



**Mackenzie Maritime (EA) Ltd v Ngali (Appeal 31 of 2022)
[2023] KEELRC 2391 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2391 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 31 OF 2022
AK NZEI, J
SEPTEMBER 29, 2023**

BETWEEN

MACKENZIE MARITIME (EA) LTD APPELLANT

AND

WILLY NGALU NGALI RESPONDENT

*(Being an Appeal against the entire judgment/order of the Hon.
D.O. Mbeja PM in Mombasa CMC ELRC No. 266 of 2021)*

JUDGMENT

1. The Appellant herein was the Respondent in Mombasa CMELR Case No. 266 of 2021 whereby the Respondent herein had sued the Appellant vide a Statement of Claim dated 19th April, 2021 and filed in Court on 22nd April, 2021. The Respondent had pleaded in the said Statement of Claim, inter alia:-
 - a. that the Respondent started working for the Appellant as a truck driver in the year 2013 on renewable fixed term contracts, the last such fixed term contract commencing 1st February, 2021 and set to lapse on 31st January, 2022.
 - b. that the Respondent was earning Kshs. 20,000/=, which was later reviewed and increased to Kshs. 31,311 monthly, which was the Respondent's earning until his dismissal.
 - c. that in mid-February, 2021, the Respondents was assigned to go and load materials at a place called AGOL and when he got there, and having parked the truck at the loading zone, he was instructed by the site supervisor to go and get a gate pass, whereupon he left the truck at the loading zone where the crane operators were and went to get a gate pass as instructed by the supervisor.
 - d. that upon return, the Respondent, who was the Claimant in Lower Court suit, found the crane operators off-loading some metals from the truck, with a claim that they had loaded them



there in order to create space to operate the crane properly, so as to load the assigned metals that the Respondent had been sent to pick.

- e. that after the crane operators loaded the metals that the Respondent had been sent to pick, an order came from the security that the Respondent was not to leave as the crane operators who were loading were allegedly trying to steal the metals.
 - f. that the claimant was asked to write a statement with the security, which he did, before being informed that he had been suspended on allegation of attempting to steal the Appellant's property.
 - g. that the Respondent was subsequently called to the Appellant's office and handed a disciplinary hearing letter dated 22nd February 2021 for a hearing scheduled for 25th February 2021. That the Respondent attended the hearing as scheduled; with a witness (a receptionist) who had no idea of what was going on.
 - h. that following the hearing, the Respondent received a summary dismissal letter dated 1st March 2021, which he was forced to sign after the Appellant withheld his salary for the month of February 2021.
 - i. that the Respondent appealed, and was at the hearing of the Appeal informed that his mistake was leaving the pick-up truck unattended to before loading when he went to get a gate pass; a mistake that would have been punishable by issuance of a warning letter.
 - j. that the Respondent's summary dismissal was wrongful for failure to follow the laid down procedure to the letter, and that the reasons for the dismissal did not fall within Section 44(4) of the [Employment Act](#) to warrant summary dismissal.
2. The Respondent sought the following reliefs against the Appellant:-
- a. a declaration that the Respondent's summary dismissal from employment was wrongful.
 - b. Notice payKshs. 31,311
 - c. GratuityKshs. 109,588.5
 - d. Compensation for wrongful dismissal.....Kshs. 375,732
Total Kshs. 516,631.5
 - e. Costs of the suit.
 - f. Any other relief that the Court may deem fit and just to grant.
3. Other documents filed by the Respondent included an affidavit in verification of his claim, his written witness statement dated 19th April 2021 and an evenly dated list of documents. The listed documents included a demand notice dated 23rd March 2021, response to demand letter dated 29th March 2021, copies of employment contracts, a certificate of service, summary dismissal letter dated 1st March 2021 and invitation to hearing of the Appeal dated 8th March 2021.
4. The Appellant defended the Respondent's claim/suit vide a Response to Memorandum of Claim dated 27th May 2021 whereby the Appellant pleaded that the Respondent's summary dismissal was justified.
5. The Appellant further:-



