



REPUBLIC OF KENYA



**West Kenya Sugar Company Limited v Disi (Employment and Labour Relations Appeal E010 of 2023) [2024] KEELRC 1994 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1994 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2023**

**JW KELI, J  
JULY 25, 2024**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**JOHASI MUSAMALI DISI ..... RESPONDENT**

*(An Appeal from the Judgment and Decree of the Honourable Dolphina Alego (S.P.M) delivered on 23/10/2023 in Kakamega MCELRC Cause No. 17 of 2019) CORAM Before J.W. Keli, J. C/A Macheso For Appellant- O&M Law LLP Advocates For Respondent- V.A. Shibanda & Co. Advocates)*

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment and Decree of the Honourable Dolphina Alego (S.P.M) delivered on 23/10/2023 in Kakamega MCELRC Cause No. 17 of 2019 Between Johasi Musamali Disi versus West Kenya Sugar Company Limited, filed the Memorandum of Appeal dated 22<sup>nd</sup> November 2023 and Record of Appeal dated 8<sup>th</sup> April 2024 seeking the following orders: -
  - a. The Appeal be allowed.
  - b. The judgment by the Honourable Dolphina Alego (S.P.M) dated and delivered on 23<sup>rd</sup> October 2023 at the Chief Magistrates Court, Kakamega in Kakamega MCELRC Cause No. 17 of 2019- Johasi Musamali Disi versus West Kenya Sugar Company Limited and the consequential decree be set aside.
  - c. The costs of this Appeal and those of the Trial court be awarded to the Appellant.
  - d. Such further or other reliefs as this Honourable Court may deem just and fit to grant in the circumstances of this Appeal.



2. The Appeal was premised on the following grounds: -

- i. The Learned Trial Magistrate erred in law and fact in failing to consider, identify, and appreciate the fact that the Respondent had engaged himself with the Appellant as a loader on a piece rate basis on various dates.
- ii. The Learned Magistrate erred in fact in failing to appreciate that the Loader Weighment and Cane Haulage Reports showcase two separate and distinct records and accordingly erred in assuming that the Respondent was terminated yet he left and absconded work out of his own volition.
- iii. The Learned magistrate erred in law in failing to consider and appreciate Section 47(5) of the Employment Act, 2007 by failing to appreciate that the burden of proving that an unfair termination of employment or wrongful dismissal shall rest on the Respondent herein, who claimed to be the Appellant's employee.
- iv. The Learned Magistrate erred in law and fact in finding that the Appellant terminated the Respondent despite the Respondent not having proved that he was terminated.
- v. The Learned Magistrate erred in law and fact in finding that the Appellant did not follow the due and fair procedure on termination.
- vi. The Learned Magistrate despite entering judgement for the respondent as prayed for, erred in law and in fact by only making a determination on whether the Respondent was terminated and due process followed, without reasoning or making any determination on any of the other claims or prayers by the Respondent in his Amended Statement of Claim.
- vii. The Learned Magistrate despite entering judgement for the Respondent as prayed for and without availing reasoned or making any determination on any of the other claims or prayers by the Respondent in his Amended Statement of Claim, failed to make clear the amounts owed to the Respondent.
- viii. The Learned Magistrate erred in law and in fact in disregarding the evidence tendered by the Appellant and/or failing to consider the said evidence in its totality.
- ix. The Learned Magistrate erred in law and in fact in failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case.
- x. The Learned Magistrate erred in law and in fact in failing to consider the Appellant's submissions which were duly filed.
- xi. The Learned Magistrate erred in law and fact in appreciating, and considering the appellant's witnesses' testimony during the hearing at the trial court only to the prejudice and detriment of the appellant.
- xii. The Learned Magistrate erred in law and in fact in misapprehending the evidence on record.
- xiii. The Learned Magistrate erred in Law and fact in failing to properly and exhaustively evaluate the evidence on record filed on behalf of the Appellant.
- xiv. The Learned Magistrate erred in law and fact in arriving at conclusions and inferences which are not supported by evidence and/or based on any documentation.
- xv. Other grounds and reasons to be adduced at the hearing hereof. (Pages 9-12 of the Record)



3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by O & M Law LLP Advocates were dated 2<sup>nd</sup> May 2024 and received in court on 3<sup>rd</sup> May 2024. The Respondent's written submissions drawn by V.A. Shibanda & Co. Advocates were dated 13<sup>th</sup> June 2024 and received in Court on 15<sup>th</sup> June 2024.

