Muthama v Leo Investment Limited (Employment and Labour Relations Appeal 10 of 2020) [2024] KEELRC 1797 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1797 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 10 OF 2020

AN MWAURE, J

JULY 11, 2024

BETWEEN

FELIX MUEMA MUTHAMA ..... APPELLANT

AND

LEO INVESTMENT LIMITED ..... RESPONDENT

(Being an Appeal against the judgment and decree of Hon. D M Kivuti (Mr) dated 17th January 2020 in the Chief Magistrates Employment and Labour Relations Cause 566 of 2018)

JUDGMENT

1. The Appellant being dissatisfied and aggrieved with the whole judgement of the Hon. D.M Kivuti (Mr) delivered on 17th January 2020 on grounds that: -

    1. the learned magistrate erred in law and fact by failing to make a finding that the manner of the Appellant's termination was unfair and unlawful;

    2. the learned magistrate erred in law and in fact by failing to make a finding that the termination of employment was unfair;

    3. the learned magistrate erred in law and fact by failing to award the Appellant his claim for terminal dues despite the overwhelming evidence;

    4. the learned magistrate erred in fact and law by failing to award the Appellant his claim for Certificate of Service in accordance with the provisions of Section 51 of the *Employment Act* despite evidence that it was not issued;

    5. the learned magistrate erred in fact in failing to record material aspects of the evidence tendered by the Appellant despite being prodded by the Appellant's advocate;

6. the learned magistrate created a threadbare record unlike his counterpart who heard a similar matter in Milimani CMEL 565 OF 2018 and who recorded all material aspects of the case and eventually entered judgment in favour of the Claimant.

2. The Appellant prayed for orders that: -

    1. The judgment be entered as prayed in the Memorandum of Claim; and

    2. The costs of this Appeal and at the Magistrates court be awarded to the Appellant.

Appellant's Submissions

3. That Appellant submitted that based on the evidence laid before the trial court, the Respondent failed to meet the substantive and procedural test. Hence, the trial magistrate failed to make a proper finding on whether there was a valid reason and whether the laid down procedure was followed.

4. The Appellant avers that on 20/09/2018, he and 7 other

    employees were called to the security office and given a letter which required his signature as 'admission of mistake'. Subsequently, they were arrested at 3.45 pm by officers from Parklands Police Station and on 21/09/2018, he was requested to respond on the alleged pilferage at the Respondent which he did.

5. He was released and given 2 days off but upon resumption of duty on 24/09/2018 he was given access to his work station and not allowed to perform any duties; and on 28/09/2018, he was summarily dismissed.

6. It is the Appellant's submission that he was not accorded time to respond to the NTSC as he was in custody on the day he could have responded and he was not allowed to work upon release. Additionally, no disciplinary hearing was constituted to grant him an opportunity to defend himself and his arrest was malicious and by bad faith.

7. The Appellant submitted that the valid reason relied by the trial court on the test of 'balance of probabilities' in making its finding that the Respondent had genuine belief that the employee conducted in a manner inconsistent with his duty. The Respondent's genuine belief that he misconducted himself failed the procedural test tainting the entire disciplinary process.

8. The Appellant submitted that no witness testified that he was invited to attend a disciplinary hearing and he refused to attend. It is strange that the learned magistrate would hold that the "Claimant was invited to a due process but failed to explain" when no evidence at all was laid before the court. The learned magistrate failed to give an analysis of what and when due process was carried out and exact legal provisions relied upon.

9. It is the Appellant's submission that he testified in the trial court that he was not paid for the month of September 2018 and was due for leave. The Appellant was entitled as of right to claims set out in clause 17(ix)(a)(c) and (d) of the memorandum of claim. The court should exercise its discretion according to his 12 months wages in view of how he had been treated by the Respondent.

10. The Appellant submitted that the learned magistrate completely ignored to consider his prayer for certificate of service which he is entitled by dint of Section 51 of the Act.

Respondent's Submissions

11. The Respondent submitted that he discharged its burden under Section 43 of the *Employment Act*. The Hotel Mpesa Transaction Incident Report clearly shows that upon investigation, the Appellant

among others had settled guest bills via an invalid Mpesa code (MIGIOR1699) and as such the Appellant had reason to believe that it had lost Kshs. 2,850/=. This was an indication of negligence and theft on Appellant's part which amounted to gross misconduct under Section 44 of the *Employment Act*.

12. The Respondent submitted that it demonstrated that it had valid reasons for the Appellant's termination attributable to his poor keying in of the M-Pesa codes for services offered to the Respondent's customers. The action and inaction of the Appellant to respond to the NTSC meant that the allegations against him stood unchallenged despite having been given an opportunity to tell his story, and thus the Respondent's allegations remained uncontroverted and unchallenged.

