissatisfied, and he lodged a Memorandum of Appeal with the Court on 30 June 2022, contending that:
 - i. THAT the learned Magistrate erred in law and fact by finding that the Appellant, in this case, did not prove his case on a balance of probability as per section 44 of the *Employment Act* in face of abundant evidence adduced before the Court.
 - ii. THAT the learned trial Magistrate misapplied section 44(4)(g) of the *Employment Act*, noting that the Claimant did not steal as implied by the trial Magistrate and of which the Claimant was never charged in court of law.
 - iii. THAT the learned trial Magistrate erred in law and fact by dismissing the Appellant's claim of unfair termination of employment in its entirety without taking into consideration that the Respondent disregarded procedures laid down for summary dismissal in the *Employment Act*.



- iv. THAT the learned trial Magistrate erred in law and fact in failing to find that the Claimant was unfairly terminated, noting that procedures for summary dismissal were never followed.
 - v. THAT the learned trial Magistrate erred in law and fact for failing to consider the Claimant's argument for legitimate expectation.
 - vi. THAT the learned trial Magistrate erred in law and fact for failing to consider the Claimant's argument for discrimination by the Respondent in contravention of Article 27 of the [Constitution of Kenya](#).
 - vii. THAT the learned trial Magistrate misapprehended the facts, applied the wrong legal principles, and drew erroneous conclusions to the prejudice of the Appellant.
4. The Court gave directions on the Appeal on 5 December 2022 and 8 December 2022. The Appellant filed his submissions on 20 December 2022, and the Respondent on 30 January 2023.
 5. The Court has considered the Record and submissions.

Role of the court on first appeal

6. This being a first appeal, the Court is enjoined to re-evaluate the evidence before the trial Court and make its own findings on the evidence and facts, but conscious that it did not see the witnesses.

Unfair termination of employment

7. In order to succeed in an action asserting unfair termination of employment, the Claimant should, at the first instance, satisfy the requirements of section 47(5) of the [Employment Act](#), 2007.
8. During the oral hearing before the trial Court, the Appellant testified that he was not afforded an opportunity to be heard (no show-cause) before the decision to terminate his contract was made on 15 November 2019.
9. The Respondent's witness admitted during cross-examination that the Appellant was not issued a show-cause notice. He also testified that he was unaware whether the Appellant was invited or subjected to a disciplinary hearing.
10. The trial Court found that the case was one of summary dismissal.
11. In reaching her conclusions, the trial Court found that the case was one warranting summary dismissal under section 44(1)(g) of the [Employment Act](#), 2007 because the Respondent had reasonable and sufficient grounds to terminate the contract since a theft of a phone had been reported to the Police.
12. In a case of summary dismissal, a written show cause notice is not required/practical, but section 41(2) of the [Employment Act](#), 2007 makes it mandatory for an oral hearing.
13. The section provides:

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.
14. The Respondent did not displace the Appellant's evidence that an oral hearing was not conducted. It did not demonstrate that the Appellant was afforded an opportunity to make representations in the presence of a colleague (even minutes of the meeting were not produced in Court).



15. The trial Court, therefore, fell into an error of law and fact in finding that the termination of the contract was fair and dismissing the Cause without considering the implication of section 41(2) of the *Employment Act*, 2007.
16. The Appellant had served the Respondent continuously for about 5 years by the time of separation, and the Court will award the equivalent of 5 months' gross salary as compensation.

Breach of contract

Salary arrears

17. The Appellant claimed Kshs 72,000/- stated to be salary arrears for November and December 2019.
18. During cross-examination, the Appellant admitted that he was paid for days worked in November 2019 and another month's salary.
19. The claim for the salary arrears was therefore misplaced.

Salary in lieu of notice

20. The Court has concluded that the termination of the Appellant's contract was unfair. He is consequently entitled to one month's salary in lieu of notice in the sum of Kshs 36,000/-.

Service pay

21. The Appellant was a contributing member to the National Social Security Fund, and is thus not entitled to service pay by dint of section 35(5) and (6) of the *Employment Act*, 2007.

House allowance

22. The Appellant's salary was inclusive of house allowance, and he was paid up to the time of separation. This head of relief is not available to him.

Discrimination

23. The Appellant alleged that the Respondent discriminated against him because he was restricted to a room while colleagues of Korean extraction were allowed to leave.
24. In the witness statement adopted as part of the evidence, the Appellant stated:

THAT on or about the 14th day of November 2019, the said Respondent's Director at 9 am informed me that two office mobile phones had been stolen and that unless the said phones were returned by 3.00 pm of that very day, I would be terminated from employment. Having no knowledge of the theft of the phones, I was at the mercy of the Respondent, who closed the office, demanding that the phones be returned by 3 pm. The Korean volunteers were excluded from the meetings in a clear sign of discrimination as provided within the provisions of Article 27 of the *Constitution of Kenya* and the relevant provisions of the employment law and labour practices.
25. The aforesaid testimony was mirrored in paragraph 9 of the Statement of Claim.
26. The trial Court did not address the discrimination claims in the judgment under attack. The failure was an error of law.
27. The Court has relooked at the pleadings and evidence placed before the trial Court. The same does not demonstrate an action for discrimination. An action for restriction of liberty may have been plausible.



28. Before concluding, the Court notes that although the Appellant pleaded to be awarded damages for loss of reputation and diminished employability, he did not satisfy the Court that he deserved the awards.

Conclusion and Orders

29. From the foregoing, the Appeal succeeds, and the judgment of the trial Court is set aside and substituted with findings/orders:

- i. The termination of the Appellant's employment was unfair.
- ii. The Appellant is awarded Kshs 180,000/- as compensation.
- iii. The Appellant is awarded Kshs 36,000/- salary in lieu of notice.

30. The other heads of claims are dismissed.

31. The Appellant to have the costs of the Appeal and before the trial Court.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 1ST DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Byron Menezes, Advocate

For Respondent Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo Aura