### **Background to the appeal**

4. The Respondent filed a suit in Kakamega CMELR Cause No. 17 of 2019 against the Appellant alleging unfair termination. The Statement of Claim was dated 17<sup>th</sup> January 2019 supported by a verifying affidavit of the Claimant sworn on an even date and filed on 4<sup>th</sup> March 2019(pg. 13-15).
5. Through an application dated 12<sup>th</sup> July 2021 and filed on 16<sup>th</sup> July 2021(Not in the record but available in the lower court file), the claimant sought leave to amend his statement of claim, with a draft enclosed therein, which leave was granted by consent of parties on 27<sup>th</sup> October 2021(pg. 110 of Record). Through the amended statement of claim, the Respondent/Claimant sought the following reliefs: -
  - a. Days worked during March/2016(31 days)- Kshs. 8,000/-
  - b. One month's salary in lieu of notice- Kshs. 11,926.42/-
  - c. Prorate leave for 55 months-Kshs.38, 263.87/-
  - d. Underpayment of ages-Kshs. 134,059.45/-
  - e. Public holidays -Kshs. 50,287.6/-
  - f. overtime for extra hours worked-49,500/-
  - g. Rest days- Kshs. 87.460.27/-
  - h. 12 months compensation salary- Kshs. 143,117.4/-
    - i. Costs of this suit
  - j. Certificate of service.
  - k. House Allowance- Kshs. 98,392.8/-pages 28-31 of the record is the Respondent's claim
6. The Respondent relied on his written statement dated 17<sup>th</sup> March 2019, the list of documents of even date, and the documents attached to the Statement of Claim dated 17<sup>th</sup> January 2019(pg. 16-22 of the Record).
7. The Appellant entered appearance on 26<sup>th</sup> March 2019 and by an application dated 29<sup>th</sup> May 2019 and filed on 3<sup>rd</sup> June 2019, the Appellant sought leave to amend its defence (Pg.23-27 of Record). The draft amended memorandum of defense dated 15<sup>th</sup> May 2019 was enclosed in the application (pg. 39-42 of the record). The application was allowed as prayed on 18<sup>th</sup> June 2019(Pg. 107 of the Record).
8. The Appellant/respondent had on 8<sup>th</sup> October 2019 filed a list of witnesses dated 17<sup>th</sup> September 2019, a list of documents of an even date, a witness statement of Innocent Baraza Kisaka dated 11<sup>th</sup> July 2019 and documents (pg.32-33, 36- 38 of Record). On 1<sup>st</sup> September 2021, the Respondent filed a supplementary list of Documents dated on an even date and one the document (Pg. 43-44 of Record). Additionally, on 17<sup>th</sup> September 2021, the Appellant filed the Witness statement of Duncan Abwawo dated 1<sup>st</sup> September 2021(Pg.34-35 of Record).



9. The Trial Court proceeded with the hearing of the Claimant's case with him as the only witness on the 3<sup>rd</sup> of April 2023. The Defence case was heard on the same day when Duncan Abwawo testified as DW1 and produced the Appellant's documents as Exhibits 1 to 4. One Innocent Baraza Kisaka testified as DW2(pages 112-114 of the record).
10. The parties filed submissions in the lower Court after the closure of the defence case. The Respondent/Claimant filed submissions and authorities (pages 45-55 of the Record). The Appellant/Respondent filed written submissions and authorities (pages 56-99 of the Record).
11. The Trial Court (Hon. Dolphina Alego (S.P.M)) delivered its judgment on the 23<sup>rd</sup> of October 2023 in favour of the Respondent/Claimant as prayed in the Claim (Pg. 100-105 of the Record).

## **Determination**

### **Issues for determination.**

12. The Appellant in its submissions submitted the following issues for determination in the appeal: -
  - a. Whether the trial court erred in finding that the Respondent was an employee.
    - i. What was the nature of the Relationship between the Appellant and the Respondent?
  - b. Whether the trial court erred in law by shifting the burden of proof of termination to the Appellant.
  - c. Whether the Appellant is entitled to notice pay or any of the reliefs sought.
13. The Respondent did not identify specific issues for determination and submitted globally for the Court to uphold the Trial Court's decision, asserting that the Respondent was unfairly and unprocedurally terminated.
14. The Court sitting on appeal from the Trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen nor heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123.
15. The court guided by *Selle's* decision, that the court sitting at first appeal has to evaluate the facts and evidence before the trial court while making allowance of not having seen the witnesses to reach its own conclusion, finds the issues for determination in the appeal are as follows: -
  - a. Whether the trial court erred in finding that the Respondent was an employee. What was the nature of the Relationship between the Appellant and the Respondent.
  - b. Whether the trial court erred in holding there was a wrongful and unfair termination
  - c. Whether the Appellant is entitled to notice pay or any of the reliefs sought.Whether the trial court erred in finding that the Respondent was an employee. What was the nature of the Relationship between the Appellant and the Respondent.
16. From the evidence of the claimant and the defence witnesses before the Trial Court this Court returns that it was not in dispute that the Respondent had been an employee of the Appellant. What was in dispute was the nature of employment.
17. The Respondent pleaded in paragraph 3 of the amended claim that he was a loader earning Kshs. 8000 per month. During the hearing cross-examination, the Respondent stated he was earning 8000 paid



every 2 weeks, paid vide by MPSESA. His supervisor called Innocent told him to leave work without payment and further, he was not able to write a second statement

