Van Kappel Kenya Limited v Wanjohi (Appeal E015 of 2023)
[2024] KEELRC 2193 (KLR) (12 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2193 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

APPEAL E015 OF 2023

ON MAKAU, J

SEPTEMBER 12, 2024

BETWEEN

VAN KAPPEL KENYA LIMITED ..... APPELLANT

AND

CHARLES NDERITU WANJOHI ..... RESPONDENT

(Being an appeal against the whole of the Judgement of the Honourable Mr. B. Mararo (SPM) delivered on 3rd October 2023 in CMELRC Cause No. E016 of 2021 at Nanyuki)

JUDGMENT

1. By a Memorandum of Appeal dated 13th October 2023, the Appellant impugned the aforementioned judgement on following grounds:

    a. The Learned Magistrate erred in law and in fact by denying the Respondent the opportunity of being heard and proceeded with the hearing of the cause despite the matter not being cause listed for the day.

    b. The Learned magistrate erred in law and in fact by denying the Respondent the right to cross examine the Claimant on his witness statement and oral evidence to verify the correctness of the same.

    c. The learned magistrate erred in law and fact by excluding the Respondent in the proceedings subsequent to the ex-parte hearing as no notice was served upon the Respondent for submissions or judgement yet the Respondent's advocates were still on record.

    d. That the learned magistrate erred in law and in fact by awarding reliefs in form of notice pay and severance pay which reliefs are special damages claims and the amounts ought to have been specifically and proved.

e. The learned magistrate erred in law and fact in awarding the Claimant notice pay of Kshs 100,000/= without justification yet the net monthly salary as per contract was Kshs 50,000/=.

f. The learned magistrate erred in law and in fact by granting the Claimant severance pay despite the claimant having not pleaded and sought the said relief.

g. The learned magistrate erred in law and fact by awarding the Claimant compensation of maximum 12 months' salary without justification or explaining the reasons and contrary to the provisions of section 49(4) of the *Employment Act*.

h. The learned magistrate erred in law and in fact by failing to order statutory deductions to be paid from the sums awarded to the Claimant.

i. In all circumstances of the case, the finding of the learned magistrate are insupportable in law or on the basis of the evidence adduced.

2. The Appellant urged the Court to allow the appeal, set aside the whole judgement and dismiss the respondent's suit with cost and also award costs of the appeal.

Factual background

3. The appellant employed the respondent as a Mechanic vide a contract dated 14th August 2017 for a monthly salary of Kshs 50,000 and he worked until he was retrenched vide the letter dated 31st May 2019 due to low business. He filed suit in the lower court seeking declaration that the said retrenchment amounted to unfair and unlawful termination; salary in lieu of notice; general damages for unlawful termination of employment; terminal dues and benefits; and costs plus interest at court rate.

4. The appellant filed a response admitting that it retrenched the respondent as alleged, and averred that it paid him one-month salary in lieu of notice amongst other terminal benefits. Consequently, it averred that the retrenchment was justified and a fair procedure was followed.

5. During the trial, the respondent testified as PW1 and gave evidence which echoed the facts set out in the Statement of Claim and his written testimony. He tendered documentary evidence and oral evidence to demonstrate that; retrenchment was by a letter dated 31st August 2019; there was no prior redundancy notice; and no payment was made to him in respect of salary, salary in lieu of notice, terminal benefits or at all.

6. The appellant never tendered any evidence to support its pleadings and to rebut the evidence by the respondent and upon the consideration of the evidence presented, the trial (Hon Mararo SPM) found that the respondent had succeeded in proving that the appellant had terminated his employment unlawfully and unfairly. Further, the court awarded the respondent two months' salary in lieu of notice, severance pay for two years, twelve months general damages for unfair and unlawful termination totaling to Kshs 752,500 plus costs and interest.

Submissions in the appeal

7. The Appellant's Counsel filed written submissions dated 8th May 2024. Grounds 1, 2, 3 & 9 were collapsed into one issue, the trial court erred by failing to grant the appellant an opportunity to be heard. It was submitted that the hearing date was taken ex-parte by the Respondent in Court on 28/03/2023, and service of the hearing notice upon the Appellant was not proved. Further that, there was no service of written submissions or notice of judgement upon the Appellant, and therefore it was excluded from participating in the proceedings. It was argued that had the Appellant been served

with a notice of the hearing or subsequent notices, it would have recalled the Respondent for cross examination or filed its submissions.

8. Grounds 4 and 6 of the appeal are about the award of salary in lieu of notice and severance pay ought not to be awarded because they were not specifically pleaded in the Statement of Claim. Reliance was placed on the case of *Socfinaf Company Limited T/A Tatu Estate v Julius Ouma Okoth* [2010' eKLR, *Nanyuki Water & Sewerage Company Limited v Benson Mwiti Ntiritu* [2018] eKLR, *Computer Revolution Africa Ltd v Anthony Mwai Munyi* [2020] eKLR, *Kenya Commercial Bank Limited v Sheikh Osman Mohammed* CA No 179 of 2010 and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR where it was held that special damages should be specifically pleaded and further underscored the function of pleadings in adversarial litigation.

