Ufanisi Freighters (K) Limited v Nyamai (Civil Appeal 105 of 2019)
[2023] KECA 297 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 297 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 105 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

MARCH 17, 2023

BETWEEN

UFANISI FREIGHTERS (K) LIMITED ..... APPELLANT

AND

WAMBUA NYAMAI ..... RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (O. N. Makau J.) delivered on 28th April 2017 in Mombasa ELRC Cause No 857 of 2015)

JUDGMENT

1. Wambua Nyamai, the respondent herein, filed a suit in the Employment and Labour Relations Court (ELRC) by way of a memorandum of claim dated November 5, 2015, in which he averred that he was employed by the Ufanisi Freighters (K) Ltd (hereinafter the appellant) as a truck driver at a salary of Kshs 26,650.00 per month from August 23, 2014. That on or about July 7, 2015, he was sent on compulsory leave following his inquiry as to why his salary was being deducted without any explanation, and upon returning to work on July 22, 2015, he was informed that his services had been terminated.

2. The respondent claimed that he was therefore entitled to compensation made up of one (1) month salary in lieu of notice at Kshs 26,650/-, unexplained deductions amounting to Kshs 27,840/-, damages for unfair termination amounting to Kshs 319,800/-, all totalling to Kshs 374,290.00/-, and a certificate of service. He accordingly sought a declaration that his services were terminated wrongfully and /or unfairly; damages for wrongful and/or unfair dismissal; an order compelling the appellant to immediately release the respondent's final dues of Kshs 372, 290/- or dues due to him; that the appellant to release his certificate of service; and that the cost and interest of the claims be awarded.

3. The appellant's case, as set out in a memorandum of response dated February 23, 2016 filed in the ELRC, was that the respondent went on 14- days leave from July 7, 2015, and that upon his return

on July 22, 2015, he was assigned to drive truck number KAV 284S/ZC 4370, which duties he refused to take up and failed to report to his designated work place. That the actions by the respondent were deemed to amount to absconding duty, and a letter to show cause dated July 29, 2015 was issued to the respondent at his last known address, which also invited him to attend a disciplinary meeting on August 14, 2015. However, that the respondent did not respond to the letter nor did he show up for the hearing, and that as a result, the appellant was left with no alternative but to dismiss the respondent on August 21, 2015.

4. On the relief sought by the respondent, the appellant's position was that the respondent's dues were calculated and paid to him, and that he was therefore not entitled to the one-month's salary in lieu of notice. Further, they were a stranger to the prayer on unexplained deductions and placed the respondent to strict proof. The appellant in this regard, in its witness statement dated September 26, 2016 signed by Mr. Lawrence King'ora, its Human Resource Manager, explained that the deductions were for the recovery of excessive diesel which the respondent could not account for and were deducted as follows: Kshs 1,000/= in October 2014 Kshs 4,100/= in November 2014; Kshs 3,550/= in January 2015 which was erroneously deducted and refunded; Kshs 4,970/= in April 2015; Kshs 8,000/= in April 30, 2015, paid for him in Court by the appellant following his arrest; and Kshs 2,050/= June 2015.

5. According to the appellant, the respondent's employment was terminated with a reason and all due processes were followed prior to his termination. Further, that the decision arrived at the disciplinary hearing to dismiss him was communicated to him in writing and sent via registered post to his last known address. Lastly, that at the time of the dismissal, the respondent's dues for days worked up to July 22, 2015 was tabulated to Kshs 16,976/- after the statutory deductions, which the respondent refused to collect and which the Appellant was ready and willing to pay.

6. The learned trial Judge (O.N. Makau J.), after considering the parties' witness statements, documents and submissions, delivered a judgment on April 28, 2017, in which he found that the respondent was verbally dismissed from work on July 22, 2015 by a Mr. Kingora, and that the disciplinary process commenced by the appellant after service of the demand letter was an afterthought. The court found that the reason for termination and compliance with the procedure had not been proven by the appellant; and that the appellant did not prove misconduct, poor performance or physical incapacity on the part of the respondent to warrant his dismissal on July 22, 2015.

7. It was therefore the conclusion of the court that the dismissal of the respondent from employment on July 22, 2015 was unfair within the meaning of section 45 of the *Employment Act*. In the result, the court while appreciating section 49 of the *Act* that is to the effect that an unfairly terminated employee is entitled to salary in lieu of notice, plus compensation for the unfair termination noted that the respondent was serving under a fixed term contract which had six months remaining before expiry.

