



REPUBLIC OF KENYA



KENYA LAW
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**Juma v United Millers Limited (Appeal E009 of 2024)
[2025] KEELRC 85 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 85 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E009 OF 2024
NZIOKI WA MAKAU, J
JANUARY 23, 2025**

BETWEEN

RICHARD ODONGO JUMA APPELLANT

AND

UNITED MILLERS LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of Hon. Maureen Shimenga
(SRM) in KISUMU CMELRCC NO. E112 OF 2022 dated 14th March 2024)*

JUDGMENT

1. In a judgment delivered on 14th July 2023 the Senior Resident Magistrate found that United Millers Ltd (the Respondent) had rightfully terminated Richard Odongo Juma's (the Appellant) employment for acting contrary to company policies and rules. She dismissed the claim, and directed that the Appellant be issued with a certificate of service within 30 days.
2. The Appellant was dissatisfied and he lodged a Memorandum of Appeal and Record of Appeal with this Court dated 31st July 2024, contending that:
 1. The Learned Magistrate erred in fact and law by determining that the Claimant contravened the Respondent's policies and rules which did not exist at all.
 2. The Learned Magistrate erred in fact and law by failing to interpret the law regarding substantive and procedural fairness on dismissal issues.
 3. The Learned Magistrate erred in fact and law by failing to properly interpret the evidence on record thereby determining that the Claimant did not prove his case on a balance of probability.
3. Pursuant to directions of the Court, the instant Appeal was disposed of by way of written submissions.



Appellant's Submissions

4. The Appellant submits that the Respondent was on a mission to target him and identifies the following issues for determination:
 - i. Whether his summary dismissal met the requisite statutory standard.
 - ii. Whether the trial Magistrate erred in her conclusion regarding the substantive and procedural fairness of the dismissal.
 - iii. Whether he is entitled to the reliefs sought.
5. On the first issue, the Appellant submits that the grounds for summary dismissal, as outlined in section 44 of the *Employment Act*, were neither pleaded nor proven by the Respondent. He refers to the definition of gross misconduct as an act of misconduct serious enough to justify immediate dismissal from employment, as stated in the case of *National Union of Water and Sewerage Employees v Meru Water & Sewerage Service ELRC Cause No. 44 of 2012* (unreported). The Appellant submits that the evidence presented before the Magistrate's Court only demonstrated that he was bridging the gap between the Respondent and its customers. He emphasizes that all the money received was properly channelled to the Respondent, and that no customers who allegedly experienced extortion lodged complaints or were called to testify.
6. The Appellant further submits that the arrangements he made were not prohibited by the Respondent's terms, conditions, or policy. For this reason, he argues that his dismissal was unfair, referencing the case of *Gas Kenya Limited v Odhiambo* (Appeal E006 of 2022) [2022] KEELRC 3930 (KLR) (22 September 2022) (Judgment) where Baari J. stated:

"In my opinion, premised on the ground that the Appellant has not discharged its burden of proof in relation to the reasons for the Respondent's summary dismissal, I find the reason given for the summary dismissal invalid and unjustified, considering that no incident or loss occurred that resulted in loss or damage of the Respondent's employer/client's property.

The charges levelled against the Respondent aforesaid, do not constitute the grounds set out under section 44(4) of the *Employment Act* as acts of gross misconduct to warrant summary dismissal.

Further, although the *Employment Act* allows an employer to make regulations expanding the grounds that may constitute acts of gross misconduct over those set out in section 44(4), there is no proof that the Appellant had formulated additional grounds, and whether the additional grounds if any, were brought to the attention of the Respondent.

In light of the foregoing, I find the grounds given for the Respondent's summary dismissal unreasonable, invalid and unjustified."

7. On the second issue, the Appellant submits that his termination of employment was both substantively and procedurally unfair. He argues that the Magistrate's finding, which claimed he had violated the company's rules in the absence of evidence to support such policies, went against the principle of proof on a balance of probabilities typically applied in civil cases. To support this argument, the Appellant cites the case of *Eldoret Express Ltd v Otako (Civil Appeal 18 of 2021)* [2024] KEHC 9155 (KLR) (19 July 2024) (Judgment), in which the court faulted the Trial Magistrate for disregarding the Respondent's proof of injuries, asserting that the burden of proof was satisfied by the medical report. The Appellant also cites sections 45(4)(b), 47(5), 43, and 45(2) of the *Employment Act* and relies on the case of *Josephine. M. Ndungu & others v Plan International Inc.* [2019] eKLR, where the Court



held that section 47(5) bars an employer from terminating an employee's contract unless there is a valid reason and the procedure followed is fair.

