



**Yellowline Logistics v Langat (Appeal E001 of 2021)
[2022] KEELRC 3796 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3796 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E001 OF 2021**

**AK NZEI, J
JULY 28, 2022**

BETWEEN

YELLOWLINE LOGISTICS APPELLANT

AND

BENSON KIPTOO ARAP LANGAT RESPONDENT

*(An appeal from the judgment of Hon. Kiage delivered
on 11th December 2020 in CM -ELR NO. 347 of 2019)*

JUDGMENT

1. The appellant herein was the respondent in Mombasa Chief Magistrate’s Court Employment Case No. 347 of 2019, while the Respondent was the Claimant, whereby the Respondent sued the Appellant alleging unfair termination of employment, and claiming a total sum of ksh. 677,909, made up of compensation for alleged unfair termination of employment, payment in lieu of notice, salary for days worked in April 2018, payment for leave days accrued during three years of employment, unpaid house allowance and severance pay.
2. The respondent (claimant in the lower court suit) pleaded that he was engaged by the appellant as long-distance driver in January 2016 earning ksh. 29,000 per month, and retained continuous employment as such driver upto the time of termination of employment on April 10, 2018. The respondent further pleaded:-
 - a. that vide a letter dated April 10, 2018, his services were terminated by the appellant on allegations of engaging in suspicious activities.
 - b. that the said termination was wrongful, unlawful, abrupt and in total contravention of the relevant labour laws as the Respondent was not subjected to substantive and procedural justice, the Appellant did not act in accordance with justice and equity and did not comply with



the requirements of section 41 of the Employment Act, the respondent was not afforded an opportunity to defend himself, and was not paid his terminal dues.

3. The appellant filed response to the respondent's claim on 28/6/2019 and admitted having employed the Respondent as pleaded by him. The appellant however denied having unfairly terminated the respondent's employment, and contended that due process was followed and the respondent was accorded fair hearing and was given an opportunity to explain himself. The appellant denied having dismissed the respondent without justifiable cause, and pleaded that the respondent had taken paid leave from time to time during the period of employment, and had been paid all his dues. The appellant prayed that the claimant's claim be dismissed withcosts.
4. After hearing both parties in a full trial, the trial Court delivered its judgment on December 11, 2020 in favour of the respondent herein and made awards as follows:-
 - a. six months' salary in compensation for unfair termination of employment.....ksh 174,000
 - b. one month salary in lieu of notice.....ksh 29,000
 - c. leave allowance.....ksh 25,654
 - d. unpaid salary for April 2018.....ksh 11,153
 - e. house allowanceksh 113,100Total ksh 352,907

5. Aggrieved by the said judgment, the appellant filed the present appeal, raising a total of twelve (12) grounds of appeal, which I summarise as follows:

The Honourable Magistrate erred in law and in fact:

- a. in allowing the respondent's claim.
- b. in holding that the respondent's termination was unprocedural and substantially unfair despite the appellant having shown reason to terminate him on grounds of gross misconduct.
- c. in failing to appreciate section 44 of the Employment Act 2007 and holding that the respondent was entitled to one month salary in lieu of notice despite him having been summarily dismissed for gross misconduct.
- d. in awarding the respondent accrued leave days despite the appellant producing documentary evidence showing that the respondent had taken all his leave days and had no pending leave days left.
- e. in awarding the respondent alleged unpaid house allowance despite the appellant stating that the respondent's salary was an all-inclusive sum, and the respondent tendered no evidence to prove that he was never paid house allowance.
- f. in awarding the respondent six(6) months salary as compensation for unfair termination despite this being excessive due to the nature of gross misconduct committed by the respondent, which resulted to huge losses for the appellant.
- g. by failing to consider the Appellant's statement, documentary evidence adduced, submissions and legal authorities relied on in support, and instead choosing to rely heavily on the Respondent's statements.



- h. by placing the burden of proof on the Appellant entirely and none at all on the Respondent, allowing the Respondent's claim which had not been proved to the required standards, and making excessive and unjustified awards.

I will handle all the grounds of appeal together.

