



Kabansora Millers Limited v Oracho (Employment and Labour Relations Appeal E059 of 2022) [2024] KEELRC 1034 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1034 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E059 OF 2022**

BOM MANANI, J

MAY 7, 2024

BETWEEN

KABANSORA MILLERS LIMITED APPELLANT

AND

HARRISON WAMANGA ORACHO RESPONDENT

JUDGMENT

Background

1. This is an appeal from the decision of the Chief Magistrate's Court in CMELRC Case No 2157 of 2019. The decision was rendered on 17th May 2022.
2. The parties had an employment relation which terminated in July 2019. However, they do not agree on when the relation commenced and how it terminated.
3. The Respondent contends that the Appellant hired his services as an electrician in 2017. However, he does not state with exactitude when the engagement commenced in 2017.
4. In paragraphs 3 and 4 of the Statement of Claim, the Respondent variously suggests that the employment relation between them commenced either in July 2017 or October 2017. Yet, in his advocates' demand letter dated 26th July 2019, he alleges that he was employed by the Appellant on 25th August 2017.
5. On the other hand, in the Appellant's Memorandum of Response, it asserts that the Respondent was hired on 2nd January 2019 under a one year fixed term contract. Yet, in the Certificate of Service it (the Appellant) issued the Respondent, it states that he was employed on 25th July 2017.
6. The Respondent asserts that he was arrested by the police on 17th July 2019 on allegations of theft by servant. He contends that he was held in custody until the following day when he was released.



7. He contends that upon his release from police custody, the Appellant refused to allow him to resume duty. He contends that the Appellant's security prevented him from gaining access to the workplace on instructions of the Appellant's management allegedly because his contract of service had been terminated.
8. On the other hand, the Appellant contends that the Respondent did not report back to work after he was released from police custody. He allegedly only showed up at the workplace on 5th August 2019 to collect his Certificate of Service allegedly because he had secured other employment.
9. It was the Appellant's case that the Respondent absconded duty. As such, his assertion that he was prevented from resuming duty is untrue.
10. After hearing the parties, the learned trial magistrate arrived at the conclusion that the Respondent was employed in 2017. Further, he found that the Respondent's contract was unfairly terminated.
11. With regard to the reliefs that were sought by the parties, the learned trial magistrate arrived at the conclusion that the Respondent was entitled to compensation for unfair termination of his contract of service. Further, the court found that the Respondent was entitled to unpaid house allowance and salary for days worked in July 2019.
12. Aggrieved by the decision, the Appellant has filed the instant appeal. The appeal raises seven (7) grounds of appeal to wit the following:-
 - a. That the learned trial magistrate erred in law and fact in deciding the case before him against the weight of the evidence on record.
 - b. That the learned trial magistrate erred in law and fact in failing to find and hold that the Respondent was, as at the time of the alleged termination, engaged by the Appellant on a fixed term contract of employment which commenced on 2nd January 2019 and was to terminate on 31st December 2019.
 - c. That the learned trial magistrate erred in law and fact by failing to uphold the written contract of employment dated 2nd January 2019 which the Respondent admitted to have executed during cross examination.
 - d. That the learned trial magistrate erred in law and fact in finding and holding that the Respondent's contract of employment was terminated unfairly and further erred by rejecting the evidence tendered by the Appellant's witnesses which demonstrated that the Respondent left employment on his own accord and was not terminated as he alleged.
 - e. That the learned trial magistrate erred in law and fact in failing to find and hold that the Respondent's monthly salary of Kshs 40,000/= was inclusive of house allowance of Kshs 6,000/= and the learned magistrate further erred when he awarded the Respondent Kshs 144,000/= purportedly on account of unpaid house allowance.
 - f. That the learned trial magistrate erred in law and fact in awarding the Respondent "general damages" of Kshs 320,000/= or the equivalent of 8 months' salary when the evidence and circumstances of the case before him did not support such an award.
 - g. That the learned trial magistrate erred in law and fact in reaching contradictory conclusions in the matter when he on the one hand held that the Respondent contributed to his loss of employment and on the other held that the Appellant unfairly terminated the Respondent's contract of employment.



13. The parties agreed to canvass the appeal through written submissions. Both filed their submissions as agreed.

Issues for Determination

14. The aforesaid grounds of appeal yield the following issues for determination:-
 - a. Whether the Respondent's employment commenced in 2017 or 2019 and whether it was a fixed or indefinite term contract of service.
 - b. Whether the Respondent absconded duty or was unfairly dismissed from employment.
 - c. Whether the Respondent was entitled to the various reliefs that were granted by the trial magistrate.

