



**Ameriken Limited v Moraa Nyamwange & another (Appeal E079 of 2020)  
[2022] KEELRC 12691 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12691 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E079 OF 2020  
J RIKA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**AMERIKEN LIMITED ..... APPELLANT**

**AND**

**DIVINAH MORAA NYAMWANGE ..... 1<sup>ST</sup> RESPONDENT**

**ROSE KWAMBOKA NYAMKEKI ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the decision of Hon Mrs GA Mmusi, SPM, at CMC Mililani Commercial Courts, in Claim No 415 of 2019, delivered on 19th February 2020)*

**JUDGMENT**

**Rika J**

Court Assistant: Emmanuel Kiprono

Kayugira & Company Advocates for the Appellant

Charles Gomba & Company Advocates for the Respondents

1. The respondents herein, filed a joint statement of claim at the trial court, on March 27, 2019.
2. The averred that they were employed by the appellant as tissue paper packers, between January 2017 and August 14, 2018
3. They were dismissed on the allegation that they stole 2 rolls of tissue paper from the appellant. Theft was alleged to have taken place on August 11, 2018.
4. They sought judgment against the appellant for notice equivalent of 1-month salary; house allowance in arrears for the period worked; annual leave over the same period; pro-rata leave; and 12<sup>th</sup> months' salary in compensation for unfair termination.



5. The trial court heard both parties and determined through its Judgment delivered on February 19, 2020, that the respondents were entitled to notice; house allowance; annual leave; and 12 months' salary in compensation - totalled at Kshs 193,500 each. They were granted costs and interest.
6. The appellant filed a memorandum of appeal dated November 12, 2020, advancing 9 grounds of appeal. They are that: -
  - a. The trial court erred in finding that termination was unfair and unlawful, yet there was no such prayer in the claim.
  - b. The trial court erred in finding that the respondents were permanent and pensionable employees.
  - c. The trial court erred in finding that failure by the appellant to initiate criminal proceedings against the respondents meant there were no valid reasons to justify dismissal.
  - d. The trial court erred in failing to find that the respondents were casual workers.
  - e. The trial court failed to consider the appellant's response and submissions occasioning the appellant miscarriage of justice.
  - f. The trial court erred in awarding maximum compensation equivalent of 12 months' salary without justification.
  - g. The trial court misapplied the law in awarding notice pay to casual workers.
  - h. The trial court erred in awarding annual leave to casual workers.
  - i. The trial court did not give its ratio decidendi in arriving at the impugned judgment.
7. The appellant prays that the decision of the trial court is quashed and set aside; the claim is dismissed; and costs of the appeal and the trial be provided for.
8. Parties agreed to have the appeal considered and determined on the strength of the record of appeal and their submissions. They confirmed filing and exchange of the submissions on June 23, 2022.

**The Court Finds: --**

9. Ground [a] is unsuccessful. The respondents need not have specifically prayed, that the trial court finds termination was unfair and unlawful. The pleadings and evidence by both parties directed the trial court to making the finding. The respondent pleaded that they were not issued notification of hearing and that there was no disciplinary hearing. They asked for 12 months' salary, which any reasonable man, in employment and labour relations jurisdiction, would know, is pleaded as a remedy for unfair termination. They pleaded and stated in their evidence that termination was not based on valid reason. The appellant pleaded at paragraph 8 of the statement of response, that termination was lawful and fair. The same stance was adopted in 3 witness statements filed by the appellant. The statements uniformly stated that dismissal was lawful and reasonable. The trial court in any event, did not make an order declaring that termination was unfair, but made a finding that termination was unfair, which was within the responsibility of the trial court to find. This ground has no merit and is declined.
10. Ground [b] is declined. The respondents had worked for 1 year and 8 months. DW2 told the court he was not able to say on which month the respondents did not report to work. There was no evidence given by the appellant, that service was truncated. The trial court relied on section 37 of the [Employment Act](#), concluding correctly, that the respondents were regular employees.



11. Ground [c] is allowed, but the court does not think that it affected the overall finding on lack of reason or reasons to justify termination. Page 14 of the typed proceedings, line 14, states that, “ the claimants were not charged in the criminal court hence, as provided for by section 45 of the Employment Act, the respondent have not demonstrated that the reasons for terminating the claimants were valid and fair.” The employer is only required under section 43 of the Employment Act, to genuinely believe to exist, matters which cause the employer to terminate the employee’s contract. The appellant genuinely believed that the respondents were involved in theft of its tissue papers. There was no obligation to report to the police. It was in the discretion of the employer to report or not to report. Failure to report did not have any effect of the validity and fairness of termination reason or reasons. The court however finds that even without this consideration, the conclusion by the trial court that the appellant did not show valid reason or reasons, holds. There were other parameters, beyond failure to report theft to the police.
12. Ground [d] is a rehash of ground [b], and is declined for the same reasons.
13. Ground [e] is not borne out by the proceedings of the trial court. The trial court gave a summation of the parties’ respective cases in its judgment. The appellant does not say what aspect of its pleadings and submissions were disregarded by the trial court in its judgment. This ground is declined.
14. Ground [f] bears some weight and is partly allowed. The trial court granted maximum compensation equivalent of 12 months’ salary to the respondents. They had worked for 1 year 8 months. section 49 [4] requires the court to take into account the matters listed thereunder, in granting remedies. The trial court did not indicate if due regard was made to this provision. An award of 12 months’ salary, which is the ceiling, for employees with only 1 year and 8 months’ service, was in the excess. The court would adjust compensation awarded to the respondents, to equivalent of 5 months’ gross salary each. Their basic monthly salary was Kshs 10,000. Payslips of 1<sup>st</sup> respondent for the months of February 2018 and May 2018, show that she was paid basic pay. There was no housing element. The appellant justified non-payment on the fact that it considered the respondents to be casual workers, disentitled the benefits due to regular Employees under the Employment Act. This has been discounted by the court. The trial court awarded them house allowance in arrears correctly. Their gross pay was Kshs 11,500 which for 5 months, adds up at Kshs 57,500. The award of 12 months’ salary at Kshs 138,000 is substituted for an award of 5 months’ salary each, at Kshs 57,500.
15. Grounds [g] and [h] are declined. The court has concluded that the trial court correctly found that the respondents were regular employees, meriting all benefits and protections due to a regular employee, under the Employment Act.
16. Ground [i] has no merit. The trial court gave the rationale for its decision. The appellant may not have agreed with the rationale, but that cannot be the same thing as saying there was no rationale for the decision. The trial court explained why the respondents were deemed to be regular employees; why notice was payable; why house allowance was awardable; why annual leave was due; and why termination was unfair and remediable through compensation. The court posed the question, why the 2<sup>nd</sup> respondent’s services were terminated, if the bag in which the tissue paper was found, belonged to the 1<sup>st</sup> respondent, as stated by DW1. *Ratio decidendi*, is all about why. The trial court gave clear reasons, for its decision on all aspects of the dispute, except perhaps for the award of maximum compensation, which this court has corrected.

**IT IS ORDERED: -**

- a. The appeal is partly allowed.



- b. The judgment of the trial court is adjusted, granting the respondents compensation equivalent of 5 months' salary each, at Kshs 57,500.
- c. Ground [c] above [which is ground 4], in the memorandum of appeal is sustained.
- d. Costs in the trial to be paid by the appellant as ordered by the trial court.
- e. No order on costs for the appeal.

**Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 29<sup>th</sup> day of September, 2022.**

**James Rika**

**Judge**

