



**Nzomba v Krish Hardware & General Supplies (Appeal E066 of 2023)
[2024] KEELRC 1029 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1029 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E066 OF 2023**

S RADIDO, J

MAY 8, 2024

BETWEEN

STEPHEN SILA NZOMBA APPELLANT

AND

KRISH HARDWARE & GENERAL SUPPLIES RESPONDENT

*(Being an Appeal from the judgment of Hon K. Cheruiyot (SPM) given at Kisumu
on the 1st December 2023 in Kisumu CMC ELRC Cause No. E094 of 2021)*

JUDGMENT

1. Stephen Sila Nzomba (the Appellant) sued Krish Hardware & General Supplies (the Respondent) before the Senior Principal Magistrates Court, Kisumu alleging unfair termination of employment and breach of contract.
2. The Senior Principal Magistrate delivered a judgment in which it found that the termination of employment was fair but made no mention of some of the reliefs sought by the Appellant.
3. The Appellant was aggrieved with the judgment and he lodged a Memorandum of Appeal with the Court on 13 December 2023, contending:
 - i. That the Learned Trial Magistrate erred in law and fact in failing to appreciate the provisions of section 40 of the *Employment Act* which is explicit in terms and mandatory in tone thereby arriving at an erroneous decision based on extraneous facts not forming part of the proceedings.
 - ii. That the Learned Trial Magistrate erred in fact and law in treating the main issue of termination as redundancy, that the due process was followed and thus procedurally fair despite the absence of consultation in compliance with section 40 and disciplinary process under section 41 of the *Employment Act*.



- iii. The Learned Trial Magistrate erred in law and fact and misdirected himself by failing to exercise judicial authority on known legal principles and rendering an unjust judgment.
 - iv. The Learned Trial Magistrate erred in fact and law in holding that the Appellant was not entitled to any compensation on account of lawful termination whereas the redundancy was unfair and unlawful and hence not justified.
 - v. The Learned Trial Magistrate erred in fact and law by failing to award the Appellant one month's salary in lieu of notice, and damages for unlawful termination, despite the Respondent having failed to prove adherence to the statutory protections under sections 40 and 41 of the *Employment Act*, 2007.
 - vi. The Learned Trial Magistrate erred in fact and law in making findings that were total misdirection and legal deviations from the express provisions of the law and known legal principles.
4. The Appellant filed a Record of Appeal on 5 March 2024, and the Court gave directions on 19 March 2024.
 5. The Appellant filed his submissions on 26 April 2024, and the Respondent on 3 May 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 the 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 Senior Principal Magistrate found that the termination of the Appellant's employment was fair because the notices contemplated by section 40(1) of the *Employment Act* were issued to the Appellant and County Labour Officer. The Magistrate did not make any reference to the allegations on selection criteria.
10. Before this Court, the Appellant challenged the termination of his contract on the single ground of want of due process in that the Respondent did not issue a notice of termination of employment or consider seniority, competence and skill in choosing him for redundancy and because his colleagues were allowed to continue working (he admitted there was a valid reason to terminate the contract).
11. The Respondent terminated the Appellant's contract through a letter dated 19 November 2020, and the letter gave the reason as a difficult business environment arising from the effects of COVID-19 making it difficult to operate two shops. The effective date of termination was given as 31 December 2020. The Respondent notified the County Labour Officer of the termination through a letter of even date.
12. The question of notice does not, therefore, arise.



13. However, on the question of selection criteria, despite asserting that his colleagues were not sent away, the Appellant did not disclose the details of the colleagues such as job descriptions or names of the colleagues.
14. The Respondent's Human Resource Manager testified that the shop that the Appellant used to operate was closed and all the employees in that particular shop were sent home and the remaining shop could not accommodate another employee due to space constraints.
15. The Appellant did not interrogate the Respondent's witness testimony that when the shop in question was closed all the employees working therein were affected.
16. The Court consequently finds that discrimination in the selection criteria was not proved, and the Senior Principal Magistrate did not err either in law or fact in reaching the conclusion he did.
17. Compensation was not available as a remedy to the Appellant.

Salary in lieu of notice

18. Despite section 40(1)(b) of the *Employment Act* providing for written notice of not less than one month in cases of redundancy, section 40(1)(f) of the Act requires the employer to pay the employee the equivalent of one month's salary in lieu of notice. The effect of the latter provision is that salary in lieu of notice is payable even if notice is given.
19. The Senior Principal Magistrate fell into an error of law in not awarding the relief which was pleaded by the Appellant and which the law provides for.

Severance pay

20. The Appellant claimed Kshs 112,500/- on account of severance pay. The Respondent pleaded in the Response that the Appellant was paid and acknowledged receiving his terminal dues.
21. The Respondent's witness did not testify as to the terminal dues paid to the Appellant or give a breakdown. Record of payment of the dues was not produced. The Appellant was not cross-examined on the claim for severance pay.
22. Section 40(1)(g) of the *Employment Act* obligates the employer to pay an employee whose position has been declared redundant severance pay at a rate not less than 15 days pay for each completed year of service.
23. The Senior Principal Magistrate fell into an error of both law and fact in not awarding the statutory due of severance pay and this Court will award the Kshs 112,500/- as claimed.

Conclusion and Orders

24. From the foregoing, the Court finds and holds:
 - i. The Senior Principal Magistrate did not err in finding that the termination of the Appellant's contract was fair.
 - ii. The Senior Principal Magistrate erred in law and fact in not awarding salary in lieu of notice and severance pay.
25. The Court sets aside the part of the impugned judgment and awards the Appellant:
 - i. Pay in lieu of notice Kshs 25,000/-



ii. Severance pay Kshs 112,500/-

Total Kshs 137,500/-

26. The Appellant to have costs on half scale since he has only partly succeeded.

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

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Omondi, Abande & Co. Advocates

For Respondent

Court Assistant Chemwolo