9. As regards ground 5 of the appeal, it was argued that the Kshs 100,000/= was erroneous as it was equivalent to 2 months yet section 35 (1) (c) of the *Employment Act* provides for issuance of 28 days' termination notice by either party. Consequently, since there was no contract indicating a longer notice period, it was submitted that the award of two months instead of one-month salary was unjustified.

10. Ground 7, reliance is about maximum compensation for unfair termination under section 49 of *Employment Act*. It was argued that the Court ought to have considered the length of service and the opportunities available for the employee to secure comparable and suitable employment to justify the maximum award as required under subsection (4). Reliance was also placed on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR.

11. Ground 8 of the appeal reliance was placed on section 49 (2) of the Act that provides for statutory deductions on awards made. Reliance was also placed on the case of *Kioko Joseph suing as the legal representative of the Estate of Joseph Kilinda) v Bamburi Cement Ltd* [2017] eKLR to argue that the court erred in not ordering statutory deductions on the awards. The Court was therefore urged to allow the appeal, set aside the judgement and dismiss the Respondent's suit with costs.

12. On the other hand, it was submitted for the Respondent that the Appellant was afforded a chance to be heard as its advocates were served hearing notice vide email dated 5th April 2023 and an affidavit of service is on record.

13. As regards grounds 4, 5, & 6 on salary in lieu of notice and severance pay, it was submitted that the Court arrived at the same after the court's declaration that the termination was unfair and unlawful. Further that the salary in lieu of notice the computation in accordance with section 49. Reliance was placed on the cases of *Mbogo v Shah* [1968] EA page 93 and *Gicheru v Morton and another* [2005] 2KLR 333 where the courts held that an appellate court would not normally interfere with an award of damages.

14. as for ground 7, it was submitted that the maximum compensation of twelve months' salary for unfair termination was in accordance with section 49 (1)(c) after the court exercised its discretion. Reliance was placed on the case of *Kemfro Africa Limited T/A Meru Express Services [1976] & another v Lubia & another No 2* [1987] KLR 30 and *Catholic Diocese of Kisumu v Sophia Achieng Tete* Civil Appeal No 284 of 2001 [2004] 2 KLR 55 to argue that the assessment of general damages is at the discretion of the trial court and an appellate Court is not justified to interfere with the same unless it is satisfied that the trial Court proceeded on wrong principles of the law or misapprehended the evidence and so arrived at a figure that is manifestly too high or too little.

15. Grounds 8 is on the failure to subject the award in the impugned judgment to statutory deductions and it was submitted that section 49 (2) of the Act provides in mandatory terms that awards shall be subjected to statutory deductions, with or without a court order to that effect.

16. Finally, the court was urged to seek guidance from the cases of Selle & another v Associated Motor Boat Co. Ltd & others and Peters v Sunday Post Limited on the mandate of a court in a first appeal court ought, that is, to, consider the law, pleadings and re-evaluate the evidence before the trial court. In the instant case the Court was urged to find no merits in the appeal and dismiss it with costs.

Analysis and determination

17. The mandate of this court on a first appeal was enunciated in *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 the Court of Appeal held that: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate he evidence or if the impression based on the demeanother of a witness is inconsistent with the evidence in the case generally."

18. Being guided by the foregoing authority, I have carefully perused the Record of appeal and the rival submissions. The following issues fall for determination:

    a. Whether the Appellant was condemned unheard.

    b. Whether the retrenchment of the respondent amounted to unfair and unlawful termination.

    c. Whether this Court should disturb the award of damages by the trial Court.

Whether the Appellant was condemned unheard

19. The Appellant's argument was that the matter proceeded without its counsel's knowledge and thereby it was denied a chance to cross examine the Respondent to verify the correctness of his claim. The Appellant contended that there was no affidavit of service on record to prove service upon it. However, the Respondent submitted that the Appellant was well aware of the hearing date as its counsel was served with a hearing notice on 5th April 2023 via email and and Affidavit of Service was filed in Nanyuki Law Courts on 6th April 2023.

20. There is no denial that the matter was fixed for hearing on the 13/6/2023 and the appellant did not attend the hearing. The trial court satisfied itself that the appellant was aware of the hearing and allowed the respondent to prosecute his case. The appellant never followed up the matter until judgment was delivered on 3rd October 2023. It is therefore an afterthought to raise the matter in the appeal without applying for review of the judgment. The decision to hear the matter in the absence of the appellant was made in June 2023 and therefore the right of appeal against the same lapsed before the impugned judgment was delivered. My conclusion is therefore that the appellant was given an opportunity of being heard before trial court but it deliberately failed to participate in the hearing.