8. Further, the Appellant submits that the Respondent failed to comply with the procedural fairness requirements under section 41 of the *Employment Act* by not granting him a hearing. He relies on the case of Josephine M. Ndungu & others v Plan International Inc. (supra), where the Court emphasized that “fair procedure” entails providing the employee with an opportunity to be heard before termination of employment. Regarding the reliefs sought, the Appellant asserts his entitlement based on the demonstrated substantive unfairness and his 20 years of service with the Respondent. He requests the court to award him one month's salary in lieu of notice and 12 months' compensation for unfair termination, as provided under sections 49 and 50 of the *Employment Act*. In support of his claim for 12 months' salary as compensation, he cites the case of Alfred Muthomi & 2 others v National Bank of Kenya Limited [2018] eKLR, where the Claimant was awarded 12 months' salary as compensation for unfair termination, considering his long service. Lastly, the Appellant submits that he is entitled to exemplary damages in the amount of Kshs 1,000,000/-, to deter the Respondent from engaging in unfair labour practices.

Respondent's Submissions

9. The Respondent urges the court to adhere to its primary appellate duty, which is to thoroughly scrutinize the evidence presented before the trial court and reach its own conclusion, being mindful that it did not have the opportunity to hear the witnesses firsthand, in line with the case of Selle & another v Associated Motor Boat Co. Ltd & others [1968] EA 123. In opposition to the Appeal the Respondent identifies the following issues for determination:
 - a. Whether the Appellant's employment was procedurally and lawfully terminated as was determined by the subordinate court.
 - b. Whether the Appellant was entitled to the reliefs sought; and
 - c. Who bears the costs of this suit.
10. The Respondent submits that the Appellant's dismissal was lawful and urges this court to uphold the Learned Magistrate's Judgment. It draws attention to the Appellant's admission, both during cross-examination and at the disciplinary hearing, that he received company money under a different arrangement from that prescribed by the company. The Respondent further asserts that the discrepancies between the amount the Appellant received from customers and the amount remitted were sufficient grounds to infer misconduct, thereby justifying the initiation of disciplinary proceedings. Additionally, the Respondent submits that the Appellant did not raise the issue of a non-existent policy during the disciplinary hearing and failed to justify his retention of portions of money received from clients. In support of this, the Respondent emphasized that, as a decision-making body, they are not bound by strict court procedures but are required to exercise reasonable fairness in their actions, referencing the case of R v Immigration Appeal Tribunal ex-parte Jones [1988] 1 WLR 477, 481.
11. Regarding the dismissal procedure, the Respondent submits that it complied with the law. It asserts that the Appellant was clearly informed of the allegations against him, given sufficient time to prepare his defence, and afforded a disciplinary hearing thereafter. It points out that, a notice to show cause was served on the Appellant on 17th March 2022. The Appellant responded on 21st March 2022 and the disciplinary hearing took place on 26th April 2022, with the verdict being communicated on 5th May 2022.



