



REPUBLIC OF KENYA



KENYA LAW
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**Bridge International Academies Limited v Wasgongo (Appeal E045 of 2023)
[2023] KEELRC 3462 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E045 OF 2023
M MBARÚ, J
DECEMBER 19, 2023**

**BETWEEN
BRIDGE INTERNATIONAL ACADEMIES LIMITED APPELLANT
AND
KEVIN OKOTH WASGONGO RESPONDENT**

*(being an appeal from the judgment of the Senior Principal Magistrate Hon.
M. Nabibya in Mombasa CMELRC No. E463 of 2022 dated 18 May 2023)*

JUDGMENT

1. The background to this appeal is the claim filed by the respondent in Mombasa in CMELRC No E463 of 2022 on the grounds that he was employed by the appellant as the academy manager earning a wage of Kshs 16,395 but on 13 August 2019, the respondent summarily dismissed him under unclear circumstances and without being given any reasons. There was no due process or payment of his terminal dues. he claimed the following dues;
2.
 - a. Notice pay Kshs 16,395;
 - b. Unpaid salary for 13 days worked in August 2019 Kshs 8,197.50;
 - c. 112 leave days for years worked May 2014 to August 2019 at Kshs 70,624.62;
 - d. House allowance for 5 years Kshs 147,555;
 - e. Gratuity for 5 years Kshs 47,293.27;
 - f. 12 months Compensation at Kshs 196,740; and
 - g. Costs of the suit.



2. In response, the appellant admitted the respondent was an employee. He had a consolidated wage of Kshs 16,395 which constituted a basic wage of Kshs 14,359 and a house allowance of Kshs 2,036 per month. He was however not diligent in his duties and the appellant terminated employment for gross negligence and breach of the appellant's Child Protection Policy when the respondent failed to escalate incidences of corporal punishment and orchestrated reprisals against a pupil victim of corporal punishment. Such punishment is expressly prohibited in the appellant's Child Protection Policy; a fact that the respondent was reasonably aware of. The appellant followed the statutory guidelines under Section 41 of the Employment Act, 2007 (the Act) and issued the respondent with a notice to show cause to which he responded and was accorded an opportunity to make his representations. The decision to dismiss the respondent was arrived at following due process. He was paid his final dues of Kshs 7,500. The respondent took all his leave days, his wages were inclusive of a house allowance, there was no provisions of gratuity pay and the claims made were without merit.
3. The lower court heard the parties and in the judgment delivered on 18 May 2023 made a finding that termination of employment was unfair for want of a fair hearing. The respondent was awarded notice pay, leave pay, unpaid salaries for 13 days in August 2019, house allowance and compensation for unfair termination of employment.
4. Dissatisfied with the judgment, the appellant filed this appeal on five grounds that the lower court ignored the gross inadequacies of the respondent's evidence and hence arrived at wrong findings. The strict burden under Section 47(5) of the Employment Act, 2007 was ignored and by failing to consider the appellant's written submissions, the final awards were without proper basis and the appeal should be allowed with costs.
5. Both parties attended and agreed to address the appeal by way of written submissions.
6. The appellant submitted that the legal burden of proof under Section 43 of the Act is that the employer must have valid reasons leading to termination of employment while under Section 47(5) of the Act, the employee has the legal burden to prove that termination of employment was unfair. The lower court in analysing the evidence failed to consider such legal requirements as held in Pius Machafu v Lavington Security Guards Limited [2017] eKLR. The trial court made a finding that there was termination of employment without the respondent being given reasons which was not the case as he was issued with a notice to show cause over his gross negligence of duty, to which he responded and then summary dismissal notice issued. In his evidence, the respondent admitted that he had a duty to abide the appellant's Child Protection Policy but he failed to escalate a case of corporal punishment of a pupil which he ought to have done as the academy manager. The evidence that the subject matter was not reported to the police was immaterial. Termination of employment was fair and the grounds were justified and it was erroneous for the trial court to find this was unfair.
7. The appellant submitted that the motions of Section 41 of the Act were followed. The respondent was issued with a notice to show cause and allowed to respond. This was after conducting an investigation and the respondent was privy to the facts. In the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR the court held that the employee has the burden of proof under Section 47(5) of the Act to demonstrate that termination of employment was unfair. Where the employer has given valid reasons that existed at the time employment was terminated, then the burden is discharged.
8. The reliefs awarded were not justified. Compensation is not due in a case where summary dismissal is justified. The respondent would take his annual leave during school holidays. There was a consolidated wage inclusive of house allowance. The respondent was paid for days worked and the evidence by the respondent's witness, Gwenyi that Kshs 7,500 was paid was not challenged. The award of costs was



not justified and in its totality, the judgment of the lower court should be set aside with costs to the appellant.