- a. admitted that it had employed the Respondent as a heavy commercial vehicle driver on term specific contracts, the initial contract having commenced in 2014 and the last having taken effect from 1st February 2021 and was due to lapse on 31st January 2022 before the Respondent was lawfully terminated from employment.
 - b. that the Respondent's period of employment was littered with several incidences of disciplinary issues that included negligence and dereliction of duty leading to the Appellant incurring loss and damage, over which the Respondent was issued with warning letters and surcharged for the losses after being taken through the disciplinary process.
 - c. that at all material time to the suit, the Appellant company was, and is associated with, and forms part of the same group of companies with M/s African Gas and Oil Company Limited (AGOL), whose physical address is situated at Miritini within Mombasa County.
 - d. that between 9th and 13th February 2021, the Appellant was undertaking a project at the AGOL premises which entailed the refurbishment of Gallery Hoppers which were thereafter transported on the Appellant's trucks to the port of Mombasa (KPA) sheds whence they would be off-loaded.
 - e. that at all material times to the operation aforesaid, the Claimant was assigned the task of transporting the Gallery Hoppers to the Port of Mombasa, using the Appellant's low loader truck Registration No. KCG 189J.
 - f. that by 12th February 2021, the Respondent had made three trips to the port of Mombasa, but when the truck was being loaded with Hoppers in the morning of 13th February 2021, the Appellant's contracted security company's guards noticed something out of the ordinary happening, that is, pieces of metal which were not part of the consignment to be transported being loaded onto the Respondent's truck.
 - g. that in the course of the ensuing investigations, it became apparent that the Respondent and three (3) other employees had hatched an elaborate plan to steal and smuggle scrap metal from AGOL premises, concealed in under the Gallery Hoppers that was being load on the low loader truck for transportation to the KPA sheds.
 - h. that the three were subjected to the Appellants internal disciplinary mechanisms, at the conclusion of which both the initial and appellate panels constituted to consider the matter unanimously reached a guilty verdict and recommended summary dismissal, which advise the Appellant duly acted on.
 - i. that the Respondent's termination was justified and the procedure employed in effecting the termination was lawful and fair, and that the claim was devoid of merit.
6. Other documents filed by the Appellant included a written witness statement of Raymond Pekeshe dated 27th May 2021 and an evenly dated list of documents. The listed documents included a bundle of employment contracts, a bundle of documents on previous disciplinary process against the Respondent, a bundle of documents regarding the Respondent's initial disciplinary hearing, a bundle of documents on the Respondent's appeal hearing, and a bundle of documents evidencing the Respondent's discharge and clearance from the Appellant's employment.
 7. At the trial, the Respondent adopted his written witness statement and produced in evidence the documents referred to in paragraph 6 of this Judgment. The Respondent further testified that he was not given time to be heard well, that there was contradiction (in the Appellant's letters), that his witness



did not testify, that the show cause notice gave him 3 days, that he was not charged with theft of scrap metal, that he did not conspire with anyone to steal from the company, that he was not comfortable with the decision to terminate his services, and that he was seeking the Court's intervention.

8. Cross examined, the Respondent testified:
 - a. that he used to pay NSSF.
 - b. that it was not mandatory for the Respondent to be present at the loading that was being done in a sister company where there was a supervisor.
 - c. that the Respondent did not have a turn boy, and that loading was being done by other employees.
 - d. that the Respondent was directed by the supervisor to get a gate pass processed, and left the motor-vehicle (truck) with other employees and that on getting back, he found the crane operator lifting some materials (from his truck). That the Respondent noted something unusual and questioned, and that this is what cost him his job. That he did not carry any unauthorized material.
9. The Appellant called one witness, Raymond Pekeshe, an employee of the Appellant company, who adopted his written witness statement as his testimony and produced in evidence the documents referred to in paragraph 6 of this Judgment. He further testified that the disciplinary panel, of which he was the secretary, noted negligence on the part of the Respondent; as any business conducted on the truck was supposed to be with his knowledge.
10. Cross examined, the Appellant's said witness testified:-
 - a. that the Appellant had loaders, vickers and two supervisors, Sudi and Caleb, who allocated and monitored duties.
 - b. that the truck in issue (the Respondent's truck) was already in the compound and that there was security, and that that duty to watch over the truck ought to have been delegated to a security officer.
 - c. that there were wardens present at the loading section and that inspection (of trucks) was being done at the gate after loading.
 - d. that the Respondent got a call from the supervisor to process a gate pass, was supposed to process the gate pass 500 metres away, and was not present during the incident (illegal loading).
 - e. that the Respondent was not present when loading was taking place, and this led to ASSUMPTION that he was involved in the loading of the unauthorized materials.
 - f. that investigations were done, the Respondent was not given the investigation report, and that the notice to show cause was based on allegations.
 - g. that the matter was not reported to the police.
 - h. that the reason for the Respondent's dismissal was dishonesty.
11. Re-examined, the Respondent's witness testified that the Respondent was part of team that intended to smuggle metal.