12. In defence of the procedure followed, the Respondent cites the case of Samuel Nyamasi v Vegpro Kenya Ltd [2014] eKLR where the court emphasized that section 41 of the [Employment Act](#) ensures fairness and the reasonable application of natural justice, particularly in cases of serious misconduct, also stressing that an employee should be allowed to choose a fellow employee or union representative of their choice to be present at the hearing, to prevent bias and ensure fairness. The Respondent submits on the justification and reasonableness of the termination proceedings and cites the case of Evans Kamadi Misango v Barclays Bank of Kenya Ltd [2015] eKLR, where the Court reaffirmed the employer's obligation, under section 43 of the [Employment Act](#), to demonstrate a valid reason for dismissal, and further cited Halsbury's Laws of England (4th Edition, Volume 16, p. 481) regarding the "range of reasonable responses to the employee's conduct" test, which ensures that a dismissal falls within a reasonable range of actions that a reasonable employer might take in the same situation. In light of the foregoing the Respondent submits that the Magistrate's court rightfully dismissed the Appellant's case.
13. Regarding the reliefs sought, the Respondent submits that reinstatement is not feasible due to the lawful termination of the Appellant's employment. It argues that the circumstances surrounding this claim, the proper handling of the disciplinary proceedings, and the settlement of the Appellant's final dues make reinstatement impracticable. The Respondent cites section 49 (4) of the [Employment Act](#), which stipulates that reinstatement should only be ordered in exceptional circumstances as it amounts to specific performance of personal services. It further stresses that the Appellant has not demonstrated exceptional circumstances to justify reinstatement and asserts that his admission of unjust enrichment undermines the possibility of reinstatement. In support of this position the Respondent urges the Court to be guided by the preconditions for reinstatement enunciated in the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR where the Court of Appeal considered factors such as the employee's wishes, the common law principle against ordering specific performance in service contracts, and the practicability of reinstatement, while dealing with the question of reinstatement. As for salary in lieu of notice, the Respondent submits that the Appellant is not entitled to such payment due to his summary dismissal, citing the case of Vincent Abuya Obunga v Mast Rental Services Limited [2019] eKLR. The Respondent equally submits that the Appellant should not be awarded 12 months' salary as compensation for unfair dismissal, given the lawful nature of his dismissal. It relies on George Okello Munyolo v Unilever Kenya [2019] eKLR and section 47(5) of the [Employment Act](#), which places the burden of proving that an unfair termination has occurred on the employee. Moreover, the Respondent submits that the Appellant has failed to present any aggravating factors that would justify the maximum 12-month compensation. It draws attention to the Appellant's acknowledgment that he had received his final dues.
14. Regarding the claim for exemplary damages the Respondent submits that the Appellant has not shown any evidence of arbitrariness or oppression to warrant such an award. It cites the case of Godfrey Julius Ndumba Mbogori & another v Nairobi City Council NRB Civil Appeal No. 55 of 2012 [2018] eKLR, which reinforced that exemplary damages are meant to punish a party for improper conduct. The Respondent also cites the case of John Njoroge v National Bank of Kenya Limited [2018] eKLR where the court clarified that for a claimant to be entitled to exemplary damages, they must prove that the respondent's actions were driven by malice or ulterior motives, and that mere unfair dismissal does not suffice. Finally, with respect to the certificate of service, the Respondent submits that it is a statutory requirement and that they are ready to issue it to the Appellant.
15. The Court has considered the law, the pleadings as well as the submissions of parties bearing in mind it is the position of an appellate court to reconsider the entirety of the case before the Court below to come to its own conclusion mindful that it did not see or hear the parties testify. The Appellant asserts



that the Magistrate's Court erred both in law and fact in upholding his dismissal. He relies on a series of grounds the gravamen of which is that he never got the benefit of the safeguards of section 41 of the Employment Act and that the Respondent terminated his services without basis. The case against the Appellant was that the Appellant retained portions of money received from clients. The Respondent asserted that the Appellant received company money under a different arrangement or procedure from that prescribed by the company. The Respondent further asserted that the discrepancies between the amount the Appellant received from customers and the amount remitted to it were sufficient grounds to infer misconduct, thereby justifying the initiation of disciplinary proceedings. In answer, the Appellant asserted that all the money received was properly channelled to the Respondent, and that no customers who allegedly experienced extortion lodged complaints or were called to testify against him. This is a tacit acknowledgment that the Respondent gave the Appellant a hearing despite his assertions to the contrary.

16. The evidence before this Court, and the record before the Learned Magistrate reflects this, is that the Appellant was clearly informed of the allegations against him. He was given sufficient time to prepare his defence and afforded a disciplinary hearing thereafter. It is clear that a notice to show cause was served on the Appellant on 17th March 2022 and the Appellant responded on 21st March 2022. Subsequently, the disciplinary hearing took place on 26th April 2022 with the verdict being communicated on 5th May 2022 resulting in termination.
17. The Employment Act makes provision under section 41 that the employee who is suspected of misconduct that would amount to gross misconduct such as was alleged against the Appellant would have to be notified of the accusation and allowed to make a response thereto and be heard. In this case, the Appellant was notified in a show cause and he responded to it, he was subsequently heard and a verdict issued. That clearly demonstrates the Appellant was accorded the safeguards in law. The Learned Magistrate did not fall into any error in determining that the Respondent had afforded the Appellant a hearing.
18. The appeal from all angles is doomed to fail as no demonstration of failure to consider facts or apply the law is discerned. The Appeal is found to lack merit and is accordingly dismissed. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JANUARY 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE

