



REPUBLIC OF KENYA



**Mokaya v Mini Bakeries Ltd (Appeal E034 of 2021)  
[2022] KEELRC 13327 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13327 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E034 OF 2021  
S RADIDO, J  
NOVEMBER 30, 2022**

**BETWEEN**

**GEOFFREY MICHIRA MOKAYA ..... APPELLANT**

**AND**

**MINI BAKERIES LTD ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of Honourable  
J. Wambilianga darte3d and delivered at Kisumu on the 13th  
September 2021 in original Kisumu CMCC ELRC No. 86 of 2020)*

**JUDGMENT**

1. Geoffrey Michira Mokaya (the appellant) sued Mini Bakeries Ltd (the respondent) before the Magistrates Court, alleging unfair termination of employment.
2. In a judgment delivered on September 13, 2021, the honourable trial magistrate found the cause without merit and dismissed it.
3. The appellant was aggrieved, and he lodged a memorandum of appeal with the court contending:
  - (1) The learned trial magistrate erred in law and fact in dismissing the appellant's suit.
  - (2) The learned trial magistrate erred in law in failing to find that the appellant had proven his case on a balance of probabilities.
  - (3) The learned trial magistrate erred in law and fact in misconstruing the evidence tendered by the appellant in favour of the respondent.
  - (4) The learned trial magistrate erred in law and fact by failing to find that the respondent failed to discharge the burden that was placed upon it to demonstrate the reasons for terminating the appellant's services.



- (5) The learned trial magistrate erred in fact in failing to find that the termination of the appellant's services was unfair hence unlawful.
- (6) The learned trial magistrate erred in law and in fact in failing to take into consideration the submissions made by the appellant.
- (7) The judgment was against the weight of evidence.
4. The appellant filed the record of appeal on August 25, 2022, and submissions on October 21, 2022.
5. The respondent filed its submissions on November 21, 2022.
6. The court has considered the record and submissions.

### **Role of the Court on first appeal**

7. The role of a first appellate court was discussed in *Kamau v Mungai (2006) 1 KLR 150* where it was held that:

this being a first appeal, it was the duty of the court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
8. This court will abide by the interdict on its role as a first appellate court.

### **Unfair termination of employment**

#### **Procedural fairness**

9. The respondent issued a show-cause notice dated November 19, 2019 to the appellant, outlining 7 allegations he was requested to respond to. The appellant made a written response to the show-cause.
10. The respondent after that invited the appellant to attend an oral hearing on November 25, 2019, and he attended. The respondent had notified the appellant of a right to be accompanied.
11. The court is satisfied that the respondent complied with the statutory elements of procedural fairness as contemplated by sections 35(1) and 41 of the *Employment Act*, 2007.

#### **Substantive fairness**

12. Sections 43 and 45 of the *Employment Act*, 2007, places a burden on the employer to prove the validity and fairness of the reasons for terminating an employment contract.
13. The respondent called 1 witness to discharge the burden. The witness testified that the appellant handed over keys to his juniors contrary to the guidelines in place, he superintended production of underweight bread, manipulated dispatch records and payment vouchers, brought yeast into the bakery without authorisation, among other allegations.
14. During cross-examination, the witness admitted that records implicating the appellant had not been filed/produced in court.
15. Some of the allegations against the appellant were record based.
16. The records, such as manipulated payment vouchers or dispatch notes constituted the best evidence on the respondent's side but were not produced.



17. The other testimony by the respondent required some corroboration (such as handing over keys to unauthorised staff or bringing in yeast without permission).
18. After reviewing the evidence placed before the trial court, this court regrets to conclude, contrary to the findings by the trial court, that the respondent did not discharge the burden expected of it by sections 43 and 45 of the *Employment Act*, 2007.

### **Appropriate remedies**

19. The appellant sought for reinstatement and compensation. He served the respondent for nearly 16 years. He was paid terminal benefits.
20. This court is of the view that the equivalent of 4 months' salary would be appropriate (gross salary at separation was Kshs 70,000/-).

### **Conclusion and Orders**

21. The court sets aside the order dismissing the cause and substitutes it with an order finding the dismissal unfair.
22. The appellant is awarded Kshs 280,000/- as compensation.
23. Appellant to have costs of appeal and before the trial court.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2022.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For appellant Bruce Odeny & Co Advocates

For respondent Owiti, Otieno & Ragot Advocates

Court Assistant Chrispo Aura