6. The trial court identified two issues for determination, being
 - a. whether the respondent's termination was unlawful and unfair.
 - b. what reliefs, if any, the respondent was entitled.
7. The trial court made a finding that termination of the respondent's employment was unfair and unprocedural, the appellant having failed to establish what suspicious activities the respondent was engaged in and therefore failing to prove misconduct on the part of the respondent. The trial Court further noted that although the appellant's General Manager, one Muhsin Said, testified that the respondent was accorded a hearing before the decision to terminate him was taken, the witness admitted under cross-examination that he did not have the minutes of the said hearing.
8. This is a first appeal, and this court is obligated to re-evaluate the evidence presented before the trial court and to arrive at its own decision thereon, taking into account the fact that it never saw the witnesses testify.
9. It was not disputed that the Respondent was employed by the Appellant, that he was served with a notice to show cause dated April 6, 2018, to which he responded vide a letter dated April 10, 2018, and that he was summarily dismissed on April 10, 2018. The termination letter, if any, did not form part of the Record of Appeal filed in this court, and I did not, therefore, have an opportunity to see it.
10. At the trial, the respondent adopted as his testimony his witness statement which he said was recorded on March 25, 2019. The said statement, which forms part of the record of appeal filed herein, is dated April 2, 2019, and basically replicates the averments made in the respondent's memorandum of claim filed in the trial court. The respondent further testified that he was given a show cause letter on April 6, 2019 and that he wrote a response to the same on April 10, 2019, upon which his employment was terminated.
11. It was the respondent's further testimony that the termination letter indicated that he (the respondent) had been involved in suspicious activities. He further told the Court that he was not given a hearing. Cross-examined, the respondent admitted having taken leave in one year during the period of his employment, and that for two years he did not take leave. That he applied for leave in July 2016 and July 2017 but the same was not approved.
12. On his part, the respondent's witness, Muhsin Said (DW1), adopted his recorded statement dated 31st July 2019 as his testimony and produced in evidence documents which included the show cause letter dated 6th April 2018 and the respondent's response to it dated 10th April 2018. The witness (DW1) further testified that a hearing was held and a decision made to terminate the claimant. The appellant did not, however, produce and/or exhibit any record and/or minutes of the alleged hearing, neither did he state the date of such hearing and those in attendance.
13. The appellant (DW1) further testified that the respondent refused to take his terminal dues. The respondent did not, however, exhibit any documents to back up that allegation. No tabulation of such dues was exhibited.
14. In view of the pleadings filed and evidence presented before the trial Court, two issues present for determination. These two issues are the same as identified by the trial Court; and are:-



- a. whether termination of the Respondent's employment was unlawful and unfair.
 - b. whether the Respondent was entitled to the reliefs sought.
15. In determining whether or not termination of an employee's employment was unfair, reference must always be made to section 41 of the *Employment Act*, which mandatorily provides as follows:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

16. The appellant did not demonstrate that it complied with the foregoing mandatory statutory procedural requirements. It was not demonstrated that the Respondent was given a hearing before termination of his employment, and in the presence of a fellow employee or union official as by law required. His response to the show cause letter should have been followed by a disciplinary hearing before a decision to terminate his employment could be made.

17. The mandatory statutory procedural requirements that must be adhered to by any employer contemplating termination of an employee's employment were summed up by the Court of Appeal in the case of *Pius Machafu Isindu -vs- Lovington Security Guards Limited* [2017] eKLR as follows:-

“there can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove that the reasons are valid and fair (Section 45), prove that the grounds are justified (section 47(5)) amongst other provisions. A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally the remedies for breach set out under Section 49 are also fairly onerous and generous to the employee...”

18. The Court of Appeal held as follows in the case of *Kenfright (E.A) Limited -vs- Benson K. Nguti* [2016] eKLR:-

“apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in



agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding..."

19. On the first issue, I find and hold that termination of the respondent's employment fell short of mandatory procedural requirements of the statute, and was therefore unlawful and unfair.
20. On the second issue, and having made a finding that termination of the respondent's employment was unlawful and unfair, I do uphold the trial Court's award of six months' salary as compensation for unfair termination of employment. The said award is fair, taking into account the circumstances and the manner in which the respondent's employment was terminated.
21. The award of one month salary in lieu of notice was deserved, as the appellant did not demonstrate that the respondent was served with termination notice before his employment was terminated. The appellant testified that the respondent had not been paid his dues. The award of ksh. 29,000 being one month salary in lieu of notice is upheld.
22. On the claim for leave payment, the trial court rightly noted that the respondent had worked for the appellant for two years and two months, and was entitled to twenty one days leave for each year served and that the respondent had admitted having taken leave during one of the years served. The trial court rightly found that the respondent was entitled to 23 days leave at the time of termination and awarded him ksh. 25,654.
23. The appellant, being the custodian of all employment records on the respondent's employment pursuant to section 74 of the *Employment Act* did not produce in court any documents to controvert the respondent's evidence on his claim for leave pay. I uphold the said award of ksh. 25,654.
24. I uphold the trial court's award of ksh. 11,153 being salary for ten days worked by the respondent in April 2018. Again, the Appellant did not adduce any evidence to show that the Respondent was paid for the days worked in April 2018. As already stated herein, the appellant testified that the Respondent was not paid his terminal dues upon termination.
25. On the claim for unpaid house allowance, the appellant's allegation that the respondent's salary (ksh.29,000 per month) included house allowance was not backed up by any documentary evidence. No employment contract was produced in evidence to demonstrate that the respondent's salary was consolidated and included house allowance. Further, the appellant did not exhibit the respondent's pay statement to show that the respondent's salary included house allowance. House allowance was the respondent's entitlement pursuant to section 31 of the *Employment Act*. I uphold the award of ksh. 113,907 being unpaid house allowance.
26. The appellant lamented in the appeal that the trial court relied too much on the respondent's statements and not on his. Section 10(7) of the *Employment Act* provides:-

"If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."
27. Section 47(5) of the *Employment Act* on the other hand provides:-

"for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or unlawful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."



28. The trial Magistrate was within the law in placing a burden of proof on the appellant, having been the employer. I have done likewise /in this judgment.
29. In sum, and having considered written submission by both parties, I find no merit in the appeal. The appeal fails, and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... for Respondent

