



**Osao v Mayfair Holdings Limited (Appeal E055 of 2021)  
[2023] KEELRC 951 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 951 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E055 OF 2021  
CN BAARI, J  
APRIL 27, 2023**

**BETWEEN**

**CHRISPINE OWINO OSAO ..... APPELLANT**

**AND**

**MAYFAIR HOLDINGS LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Wambilianga (PM)  
delivered on 6th December, 2021, in Kisumu CMEELRC NO. 3 OF 2020)*

**JUDGMENT**

1. This appeal arises from a Judgment rendered on 6<sup>th</sup> December, 2021, where the Trial Court found that the Appellant had not proved his case, and proceeded to dismiss the same with costs.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 16<sup>th</sup> December, 2021.
3. The appeal is premised on the grounds THAT:
  - i. The Learned Trial Magistrate erred in both law and fact in failing to appreciate the totality of the evidence as placed before her thereby arriving at a wrong decision.
  - ii. The Learned Trial Magistrate erred in both fact and law in failing to appreciate the fact that the employer did not discharge the burden of proving that the termination was just and fair in the circumstances even after the explanation that the Appellant gave in his letter dated 4/6/2018, and as it emerged at the disciplinary hearing that he was asked to perform the duties of a Mechanic yet he was employed as a trained welder and had no skill to perform duties of a mechanic.
  - iii. The Learned Trial Magistrate erred in both law and fact in failing to appreciate that the Appellant was not formally invited to the disciplinary hearing and was not given an



opportunity to attend the same with a colleague of his own choice, thereby arriving at a wrong decision.

- iv. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Appellant was only acting in good faith in mitigating any loss that could occur when he was asked to perform the duties of a welder, a skill that he neither possessed nor was appointed for.
- v. The Learned Trial Magistrate erred in both law and fact in failing to consider the explanation that was given by the Appellant when asked by the management thereby making the reasons for termination unjustified.

### **The Appellant's Submissions**

4. The Appellant submits that the Learned Magistrate failed to appreciate from the evidence tabled before her that there was no invitation to a disciplinary hearing on a specified date.
5. The Appellant further submits that there was no formal letter inviting him to a disciplinary hearing and requiring him to attend with a colleague of his choice to make representation. It is the Appellant's further submission that the trial court imported facts to the case which did not form part of the Respondent's evidence, in finding that he was verbally invited to the disciplinary hearing.
6. It is submitted for the Appellant that the Court in spite of failure by the Respondent to demonstrate that the disciplinary hearing actually took place and that the Respondent participated, went ahead and made a finding that the disciplinary hearing took place and that the Respondent was orally invited.
7. The Appellant submits that the aspect of oral invitation was foreign to the proceedings and none of the parties ever mentioned the oral invitation and who it was that communicated the invitation orally.
8. The Appellant prays that his appeal is allowed.

### **The Respondent's Submissions**

9. The Respondent submits that the Appellant's termination was reasonable and fair in the circumstance and that the Appellant was terminated purely on ground of gross misconduct. The Respondent sought to rely in the dictum of Lord Denning in *British Leyland u/c Ltd vs Swift* [1981] KLR 91.
10. It is the Respondent's submission that it followed the provisions of Section 41 of the [Employment Act](#), which suggests only a co-employee of the Claimant or his shop floor trade union representative to be present at the forum where the Claimant is heard. It is the Respondent's further submission that during the hearing of the Appellant, the shop floor trade union representative was present.
11. The Respondent further submits that the disciplinary meeting held on 12/6/2018, was fair because the committee was properly constituted and that the Appellant was given a chance to tender his defense as per the minutes of 12/6/2018.
12. The Respondent submits that the Respondent's group General Manager, Deputy General Manager and the Shop Steward/Trade Union Representative, made a final decision to terminate the Appellant on the basis of the evidence availed, which showed that the Appellant had breached the code of conduct.
13. It is the Respondent's submission that the termination of the Appellant was fair and procedural as it had adhered to the provisions of Section 43, 45 and 47 of the [Employment Act](#).
14. The Respondent further submits that the Claimant was duly paid his final terminal dues as per payment slip dated 18/6/2018 produced as DEX8. The Respondent further submits that the



Appellant was paid Kshs.18,801.41 (one month in lieu of notice) and which is clearly reflected on the payment slip duly received by him.

15. The Respondent submits that the Appellant failed to prove his case on a balance of probability and the appeal should be dismissed.

