



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**ELRC APPEAL NO. 4 OF 2020**

**MAYFAIR HOLDINGS LIMITED..... APPELLANT**

**VERSUS**

**ENOKA OMOLO OJWANG.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. R. K. Ondieki SPM delivered on 4<sup>th</sup> February, 2020, in CMCC ELRC Cause No. 21 of 2019)*

**JUDGMENT**

1. The Respondent lodged Cause Number 21 of 2019 at the Kisumu Chief Magistrates Court against the Appellant, seeking a declaration that his termination was unfair, payment of one month's salary in lieu of notice, 12 month's salary as damages for loss of employment and payment for leave earned; all amounting to Kshs. 471,500/-.

2. The court delivered judgment in the matter on 2<sup>nd</sup> February, 2020, wherein, the learned Trial Magistrate entered judgment in favour of the Respondent against the Appellant in the following terms:

***“Having found the termination of the Claimant unfair for want of both valid reasons and fair procedure, he is entitled to the prayers sought and I enter judgment for the Claimant against the Respondent in terms of prayers sought in his Memorandum of Claim. The Monies paid by the Defendant upon termination to be deducted from the Decretal sum.”***

3. The Appellant being aggrieved by the decision of the Trial Court, filed a Memorandum of Appeal on the 2<sup>nd</sup> March, 2020, premised on the following grounds:

i. The Learned Trial Magistrate erred in law and fact by wrongly evaluating the evidence on record and hence coming to a wrong conclusion.

ii. The Learned Trial Magistrate erred in law and fact by entering judgment despite clear evidence on record that the Respondent herein had admitted to have without permission absconded from duty for two days.

iii. The Learned Trial Magistrate erred in law and fact in entering judgment despite clear evidence on record that the Respondent herein had admitted refusing to take instructions from his immediate supervisor.

iv. The Learned Trial Magistrate erred in law and fact in failing to evaluate contractual obligations of the Respondent herein and the breach of the same.

v. The Learned Magistrate's judgment is unlawful and contrary to the law as the termination of the Respondent herein was in accordance with Section 44(4) of the Employment Act.

vi. The Learned Magistrate completely misinterpreted the law and the burden placed upon the parties with reference to termination vis-à-vis the evidence placed before the trial court and arrived at the wrong decision.

4. Submissions were filed for both parties.

**The Appellant's Submissions**

5. It is submitted for the Appellant that the consistent refusal by the Respondent to obey orders and defiance of authority, amounted to gross misconduct, which contravened Clause 5 (d) of his employment contract which states:

***“We retain the right to terminate your services immediately for any of the following reasons”***

***(b) dishonesty, insobriety or any attitude of misconduct may lead to instant dismissal from employment.”***

6. It is submitted for the Appellant that the Respondent’s actions of insubordination offended Section 44(4)(a) of the Employment, and thus justifying his summary dismissal. The Appellant cited the holding in ***Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR*** and ***George Okello Munyolo v Unilever Kenya Limited (2019) eKLR*** to support this position.

7. The Appellant further submitted that the Respondent resigned from their employ. It is the Appellant’s submission that the resignation was termination at the instance of the Respondent (employee), and that the employer (Appellant) was under no obligation to accept the resignation as the same was a unilateral act of the Respondent. The Appellant sought to rely on the case of ***Edwin Beiti Kipchumba v National Bank of Kenya Limited (2018) eKLR*** to buttress this position.

#### **The Respondent’s Submissions**

8. It is submitted for the Respondent that summary dismissal is at the instance of the employer, and which dismissal requires higher standard of proof for reason that it is prone to abuse by employers, being dismissal without notice or with less notice than is usually required. The Respondent further submitted that even in cases of misconduct, the employee is still entitled to the fair process envisaged under Section 41 of the Employment Act.

9. It is submitted for the Respondent that he was neither given notice prior to the dismissal nor was he accorded a hearing contrary to Section 41 of the Employment Act, 2007. It is further submitted that an employer or party to an employment contract cannot simply invoke a term of the contract to deny an employee the protection afforded under mandatory statutory provisions.