12. It is worth noting that the Respondent was, on 22nd February 2021, issued with a letter dated the same date (22nd February 2021) and titled “show cause and invitation to disciplinary hearing”. The letter stated in part:

“... preliminary investigation report finds you answerable to the alleged attempt to smuggle scrap metal pieces concealed under a hopper that was to be delivered to KPA, using registration number KCG 189J/ZF3542 on 13th February 2021

In view thereof, you are hereby required to submit a written defence statement as to why stern disciplinary action should not be taken against you for attempting to steal company property.

Your explanation should reach the undersigned by 5.00 p.m. Wednesday 24th February 2021.

... The company also invites you to a disciplinary hearing set for Thursday 25th 2021 at 2.30 p.m. at the company’s Shimanzi offices. You have the right to have another employee of the company being your witness of choice present during this hearing.”

13. It is clear from the foregoing that the Respondent was served with a statement of accusation against him, in the form of a show cause letter, and was required to respond to the charges in writing by 5.00 p.m. on 24th February 2021. The same letter (show cause letter) notified the Respondent that a disciplinary hearing would be conducted on 25th February 2021, and that he had a right to have another employee as a witness.

14. There was only one (1) day between the date of the show cause letter and 24th February 2021 and the date when the Respondent was supposed to deliver to the Respondent a written defence in response to the charges levelled against him, and there was absolutely no single day between the date of delivering the written response/defence and the date of the disciplinary hearing. This was to say the least, not fair. I have severally said, and I repeat it here, that an employee ought to be given reasonable time to respond to a show cause letter, at least 3 to 7 days, and should thereupon be given reasonable time to prepare for the disciplinary hearing and to get witnesses/a witness. I have also severally stated that in my view, a show cause letter/charge sheet, and an invitation to a disciplinary hearing should not be combined in the same letter. The two are different, and they serve different purposes. They cannot be given at the same time, if fairness is to be achieved.

15. Having heard both parties, the trial Court delivered its Judgment on 14th April 2022 whereby it made a finding that the Respondent’s termination was wrongful, unfair and unlawful, and awarded him Kshs. 375,732 (being the equivalent of twelve months’ salary), costs of the suit and interest. The Court declined to award the Respondent notice pay and gratuity.

16. Dissatisfied with the aforesaid Judgment, the Appellant preferred the appeal herein vide a Memorandum of Appeal dated 27th April 2022 and filed in Court on 28th April 2022, setting forth the following grounds of appeal:-

- a. the learned trial Magistrate erred in law and in fact by determining that the Respondent had been unfairly or unlawfully terminated, thus reached an erroneous award.
- b. the learned Magistrate erred in law and in fact by failing to appreciate that the conduct of the claimant at all material times to the cause of action contributed to, and justified his termination from employment.



- c. the learned trial Magistrate erred in law and in fact by holding that the Appellant’s decision not to pursue criminal proceedings against the Respondent lessened his culpability for the attempted theft of the Appellant’s goods contrary to the express stipulations in his contract of service.
 - d. the learned trial Magistrate erred in law and fact by failing to appreciate that the alleged attempted theft of a 5 tonne heavy piece of metal subject matter of the disciplinary process could not have been pulled off without the connivance and facilitation of the Respondent, and thus wrongly absolved him from culpability.
 - e. the learned trial Magistrate erred in law and failed to exercise his discretion judiciously by misapprehending the fact that the circumstances of the case did warrant awarding the Claimant maximum compensation.
 - f. the learned trial Magistrate erred in law and in fact by awarding the Respondent the sum of Kshs. 375,732 being maximum compensation for 12 months as prayed and in so doing failed to appreciate that what the Respondent was entitled to if his claim was proven was at most compensation for 11 months which was the residual period under his contract of service.
 - g. the learned trial Magistrate erred in law and fact by, while appreciating that the Respondent was subjected to procedural fairness at the disciplinary hearing, nevertheless thereafter erroneously determined that the allegations of misconduct on the Respondent’s part had not been proven, and which finding was contrary to the weight of evidence tendered in support of the Appellant’s case.
 - h. the learned trial Magistrate erred in law and in fact by holding that the Respondent’s case had not been rebutted at all by the Appellant, and which finding is not supported by the evidence on record.
 - i. the learned trial Magistrate erred in law and fact by rendering a Judgment that does not conform to the legal provisions regarding the contents of a proper Judgment in a defended suit.
 - j. the learned trial Magistrate erred in law and fact by partially allowing the Respondents claim against the Appellant with attendant costs in the circumstances.
17. The Appellant sought the following reliefs:
- a. that the trial Court’s Judgment delivered on 14th April, 2022 be reversed and/or vacated, and consequently this Court be at liberty to render its own verdict.
 - b. That costs of the Appeal be awarded to the Appellant.
18. This is a first appeal, and as stated in the case of Abok James Odera t/a A. J. Odera & Associates – vs- John Patrick Machira t/a Machira & Co. Advocates [2013] Eklr, a first appellate’s Court’s primary role is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the trial Judge are to stand or not, and give reasons either way.
19. It was stated as follows in Mursal & Another –vs- Munene (Suing as the legal administrators of Dalphine Kanini Manesa) Civil Appeal No. E20 of 2021 [2021] eKLR:-

“A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for review, both on questions of fact and law. A first appellate court is the



last court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust ...”