13. The Respondent submitted that the Appellant was accorded an opportunity to respond to the charges leveled against him but failed to appear for the disciplinary hearing as invited. The Appellant did not challenge this position thus the Respondent's assertions remained uncontroverted. The Appellant did not file a response to the said allegation nor did he file a further witness statement to controvert the Respondent's statement.

14. The Respondent submitted that the Appellant's termination was procedurally sound and fair, it is clear the Appellant blew his chance to mount a defence to the allegations against him in the show cause letter and to attend the disciplinary hearing. The Appellant's inactions frustrated the very process he now claims were unfair.

15. It is the Respondent's submission that having demonstrated that the Appellant was not unfairly and unlawfully terminated, the Appellant is not entitled to one-month salary in lieu of notice, damages for abrupt dismissal and compensatory damages on account of unlawful termination.

16. The Respondent submitted that the Appellant failed to prove that he did not go for annual leave in 2018. The courts have held that in order to sustain the relief of payment for annual leave days not taken, the Claimant has to demonstrate that there were leave applications made and the same were declined.

17. It is the Respondent's submission that the Appellant was offered his terminal dues upon termination but he declined receipt and instead demanded more than was due to him. Further, the Appellant was issued with a Certificate of Service.

Analysis and determination

18. Arising from the grounds of appeal, the following are the issues for determination:

    a. Whether the learned magistrate erred in law and in fact by failing to make a finding that the manner of the Appellant's termination was unfair and unlawful.

    b. Whether the learned magistrate erred in law and in fact by failing to award the Appellant his claim for terminal dues

Whether the learned magistrate erred in law and in fact by failing to make a finding that the manner of the Appellant's termination was unfair and unlawful

19. It is trite law that for termination of an employee to be considered lawful and fair, the employer must prove that it is justified by a valid reason and the termination was in accordance with a fair procedure. This was well elaborated under Section 45 of the *Employment Act* which provides as follows:

    "(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure."

20. For the court to determine whether termination was substantively and procedurally fair, it is guided by Section 43 and 41 of the *Employment Act*.

21. Sections 43(1) provides:

> "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."

22. Section 41 of the *Employment Act* then states that:

> "Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

23. In Walter Ogal Anuro v Teachers Service Commission [2013] eKLR Ndolo, J held that –

> "However, for a termination of employment to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness."

24. The court is further guided by George Musamali v G4S Security Services Kenya Ltd [2016] eKLR where the court stated that:

> "A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers' human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or

she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee's guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made."

25. It is the Respondent's submission that the Appellant was negligent which amounting to gross misconduct under Section 44 of the *Employment Act* as evidenced by the Hotel Mpesa Transaction Incident Report which shows that the Appellant among others had settled guest bills via an invalid mpesa code (MIGIOR1699). As such it had reason to believe that it had lost Kshs. 2,850/=.

26. The matter was subsequently reported to the police and the Appellant apprehended for several days. There is no evidence adduced about the investigations neither by the police outcome nor by the respondents.

27. Further the court has not been presented with evidence on how the respondent reached to the conclusion that the claimant was involved in tempering with Mpesa transactions. This is a mere allegation and courts go by evidence and facts and not mere allegations and speculation. The court finds the trial magistrate erred in law and fact in finding the respondent had a valid reason to terminate the claimant whereas no such evidence is presented in court. The test for substantial justification therefore fails.

28. In respect to procedural fairness, the Respondent's witness at the trial court testified that "the Claimant was given an audience by Human Resource Committee and it was not a disciplinary hearing".

29. Further, the Respondent claims that the disciplinary process was frustrated by the Appellant on account of him failing to attend the hearing. However, the Respondent did not present in court any letter or evidence to show that the Appellant was indeed invited for the disciplinary hearing which he allegedly refused to attend. It is mandatory under section 41 of the *employment act* for an employee to be invited formally for a disciplinary hearing.

30. Against this background, it is clear that the termination was devoid of the laid down procedure provided under Section 41 of the *Employment Act*. There is no evidence the appellant was taken through a disciplinary hearing in the presence of a witness of his choice.

31. Therefore, the termination was unlawful as it was procedurally unfair and the trial magistrate erred in finding the claimant was lawfully terminated. The court holds the appeal herein succeeds.

Whether the learned magistrate erred in law and in fact by failing to award the Appellant his claim for terminal dues

32. Having established that the termination of the Appellant's employment was unlawful, he is entitled to the reliefs sought in his memorandum of claim as follows.

Reliefs awarded

1. One month salary in lieu of notice Kshs 28,000/-.

2. Two months equivalent salary considering the period he served the respondent kshs 56,000/- being compensation for unlawful termination.

3. Untaken leave for 2018. No proof that appellant prayed for leave and was denied same is declined.

4. Salary for September 2018 kshs 28,000/-

5. Costs are awarded to the appellant of the lower court and of this appeal.

6. Interest is awarded of the total award of kshs 112,000/- at Court rates from date of this judgment till full payment.

7. Appellant to be given is certificate of service with 14 days hereof.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.