



**Amee Holdings Limited v Okwiri (Appeal E056 of 2023)
[2024] KEELRC 1180 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E056 OF 2023**

S RADIDO, J

MAY 8, 2024

BETWEEN

AMEE HOLDINGS LIMITED APPELLANT

AND

CHARLES AMONDI OKWIRI RESPONDENT

(Being an Appeal arising from the judgment and decree of the Honourable K. Cheruiyot (SPM) in Kisumu CM ELRC No. E75 of 2021 delivered on 22nd September 2023)

JUDGMENT

1. In a judgment delivered on 22 September 2023, the Senior Principal Magistrate found that Amee Holdings Ltd (Appellant) unfairly terminated the employment of Charles Amondi Okwiri (the Respondent) and that it was also in breach of contract.
2. The Senior Principal Magistrate awarded the reliefs sought by the Respondent being the equivalent of 12 months' salary as compensation, underpayments, and house allowance.
3. The Appellant was aggrieved and it lodged a Memorandum of Appeal with the Court on 16 October 2023, contending that:
 - i. The Learned Trial Magistrate erred in law and in fact in making a finding that the Respondent's dismissal was unfair which finding was against the weight of evidence on record and the law applicable in instances of summary dismissal.
 - ii. The Learned Trial Magistrate erred in law and in fact in failing to consider and make a finding as to whether there was a valid reason for the Appellant to terminate the Respondent's employment which failure was contrary to the applicable law and occasioned the erroneous decision.



- iii. The Learned Trial Magistrate erred in law and in fact in awarding the Respondent twelve (12) months gross salary as compensation for unfair termination which award was excessive in the circumstances and as a result arrived at an unjustified decision on quantum.
 - iv. The Learned Trial Magistrate erred in law and fact in making an award for house allowance without analysing the evidence on record and parties' submissions on the issue which finding was against the applicable law and weight of evidence on record and as a result arrived at an unjustified decision on quantum.
 - v. The Learned Trial Magistrate erred in fact and in law in awarding the Respondent underpayments since the temporary employment contract produced by the Respondent indicated that the Claimant was a general labourer which finding was against the applicable law and weight of evidence on record and as a result arrived at an unjustified decision on quantum.
 - vi. The Learned Trial Magistrate erred in fact and in law in failing to consider the Respondent's submissions and more specifically on the quantum by completely disregarding the submissions and authorities of the Respondent and as a result arrived in unjustified decision on quantum.
 - vii. In arriving at his decision, the Trial Magistrate did so in a speculative and cursory manner not guided by any set of principles and failed to exercise his discretion within the applicable principles of assessment of damages on quantum and his failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
4. The Record of Appeal was filed on 14 March 2024 and the Court gave directions on 19 March 2024.
 5. The Appellant filed his submissions and Supplementary Record of Appeal (decree) on 26 March 2024, and the Respondent on 15 April 2024.
 6. The Court has considered the Record of Appeal and submissions.

Role of the Court on a 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

9. The Respondent's case before the Senior Principal Magistrate was that sometime in 2020, he fell sick and stayed away from work to recuperate with the knowledge of the Appellant but upon resuming work, he was verbally informed of the termination of his employment. The decision, the Respondent asserted was unfair because there was no notice or hearing.
10. The Appellant's case on the other hand was that the Respondent stopped reporting to work sometime in September 2020.
11. In the judgment under challenge, the Senior Principal Magistrate found that the Appellant had unfairly terminated the Respondent's employment because it had not attempted to reach out to him



- to explain his absence or hold a disciplinary hearing on the ground of desertion or unexplained absence from work.
12. The Senior Principal Magistrate also reasoned that the Appellant should have produced the Respondent's attendance records in Court to demonstrate absence without permission.
 13. By virtue of section 47(5) of the [Employment Act](#), 2007, the Respondent had the initial burden of establishing that an unfair termination of employment occurred before the Appellant would be called upon to justify any termination of employment.
 14. In the Statement of Claim, the Respondent did not set out the exact date or month that he alleged the Appellant verbally terminated his employment.
 15. The Respondent's witness statement which was adopted as part of the evidence did not equally set out the date or month of verbal termination of employment.
 16. During the Respondent's oral examination, he again failed to give the date or month of the verbal termination of employment. He did not reveal the name of the Appellant's manager or agent who informed him of the termination of employment.
 17. Without a disclosure of the date and month of the alleged termination of employment or the name of the person who informed him that his services were no longer required, the Respondent did not discharge the very low threshold burden imposed on him by section 47(5) of the Act.
 18. By failing to consider whether the Respondent discharged the burden under section 47(5) of the [Employment Act](#), and moving to a second stage inquiry whether the Appellant had discharged the burden imposed on employers by sections 41 and 45 of the [Employment Act](#), 2007, the Senior Principal Magistrate fell into error of both law and fact.
 19. In this Court's view, the Respondent did not discharge the burden expected of him in the first instance before the Appellant could be called upon to justify the validity or fairness of desertion or repudiation of the contract.
 20. This limb of the cause of action was for dismissal.

Underpayments

21. The Respondent pitched for underpayments from January 2018 to December 2020.
22. The Respondent pleaded that he was a machine operator (mixing-machine) and that the Appellant paid him wages below the prescribed minimum wage set by the Regulation of Wages (General) (Amendment) Order, 2018 of Kshs 18,319/-. He asserted that the Appellant paid him Kshs 16,900/- during the relevant period.
23. The Appellant's witness testified before the Senior Principal Magistrate that the Respondent was initially employed as a general labourer but that in 2019, he was engaged in a different capacity. The new capacity was not disclosed in the witness statement or during the oral hearing.
24. Section 9 of the [Employment Act](#) demands that an employer issue a written contract under certain circumstances setting out the designation and remuneration of an employee.
25. The Appellant did not issue such a contract to the Respondent and pursuant to section 10(7) of the [Employment Act](#), 2007, the Court accepts the Respondent's oral testimony on the wage and underpayment.



26. The Court, therefore, finds that the Senior Principal Magistrate did not err in allowing the head of claim for underpayments.

House allowance

27. Under section 31 of the *Employment Act*, an employer should provide housing to its employees or pay an allowance to cover housing unless the wage is consolidated.

28. The Appellant did not place before the Senior Principal Magistrate any records to show that it provided the Respondent with housing or that the wage was consolidated, and this Court can conclude the Senior Principal Magistrate did not err in allowing this head of the claim.

Conclusion and Orders

29. Arising from the above, the Court sets aside the part of the judgment finding that the Appellant unfairly terminated the Respondent's employment and awarding compensation, and substitutes thereof judgment that the Respondent did not prove unfair termination of employment occurred.

30. Apart from the vacation of the aforesaid part of the judgment, the judgment of the Senior Principal Magistrate is confirmed.

31. Since the Appellant has succeeded only part, the Court directs each party to bear own costs of the Appeal.

32. The Respondent to have costs before the Senior Principal Magistrates Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF MAY 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant L.G. Menezes & Co. Advocates

For Respondent Owiti, Mwalo, Odhiambo & Co. Advocates

Court Assistant Chemwolo

