



**Mayfair Holdings Limited v Angech (Appeal E029 of 2021)
[2022] KEELRC 3915 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3915 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E029 OF 2021
S RADIDO, J
SEPTEMBER 21, 2022**

BETWEEN

MAYFAIR HOLDINGS LIMITED APPELLANT

AND

PHILIP ODUOR ANGECH RESPONDENT

(Being an appeal from the judgment of Hon R K.Ondieki (SPM) in Kisumu ELRC No 40 of 2019)

JUDGMENT

1. In a judgment delivered on July 12, 2021, the trial court found breach of contract and that the termination of the employment of Philip Oduor Angech (the respondent) was unfair and awarded him compensation, pay in lieu of notice, accrued leave, salary arrears and costs.
2. Mayfair Holdings Ltd (the appellant) was dissatisfied, and it filed a memorandum of appeal on August 11, 2021, contending:
 - (1) That the learned magistrate misunderstood the entire case hence arriving at a wrong conclusion.
 - (2) That the learned magistrate failed to take into consideration the evidence of the defence witness.
 - (3) That the learned magistrate erred in giving all the awards that he gave as the claimant was lawfully terminated.
 - (4) That the learned magistrate failed to consider the defendant's written submissions hence arriving at a wrong conclusion.
 - (5) That the learned magistrate gave awards that were excessive in the circumstances.



3. The appellant prayed that this court set aside the trial court's judgment.
4. The appellant filed a record of appeal on April 7, 2022 and a supplementary record of appeal on April 28, 2022.
5. Pursuant to court orders given on May 9, 2022, the appellant filed its submissions on June 22, 2022, and the respondent on July 5, 2022.
6. The court has considered the record of appeal and the submissions.

Role of the Court on the first appeal

7. The Court of Appeal pronounced itself on the role of a first appellate court in *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212 thus:

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

8. The court will bear in mind the caution of the Court of Appeal while reconsidering the evidence and proceedings before the trial court.

Unfair termination of employment

9. The trial court reached the decision that the summary dismissal of the respondent was unfair on the ground that he was not afforded an opportunity to be heard as the disciplinary hearing was purportedly held when the respondent was in custody.
10. The court has reviewed the evidence. The record shows that the respondent was arrested and placed in police custody on November 10, 2018 and was arraigned before the magistrates court on November 12, 2018.
11. The appellant produced minutes to show that it conducted a disciplinary hearing on November 11, 2018, when the respondent was in police custody.
12. The appellant was aware that the respondent had been arrested by the police on November 10, 2018 and was eventually charged on November 12, 2018.
13. The appellant's assertion that a disciplinary hearing was held while the respondent was in custody is suspect. It did not establish that a hearing was held. The union representative who allegedly attended the hearing was not called. Its decision to hold a disciplinary hearing just a day after the arrest without confirming whether the respondent would be available was unfair and contrary to the requirement to afford an employee sufficient time or facilities to defend self.
14. Section 41(2) of the *Employment Act, 2007*, has put a higher threshold regarding summary dismissals. It contemplates an oral disciplinary hearing.
15. From comparative jurisdiction, the Labour Appeal Court of South Africa in *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council (MEIBC) and Ors* (2010) ZALAC 7 opined that:

it may have been impossible for appellant to hold a pre-dismissal hearing while the fourth respondent was incarcerated. But, merely providing fourth respondent with a letter informing him in writing of



the decision to dismiss him and the reasons for the dismissal while he was in prison did not constitute a fair opportunity for fourth respondent to present his case.

16. This court finds the statement of law generally applicable.
17. The court, therefore, agrees with the finding by the trial court that the summary dismissal of the respondent was procedurally unfair.

Excessive awards

Compensation

18. The factors a court should consider in awarding compensation for unfair termination of employment are set out in section 49(4) of the [Employment Act, 2007](#).
19. The trial court considered that at the time of judgment, the criminal charges facing the respondent were still pending and that he was presumed innocent until proven guilty in awarding compensation equivalent to 6 months of gross wages.
20. Such is one of the factors contemplated by section 49(4)(b) of the [Employment Act, 2007](#). However, the provision also requires the court to consider the extent of the employee's contribution to the termination of employment.
21. The respondent faced serious misconduct allegations, and the appellant placed before the trial court extracts of records to show that the respondent was manipulating the sales records and sending different sets of records to accounts and audit departments.
22. This court further notes that the record indicates that the respondent had served the appellant for about 7 years.
23. Considering the above, this court is of the view that the trial court did not consider all the relevant factors and therefore awarded compensation not proportionate to the facts of the case.
24. The court will reduce the compensation to the equivalent of 3 months' gross salary (gross salary was Kshs 50,050/-).

Pay in lieu of notice

25. The respondent had served the appellant for about 7 years, and he was awarded the equivalent of 2 months' salary in lieu of notice in the sum of Kshs 101,700/-.
26. The contract between the parties at the time of separation provided for 2 months' notice or pay in lieu of notice for an employee who had served from 5 years to 10 years.
27. Salary in lieu of notice is ordinarily computed using basic salary. The claimant's basic salary as of October 2018 was Kshs 33,783/-.
28. The trial court used the gross salary to compute the salary in lieu of notice.
29. This was an error, and the correct figure should have been Kshs 67,566/-.
30. The court, therefore, sets aside this head of relief and substitutes the sum of Kshs 101,700/- with an award of Kshs 67,566/-.



Unpaid leave, leave allowance and salary arrears for November 2018

31. The appellant's witness admitted that there was no proof that the terminal dues outlined in the final dues schedule produced in court were paid to the respondent, and the court will not disturb the findings/awards.

Conclusion and Orders

32. From the foregoing, the appeal partially succeeds and the court orders:

- i. Award of compensation substituted to Kshs 150,150/-.
- ii. Award of pay in lieu of notice substituted to Kshs 67,566/-.

33. The other awards by the trial court are not disturbed.

34. Each party to bear the costs of the appeal. respondent to have the costs before the trial court.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 21ST DAY OF SEPTEMBER 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Otieno, Yogo, Ojuro & Co. Advocates

For Respondent Owiti, Mwalo, Odhiambo & Associates, Advocates

Court Assistant Chrispo Aura