Analysis

15. This is a first appeal. As such, the role of this court is to evaluate the evidence on record and reach its own conclusion on the matters in controversy. However, the court ought to do so with the usual caution that unlike the trial court, it did not have the benefit of taking the evidence of the witnesses in the cause. As such, it should only depart from the findings of fact by the trial court if they are not supported by the evidence on record or are inconsistent with the law.
16. As mentioned earlier, there is no consensus between the parties on when the employment relation between them commenced. On his part, the Respondent suggests that the relation commenced either in July 2017 or August 2017 or October 2017. Yet, the Appellant contends that the employment commenced in January 2019 even though in the Certificate of Service which it issued to the Respondent, it suggests that the relation commenced on 25th July 2017.
17. I have carefully evaluated the evidence by the parties on this issue. It is clear to me that neither of them was candid on the matter. However, it is apparent that the employment relation between them commenced sometime in 2017.
18. This fact is established by the Certificate of Service which the Appellant issued to the Respondent on 5th August 2019. In the instrument, the Appellant confirms that it engaged the Respondent's services on 25th July 2017. Although the Appellant produced a contract of service dated 2nd January 2019 which is signed by the Respondent, it did not account for why it subsequently indicated in its Certificate of Service of 5th August 2019 that he (the Respondent) was employed on 25th July 2017.
19. There is also a schedule of remittance to the National Hospital Insurance Fund for January 2018 produced by the Appellant (see pages 38 to 40 of the Record of Appeal). In the schedule, the Appellant lists the Respondent as one of its employees as at that time (see entry No 000084). This is further confirmation that the parties had a subsisting employment relation prior to 2019 despite the Appellant's assertions to the contrary.
20. What is critical is to discern the nature of the employment relation that the parties had. As indicated earlier, although there is evidence that the two had a subsisting employment relation from July 2017, there is no evidence that it was an indefinite relation. On the contrary, all evidence on record suggests that it was a fixed term relation which was apparently renewed periodically either orally or in writing.
21. This fact is affirmed by the fact that on 2nd January 2019, the two signed a fixed term contract for one year. This is notwithstanding that they had been in a previous unwritten employment relation that had



- run from 2017 to 2018. This implies that the two had fixed term engagements which were renewed periodically.
22. The next question for determination is whether the employment relation between the parties was unfairly terminated. According to the trial magistrate, although the Appellant asserted that the Respondent absconded duty, there was no evidence that he (the Respondent) was subjected to due process before his contract was considered closed. For instance, there was no evidence that he was issued with a notice to show cause letter.
 23. The Appellant's position is that since the Respondent allegedly failed to report back to work on 18th July 2017 after he was released from police custody, he was deemed to have absconded duty. Thus and according to the Appellant, the Respondent voluntarily gave up his employment.
 24. I have considered the reasons given by the trial magistrate in support of his findings on the issue. According to him, even if the Appellant managed to demonstrate that the Respondent had absconded duty, it (the Appellant) ought to have subjected him to due process before considering the contract between them as closed.
 25. I have considered the submissions by the Appellant before the trial magistrate and before this court on this issue. I note that the Appellant relied on two decisions before the trial court (*Ben Nandasaba Muiyundo v Ideal Security Services Limited* [2018] eKLR and *Vincent Keya and another v D. M. Enterprises Limited* (2020) eKLR) to advance the argument that because the Respondent did not provide evidence of resumption of duty, he ought to be considered as having absconded duty. As such, the contract between the two terminated by reason of the Respondent's act of desertion.
 26. Without doubt, desertion of duty by an employee provides a legitimate ground for the employer to consider terminating the employee's contract of service. However, the employer must follow the right procedure in terminating the contract on this ground.
 27. I have looked at the two decisions that the Appellant relied on to advance its case before the trial court. It is apparent that although the learned Judge arrived at the conclusion that desertion of duty is a valid ground for terminating a contract of employment, he did not consider whether an employee who is accused of desertion is entitled to undergo the disciplinary process that is envisaged under section 41 of the *Employment Act*.
 28. There is a series of decisions by this court suggesting that in order for the employer to legitimately terminate a contract of employment on the ground of desertion of duty, he must demonstrate that he has afforded the absconding employee due process in terms of sections 41 and 45 of the *Employment Act*. This is because in addition to demonstrating desertion from duty which is a substantive ground to terminate a contract of service, the employer is obligated by the two provisions of statute to adhere to the requirement of procedural fairness. This latter requirement can only be surmounted by the employer according to the absconding employee the opportunity to rebut the accusation of desertion leveled against him (*Everline Ichechi v Mombasa Continental Resort* [2019] eKLR, *Wanjiru Munyao v New Wide Garments Kenya Epz Limited & another* [2022] eKLR, *Nyabiba v Apak Company Limited* (Cause 2005 of 2017) [2023] KEELRC 672 (KLR) (21 March 2023) (Judgment), *Lilian Akoth Otuoma v Mohan Oysterbay Drinks Kenya Limited* [2019] eKLR and *Paul Mwakio v Reliable Freight Services Ltd* [2022] eKLR).
 29. In the instant case, besides the Appellant asserting that the Respondent deserted duty, it did not provide evidence to demonstrate that it accorded him an opportunity to be heard on the alleged desertion of duty. In effect, there was no evidence that the Appellant met the procedural requirements that are set under sections 41 and 45 of the *Employment Act*. Consequently, I agree with the trial court's



finding that the Appellant's decision to close or consider as closed the employment relation between the parties was procedurally flawed.