18. Defence DW 1 was the Human Resources Manager who produced the cane load haulage report on the Respondent's work for January 2016 and the letter by the Respondent dated 7<sup>th</sup> June 2019 asking for reinstatement as a driver. DW2 was the supervisor Innocent, who stated the Respondent was their driver from 2015 to 2016 and left after, he was asked to write a statement on the incident of the tractor he had.
19. The Trial Court upon outlining the evidence before the it , observed, "As per the law, did the Respondent comply with section 43 of the Employment Act? This was not the case!"(page 104). Section 43 of the Employment Act reads:- "43. Proof of reason for termination (1) 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. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." The claimant was asked to write a statement on the tractor he was driving by the supervisor as disclosed in his letter dated 7<sup>th</sup> June 2019. He also stated he just went home (On page 38 was the letter by the Respondent dated 7<sup>th</sup> June 2019 to the Appellant). The Court returns that the Respondent left his employment of his own volition and hence the termination was justified.
20. The Court further returns that the Respondent was entitled to notice under section 35 of the Employment Act as held in *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR where the Court of Appeal observed:- "On the other hand section 35(1) (c) provides for the manner of termination of various forms of employment in the following terms: "35(1)A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be – ..... (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing." The court held that a piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service. I uphold the decision to apply in the instant appeal.  
  
Whether the Appellant is entitled to notice pay or any of the reliefs sought.
21. In *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR the Court of Appeal held:- "On the other hand section 35(1) (c) provides for the manner of termination of various forms of employment in the following terms: "35(1)A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be – ..... (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing." A piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service. "A piece rate worker would, in terms of these provisions be entitled to a notice of 28 days before termination of service."
22. The Learned Magistrate erred in the conversion of the engagement to a term contract when the evidence by the employer of weighment (page 37 was the driver cane haulage report) was not controverted. DW2 was the supervisor and corroborated the work based on tonnage delivery.
23. The Learned Magistrate applied the minimum wage of Kshs. 11,926.40/- as pleaded (page 30) as it was not controverted by the Appellant and awarded the same as notice pay. The Learned Magistrate further awarded all the prayers without any analysis. This Court was disturbed that such decisions



could mean an employee need not to prove the prayers and all what they need to do is plead. Such awards are reckless. For example, the claimant prayed for overtime. This was a special damage that required strict proof yet it was granted without any basis. The Court is guided by section 108 of the *Evidence Act* to wit:- "108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

24. The Court believes that the Claimant in an employment claim must not only plead claims (prayers) but must lay the basis for the same. The remedies for unfair dismissal are as under section 49 of the *Employment Act* (Rev. 2024) which reads in subsection 1. "49(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—"(emphasis given)
25. The reason for the termination was explained by DW being absconding work on being faced with an incident concerning the tractor under the custody of the Respondent. This was confirmed in the letter of the Respondent of 7<sup>th</sup> June 2019 where he stated, "I am a driver of West Kenya and I had a problem whereby I caught an accident with tractor No. KBN 709V at Webuye. My supervisor was Mr. Kimi. He told me to write a statement here in company and also at Webuye police station. After that they changed my supervisor to Innocent. He told me to write another statement and (sic) told him that I had already finished all statement(sic) he forced me to write. I just decided to go home. I have been at home for more than three years I am urging the company to activate my driver no to continue working a driver." The Court returns that that the Respondent decided to go home and stay there after he was asked to write a statement by his new supervisor. The termination was on was own volition thus justified under section 49 of *Employment Act*.
26. As per the Kyrstalline decision a piece rate worker is entitled to notice of termination and to compensation under section 49 where the termination is unjustified. In the instant case, the Court held that the termination was justified.
27. Consequently, termination being justified, the application of section 49 of the *Employment Act* to award compensation was erroneous. The Learned Magistrate erred in law and facts in her determination. The minimum wage for drivers in the period Notice pay under section 35 of the *Employment Act* sufficed as sought 11,926.42/-

## CONCLUSION

28. The appeal is allowed and the Judgment and Decree of the Honourable Dolphina Alego (S.P.M) delivered on 23/10/2023 in Kakamega MCELRC Cause No. 17 of 2019 is hereby set aside and in its place, Judgment is entered for the Claimant for payment of notice pay in lieu of Kshs. 11,926.42/-with interest at court rate from the date of judgment. The claimant is awarded costs of the suit.
29. As concerns costs in the appeal, the court returns that the appeal was substantially successful. The Court orders each party is to bear its own costs in the appeal.
30. It is ordered.

**DATED, SIGNED, AND DELIVERED ON THE 25<sup>TH</sup> DAY OF JULY 2024 IN OPEN COURT AT KAKAMEGA**

**J.W. KELI**

**JUDGE**

IN THE PRESENCE OF

C/A – Macheso



For Appellant: Ms. Kahi

For Respondent: Ms. Shibanda

