

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E130 OF 2023

SUNSET MANAGEMENT AND RENTALS LTD... APPELLANT

VERSUS

TERESIA WAIRIMU MAHARIARESPONDENT

(Being an Appeal from the Judgment of the Hon. M.L Nabibya delivered on the 26th October,2023 in Mombasa CMELRC E65 of 2021)

JUDGMENT

Background

1. By a Statement of Claim dated 8th July 2021, the Respondent sued the Appellant in the above-mentioned lower cause, seeking judgment against the Appellant for KShs. 784,841.00, as particularised hereunder;

- i) Salary for May 2021.KShs.
50,000.00

- ii) Salary for 4days worked in June, 2021.....KShs.
6,666.00
- iii) Pending leave days (15) KShs.
22,125.00
- iv) Public Holidays worked (19daysx2)KShs.
56,050.00
- v) Payment in lieu of Notice.KShs.
50,000.00
- vi) Damages for unfair termination
(Kshs. 50,000 x 12)KShs.
600,000.00

2. The Respondent further sought that the Appellant be directed to issue her a certificate of service, and be condemned to pay the costs of the cause.
3. The Appellant contested the Respondent's claim through the Respondent's Statement of Defence dated 17th August 2021. The Appellant acknowledged that the Respondent was employed by it at all material times but denied that her employment had been terminated. It

further denied the Respondent's entitlement to the reliefs she had sought.

Respondent's case in the lower court

4. The Respondent was employed by the Appellant as a Human Resources Officer on a permanent and pensionable basis from 7th March 2020, earning a gross monthly salary of KShs. 50,000.
5. She served the Appellant diligently and continuously. During her employment, she did not take annual leave and worked on public holidays.
6. Following an inter-county Covid-19 lockdown in April 2021, the Appellant's directors agreed with the Management team on a temporary reduction in workers' salaries to half pay and a reduced working schedule pending the lifting of the lockdown and an improvement in business.
7. On 11th May 2021, the Director of the Appellant, without consulting any Manager, disseminated a work schedule, which notably excluded her name. In reaction, she sent an email and a sales report indicating that the business had improved. Notwithstanding this, he insisted that the Appellant reduce the number of workers.

8. On 4th June 2021, the Appellant's Manager verbally informed her that she was missing from the shared schedule because her employment had been terminated. This prompted her to write an email to the Director, seeking clarification of her employment status. The email did not elicit any response at all. Her efforts to reach the Director by phone were unsuccessful.
9. She contended that the Appellant terminated her employment, which was unlawful, unfair and without adherence to due process. She was not served with a termination notice or subjected to any disciplinary process.
10. After terminating her employment, the Appellant refused to pay her terminal dues.

Appellant's case in the lower court

11. It was the Appellant's case that at all material times the Respondent was its Human Resources Manager. During the COVID-19 period, its business was significantly adversely affected. This prompted the Appellant to convene a meeting between its Human Resources and Finance Departments. The Respondent suggested that the

Appellant should send all of its employees on unpaid leave, allowing only a very essential skeleton staff to attend work on a special rotation and demand basis.

12. Following the meeting, the Appellant wrote to all employees, sending them on unpaid leave and allowing only essential skeleton staff to attend work on a special rota and on a demand basis.
13. As business conditions worsened, the Appellant further reduced operations and provided a new schedule for the remaining staff.
14. The Appellant claimed that she hurried to court before her business recovered and before the Respondent could be reinstated to the rota, despite her employment still being ongoing.
15. It was asserted that no termination letter was issued, that there was no intention to terminate the Respondent's employment and did not express any. that no termination process was initiated. As such, the Respondent's case was without foundation.

16. It indicated that it would issue a certificate of service and calculate terminal dues only if the Respondent confirmed her unwillingness to continue working.

Judgement

17. After hearing the parties' cases, the learned trial magistrate determined that the Respondent's employment was unfairly terminated by the Appellant. Consequently, she was awarded notice pay, salary for May 2021, wages for the days worked in June 2021, compensation for accrued but unused leave days, and three months' salary (KShs. 150,000) for unfair dismissal. The court also directed the issuance of a certificate of service. Additionally, the costs of the suit were awarded to the Respondent.

The Appeal

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

1. That the trial court erred in law and fact in that the judgment completely failed to consider the Appellant's Evidence.

2. The trial court erred in law and in fact in that it failed to consider and give any weight to the Appellant's evidence with regard to the unreasonable and insubordinate actions of the Respondent, particularly with regard to the issue of her tampering with the Appellant's computer.

3. The trial court erred in law and fact in that it delivered a judgment that was inconclusive in all the issues that should have been determined.

4. The trial court erred in law and in fact in that it failed to determine whether the termination of the Respondent was fair and justified or not.

5. The trial court erred in law and in fact in holding that the Respondent's employment was terminated verbally, without notice, hearing, and without any criteria.

6. The trial court erred in law and in fact in that it failed to evaluate the documentary evidence that had been produced by the Appellant.

7. The trial court erred in law and in fact in that it did not make a determination on the issue raised by the Appellant that the Respondent unfairly rushed to file the action in court without any justification.

8. That the Learned Judge erred in both law and fact in arriving at a decision that was wholly against the weight of Evidence, Law, and Justice.

Appellant's submissions

19. The Appellant submits that the trial Court did not determine all the issues that were left for it to determine, and give reasons for its findings. Such a state of affairs rendered the judgment unreliable and subject to being set aside on appeal. To support this, reliance has been placed on the decision in **Flannery v Halifax Estate Agencies Ltd [2000]1 WLR 337 at 381**, where Henry LJ aptly:

“A judge was under a duty to explain why he had reached his.....where reasons and

analysis were advanced on either side, a judge had to enter into issues canvassed and explain why he preferred one case over the other Failure to supply reasons in those circumstances offended against the requirements inherent in the duty of showing fairness to both parties and of producing a decision soundly based on the evidence, and constituted a good free -standing ground of appeal.....his failure to do so justified setting aside his judgment and remitting the case for retrial.”

20. It is further submitted that the principle set out in the decision mentioned above is what Order 21 Rule 4 of the Civil Procedure contemplates. A judgment in a defended suit must contain a concise statement of the case, the issues for determination, the decision thereon, and the reasons for the decision. To support this point, reliance has been placed on **Mikaal Limited & another v Attorney General & 2 others (Civil Appeal E020 of**

2021) [2024] KECA 358 (KLR), and Chandaria v Nyeri [1982] KLR 84 at 85.

21. The Appellant further submits that the judgment of the trial Court was not only inconclusive but also devoid of the necessary judicial reasoning required under the law. It failed to resolve the question of whether a termination occurred, ignored documentary and oral evidence that discounted the allegation of termination, and did not address the justification and context of the Appellant's actions in light of the COVID-19 pandemic.

Respondent's submissions

22. The Respondent argues that, despite the Appellant blaming the Covid-19 pandemic for the termination, their own witness, Mr Malik Makori, admitted during his testimony that the Respondent was dismissed from her employment.

23. The Respondent submits that her employment was terminated on account of redundancy as her office was abolished. However, the termination was not in accordance with the provisions of Section 40 of the

Employment Act, which provides mandatory requirements for a substantively and procedurally fair termination on the account.

24. The unilateral exclusion of the Respondent from the staff list and sending her on compulsory unpaid leave amounted to an unfair labour practice contrary to the stipulations of Article 41 of the Constitution.

25. Contrary to the Appellant's contention, the learned trial Magistrate addressed and determined all issues, including whether there was a termination and offered reasons for her finding. This Court should be slow, therefore, to accede to the Appellant's plea that it sets aside the trial Court's judgment. She places reliance on the case of **Peters v Sunday Post Ltd (1958) EA**, where the Court held;

"It is a strong thing for an appellant court to differ from a finding on a question of fact of the Judge who tried the case, and who had the advantage of seeing and hearing witnesses. But the jurisdiction to[review evidence] should be exercised with caution; it is not enough that

the appellate court might itself have come to a different conclusion.”

Analysis and determination

26. In the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, the court therein rendered itself as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it 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...”

27. I have thoroughly reviewed the grounds of appeal, together with the parties' pleadings, the oral and documentary evidence adduced before the trial court, and

the written submissions of counsel. In my assessment, this appeal turns on four key issues:

(a) whether the learned trial magistrate sufficiently identified the issues for determination, in the matter before her;

(b) If the answer to [a] is in the affirmative, whether she decided on each and every one of them, and gave the reasons thereof.

[c] Whether the learned trial Magistrate failed to consider the Appellant's evidence sufficiently.

[d] was the employment of the Respondent terminated, and at the initiative of the Appellant, unfairly.

