

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E 263 OF 2024

TAMARIND RESTAURANT MOMBASA.....APPELLANT

VERSUS

ONESMUS MUNGA..... RESPONDENT

*[Being an Appeal against the Judgement and Decree of Hon. Maureen Nabiya, **Principal** Magistrate, in MCELRC NO. E 090 of 2022, dated and delivered on 14th November 2024]*

JUDGMENT

Background

1. The Respondent, asserting that at all material times he was employed by the Appellant as a waiter and that his employment was unjustly terminated, initiated legal proceedings against the Appellant in the aforementioned trial court, seeking various remedies. After hearing the parties on their respective cases, the trial court, in its judgment dated 14th November 2024, found in favour of the Respondent, declared that the termination of his employment was unfair, and awarded compensation for unfair dismissal as well as notice pay and unpaid house allowance.

2. Aggrieved by the Judgment, the Appellant impugned it on the grounds set out in their memorandum of appeal, filed herein, dated 10th December 2024.
3. Following the directions of this Court, the appeal was canvassed by way of written submissions.

The Respondent's Case Before the Trial Court.

4. It was the Respondent's case that, at all material times, he was employed by the Appellant as a waiter and served under various fixed-term contracts between 1st January 2017 and 19th December 2019. The fixed-term contract under which he last served was to run from 1st January 2019 to 31st December 2020.
5. The Appellant unfairly terminated the contract on 19th December 2019, a whole year before the expiry date. The termination was without a justifiable reason and did not comply with the principles of procedural fairness under section 41 of the Employment Act.
6. By reason of the foregoing premises, he was entitled to the following reliefs;

- a) 12 months' gross salary for the remainder of the contract period, 31st December 2019 to 31st December 2020, KShs. 308, 124.00.
- b) One month's pay in lieu of notice.....KShs. 25,677.00.
- c) House allowance 1st January 2019 to 31st December 2020.....92,437.00.
- d) Compensation for public holidays worked25,676.82
- e) Compensation for earned but unutilised leave 13 leave days.....12,838.41

The Appellant's case before the trial Court.

- 7. The Appellant presented one witness, Maureen Namiroi, its Human Resources Support and Benefits Manager, to testify on its behalf. At trial, she adopted her witness statement as her evidence in chief. The witness testified that at all material times, the Respondent served the Appellant as a waiter under various fixed-term contracts from 1st January 2017 until 31st December 2019, when his employment was terminated.
- 8. The Claimant was last engaged under a fixed-term contract effective 1st January 2019, which was set to lapse on 31st December 2020 unless terminated by either party giving the other 48 hours' notice.

9. On 31st December 2019, the Claimant's services were terminated in line with poor performance.
10. The Respondent cleared with the Respondent and was paid his terminal dues, inclusive of outstanding leave days for January 2020.
11. At separation, the Respondent was earning a gross monthly consolidated salary of KShs. 19,910, an amount that included the house allowance. The Respondent's claim for house allowance was not founded.
12. She further stated that the nature of the Appellant's business required operations to continue during public holidays, as some patrons opt to seek recreation at the Appellant's various establishments on such days, and some waiters would be called upon to provide services on such days. In light of the inconvenience caused, all staff who worked on public holidays were compensated by being granted a second day off in the week following such a public holiday. It was never the Appellant's practice to pay for such days.
13. The witness asserted that the termination of the Respondent's employment was in conformity with the law.

The Judgment by the Lower Court.

14. After considering the parties' evidence and respective submissions by their Counsel, the learned trial Magistrate entered Judgment for the Respondent against the Appellant in the manner brought out in the introductory part of this Judgement.

The Appeal

15. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

- a) That the learned trial Magistrate erred in law and fact in failing to determine the gross monthly salary of the Respondent, given that it was an issue in dispute between the parties on the basis of the pleadings before the Court.
- b) That the learned trial Magistrate erred in fact and law in delivering a judgment that was inconclusive, as it failed to determine the value of the monetary.
- c) That the learned trial Magistrate erred in law and fact in awarding the Claimant house allowance despite the fact that the Respondent was paid a consolidated monthly salary inclusive of house allowance.
- d) That the Learned trial Magistrate erred in law and in fact in awarding the Respondent twelve [12] months' gross salary as compensation for unfair termination.

- e) That the learned trial Magistrate erred in law and in fact in failing to appreciate that the Claimant was duly paid his terminal dues.

Analysis and Determination

16. Before I delve into considering the grounds of appeal, set out hereinabove, it is imperative to point out that the role of a first Appellate Court, as is this Court in the instant appeal, is to reconsider the material, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. See **Kenya Ports Authority v Kuston [Kenya] Limited [2009]2EA 212**, cited by Counsel for the Appellant.
17. The Appellant contends that the issue as to how much the Respondent was earning at termination was a vital issue that emerged for determination, but which the learned trial Magistrate did not make a determination on.
18. In employment disputes, particularly in cases where compensatory reliefs are sought that inherently require

computation based on the employee's monthly salary, the court must initially ascertain the precise monthly salary in instances where the parties have adopted conflicting stances regarding the matter. This is so, as failure to do so may result in an underaward or an overaward, thus an injustice to one of the parties.