### **Analysis and Determination**

16. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The five grounds of appeal are summarized into one, as follows: -
  - i. The Learned Trial Magistrate erred in both law and fact in failing to appreciate the totality of the evidence as placed before her thereby arriving at a wrong decision.
17. The Court of Appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, guided on the handling of a first appeal as follows:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and re-analyse 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”
18. The Trial Court found that the Appellant herein did not prove his case of unfair termination on a balance of probability and thus proceeded to dismiss the Appellant's entire claim. The Appellant's assertion of an unfair termination emanates from both procedure and the reasons upon which his termination is premised, commonly referred to as substantive justification. These are by law the tenets upon which a court would determine whether or not a termination/dismissal is unfair per Sections 41, 43, 45 and 46 and 47(5) of the *Employment Act*.
19. From the court record, the Appellant was issued a show cause letter dated 31<sup>st</sup> May, 2018, which he was required to respond to within 24 hours. In spite of the short period allowed for response, the Appellant responded to the show cause vide a letter dated 4<sup>th</sup> June, 2018, which letter indicates a remorseful employee keen to make amends.
20. The Appellant's issue with the disciplinary procedure, is that he was not formally invited for a disciplinary hearing. Indeed, nothing in the court record shows that the Appellant was invited for a disciplinary hearing. All there is are hand-written minutes of the purported hearing which do not indicate who attended the meeting.
21. In *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017) eKLR the Court expounded on the provisions of Section 41 thus: -

“To satisfy the requirements of Section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.

  27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.
22. To start with, the notice to show cause did not allow sufficient time for the Appellant to respond to the notice, and further, no invitation was made to the Appellant to appear for the hearing and neither



was he informed of the need to appear with a representative of his choice. Although the Respondent insists that the Appellant was given a verbal notice, the same cannot be evidenced, not to mention that verbal notice is not envisaged under the law.

23. I thus return that the Appellant's dismissal was procedurally flawed which renders the dismissal unfair.
24. On substantive justification, once an employee proves that he was unfairly terminated, the law demands that the burden shifts to the employer to prove that the reasons for the termination are valid, fair and justified. In Nyeri Civil Appeal No.97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another, the Court of Appeal held:

“In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer.....”
25. The show cause letter indicates that the Appellant faced charges of insubordination and the letter of dismissal lists the reasons for termination as refusal to follow instructions and refusal to leave the Respondent's premises when asked to do so.
26. The Appellant in his response to the show cause letter, told the Respondent that the incident subject of the letter, arose out of a miscommunication between himself and his supervisor. In *British Leyland UK Ltd vs Swift* [1981] IRLR 91 Lord Denning held that if a reasonable employer might have reasonably dismissed the employee then the dismissal was fair
27. In *Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union* [2017] eKLR the Court held that the Court looks into the validity and justifiability of the reasons for termination.
28. A penalty that is too severe and which does not match the transgression, even though valid, may not pass the fairness test.
29. In my considered view, the reasons for the Appellant's dismissal do not match the penalty that was meted against him. I find and hold that the reasons for the Appellant's termination are neither valid, fair nor justified. The dismissal is unfair and wrongful.
30. I thus find and hold that the Appellant's dismissal was both procedurally and substantively unfair and wrongful, and the finding of the Trial Court is hereby set aside.
31. The Appellant has under his statement of claim sought compensation for the unfair termination and payment of terminal dues being pay in lieu of termination notice.
32. The Appellant's dismissal has been found to be unfair. This finding entitles him to an award of compensation in accordance with Section 49 and 50 of the *Employment Act*, 2007. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.)
33. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR it was held that the measures of compensation should be guided by the statutory capping at the time of termination.
34. Taking into account the statutory capping provided under Section 49(4) of the Act, and considering that the Appellant may have contributed to his dismissal, I find an award of six months sufficient compensation for the unfair and wrongful dismissal.
35. On the claim for pay in lieu of notice, the Appellant's pay slip produced in evidence, indicates that the Appellant was paid salary for 13 days worked in June, 2018, holidays and annual leave. Nothing shows that the Appellant was paid on account of termination notice.



36. I thus find the claim for pay in lieu of notice merited, and the Appellant is awarded one month's salary in lieu of notice as prayed.
37. In whole, I make orders as follows: -
- i. That the Appellant's dismissal is unfair and wrongful.
  - ii. That the Appellant is awarded six months' salary as compensation for unfair and wrongful dismissal at Kshs. 205,290/-
  - iii. That the Appellant is awarded one month salary in lieu of dismissal notice at Kshs. 34,215/-
  - iv. The Respondent will bear the costs of the appeal.
38. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Yogo h/b for Mr. Ojuro for the Respondent

N/A for the Appellant

MS. Christine Omolo - Court Assistant.