20. The evidence as adduced before the trial Court is before this Court for re-evaluation, and the Court takes cognizance of the fact that it did not have the advantage of seeing the witnesses testify. I will handle all the grounds of appeal together. In my view, the following two issues fall for determination, that is:-
 - a. whether termination of the Respondent’s employment was unfair.
 - b. whether the Respondent was entitled to the reliefs in the trial Court.
21. On the first issue, unfairness in terminating an employee’s employment may either be procedural or substantive. It was stated as follows in *Walter Ogal Anuro –vs- Teachers Service Commission* [2013] eKLR:-

“ ... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
22. Section 41 of the *Employment Act* 2007 sets out a mandatory procedure that must be adhered to by any employer contemplating termination of an employee’s employment. From the evidence presented before the trial Court, the Appellant failed the procedural fairness test only in failing to give adequate time to the Respondent to respond to the charges leveled against him and to prepare for the disciplinary hearing. Formal communication/disclosure of charges to an employee, giving him reasonable time to formally respond to the charges and giving the employee a fair opportunity to be heard on the charges and to call witnesses is a procedure that is founded in the principles of natural justice which requires that a fair and reasonable opportunity to be heard be given to a person who is alleged to have misconducted himself or committed a breach of the law or regulations. Giving the Respondent one day to respond to the charges levelled against him, to get a witness, and to prepare for the disciplinary hearing amounted to procedural unfairness.
23. On substantive fairness, it is my finding that the Appellant did not establish before the trial Court that indeed the Respondent attempted, either alone or in community with others, to steal scrap metal from the Appellant and to smuggle the same out as alleged by the Appellant. As already stated in this Judgment, the Appellant’s witness, Raymond Pekeshe, testified that the Respondent parked his truck at the loading zone in the premises of the Appellant’s sister company, OGAL, and was instructed by a supervisor to go and process a gate pass some 500 metres away. That the metal in question was loaded onto the Respondent’s truck by others in his absence, and that it was assumed that he was part of the plot. This irregular loading was noticed by a security personnel who questioned the loading. It was never demonstrated that the Respondent either knew what was happening before hand or that he was part of any plot to steal. The investigation report which the Appellant’s witness alluded to was not produced in Court at the trial. The reason for termination was never proved.
24. Under Section 45(2)(a) of the *Employment Act*, termination of an employee’s employment is unfair if the employer fails to prove that the reason for the termination is valid. It is my finding that termination of the Respondent’s employment was procedurally and substantively unfair, and I so declare.
25. On the second issue, I would have awarded notice pay under Section 35(c) of the *Employment Act* had there been a cross-appeal against the trial Court’s refusal to allow the same. There is no cross-appeal, and I will leave the issue undisturbed. I however uphold the trial Court’s dismissal of the claim



for gratuity as the Respondent was a member of and a contributor to NSSF. Section 35(6)(d) of the Employment Act disqualified him from raising a claim for service gratuity.

26. On the claim for compensation for unfair termination of employment, the provisions of Section 49(4) of the Employment Act are to be taken into account while making awards. The Court should, in particular, take into account any conduct of the employee which to any extent caused or contributed to the termination. In the present case, the Appellant demonstrated that the Respondent had several previous disciplinary cases, and produced documents in evidence in support of that fact. This fact cannot be wished away while assessing compensation for unfair termination of employment. The trial Court ought to have taken this into account.
27. On the foregoing basis only, I fault the award of Kshs. 375,737 being the equivalent of the Respondent's 12 months' salary. I set aside that award, and substitute it with the equivalent of 7 months' salary being compensation for unfair termination of employment. The appeal partly succeeds.
28. Ultimately, and having considered written submissions by counsel for both parties herein, the trial Court's Judgment delivered on 14th April, 2022 is hereby set aside, and is substituted with Judgment for the Respondent against the Appellant for Kshs. 219,117 being the equivalent of seven months' salary, plus interest at Court rates.
29. Each party will bear its own costs of the appeal. The Respondent will, however, have costs of proceedings in the trial Court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH SEPTEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform.

A signed copy will be availed to each party upon payment of the applicable Respondent fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

N/A for Appellant

N/A Respondent