10. It is submitted for the Respondent that the Appellant did not adhere to the provisions of Section 41, 43 and 45(2) of the Employment Act, hence the termination of the Respondent was unfair and unlawful. The Respondent cited the holding in ***Mary Chemweno Kiptui v Kenya Pipe Line Company Limited (2014) eKLR*** to support this position.

11. It is submitted for the Respondent that having established that the Appellant had no lawful or justifiable reasons to terminate the Respondent, the Respondent is entitled to the reliefs sought, and the award of the lower court should not be disturbed.

#### **Analysis and Determination**

12. I have appraised the grounds of the appeal herein, the submissions by both parties and the impugned Judgment.

13. The appeal is premised on following consolidated grounds:

- a) The Learned Trial Magistrate erred in law and fact in wrongly evaluating the evidence before it and arriving at a wrong decision.
- b) The Learned Magistrate’s judgment is unlawful and contrary to the law as the termination of the Respondent herein was in accordance with Section 44(4) of the Employment Act.
- c) The Learned Magistrate completely misinterpreted the law and the burden placed upon the parties with reference to termination *vis-à-vis* the evidence placed before the trial court and arrived at the wrong decision.

14. The Court of Appeal in ***Musera vs. Mwechelesi & Another ([2007]) KLR 159***: stated as follows in regards to appeals:

***“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge’s findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”***

15. Guided by the holding in the case cited herein, my role in this appeal, which is a first appeal, is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions, while taking into consideration the lower court’s exercise of discretion on findings of law and fact.

16. Arising from the foregoing grounds of appeal, the issues that render themselves for determination are:

- a) Whether the trial court based its decision on evidence before it
- b) Whether the Respondent deserves the remedies awarded by the trial court
- c) Who bears the costs of the appeal and the suit before the lower court

### **Whether the trial court based its decision on evidence before it**

17. The Appellant's case is that the Trial Court wrongly evaluated the evidence before it and arrived at a wrong decision; in that it failed to consider that the Respondent was dismissed for absconding duty, failing to obey lawful instructions and generally failing to uphold his contractual obligations, which in return, justified his summary dismissal under Section 44(4)(a) of the Employment.

18. The Appellant also submitted that the Respondent admitted having resigned from the service of the Appellant and which resignation amounted to termination at the instance of the Respondent, and not a summary dismissal.

19. On the issue of whether or not the Respondent Resigned, it is clear from the evidence on record that the Respondent tendered his resignation on 26<sup>th</sup> February, 2018, and that the resignation letter was to also act as a three months' resignation notice. The effective date of the resignation letter would then have been 26<sup>th</sup> May, 2018. The Appellant issued the Respondent with a letter of summary Dismissal on 5<sup>th</sup> March, 2018, which period is two months' earlier than the end of the Respondent's notice period.

20. I find and hold that the Respondent was summarily dismissed.

21. The Trial Court held that the Respondent's dismissal was both procedurally and substantively unfair premised on the fact that he was neither accorded a hearing nor given reasons for his termination.

22. Going by the evidence on record, I agree with the Trial Court that the Respondent was not accorded a fair hearing. The letter of summary dismissal states the reasons for termination as being failure to obey and insubordination. The Respondent was however not given an opportunity to make representation in regard to the intended dismissal, as correctly held by the Trial court.

23. The clauses in the Respondent's letter of appointment that allowed for summary dismissal do not hold in light of Section 41 of the Employment and Article 47 of the Constitution. An employee is entitled to fair process irrespective of the reason(s) for termination/Dismissal. Clause 5(d) of the Respondent's employment contract that reads:

***"We retain the right to terminate your services immediately for any of the following reasons"***

***(b) dishonesty, insobriety or any attitude of misconduct may lead to instant dismissal from employment."*** Did not oust the Respondent's right to fair hearing. In the case of *Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR*, it was held that it is not enough to terminate employment by notice or payment in lieu thereof, termination should be based on valid reasons and fair procedure. In the same breath, it is neither reasonable nor justified to dismiss an employee by simply invoking a clause in a contract of service that allows for instant dismissal devoid of the statutory and constitutional requirements.

24. I conclude by holding that the Respondent's dismissal was both procedurally and substantively unfair, and thus uphold the holding of the Trial Court in this respect.