9. The respondent submitted that he discharged his burden under Section 47(5) of the Act following his unfair termination of employment by the appellant. There were no valid reasons given and the appellant failed its twin burden under the law of justifying that there were valid and genuine reasons given and that it followed the mandatory procedures before the summary dismissal. With these lapses, there was unfair termination of employment as held in *Felix Mutie Musango v Tin Can Manufacturers Limited* [2020] eKLR that termination of employment is unfair where the employer fails to apply valid and fair reasons and if the procedure followed is not fair. The claim by the appellant that there was gross negligence where the respondent is alleged to have allowed corporal punishment was unilateral and without any investigations or warning being issued to the respondent. There was no hearing conducted to allow the respondent make his representations. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR the court held that before termination of employment can be found to be fair, procedural fairness is mandatory. The motions of Section 41 of the Act must be undertaken as held in *Ayub Imbira v Teachers Service Commission*. After the notice to show cause issued, the respondent was not allowed a hearing.
10. Notice pay was properly awarded in terms of Section 35 of the Act as well as compensation upon the finding that employment terminated unfairly as held in *Fredrick Obiero Owino v Bridge International Academies Ltd* [2019] eKLR. The appellant has not produced leave records to justify that the respondent took his annual leave and this award was justified. The award of house allowance is proper and justified in terms of Section 31 of the Act as no housing was allocated as held in *Kenya Union of Sugar Plantation & Allied Workers v Butali Sugar Mills Limited* [2021] eKLR. This appeal should be dismissed with costs.

Determination

11. This being a first appeal, the court is required to re-evaluate the evidence and make own conclusions. However, account must be given to the fact that the learned magistrate had the opportunity to hear the parties in evidence.
12. The issues which emerge for determination in this appeal are whether the finding that employment terminated unfairly was proper; whether the reliefs awarded were justified and who should pay costs.
13. On 13 August 2019, the appellant summarily dismissed the respondent from his employment on the grounds that you have gross negligence of duty in the following areas ... The appellant indicated that it had conducted investigations and found out that the respondent had not escalated the corporal punishment incidences that takes place at your Academy, victimising the pupil by organising for her suspension from the Academy even after the parent had complained this to you, suspending the pupil from the Academy without following the due process. These acts were found to constitute gross misconduct.
14. In his evidence, the respondent admitted that he was issued with the notice to show cause before the summary dismissal. The Child Protection Policy was not issued and he did not sign to it but he was aware that corporal punishment was not allowed in the academy. Any matters that required child protection, he was required to escalate such incidents of punishment.



15. An employer is allowed to summarily dismiss an employee under the provisions of Section 44(3) and (4) of the Act. However, the protections due to the employee are under Section 41(2) of the Act that;
- (2) 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.
16. These provisions have two parts. One, the employer must issue the employee with notice with allegations made to allow the employee to make a response. The other part is that the employer must allow the employee to attend and make his representations in the presence of another employee of his choice. This is the import of the judgment in the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited*, Cause No 74 of 2013 which held that whatever reasons for an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under Section 41 of the Act.
17. The respondent had the right to be informed of the charges made against him and done in the notice to show cause. He was given an opportunity to respond to these allegations in writing. But the employer had a responsibility to hear and consider any representations by the employee in the presence of another employee of his choice before making the decision to dismiss or give other sanctions.
18. The Court of Appeal in *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) has outlined these motions as follows;
- Under this Section, [Section 41 of the Act] four elements must thus be satisfied for summary dismissal procedure, [to be said to be fair, being: -
- a) An explanation of the grounds of termination in a language understood by the employee;
- b) The reason for which the employer is considering termination;
- c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d) Hearing and considering any representation made by the employee and the representative chosen by the employee.
19. These four elements must be discernible for an employer to be found to have met the threshold of Section 41 of the Act. These provisions are mandatory. Where the employer is not able to adhere to any element, the prevailing circumstances hindering must be demonstrated to the court to allow for a proper finding.
20. The appellant issued the respondent with a notice to show cause after conducting investigations. In evidence, the appellant called Samuel Odhiambo the human resource officer who testified that the claimant was invited to a disciplinary hearing and that ... the claimant was represented in the meeting. But I may not be able to give the name. there was no representative for claimant. Notice of termination was given but no notice pay.
21. No minutes were filed with regard to the disciplinary hearing. This lapse exposed the appellant. Upon the claim by the respondent, the legal burden to file all work records rested on the appellant as the employer pursuant to Section 10(6) and (7) of the Act. from the evidence of the human resource officer,



it is not clear whether the respondent was allowed the completeness of Section 41 provisions. That is, being accompanied by another employee of his choice at the disciplinary hearing.

22. The findings by the trial court that the issues relating to corporal punishment of the pupil were not reported to the police should not have dissuaded the court with regard to the disciplinary procedures availed to the respondent at the shop floor. The requirement to report the matter to the police is a procedure available to the appellant but did not stop the application of employment termination procedures regulated under the Act as held in *Attorney General & another v Andrew Maina Gitbinji & another* [2016] eKLR that internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. See *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

For lapse in due process, the finding that there was unfair termination of employment was proper, save for the above reasons. Pursuant to Section 45 and 35 of the Act, the respondent was entitled to notice pay and compensation.

However, in assessing compensation due to the employee, Section 45(5) of the Act requires the court to put into account various matters including the reasons leading to termination of employment and further the culpability of the employee. Save for want of due process, the respondent does not deny that the matters put to him in the notice to show cause were not correct. On 5 June 2019 the respondent wrote to a parent that the daughter (pupil) had been suspended due to indiscipline. The matter had not been escalated to the respondent before such sanction issued. In his evidence, the respondent confirmed that he was aware that all disciplinary matters had to be escalated to the appellant.

These are matters relevant and necessary for the court to address before making an award of compensation. The culpability of the employee and matters leading to termination of employment. the award of compensation for 9 months must be rationalised and given context. The fact that the respondent had worked for 5 years for the appellant was not sufficient for the lower court to make such an award before going into the motions of Section 45(5)(b) of the Act. even though there is discretion to award compensation, reasons necessitating an allocation of zero to twelve months' compensation must be given.

In this case, the award of 9 months is found without justification or any reason. For want of due process, an award of 3 months' gross wage is hereby found sufficient. The respondent was earning Kshs 16,395 x 3 all at Kshs 49,185 in compensation.

Notice pay is due as analysed above all at Kshs 16,395.

On the claim for unpaid salary for 13 days worked in August 2019, pursuant to Section 18(4) of the Act, the employee is entitled to due wages earned, the reasons leading to termination of employment notwithstanding and unless the employee has any liabilities with the employer. In this case, the evidence that the respondent was paid terminal dues of Kshs 7,500 is not challenged. In the notice of summary dismissal, the appellant stated that notice pay was not due, which is addressed, and that upon the respondent undertaking clearance, he would be paid his terminal dues.

23. On the claim for 112 leave days earned from May 2014 to August 2019, in the Memorandum of Claim, the respondent defined the appellant as a learning institution. He was the academy manager. In response, the appellant did not clarify as to whether the respondent was in management or undertaking



teaching duties regulated under the system where during scheduled school holidays he would also not be required to be at the academy.

24. Under the employment contract, the parties agreed that the respondent had 1.75 days of annual leave per month worked. the dates for allocation of such annual leave were listed in the Academy Calendar and were to be taken within the 12 months.
25. Section 28 of the Act give a right to every employee to be allowed annual leave. Section 28(2) of the Act only allow such annual leave to accumulate for 18 months only unless the employee has applied to take annual leave but the employer for good cause allows the employee to remain at work. Assessment of untaken leave days should factor these provisions. On the gross wage of Kshs 16,395 in tabulating the due annual leave compensation, basic pay applies. the respondent had a basic wage of Kshs 14, 359 and for 18 months, compensation for untaken leave days is 33 days all at Kshs 18,225.
26. On the claim for house allowance, the respondent was under a written contract of employment. The position of academy manager is not regulated under the Minimum Wage Orders. The wage of Kshs 16,397 compared to the lowest general wage due is over and above the minimum wage. in the payment statements filed by the appellant, the gross wage was desegregated with a basic pay and a house allowance. Such factored, the respondent is removed from regulated employees, a claim for house allowance was not justified.
27. The claim for gratuity pay was well addressed by the learned magistrate with a proper finding. Such was not a term of the employment contract.
28. Costs in employment and labour relations disputes do not follow the course. These are awarded at the discretion of the court for good cause pursuant to Section 12(4) of the *Employment and Labour Relations Court Act*, 2011. This is unlike civil and commercial disputes where costs follow the suit. In *Alfred Mutuku Muindi v Rift Valley Railways (Limited)* [2015] eKLR the court held that

The couching of the provision [section 12(4) of the *Employment and Labour Relations Court Act*, 2011 gives the trial court discretionary powers to award costs or not. The costs in these kind of claims do not automatically follow the event unlike other civil claims. The court gave reasons for declining to award costs to the appellant, stating that he did not comply with the directions of court as to filing and service of written submissions and only did so long after the respondent had filed.
29. The appeal partially successful, each party ought to meet own costs of this appeal and the lower court proceedings.
30. As analysed above, Judgment delivered on 18 May 2023 in Mombasa MCELRC No E463 of 2022 is hereby reviewed in the following terms
 - a. A declaration that employment terminated unfairly;
 - b. Compensation awarded at 3 months' gross wage at Kshs 49,185
 - c. Notice pay at Kshs 16,395;
 - d. Leave pay at Kshs 18, 225; and
 - e. Each party to bear own costs in this appeal and lower court.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2023.

M. MBARŪ



JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

