



**Karanja v A.D.N Security Ltd (Appeal E013 of 2023)
[2024] KEELRC 1877 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1877 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E013 OF 2023
ON MAKAU, J
JULY 19, 2024**

BETWEEN

JOSEPH MURAYA KARANJA APPELLANT

AND

A.D.N SECURITY LTD RESPONDENT

*(Being an appeal against the Judgment of Hon. F.Muguongo , Principal
Magistrate delivered on 26th July, 2023 in Nyeri MELRC No.E28
of 2020) (Before Hon. Justice Onesmus Makau on 19th July, 2024)*

JUDGMENT

Introduction

1. By a Statement of Claim dated November 10, 2020, the appellant sued the respondent seeking declaration that his employment had been terminated unfairly and unlawfully without prior warning or notice. He also prayed for payment of Kshs.416,083.18 made up of compensatory damages plus accrued employment benefits.
2. The respondent denied liability and the suit went to full trial. After considering the evidence and submissions, the trial court (Hon F. Muguongo, PM) concluded that appellant did not prove a case for summary dismissal and dismissed the entire suit with costs. The basis of the said conclusion was because the appellant had admitted that he had resigned from employment.
3. The Appellant was aggrieved and filed this appeal seeking to vary or set aside the impugned judgment and urged the court to grant any other relief as it may deem necessary. The appeal stands on the following six grounds: -
 - a. That the learned Trial Magistrate erred in law and fact by applying the wrong principles of law whereas the Respondent had made a partial admission to the Appellant's claim on leave



days, rest days and half a month salary, and thus erroneously dismissing the Appellant's claim entirely thereby occasioning a miscarriage of justice.

- b. That the learned trial magistrate erred in law and fact by applying the wrong principles of law thus erroneously dismissing the Appellant's claim under the head of underpayment, service pay and house allowance, thereby occasioning a miscarriage of justice.
- c. The learned trial magistrate erred in law and in fact by applying the wrong principles of law by failing to make a finding that the Appellant was not accorded due process towards his termination of employment, thereby occasioning a miscarriage of justice.
- d. That the learned trial magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgement thereby occasioning a miscarriage of justice.
- e. That the learned trial magistrate failed to address her mins to the pleadings on record and the evidence by parties, thereby occasioning a miscarriage of justice.
- f. That the learned trial magistrate erred in law and in fact in failing to evaluate the entire evidence as well as submissions as presented by the Appellant thereby occasioning a miscarriage of justice.

Submissions in the Appeal

4. It was submitted on behalf of the Appellant that the trial court erred by dismissing the entire suit including the admitted claims. It was submitted that the trial court erred by failing to analyze the appellant's claim under notice pay, unpaid leave, underpayment, service pay and housing allowance and failed to award Kshs. 34,300, which was admitted by the Respondent during the hearing and in its written submissions. The Court was therefore urged to analyze the evidence especially on page 56 and 69 and page 71 – 74 of the record of appeal and interfere with the judgement in light of the said partial admission of the claim.
5. It was further submitted that the allegation that the Appellant resigned voluntarily was never proved. It was also argued that the Appellant was unfairly dismissed since he neither issued with a notice to show cause nor invited to a disciplinary hearing as was admitted by the Respondent's witness at trial. The Respondent was further accused of flaunting section 43 and 45 of the *Employment Act* as it did not justify the termination nor follow due process. Reliance was placed on the case of of *Anthony Mkala Chitavi v Malindi Water and Sewerage Co. Limited* [2013] eKLR, *Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute* [2016] eKLR *Otinju Muruka v Equity Bank Limited* [2013] eKLR and section 47 (5) of the *Employment Act* to urge that the Appellant discharged his burden of proof at trial. Therefore, it was submitted that the Appellant is entitled to the full compensation.
6. In view of foregoing matters, it was submitted that the appellant is entitled to salary in lieu of notice by dint of section 35 and 36 of the *Employment Act*. It was further submitted that the Appellant was not paid the salary for February 2020 as admitted by the respondent and urged for the same to be awarded together with payment in respect of 190 rest/off days, annual leave for 2017, 2018 and 2020, salary underpayment, service pay and house allowance. It was submitted that the respondent did not rebut the said claims by evidence including leave records, but just made partial admission on the same and failed to pay.
7. The claim for Rest days, was computed based on 1 rest day per week equaling to 190 rest days worked for the Respondent. It was argued that the said letter of 10th March proved that he never took rest days.



Reliance was placed on the case of *Daudi Haji v Kenya Ports Authority* [2013] eKLR and section 10 and 74 of the Act.