[e] Was the Respondent entitled to the reliefs granted?

Did the Learned Trial Magistrate sufficiently or at all identify issues for determination in the matter?

28. It bears repeating that the identification of issues for determination is foundational to the adjudicative process.

Issues for determination define the scope of the dispute, guide the evaluation of evidence and submissions, and ensure that the reasoning of the Court is transparent, structured, and responsive to the parties' cases. A failure to clearly identify the issues obscures the basis of the decision, risks overlooking material questions in controversy, and undermines the integrity and reviewability of the judgment. Where a court does not determine each identified issue and give reasons for its conclusions, the judgment is rendered deficient, as parties are left uncertain as to how and why the decision was reached, and an appellate court is deprived of a proper foundation for effective review.

29. Order 21 rule 4 of the Civil Procedure Rules provides that:

“Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such determination.”

30. In the case of **Agnes Nzili Muthoka vs Insurance Company of East Africa [2001]1EA 143**, the Court held;

“It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystalize the issues, answer them as fully as possible and eventually hand down a decision.”

31. In **Mohammed Eltaff & 3 others v Dream Camp Kenya Limited [2005] eKLR**, the Court aptly stated;

“it is indeed a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or that the judgment has left certain issues unresolved.”

32. With great respect to the learned trial Magistrate, her judgment defied every contemplation of the provisions of Order 21 Rule 4 and 5 of the Civil Procedure Rules. The matter before the trial Court was highly contentious. The parties took diametrically opposing positions on vital aspects dispute. There was an absolute necessity that the issues for determination be clearly distilled from the parties' pleadings and evidence, that the material

presented be critically analysed, and that a determination be made on each of the issues.

33. Questions like how the separation occurred? Was the Respondent's employment terminated at the initiative of the Appellant? If so, was the termination unfair? Clearly required to be addressed for a structured, transparent, and responsive judgment by the trial Court. They were the vital issues that, owing to the shallow manner in which the parties' pleadings and evidence were brought out and analysed by the trial Court, didn't come out for determination, or were not identified as vital for determination.
34. With great respect, the learned trial Magistrate's judgment is one from which it is really challenging to discern clearly the specific issues it determined and the reasons for their determination.
35. It is, therefore, unsurprising that at one juncture in her judgment, she proposes a finding that the termination of the Respondent's employment constituted constructive dismissal. Conversely, in the subsequent paragraph, she attributes the termination to redundancy. The situation is

either constructive dismissal, a legal concept, or redundancy, which arises under markedly different circumstances from those of constructive dismissal.

36. At the end of the day, the learned trial Magistrate was not clear and conclusive as to how the separation occurred, whether it was the result of constructive dismissal or redundancy. This failure, coupled with that of not distilling issues for determination relevant to the dispute before her, justifies the setting aside of the judgment.

37. In **Flannery and Another v Halifax Estate Agencies Ltd**, **The Weekly Law Reports 25 February 2000**, cited by Counsel for the Appellant, the Court held;

“ That a judge was under a duty to explain why he had reached his decision; that the scope of what was required to fulfil that duty depended on the subject matter of the case; that where reasons and analysis were advanced on either side, a judge had to enter into issues canvassed and explain why he preferred one case over the other; that failure to supply reasons in those circumstances offended against requirements inherent in the duty of

showing fairness to both parties and of producing a decision soundly based on the evidence and constituted a good free- standing ground of appeal; that accordingly; that, accordingly, since the judgehe was under duty to supply reasons in the form of a coherent rebuttal of the plaintiffs' expert evidence and that his failure to do so justified setting aside his judgment and remitting the case for retrial."

38. By reason of the foregoing premises, this Court is constrained to set aside the learned trial Magistrate's judgment and order for a retrial. It is imperative to point out that, appreciating the scope of this Court's authority as a first Appellate Court, I would reanalyse the evidence before the trial Court and come to my own conclusions. However, this has been obscured by the sketchy manner in which the parties' evidence was taken by the trial Court, and more specifically, that under cross-examination.

39. In the upshot, the lower Court Judgment is hereby set aside. The suit is remitted back for a retrial before another Magistrate other than **M.L. Nabibya**. The trial be

concluded within 90 days of today. Each party shall bear its own costs of the Appeal.

Read Signed and Delivered this 2nd Day of February 2026.

OCHARO KEBIRA

JUDGE

ORIGINAL