Unfair and unlawful termination

21. Section 45 (1) & (2) of the *Employment Act* provides that: -

> "(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."

22. In this case, the termination was on account of redundancy and therefore, the employee was not to blame for any wrong doing. Redundancy is defined in section 2 of the *Employment Act* as:

> "redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;"

23. In the instant appeal, the question at hand is whether the redundancy was done in accordance with the mandatory procedure set out under Section 40 of the Act provides as follows:

> " 40. Termination on account of redundancy
>
> 1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
>
> a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
>
> c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service." Emphasis added.

24. Having considered the evidence on record, it is clear that the above procedure was not adhered to before laying off the respondent. First, he was not served with prior notice of at least one month and the area labour officer was also not served with the notice of the intended redundancy. Second, the appellant did not demonstrate that it undertook fair selection before the respondent was retrenched. Third, the respondent did not pay the respondent salary in lieu of notice, severance pay plus other accrued dues as required under the above provision. Consequently, I find that the retrenchment of the respondent amounted to unfair and unlawful termination of his employment and the trial court was right in arriving at the same conclusion.

Whether this Court should disturb the award of damages by the trial Court

25. Whether or not an award of damages is to be disturbed on appeal, I am guided by the Court of Appeal decision in the case of *Butt v Khan* [1978] eKLR, thus:

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

26. Starting with the award of 12 months salary as compensation for unfair termination, the appellant faulted the trial court for not giving any justification for awarding the maximum award under section 49 (1) (c) of the *Employment Act*. The respondent contended that the trial court was convinced that the award was deserving.

27. Section 49(4) of the Act provides that:

> "A labour officer shall, in deciding whether to recommend the remedies specified in subsection (1) and (3), take into account any or all of the following-
>
> a. ..."

28. The above provision requires trial court to justify the award. In this case, the trial court applied the wrong principles of law in assessing the maximum award of 12 months' salary compensation by failing to take into account any of the factors set out in above provisions. The Court, while exercising its discretion failed to consider the relevant factors set out in section 49 (4) (e), (f), (g) and (h) of the Act which include:

    e. "the employee's length of service with the employer;

    f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

    g. the opportunities available to the employee for securing comparable or suitable employment with another employer;

    h. the value of any severance payable by law"

29. As a result of the failure to take into account the above relevant factors, the award made was manifestly excess. The respondent served for only two years as a Mechanic and he never tendered any evidence to demonstrate that it wasn't possible to secure an alternative job. He was also entitled to payment of severance pay under section 40 of the Act. Having considered the foregoing factors and the fact that he did not contribute to the termination through misconduct, I am satisfied that an award six (6) months gross salary as compensation for unfair and unlawful termination equaling to Kshs 300,000 is reasonable.

30. I gather support from *OlPejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, where the Court of Appeal held as follows:

> " The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention."

31. As regards the award of Kshs 100,000 as salary in lieu of notice, there is no evidence on record to justify the said award which was equivalent to two months salary. Even though the Respondent argued that it was in addition to the month's salary that was not paid before termination, there was no evidence tendered to that extent. Section 40 (a) and (b) of the Act prescribes the conditions for redundancy including the following:

> " (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; "

32. In view of the foregoing provisions and the evidence, I find that the correct award is one-month salary being Kshs.50,000 and not Kshs 100,000 which was not supported by evidence.

33. As regards the award of severance pay, section 40 (1) (g) requires the employer to pay a retrenched employee, thus:

> "(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

34. In this case the respondent worked for two consecutive years which entitled him to severance pay for 30 days equaling to Kshs 50,000. Consequently, I find that the trial court was right in awarding Kshs 50,000 as severance pay.

35. Finally, I agree with the appellant that an award made under section 49 of the *Employment Act* ought to be subjected to statutory deductions. Consequently, I find that the trial court erred by failing to subject the decreed sum to statutory deductions.

Conclusion

36. I have found that the appellant was not denied an opportunity to be heard in the primary suit, since he was served with a hearing notice and deliberately failed to attend the hearing. I have further found that the impugned judgment ought to be disturbed for the reason that the court applied the wrong principles of law (failed to take into account relevant factors), and for being unsupported by evidence. Consequently, I enter judgment as follows:

    a. The appeal is partially successful

    b. The appellant is ordered to pay the respondent the following:

        i. Notice Kshs 50,000.00

        ii. Compensation Kshs 300,000.00

        iii. Severance pay Kshs 50,000.00

        Kshs 400,000.00

    c. Each party to bear costs of the appeal but the award of costs in the court below remains undisturbed.

    d. Interest at court rate from the date of the impugned judgment.

    e. The award of damages is subject to statutory deduction.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 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