



**Maroo Polymers Limited v Winfred Kasyoki Willis (Civil Appeal
176 of 2019) [2023] KECA 84 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 84 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 176 OF 2019
HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA
FEBRUARY 3, 2023**

BETWEEN

MAROO POLYMERS LIMITED APPELLANT

AND

WINFRED KASYOKI WILLIS RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Ongaya, J) delivered on 4th December 2018 in ELRC Case No. 2241 of 2017)

JUDGMENT

1. The appellant, Maroo Polymers Limited has filed this appeal against the judgment and decree of the Employment and Labour Relations Court (ELRC) (Ongaya, J) delivered on December 14, 2018, in which the court gave judgment in favour of Winfred Kasyoki Willis (Winfred), the respondent herein.
2. Winfred had sued the appellant, who was her former employer, contending that her services had been unfairly terminated on June 6, 2017 after 19 years' of service. The termination allegedly came after she was beaten and abused by the Managing Director's son and asked to leave her employer's premises. She reported the assault to the police and later lodged her claim in the ELRC.
3. In her claim, Winfred sought payment for salary in lieu of notice, days worked, pro-rata leave of four months, annual paid leave of one month, gratuity/benefits for 19 years, and compensation for loss of employment. The appellant filed a defence in which it maintained that it was a separate legal entity from the workers; that it was not aware of any report by Winfred in regard to the physical assault; and that following a meeting in the advocate's office, Winfred had been assured that her job was still available and she was free to return to her job as the managing director was investigating her complaints.
4. In the impugned judgment, the ELRC found that Winfred had served in her employment with the appellant for a period of 19 years, and that she was forced to leave the appellant's employment following a physical assault, which was reported, and criminal charges initiated. The learned Judge rejected the



claim that Winfred had absconded from duty, and ruled that no disciplinary proceedings were initiated against her in that regard. The court accepted Winfred's evidence that her services were terminated, and found that there was no due process undertaken by the appellant under section 41 of the Employment Act, nor was there any valid reason for Winfred's termination under section 43 of the Employment Act. Consequently, the learned Judge awarded the appellant maximum compensation of Ksh 216,000 as well as payment of salary in lieu of notice, days worked, leave days and costs of the suit. The learned Judge rejected Winfred's claim for service pay or gratuity, as she was a member of NSSF.

5. The appellant has challenged the judgment on six grounds, stating that the learned Judge erred in law and fact: in allowing the claim despite there being discrepancies and inconsistencies in the pleadings and evidence; by linking the son of the director of the appellant to the company, which is a separate legal entity; in totally overlooking the defence evidence, particularly the pay slips on record; in failing to give reasons for arriving at his decision and awarding Winfred Kshs 273,000 inclusive of costs; in disregarding the appellant's submissions, particularly on the issue of a party being bound by their pleadings; and in shifting the burden of proof to the appellant to the effect that the appellant failed to commence disciplinary proceedings.
6. In support of the appeal, the appellant filed written submissions in which it contended that Winfred's evidence was contradictory. For instance, she stated in her evidence-in-chief, that the date her employment was allegedly terminated was June 6, 2017, while her evidence in cross-examination was that she was terminated on September 6, 2017. Her medical report from Mama Lucy Kibaki hospital indicated that she was treated on July 25, 2017, while still at work, and that these contradictions were overlooked by the trial court.
7. Citing *Dakianga Distributors (K) Limited vs Kenya Seed Company Limited [2015] eKLR*, the appellant urged that parties are bound by their pleadings, and since Winfred had indicated in her memorandum of claim that she was unlawfully terminated on June 6, 2017, and pay slips had been produced for the months of July and August, the trial Judge was totally wrong in ignoring the pay slips and the contradiction. It was argued that the appellant is a separate legal entity from the employees and the acts of the employee could not bind the company. It was pointed out that the appellant through a letter dated October 30, 2019, addressed to Winfred had sought to know the reasons for her non-attendance and given her a timeline within which to explain her absence from duty, and that Winfred responded by serving them with summons from the court and this prevented the appellant from pursuing the disciplinary proceedings. The Court was therefore urged to allow the appeal.
8. Winfred who was acting in person did not file any written submissions, nor did she attend the hearing of the appeal despite having been duly served with a hearing notice.
9. We have carefully considered this appeal. Being a first appeal, under Section 17 of the *Employment and Labour Relations Court Act*, as read with Article 164(3) of the *Constitution*, this Court has the mandate to reconsider and evaluate the evidence which was adduced before the trial court in light of the applicable law in order to arrive at its own conclusions.
10. In *Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR* this Court stated the law regarding dismissal as follows:
 13. There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5)), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.