19. True, as asserted by the Appellant, at the trial the parties took diametrically opposed positions regarding the exact amount the Respondent was earning at separation. The Respondent pleaded and maintained throughout the proceedings that his monthly salary was KShs. 25,777, while the Appellant posited that the salary was KShs. 19,910.
20. Considering the reliefs that the Respondent had sought, and the conflicting positions taken by the parties, it was very necessary that the trial Court make a finding on what salary the Respondent was earning an issue for determination.
21. Inarguably, the Respondent last served under the fixed -term contract of service dated 12th February 2019, but which was

expressed to be for the period 1st January 2019 to 31st December 2020. As submitted by the parties' counsel, the contract provided for the Respondent's monthly salary. Clause 2 of the contract provided;

“You shall be paid a consolidated monthly salary of KShs. 19,910 and 3 points of service charge per month in arrears at the end of each month.”

22. A plain reading of this clause would certainly reveal that the Respondent's gross salary was more than 19,910. The Respondent was right, therefore, to assert in his pleadings and evidence that his salary wasn't 19,910.
23. It is important to note that, before the trial Court, a dispute arose regarding a term of employment, and under section 10[7] of the Employment Act, that term had to be proved by the employer [read Appellant]. Instead of deliberately turning a blind eye to it, the Appellant ought to have realised that they were under a duty to sufficiently show what the “3 points” would constitute in order to arrive at the Respondent's actual gross salary. I note that

the terminal payment form reflects the service charge for December 2019, as KShs. 6,984.

24. For the foregoing reasons, as a first Appellate Court, I find that the gross salary for the Respondent at separation was KShs. 25,777, as he pleaded, not KShs. 19,910 as asserted by the Appellant. As such, correct amount was applied in computing the reliefs granted by the trial Court.
25. Section 49[1][c] of the Employment Act bestows upon the Courts the power to grant compensatory relief for an employee who successfully assails their employer's decision to terminate their employment unfairly or wrongfully summarily dismiss them from employment. However, it is essential to note that the power is discretionary and turns on the circumstances of each case.
26. In my view, where a decision is the result of an exercise of discretion by a Court, the Court is obliged to give reasons for the manner in which the discretion was exercised. It is clear that the learned trial Magistrate did not provide reasons for awarding

twelve months' gross salary as compensation for the unfair termination. I trust that, from this judgment, it will occur to her that providing reasons for a decision that affects the parties is a legal and constitutional imperative, as it speaks to judicial accountability.

27. In **Ol Pejeta Ranching Limited v David Wanjau Muhoro**, [2017] KECA 329[KLR], cited by Counsel for the Appellant, the Court of Appeal held;

“..... 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 sound 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 failed to take into account relevant considerations which act then invites intervention.....”

28. I have carefully considered the circumstances under which the Respondent's employment was terminated, including that the Appellant didn't adhere to the statutory dictates of procedural and substantive fairness, the length of the period [read the remainder of the contract period] the Respondent expected to serve the Appellant, and that he did not in any proven manner contribute to the termination, and hold that even though the trial Court did not give the reasons for the award of twelve months' gross salary, I am not persuaded to find that the award was excessive, as the Appellant wants me to.
29. The Appellant submits that the learned trial Magistrate erred in awarding the Respondent house allowance despite the fact that the parties' contract provided for a consolidated salary including house allowance. To them the act amounted to the Court re-writing a contract for the parties, contrary to the legal principle that was aptly enunciated in the case of **National Bank of Kenya Ltd vs Pipeplastic Samkoit[K]Ltd & another [2001] eKLR**, thus;

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”

30. The Appellant submitted further that where a contract of employment provides for a consolidated salary, the salary should be deemed to include house allowance. To support this point, Counsel puts reliance on the cases of **Oputu v Benforce Security Services Limited [2025] KEELRC 390[KLR]** and **Mulla v Unga Farm Care East Limited [2024] KEERLC1790 [KLR]**.
31. The Respondent on the other hand submitted that ordinarily, the word “consolidate” is to combine a number of things into a single usually more effective or coherent whole” In relation to wage it is a combination of two or more items, that would normally go to a remuneration package.

32. It is argued that whilst house allowance is ordinarily expected to be in what is described as consolidated salary, this does not necessarily, in law and fact, mean that the it is automatically included. A party may provide evidence to demonstrate that the allowance did not in fact form part of the gross consolidated pay.
33. Undoubtedly, the contract of employment between the parties provided for a consolidated salary. In my view, a consolidated salary should be taken to mean a single, all-inclusive fixed amount of pay given to san employee, without separate itemization of the usual components of remuneration. Definitely it is larger than basic pay. It typically covers basic pay plus allowances such as housing, transport, medical or other benefits.
34. The Respondent has cited the case of **Grain Pro Kenya Inc. Limited v Waithaka Kiragu [2019] eKLR**. In this Court's view, the decision does not at all help the Respondent's position. It is distinguishable from the instant matter. What is clear from the cited case is that the contract of employment in issue therein, expressly provided for basic pay, not consolidated salary.

35. It is important to point out at this juncture that, I have carefully considered the Respondent's Statement of Claim, his witness statement [turned evidence in chief], and his oral testimony in Court, and conclude that there was no factual and evidential basis laid for the Claim for house allowance. In fact all that the Respondent afforded to state about it, was during cross examination, thus, "*I am not aware that house allowance was part of the pay slip.*" In this Court's view, the claim was just thrown to the trial Court.
36. By reason of the foregoing premises, I return that the learned trial Magistrate erred in law, when she found that the Respondent was entitled to unpaid house allowance.
37. In the upshot, the Appellant's appeal succeeds partially. The trial Court's judgement is hereby disturbed on to the extent that the award of house allowance is set aside. As the success is partial, each party shall bear its own costs of this appeal.

Read, signed, and delivered virtually in Mombasa on January 29th 2025.

OCHARO KEBIRA

JUDGE

ORIGINAL