



**Kabusu t/a Oloita Butchery v Ndulu & another (Employment and Labour Relations Appeal E166 of 2022) [2023] KEELRC 2428 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2428 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E166 OF 2022**

**SC RUTTO, J  
OCTOBER 6, 2023**

**BETWEEN**

**PETER KABUSU T/A OLOITA BUTCHERY ..... APPELLANT**

**AND**

**MICHAEL MUTUKU NDULU ..... 1<sup>ST</sup> RESPONDENT**

**BERNARD ONYIEGO CHASIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgment delivered on 7th September, 2022, in the Chief Magistrate's at Nairobi CMEL case No. 958 of 2019 by the Hon. Principal Magistrate L.B Koech (Mrs))*

**JUDGMENT**

1. The Respondents commenced a suit by way of a Statement of Claim at the Chief Magistrate's Court at Milimani being CMEL No. 958 of 2019. Through the Claim, the Respondents averred that they were employed by the Appellant on diverse dates between March 2007 and August 2009 as cooks at his butchery located at Uchumi area, along Jogoo Road. It was the Respondents' case that they served the Appellant with loyalty and diligence until 15<sup>th</sup> February, 2019 when the Appellant wrongfully and unlawfully terminated their respective employment contracts. The Respondents further stated that on 15<sup>th</sup> February, 2019, the Appellant's Manager by the name Mr. Timothy orally informed them that their employment had been terminated and that he would call them after a week, but they never heard from him. According to the Respondents, the Appellant did not follow due process in terminating their employment and further failed to pay their terminal dues. Consequently, the Respondents sought against the Appellant a total sum of Kshs 3,208,846.00 being notice pay, unpaid house allowance, gratuity, compensation for unfair termination and underpaid wages.



2. The Appellant opposed the Claim by filing a Defence through which he denied employing the Respondents. The Appellant further denied unlawfully and unfairly terminating the Respondents' employment and put them to strict proof.
3. The learned trial Magistrate upon considering the totality of the evidence on record, delivered Judgment in favour of the Respondents. Observing that the Appellant did not call any witnesses or produce any document to show that a disciplinary hearing was conducted, the trial Court found that the Respondents' termination from employment was unlawful. In the end, the trial Court awarded the Respondents each underpaid salary, one month salary in lieu of notice, salary for days worked and compensation for unfair termination. On this score, the trial Court awarded the 1<sup>st</sup> Respondent the sum of Kshs 378,572/= and the 2<sup>nd</sup> Respondent the sum of Kshs 338,572/=.

### **The Appeal**

4. Aggrieved by the Judgment of the trial Court, the Appellant lodged the instant Appeal through which he raises the following seven grounds: -
  - 1) The learned trial magistrate erred in law and in fact in finding that the Respondents' termination of employment was unfair against the weight of the evidence when the Respondents were summarily dismissed for gross misconduct.
  - 2) The learned trial magistrate erred in law by finding the Respondents were underpaid without giving any legal or reasoned justification thus going against the principle of granting an award of compunction as set out under Section 49 and 50 of the Employment Act.
  - 3) The learned trial magistrate erred in law by finding that the Respondents were underpaid based on an erroneous Regulation of Wages (General) (Amendment) Order for the years 2012, 2015, 2017 and 2018 that was inapplicable in the circumstances.
  - 4) The learned trial magistrate erred in law and fact in awarding court (sic) of the suit plus interest to the Respondents(sic) underpaid without giving any legal or reasoned justification.
  - 5) The learned trial magistrate misdirected himself in failing to make a finding in favour of the Appellant.
  - 6) The learned trial magistrate fundamentally erred in both law and fact by finding that the Respondents had established its case on a balance of probability yet the Appellant had not been called to testify in the case as a witness.
  - 7) That consequently, the learned trial magistrate decision occasioned a miscarriage of justice.

### **The Submissions**

5. The Appeal was canvassed by way of written submissions. On 3<sup>rd</sup> May, 2023, parties took directions on the filing of written submissions. Both parties complied and I have considered their respective submissions.
6. On his part, the Appellant submitted that the Respondents' termination was undertaken in compliance with the Constitution and the Employment Act. He maintained that the Respondents were on many occasions warned against their illegal activities of theft of their employer's property, before being summoned on or about February 2019 by Timothy Kipees. It was his further submission that the Respondents were only summarily dismissed in adherence to the relevant procedure.