8. As regards the claim for underpayment, it was submitted that the appellant's salary of Kshs. 10,500/=, as a day watchman was below the minimum wage thus amounting to underpayment. To rebut the Respondent's position that the same was based on contract, reliance was placed on section 26 and 48(1) of the *Labour Institutions Act* and Article 41 of the *Constitution*. The said underpayment was equated to slavery and servitude contrary to article 30(1) of the *Constitution*. The Court was therefore urged to adopt the sums of Kshs. 11,926.40 and Kshs. 12,522.70 as per the *Regulation of Wages Orders 2017* and 2018 respectively.
9. With respect to service pay, it was submitted that the Appellant was entitled to the same at the rate of 15 days for the 3 years of service on account that the same was not controverted. It was argued that the Court has an obligation to enforce the social security regime offering superior benefits to an employee.
10. As regards house allowance, it was submitted that the Respondent did not prove that it provided the Appellant with reasonable accommodation or sufficient sum to cater for the same. Consequently, it was submitted that the appellant is entitled to house allowance as computed in his Claim by dint of section 31 of the *Employment Act* and the *Regulation of Wages Order* for 2015, 2017 and 2018.
11. It was further submitted that, the dismissal of the Appellant's claim occasioned a miscarriage of justice as his rights under the *Constitution*, the *Employment Act* and *Labour Institutions Act* were disregarded. Finally, the court was urged to find that the appellant has demonstrated sufficient grounds to warrant disturbing of the impugned judgment.
12. It was submitted that this being a first appeal, the Court is bound to re-evaluate the evidence and draw its own conclusion. To buttress, reliance was placed on the case of *Musera v Mwechelesi & another* [2007] KLR 159.
13. As regards the merit of the appeal, it was submitted that the court did not base its decision on wrong principles of law as alleged but rightly found that the Appellant voluntarily resigned from employment as opposed to summarily dismissed. It was urged that the Appellant resigned by letter and failed to go back to pick his dues. It was further urged that the appellant admitted in evidence that he was not dismissed from employment and that he had no proof of the alleged dismissal. Further that, the respondent never admitted that part of the claim during the trial. Reliance was placed on the case of *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR and *Mary Wanjiku Gachigi v Ruth Muthoni* Civil Appeal No. 172 of 2000 KLR 7276 (CAK) (2003) 1 EA 69; KLR 169 and section 45 (1) of the *Employment Act*.
14. It was further submitted that the trial Court properly analyzed and addressed the pleadings and evidence by parties before reaching the right conclusion. Consequently, it was urged that, the Appellant is not entitled to the reliefs sought and the appeal should be dismissed with costs because he failed to satisfy the trial court that he was dismissed from employment.

Analysis and determination

15. This being a first appeal, my mandate is to re-evaluate the evidence on record and make my own independent conclusions, but warn myself that I did not see the witnesses while giving their evidence. (See *Selle v Associated Motor Boat Company Ltd* (1968) EA 123).
16. Having considered the record of appeal and the submissions by both sides, the following issues fall for determination: -



- a. Whether the appellant was summarily dismissed by the respondent or she resigned.
- b. If the appellant was dismissed, whether the same was unfair and unlawful.
- c. Whether the reliefs sought in the claim are merited.

Dismissal or Resignation

17. The appellant pleaded that he was summarily dismissed by the respondent in February 2020 but during cross examination, the record of court proceedings states that: -

“Referred to his letter dated 6/3/2020. I was told to write a letter saying I will quit work. No one told me to quit work.

Question. Do you have any letter of termination from work?

Answer: No.

Question: Were you even dismissed from work.

Answer: No

Referred to his letter dated 2/7/2019. Yes I authored this letter.

Referred to a letter received on 10/3/2020. I was satisfied with the computation of my claims as per the letter of 10/3/2020.

Question did you ever go back to the defendant to collect your cheque?

They said they will call me. Defendant has never told me that he wouldn't pay me.”

18. DW1 testified that the appellant was never dismissed from work and confirmed the above evidence. Having considered the rival contentions, it is clear as the day that the appellant was not summarily dismissed from employment but rather, he voluntarily resigned after being invited to a disciplinary hearing. The foregoing evidence was corroborated by the appellant's own admission that he was not dismissed or told by anyone to quit employment.
19. It was submitted for the appellant that the wording of the resignation letter indicated that the appellant was requested to write the letter. The letter stated that:

“I Joseph hereby notify the office as you requested as I quit being an employee for ADN security company.

I claim...”

20. The grammar in the letter is not the best but I understand the appellant to have been saying that he was serving a termination notice as he had been required to do before quitting employment. The appellant was not saying that he was complying with a request to tender a resignation. The letter further made a demand for his dues upon separation. Consequently, I find that the appellant voluntarily resigned from employment vide the letter dated March 6, 2020 and further hold that the trial court was right in concluding that the appellant did not prove a case of summary dismissal.

Unfair termination

21. In view of the foregoing finding, I am satisfied that the claim for unfair and unlawful termination of employment does not arise.



Reliefs

22. Considering the foregoing, the appellant is not entitled to declaration that her employment was unfairly terminated. He is also not entitled to salary in lieu of notice and compensatory damages and I am satisfied that the trial court was right in disallowing that claim.
23. However, I agree with the appellant that the trial court failed to analyze the pleadings and evidence fully and as such, left out a bigger part of the claim undetermined. The court did not consider and determine the claim for unpaid leave, rest days, house allowance, service pay and unpaid salary. Further, the court did not show that the failure to prove the claim for summary dismissal fatally affected the other claims for accrued employment benefits. The court further fell into error when it failed to award the sum of Kshs. 34,300 which was admitted by the respondent in its written submission as owing to the appellant being:-
 - a. Annual leave for 2019 Kshs. 10,500.00
 - b. 53 off duty days Kshs. 18,550.00
 - c. Half a month salary Kshs. 5,250.00Total Kshs. 34,300.00
24. In view of the foregoing matters, I find and hold that the appeal has merits and it is partially successful to the extent highlighted above. I have noted that the appellant admitted having written a letter indicating that the computation by the employer was correct. However, that amount was not indicated anywhere. Consequently, I enter judgment for the appellant as follows:
 - a. The appeal is partially allowed.
 - b. The suit is remitted back to the Lower Court for determination of undetermined matters highlighted above by a Judicial Officer other than Hon.F.Muguongo-PM.
 - c. Appellant is awarded costs of the appeal plus interest.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.

ONESMUS N MAKAU

JUDGE