### **Whether the Respondent deserves the remedies awarded by the trial court**

25. The Trial Court awarded the Respondent all the reliefs listed in his statement of claim in the following words:

***"Having found the termination of the Claimant unfair for want of both valid reasons and fair procedure, he is entitled to the prayers sought and I enter judgment for the Claimant against the Respondent in terms of prayers sought in his Memorandum of Claim. The Monies paid by the Defendant upon termination to be deducted from the Decretal sum."***

26. The prayers sought by the Respondent are listed in paragraph 11 of the statement of claim as follows:

***"a) A declaration that the Respondent's action of refusing to pay the Claimant his terminal dues and benefits was unlawful, unfair and inhuman.***

***b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages pleaded***

***c) An order for the Respondent to pay the Claimant his dues terminal benefits and compensation damages.***

***d)interests on (c) above from the date of filing suit till payment in full***

***e) costs of the suit."***

27. Paragraph 7 of the Respondent's (Claimant) statement of claim, specifically spelt out the terminal dues referred to in paragraph 11 quoted above as:

i. One-month Salary in lieu of notice Kshs. 20,500

ii. Damages for loss of employment 20,500 X 12=246,000/=

iii. Leave earned Kshs. 205,000/=

28. The award according to the impugned Judgment is as specified in paragraph 26 above. The question for this court is whether the Respondent herein was entitled to the award granted by the Trial Court.

#### **One-month Salary in lieu of notice**

29. The Respondent issued notice of resignation from the employ of the Appellant, but the three months' notice period was cut short by the Appellant's letter of 5<sup>th</sup> March, 2018, summarily dismissing the Respondent. There was evidently no notice given prior to the Respondent's dismissal.

30. The employment contract did not provide notice period. The Trial Court's award of one month's salary in lieu of notice is upheld, being the statutory notice period for employees on a monthly wage in accordance with section 35 of the Employment Act, 2007.

#### **Damages for loss of employment/Compensation for unfair Dismissal**

31. The Trial Court made a blanket award without giving reasons for the awards made. The evidence before court indicate that the Respondent did not have a good record of service based on the myriad warning letters issued to him for various forms of misconduct. The Respondent did not rebut/deny having been issued the warning letters produced in evidence before the Trial Court, and which form part of the record of the instant appeal.

32. The trial court awarded the Respondent 12 months' salary in damages for loss of employment. No reasons were given to justify this award. The Respondent though unfairly dismissed, no doubt substantially contributed to his dismissal. The Court of Appeal addressed the issue of awards in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro Civil Appeal No. 42 of 2015**, where the court held:

***“remedies for unfair termination is provided for in section 49 of the Act. They include, payment equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the conduct of the employee, which to any extent caused or contributed to the termination.”***

33. Being guided by the provisions of Section 49 of the Employment Act, I find and hold that the awards made by the Trial Court in respect of damages/compensation for unfair dismissal, were unjustified and is hereby set aside. Secondly based on the fact that the Respondent had issued notice of resignation, and had just two months to go as at the time of dismissal, I deem a three months' salary to be sufficient compensation for unfair dismissal, and which is hereby awarded.

#### **Leave earned Kshs. 205,000/=**

34. The Respondent did not prove this claim. the Appellant submitted that the Claimant/Respondent had 17 unutilized leave days and which were paid for as part of the dismissal package. In the absence of evidence to the contrary, the award of leave earned has not been proved, and is set aside in its entirety.

35. The upshot is that the judgment of the Trial Court is set aside and the appeal allowed in the following terms:

- i. That the Declaration of unfair dismissal is upheld.
- ii. That the award of 1 months' salary in lieu of notice is upheld.
- iii. The award of 12 months' salary in compensation for unfair dismissal/damages is set aside and replaced with a 3 months' salary for unfair dismissal
- iv. The award of leave earned is set aside in its entirety.
- v. The costs of the suit before the lower court is upheld, save that the same will be taxed premised on the award in the appeal.
- vi. This appeal having partially succeeded, each party shall bear their own costs of the appeal

36. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30<sup>TH</sup> DAY OF MARCH, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Yogo h/b for Mr. Ojuro for the Appellant

N/A for the Respondent

MS. Christine Omollo - Court Assistant.