7. To this end, the Appellant urged the Court to find that the termination was not unfair as the procedure for summary dismissal as stipulated under Section 41 of the *Employment Act* was indeed followed and the Respondents were found to have engaged in activities of theft of his property which in turn amounted to gross misconduct.
8. On the other hand, the Respondents submitted that the allegations made in the Claim remain unchallenged thus uncontroverted, as the Appellant did not appear to produce documents or call witnesses.
9. It was further submitted by the Respondents that the Appellant did not justify the reason for terminating their services as required under Sections 43 and 45(2) of the *Employment Act* hence failed the substantive test.
10. The Respondents further submitted that they were not notified and subjected to any hearing as required by law. It was their contention that the Appellant did not file or produce employee records as required under Section 74 of the *Employment Act*. To this end, they referenced the case of Eddie Mutegi Njora vs Mega Microfinance Co. Ltd (2015) eKLR to support this position.
11. Concluding their submissions, the Respondents urged that the lower court made a proper finding of law and fact that their termination was therefore unfair and unlawful.

### **Analysis and determination**

12. This being the first appeal, the Court has the duty to re-evaluate the evidence before the trial Court as well as the Judgment and draw its own independent conclusion. Such was the determination in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where it was held that: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”
13. Consequently, I am enjoined to revisit and retrace the record in order to arrive at my own independent conclusion noting that I did not see or hear the witnesses as they testified.
14. Having evaluated the record before me, the opposing submissions, as well as the law, the following issues stand out for determination: -
  - a) Whether the Appellant has proved that he had a justifiable reason to terminate the Respondents’ employment;
  - b) Whether the dismissal of the Respondents by the Appellant was in line with fair procedure; and
  - c) Whether the remedies awarded to the Respondents lie in law.

### **Justifiable reason?**

15. Section 43(1) of the *Employment Act* (Act) places the burden of proving the reasons for termination on the employer and in default, such termination is rendered unfair. That is not all. Section 45 (2) of the Act, renders a termination of employment unfair where the employer fails to prove that the reason for the termination of an employee’s contract of service is valid, fair and relates to the employee’s conduct, capacity or compatibility; or based on its operational requirements.



16. Accordingly, beyond providing the reasons for an employee's termination, an employer is required to justify the fairness and validity of such reasons.
17. Turning to the instant case, it is not in dispute that the Respondents' employment was terminated by the Appellant. What is not clear is the reasons for the said termination and the manner in which the said termination was undertaken. From the record, the Respondents stated that they were terminated orally on 15<sup>th</sup> February, 2019 by the Appellant's manager called Timothy. Although the Appellant refuted this position, he did not adduce evidence to the contrary. In any event, it is noteworthy that the Respondents' letters of termination are not on record hence the reasons for their termination cannot be ascertained therefrom.
18. Coupled with the foregoing, the Appellant elected not to call oral evidence and further failed to adduce documentary evidence at the trial Court. This was despite filing two witness statements.
19. Indeed, without evidence, it is not possible to ascertain the real reason behind the Respondents' termination from employment. I find it imperative to add that the defence does not reveal much either seeing that the Appellant merely denied the assertions by the Respondents and did not substantially give the reasons for terminating the employment of the Respondents.
20. In terms of the provisions of Sections 43(1) and 45(2) (a) and (b) of the Act, the Appellant being the employer, had the heaviest responsibility in terms of proof. Therefore, he had the onus of proving the reasons leading to the Respondents' termination and more importantly that the said reasons were fair, valid and related to their conduct, capacity or compatibility.
21. As it is, the Appellant would only have discharged this burden by way of evidence. As stated herein, the record bears that the Appellant did not adduce evidence in whatever form or manner at the trial Court, hence its burden under Sections 43(1) and 45(2) (a) and (b) of the Act remained undischarged.
22. What this boils down to is that the Appellant failed to prove and substantiate any allegations he may have had against the Respondents.
23. It is in light of the foregoing that I arrive at the inescapable conclusion that the Appellant did not discharge its evidential burden under Sections 43(1) and 45 (2) (a) and (b) of the Act by proving that he had a justifiable reason to warrant termination of the Respondents' employment. This rendered the Respondents' termination substantively unfair.

### **Procedural fairness?**

24. The requirement for fair procedure is generally provided for under Section 45 (2) (c) of the Act. Further, Section 41 (1) of the Act makes specific requirements in regards to the process to be complied with by an employer. It entails notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
25. From the record, the Appellant did not lead evidence to prove that he accorded the Respondents' procedural fairness in terms of the aforementioned Section 41. Notably, the 1<sup>st</sup> Respondent while testifying under cross examination stated that the supervisor called them about alleged mistakes that they made and that it is true that Joyce, Jane and Eboso had accompanied them during the period they were being questioned.
26. On this score, I must add that the mere fact that the Respondents were invited for a hearing does not automatically mean that the same was fair and passed muster within the meaning of Section 41 of the Act.



27. Indeed, an admission by RW1 that a hearing took place was not sufficient to satiate the Appellant's burden of proof under Section 45(2) (c) as read together with Section 41 of the Act. In this regard, I must point out that the minimum requirements of a fair hearing as stipulated under Section 41 of the Act and reiterated by the Court of Appeal in the case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR are:
- (i) an explanation of the grounds of termination in a language understood by the employee;
  - (ii) the reason for which the employer is considering termination;
  - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; and
  - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.
28. In this case, there was no evidence of the manner in which the Respondents were notified of the reasons for which the Appellant was considering their termination. There was also no evidence of the manner in which the Respondents were invited for a hearing and if at all, they were notified of their right to be accompanied to the said hearing. Further, were the employees who accompanied the Respondents of their own choice or were chosen by the Appellant? Further, were the Respondents afforded an opportunity to ventilate their defence to whatever allegations?
29. In absence of any evidence from the Appellant's end, I return that he has failed to prove to the requisite standard that he terminated the Respondents' employment in a procedural manner within the meaning of Sections 45(2)(c) and 41 of the Act. Consequently, the termination of the Respondents was procedurally unfair hence unlawful.
30. All in all, I am persuaded that the Appellant did not prove to the requisite standard before the learned trial Magistrate, that the Respondents' termination from employment was fair and lawful in terms of Sections 41, 43 and 45 of the Act.
31. To that extent, the Court is unable to fault the finding by the learned trial Magistrate.

### **Reliefs?**

32. The trial Court having found that the Respondents' termination was unfair, awarded them compensatory damages equivalent to one month salary, notice pay and salary for days worked. As this Court has found that the Appellant failed to prove that the termination of the Respondents was fair and lawful within the meaning of Sections 41, 43 and 45 of the Act, I find no reason to disturb the said awards. Consequently, the said awards are sustained.
33. As a matter of fact, I find the real bone of contention to be the award of underpayments. Notably, the manner in which the trial Court arrived at the sums awarded as underpayments was not provided and justified. It is therefore the duty of this Court to reevaluate the record and ascertain whether the Respondents were underpaid and if so, to what extent.
34. The 1<sup>st</sup> Respondent averred that he was employed by the Respondent sometimes in March 2007 and was earning the sum of Kshs 7,500/= while the 2<sup>nd</sup> Respondent was employed sometimes in August 2009 and was earning the sum of Kshs 8,000/=. In this regard, the 1<sup>st</sup> Respondent sought to be paid the sum of Kshs 816,126/= while the 2<sup>nd</sup> Respondent sought to be paid the sum of Kshs 952,237/=.



35. Upon reviewing the relevant Legal Notices in respect of the years 2011, 2012, 2013, 2015, 2017 and 2018, providing for the minimum wage payable to employees in the category of the Respondents, it is evident that they were underpaid during certain periods hence they are entitled to the difference being the underpayment.

### **Orders**

36. The total sum of my consideration is that the Appeal is declined and the Court makes the following orders: -

#### **1<sup>st</sup> Respondent**

- (a) The award of one months' salary as compensatory damages, is sustained in the sum of Kshs 14,658.00.
- (b) The award of one month's salary in lieu of notice is sustained in the sum of Kshs 14,658.00.
- (c) The award of salary for 14 days worked is sustained in the sum of Kshs 7,892.00
- (d) The award of underpayment is sustained and adjusted to the sum of Kshs 356,104.90 (Kshs 693.00\*12 months) + (Kshs 1,766.30\*12 months) (Kshs 3,063.60\*24 months) + (Kshs 4,331.20\*24 months) + Kshs 6,460.80\*12 months) + (Kshs 7,158.85.30\*10 months) being underpayments from 1<sup>st</sup> May, 2011 upto 15<sup>th</sup> February, 2019.
- (e) The decretal amount in the sum of Kshs 378,572.00 is hereby set aside and the award is determined at Kshs 393,312.90.
- (f) Interest on the amount in (e) at court rates from the date this Judgment until full payment.

#### **2<sup>nd</sup> Respondent**

- (a) The award of one months' salary as compensatory damages, is sustained in the sum of Kshs 14,658.00.
- (b) The award of one month's salary in lieu of notice is sustained in the sum of Kshs 14,658.00.
- (c) The award of salary for 14 days worked is sustained in the sum of Kshs 7,892.00.
- (d) The award of underpayment is sustained and adjusted to the sum of Kshs 309,104.90 (Kshs 193.00\*12 months) + (Kshs 1,266.30\*12 months) (Kshs 2,563.60\*24 months) + (Kshs 3,831.20\*24 months) + Kshs 5,960.80\*12 months) + (Kshs 6,658.85\*10 months) being underpayments from 1<sup>st</sup> May, 2011 upto 15<sup>th</sup> February, 2019.
- (e) The decretal amount in the sum of Kshs 338,572.00 is hereby set aside and the award is determined at Kshs 346,312.90.
- (f) Interest on the amount in (e) at court rates from the date this Judgment until full payment.

37. As the Appeal has collapsed, costs in this Court and at the trial Court shall be borne by the Appellant and shall be pegged on the final award.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**STELLA RUTTO**

**JUDGE**

Appearance:



For the Appellant Ms. Muriungi

For the Respondents Mr. Nyawade

## **ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

