



**Brade Gate Holdings Limited v Mwangi (Civil Appeal 92 of 2019)
[2024] KECA 1011 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KECA 1011 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 92 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
FEBRUARY 2, 2024**

BETWEEN

BRADE GATE HOLDINGS LIMITED APPELLANT

AND

HUMPHREY MUKUNDI MWANGI RESPONDENT

(Being an appeal from the Decree and Judgment of the Employment and Labour Relations Court of Kenya at Nyeri (B. Ongaya, J.) dated 14th July 2017 in ELRCC No. 56 of 2016)

JUDGMENT

1. The respondent, Humphrey Mukundi Mwangi, was on 17th September 2013 employed by the appellant, Brade Gate Holdings Limited, as the Group General Manager at a basic salary of Kshs.134,847. The salary was subsequently increased to Kshs.154,847.
2. Through a memorandum of claim dated 29th March 2016, the respondent complained that on 18th October 2015 his contract of employment had been verbally, arbitrarily and illegally terminated without notice by Dr. Thuo Mathenge who was the Chairman of the appellant. He sought a declaration that he was still technically and/or legally in employment, and asked to be paid his salary arrears from 18th October 2015 to the time the court deemed appropriate; and, alternatively, twelve (12) months' gross salary (Kshs.1,858,164); three (3) months' salary in lieu of notice termination (Kshs.464,541); unpaid leave for 41.75 days (Kshs.307,870.46); a formal letter of termination as well as certificate of service; and costs and interest.
3. The appellant opposed the claim. The existence of employment contract between the two was denied. It was contended that it was the respondent who without any notice or legal justification absconded from duty claiming that he had been put under a lot of pressure by the Chairman, and therefore was not entitled to the prayers in the memorandum of claim.



4. The trial was conducted by the learned B. Ongaya, J. of the Employment and Labour Relations Court of Kenya (ELRC) at Nyeri. The respondent testified as did Rawlings Mathenge Thuo, the General Manager Finance of the appellant. On 14th July 2017 a judgment was delivered in which it was found that the fact of employment had been admitted. The court returned the verdict that the respondent's employment had been terminated verbally, without notice and without a valid reason as envisaged in sections 41 and 43 of the *Employment Act*, 2007; that the termination had been unfair, humiliating and intimidating before his juniors; and that the respondent had desired to continue in employment. He was awarded twelve (12) months salaries under section 49(1)(c) of the Act (Kshs.1,858,164); he was awarded one month's salary in lieu of notice (Kshs.154,847) under section 35(1)(c) of the Act; was to get Kshs.307,870.48 representing two years he had not taken leave; and was ordered to be issued with certificate of service under Section 51 of the *Act*.
5. The appellant was aggrieved by the judgment and decree and filed an appeal before the Court on the following grounds:-
 - “ 1) The learned Judge erred in law and fact in holding that the claimant was verbally dismissed from employment by the respondent.
 2. The learned Judge misdirected himself in holding that the handing over of the car keys amounted to a confirmation that the claimant was verbally dismissed from employment by the respondent.
 3. The learned Judge erred in law and fact in holding that the claimant was verbally dismissed from employment and without notice as per section 41 of the *Employment Act* against the overwhelming evidence by the respondent that the claimant absconded from duties.
 4. The learned Judge misdirected himself in holding that failure by the respondent to call the Chairman to testify amounted to a confirmation that the claimant was verbally dismissed from employment by the applicant.”
6. When the appeal came up for hearing the appellant's counsel was absent but had filed written submissions. Mr. Peter Muthoni, learned counsel for the respondent, had also filed written submissions. He elected to proceed on the basis of the submissions on record.
7. As the first appellate court, our responsibility is to re-consider the evidence that was adduced before the trial court, re-evaluate it, satisfy ourselves that the conclusions reached by the trial Judge were consistent with the evidence (See *Sanitam services (EA) Ltd -vs- Rentokil* [2006]2 KLR 70).
8. According to the record, the appellant's witnesses admitted that the respondent was their employee. The question that the trial court was asked to deal with was whether the respondent had been orally, unfairly and illegally terminated, as had been pleaded. The respondent testified that the Chairman asked him to convene a staff meeting on 18th October 2015. The Chairman was present and took over the meeting. In the meeting, he declared that the respondent was no longer the appellant's Group General Manager, and that his duties would be distributed to other staff present. When the respondent asked for reasons, the Chairman asked him to stop asking questions and instead hand over, pack and leave. The Human Resource Officer paid him the September salary and the 18 days worked in October. Leave days were computed to be 41.75 days but were not paid. He was not given a termination letter.
9. The appellant's witness admitted that indeed the Chairman had called the meeting in question. The Chairman put pressure on all departments to perform. The witness testified further that thereafter the



respondent absconded from duty, and four months later he was dismissed. The witness denied that the Chairman forced him out. He stated:-

“ Am not aware that on 18th October 2015 Dr. Mathenge send(sic) the claimant away from duty in a casual manner.....

On 20th October 2015 (Mashujaa Day) I do not know if Chairman called claimant. I say I am aware he handed over car keys to Patrick Karoki the Marketing Officer... ”

It was admitted that the Chairman had called for the car keys from the respondent.

10. The trial court considered the rival versions. It was noted that the appellant had not called the Chairman to come and rebut what the respondent had testified regarding the events of 18th October 2015. The court accepted the version by the respondent, and found that the Chairman had not only humiliated the respondent but had gone ahead and ordered him to hand over to his juniors and leave employment. The respondent had unsuccessfully sought to be told the reasons why he was being dismissed from employment. We find that, on evidence, the trial court had correctly determined that, without reason and notice, the Chairman had unfairly and illegally terminated the respondent’s employment. The termination had been verbally done. The findings under sections 41 and 43 of the Act were therefore justified.
11. We wish to emphasize that the pleadings made the actions of the Chairman an issue; the respondent saying that the Chairman had verbally and without reason or notice terminated his employment, and the appellant saying that the Chairman had not acted as alleged. The respondent testified regarding the happenings of the day. The appellant did not call the Chairman to rebut that evidence, and there was no explanation for the non-calling. We find that the trial Judge was entitled, as he did, to take an adverse view of the fact that the Chairman had not testified. The inference was that had the Chairman been called to testify he would have given evidence adverse to the appellant’s case. (See Stanley Mombo Amuti –vs- Kenya Anti- Corruption Commission [2019]eKLR).
12. From the grounds in the Memorandum of Appeal, the appellant raised no issue regarding the award and orders that the trial Judge granted after the finding that the dismissal was unfair and unlawful. Learned counsel for the appellant sought to challenge the award during the written submissions. Unfortunately, the appeal was confined to the grounds in the appeal. The appellant could not submit beyond those grounds.
13. The result is that the appeal lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY 2024.

W. KARANJA

JUDGE OF APPEAL

JAMILA MOHAMMED

JUDGE OF APPEAL

A. O. MUCHELULE

JUDGE OF APPEAL