The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

'To declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.'

Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.

11. See also *Janet Nyandiko vs Kenya Commercial Bank Limited [2017] eKLR*. Winfred contended in her claim that her services were terminated unlawfully contrary to section 41 of the Employment Act. That section requires an employer before terminating the services of an employee, to explain to the employee the reasons for which it is considering terminating the employment, and to give the employee an opportunity of being heard, including hearing any employee or shop floor union representative that the employee may choose. In this case, the appellant denied having terminated Winfred's employment. However, there was ample evidence that Winfred was assaulted and asked to leave the employer's premises. While the appellant maintained that the actions of its employees were separate from that of the appellant, it is apparent that the appellant being a limited liability company, can only run its affairs through its directors and employees. If Winfred was asked to leave by an employee of the company who had the authority to make such a decision, the company would be bound by such decision. Moreover, although the appellant accused Winfred of absconding from employment, no evidence was adduced in this regard.
12. At paragraph 4 of the appellant's defence to the claim, the appellant stated:
 - (i) The respondent as a company is not aware of any report by the claimant to the effect of physical injury to the claimant.
 - ii. The respondent has procedures in case of a dispute amongst employees where there has to be a report made to the managing director who takes action against any employee, be it the son or brother.
 - iii. None was ever reported and in the month of October police sought one of the employees to write a statement over an assault case. The case is still pending at Makadara Law Courts and awaits the first hearing.
 - iv. In the meantime, a meeting was held in the advocates' office where deliberations confirmed that the claimant's job was still available and that she was obligated to return to her job as the managing director was investigating the occurrence.
 - v.
 - vi. The acts of an individual do not reflect the acts of the company. In fact, the criminal case ought to be determined to establish the acts complained of as they are non-existent.
 - vii. Presently the respondent's employee one Ashif Dinesh is being subjected to double jeopardy by facing two cases which is greatly prejudicial to this case.
 - viii. There was no slapping, kicking or abusing at all as claimed by the claimant.



ix. The issue of beating and/or slapping is presently subject to the court case.

13. From the above extract of the defence, it is apparent that the appellant admitted that there was an incident involving Winfred and the appellant's employee, one Ashif Dinesh, and that Winfred did lodge a complaint which resulted in Ashif Dinesh being charged in a criminal court. Much as Ashif Dinesh testified denying having been involved in any altercation with the respondent, it is clear from the statement of defence that the appellant was aware of Winfred's complaint, and that efforts were made to settle the matter, hence the meeting in the advocate's office and the offer to Winfred to return back to work.
14. In her evidence-in-chief, Winfred stated that she was sent away from her employment on June 6, 2017 by Ashif Dinesh. She later went back to her place of employment but was sent away by Mr Dinesh Shah, father to Ashif Dinesh. In her cross-examination, she maintained that she was terminated on June 6, 2017 when Ashif Dinesh told her to leave, and that on September 6, 2017, she went back to work but was again told by Dinesh Shah to go away.
15. Winfred seems to have been confused as to whether she was terminated on June 6, 2017 or September 6, 2017. However, it is apparent from her evidence that she left after being told to go away on June 6, 2017, and that she went back on September 6, 2017, but was again chased away. In the defence, the appellant had given an indication that Winfred was free to go back to work, and it would appear that this is what Winfred attempted to do on September 6, 2017, but was again sent away. In our view, the inconsistencies regarding the dates when Winfred was dismissed, have been adequately explained. The date of her termination remained June 6, 2017 when she was first sent away as she was never allowed back to work thereafter.
16. There was an issue regarding the pay slips which were produced by the appellant for the months of July, August, and September 2017. However, in the absence of evidence regarding actual payments, either made directly to Winfred or made in her account, these pay slips mean nothing. They are documents created by the appellant for its own convenience as there is no evidence that Winfred received any salary for these months.
17. Under Section 44(1) of the Employment Act, summary dismissal takes place when an employer terminates the employment of an employee without notice or with lesser notice than that to which the employee is entitled to. Under section 47(5) of the Employment Act, the employee has the burden of proving the unfair termination or wrongful dismissal while the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.
18. In this case, Winfred established that she was summarily dismissed from employment because she was asked to go away after having gotten into an altercation with Ashif Dinesh and that her efforts to go back to work thereafter were frustrated by the appellant. The burden was upon the appellant to establish that they had good reasons for terminating Winfred's employment. While the appellant denied that there was any altercation with Ashif, or that Winfred was assaulted, we find that there was indeed an altercation that resulted in Ashif being charged. If Winfred was the one whose conduct instigated the altercation such as to justify her dismissal, the appellant did not establish this.
19. As regards the attempt to blame Winfred for absconding from employment, this was not pleaded by the appellant in its defence which was filed on December 4, 2017. A letter dated October 30, 2017 in which it was alleged that Winfred had been absent from employment for 6 weeks was served on Winfred's advocate on the December 4, 2017. Worthy of note is that it was not alleged in the letter that Winfred had been absent from work without permission, and this made it evident that the appellant knew why Winfred was absent from work, hence the failure to plead that she had absconded from



employment. We find that Winfred had not absconded from employment but had been chased away. This is why there was no letter written to Winfred regarding the alleged abscondment, nor were any disciplinary proceedings initiated in regard to the alleged absconding before Winfred lodged her claim. The letter dated October 30, 2017 was an attempt to create that defence when the appellant realized that Winfred had lodged a claim for unlawful termination. We find that the appellant failed to establish any grounds that would justify that it lawfully terminated Winfred's employment or that Winfred absconded employment. We come to the conclusion that the learned judge was right in finding the appellant liable to Winfred for unlawful termination of employment.

20. As regards the award of damages to Winfred, in *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor vs Lubia & Anor (2) [1987] KLR 30*, this Court held that the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court, were, that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the damages awarded are so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

21. In *Catholic Diocese of Kisumu vs Tete [2004] 2 KLR 55*, this Court held that:

- ' (i) The assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the lower court simply because it would have awarded a different figure if it had tried the case at first instance.
- ii. An appellate court can justifiably interfere with quantum of damages awarded by a trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one, or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.'

22. Section 49 (4) of the Employment Act provides the factors that may be taken into account in identifying the appropriate relief to a claimant, and these include the circumstances in which the termination took place. We are of the view that except for the award of maximum compensation which the learned Judge allowed under section 49(1)(c) of the Employment Act, the awards made to Winfred were in accordance with Section 49 of the Employment Act, and this Court has no reason to interfere.

23. In awarding the maximum compensation under section 49(1)(c), the learned Judge exercised his discretion and considered as aggravating factors, the fact that Winfred had worked for the appellant for 19 years, the fact that the appellant failed to pay Winfred for the days that she had worked, and the fact that the termination was accompanied with physical assault and insult. It is noteworthy that Winfred did not claim aggravated damages and, the aggravating factors referred to by the learned Judge were factors that were relevant to be considered in awarding maximum compensation as provided under section 49(4) of the Employment Act.

24. In *Kenya Broadcasting Corporation vs Geoffrey Wakio [2019] eKLR*, this Court stated as follows:

- ' This Court has established the rule that an award of maximum 12 months' pay must be based on sound judicial principles. In *Ol pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR*, this Court categorically stated that the trial judge must justify or explain why



a claimant is entitled to the maximum award. That the exercise of discretion must not be capricious or whimsical.'

25. In this case, the learned Judge gave reasons for awarding the maximum 12 months' compensation as the blatant disregard for fair labour practices by the appellant and the fact that Winfred had lost her employment of 19 years. The discretion by the trial court to award maximum compensation of 12 months' pay was judicially exercised and cannot be faulted.
26. We believe we have said enough to show that this appeal has no merit. It is accordingly dismissed. As Winfred did not file any submissions nor attend Court for the hearing of the appeal, we make no orders as to costs. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