30. The next issue for determination is whether the Respondent was legitimately granted the impugned reliefs. Regarding house allowance, the evidence on record shows that the Respondent was earning salary of Kshs 40,000.00 from 2017 when he was first employed. Although there was no written contract between the parties to evidence their relation between 2017 and 2018, the relation was eventually reduced into writing through a contract that covered the year 2019.
31. What is critical is that despite the above lacuna, the Respondent continued to earn the same salary between 2017 and 2019. In the 2019 contract, it was indicated that the sum of Kshs 40,000.00 paid to the Respondent included his basic salary of Kshs 34,000.00 and house allowance of Kshs 6,000.00.
32. Having regard to the foregoing and the fact that the salary for the Respondent for the entire of their relation remained at Kshs 40,000.00, I am convinced that his (the Respondent's) pay over the entire period comprised of basic pay of Kshs 34,000.00 and house allowance of Kshs 6,000.00. It was therefore improper for the trial court to have awarded the Respondent house allowance of Kshs 144,000.00 as a standalone item. For this reason, I set aside the award for house allowance.
33. With respect to compensation for unfair termination, it is apparent that when the Respondent's contract was terminated in July 2019, he was serving the Appellant under a fixed term contract which had been entered into in January 2019. According to the contract, the term of employment between the parties was to have run up to 31st December 2019. Therefore, between 17th July 2019 when the contract was terminated and 31st December 2019 when it would have lapsed by effluxion of time, the Respondent had approximately five (5) months to serve.
34. Further, in a fixed term employment relation, there is no guarantee that the employee will serve the entire of the term. The contract could terminate midstream for other lawful reasons. Having regard to the foregoing, there was no justification for the trial court to have awarded the Respondent compensation for unfair termination that exceeded the balance of his contractual term.
35. For the foregoing reasons, I consider an award of compensation for unfair termination that is equivalent to the Respondent's gross salary for eight (8) months to have been grossly exaggerated in the circumstances. As a result, I set aside the award and in place thereof, I award the Respondent compensation for unfair termination that is equivalent to his gross monthly salary for three (3) months, that is to say $Kshs\ 40,000 \times 3 = Kshs\ 120,000.00$.
36. The Appellant has also criticized the trial magistrate's decision on the ground that it was wrong for him to have found the Respondent to have contributed to his misfortune yet proceeded to award him compensation. However, this criticism is unfounded.
37. What the trial court was simply emphasizing was that although there was evidence that the Respondent contributed to his own misfortune, he nevertheless was entitled to have his case processed procedurally. Thus, to the extent that the Appellant failed to uphold due process in processing his release from employment, the decision to terminate the Respondent's employment was rendered procedurally flawed and therefore unfair. Thus, the Respondent was entitled to compensation for unfair dismissal from employment on this account notwithstanding that his conduct may have contributed to the decision to end the relation.
38. The trial court's award for pay in lieu of notice equivalent to Kshs 40,000.00 is upheld.
39. The trial magistrate's award of salary for the seventeen (17) days worked in July 2019 is upheld.



40. Similarly, I uphold the trial court's order on costs and interest.
41. However, on this appeal, I make no order as to costs. I do so appreciating that each party has partially succeeded.

Summary of Decision

42. In the ultimate, the court makes the following orders:-
- a. The parties to this action entered into the employment relationship from the year 2017 albeit on fixed term contracts which were renewed periodically.
 - b. The Respondent is not entitled to house allowance as a standalone item as this benefit was included in his monthly pay package. As a result, the trial court's award to him of Kshs 144,000.00 to cover house allowance is set aside.
 - c. The award of compensation of Kshs 320,000.00 reflecting the Respondent's gross salary for eight (8) months is set aside. In place thereof, the Respondent is awarded compensation for unfair termination of his contract of service that is equivalent to his gross monthly salary for three (3) months, that is to say, Kshs 120,000.00.
 - d. The award of Kshs 26,154.00 being the Respondent's salary for the days worked in July 2019 is upheld.
 - e. The trial court's award for pay in lieu of notice equivalent to Kshs 40,000.00 is upheld.
 - f. The award of costs and interest by the trial court is upheld.
 - g. However, there is no order for costs on the appeal.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF MAY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