8. The trial Judge awarded the respondent Kshs. 26, 650/- being one-month salary in lieu of notice and Kshs. 133,350/- being 5 months' salary as compensation for the unfair termination. On the issue of unexplained deductions, the court was satisfied that the respondent's salary was deducted and that the payslips produced did not explain the purposes of the said deductions. The trial Judge was not satisfied with the allegation of lost diesel that was not proved in evidence; that the fine that was imposed was occasioned by the appellant who instructed the respondent to drive the truck without a valid inspection sticker as evidenced by the letter dated April 17, 2015 that was produced by the defence. The court in that regard awarded the sums deducted being Kshs. 27,840/- less Ksh.4,100/- and Ksh.3,550/- which that had been reimbursed to the Respondent on August 4, 2014 and April 2, 2015 respectively. The total amount awarded for unfair termination was Ksh.180,090/- together with costs and interest.

9. The appellant being dissatisfied with the judgment proffered the instant appeal and filed their Memorandum of Appeal dated August 7, 2019. The appellant has raised eighteen (18) grounds of appeal which were condensed into four grounds during the hearing, namely, whether the trial Court failed to appreciate and apply all the evidence tendered; whether the trial Court shifted the burden of proof to the appellant; whether the appellant's summary dismissal of the respondent was lawful and whether it amounted to unfair termination of services; whether the respondent was lawfully entitled to an award of damages in the sum of Kshs 180,090/=, and whether the respondent was lawfully entitled to an award whose calculation was based on gross salary.

10. A virtual hearing of the appeal was held on October 5, 2022, and learned counsel Ms. Pauline Osino appeared for Appellant, and highlighted her written submissions dated January 14, 2022, and while there was no appearance by the Respondent, nor did he file any submissions in the appeal. Our duty as the first appellate Court as set out in *Selle and Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw our own conclusions of facts and law, and we will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* (1968) E.A.

11. Two issues arise for determination from the grounds of appeal, the first being whether the termination of the respondent's employment was unlawful and unfair, and the second, whether the respondent merited the relief sought. On the first issue regarding the termination of employment, Ms. Osino drew our attention to section 47 (5) of the *Employment Act* and the decision in the case of *Reuben Ikatwa & 17 others vs Commanding Officer, British Army Training Unit & another* [2017] eKLR, for the submission that the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. Counsel urged that the learned judge failed to appreciate the version of events presented by the appellant which were supported by cogent evidence and relied on allegations presented by the respondent which were not supported by any factual evidential or legal basis. Therefore, that the finding that the summary dismissal was unfair was based on wrong findings of facts.

12. In particular, that the respondent did not provide any proof that he was orally sacked; that the trial Court made a finding of fact that the contract was for a fixed term from December 1, 2014 to November 30, 2015 upon renewal of the original contract of August 23, 2014, and proceeded to find that the dismissal was unfair, when the only evidence on record from the pleadings filed and the statements by both parties, was that the contract commenced on August 23, 2014 and at the time their relationship ended the Respondent was earning a monthly salary of Kshs 26,650/=; that the trial Court made a finding of fact that the disciplinary process commenced after service of the demand letter upon the appellant by the respondent's advocate, while the evidence of record showed that disciplinary process commenced on July 29, 2015 when the notice to show cause letter was issued and that on August 24, 2015, the respondent, through his advocate wrote to the appellant alleging he had been dismissed verbally on August 22, 2015 unfairly and he was not subject to disciplinary proceedings.

13. Therefore, that the respondent did not discharge the burden of proving that unfair termination had occurred, and the burden of justifying termination did not shift to the appellant as held by the trial Court. Counsel further submitted that even if the respondent had discharged the burden, the appellant still discharged the burden of justifying the reasons of termination, and while placing reliance on the case of *Regent Management Ltd vs Wilberforce Ojiambo Oundo* (2017) eKLR urged that the respondent absconded from duty and absented himself thus under section 44(4)(a) of the *Employment*

Act the appellant acted within the law, he was notified of the unchallenged grounds for dismissal and was summoned for a disciplinary meeting that he failed to attend, and that summary dismissal without notice would not be unfair in the circumstances within the meaning of section 45 of the *Employment Act*. It was urged that if at all any procedural steps were omitted in the dismissal process, which the appellant denied, such omission would only result in wrongful dismissal but not unfair or illegal dismissal, and this would entitle the respondent to only one month in lieu.

14. The applicable law as regards the termination of employment by notice is sections 35 and 36 of the *Employment Act*, which provides for termination notices and procedures, while termination by summary dismissal is regulated by section 44 of the Act. Under section 35, where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice; where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. However, a contract of service may provide for the giving of a period of notice of termination, and under section 36, either of the parties to a contract of service may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be, in respect of the period of notice required to be given.

15. Under section 44, summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term, and the allowable grounds when an employer may so dismiss an employee summarily are when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service, or when the circumstances enumerated in section 44(4) of gross misconduct arise. One of such circumstances under section 44(4)(a) is where an employee absents himself from the place appointed for the performance of his work without leave or other lawful cause.

16. The learned trial Judge's analysis of the evidence adduced by the parties on termination of the respondent's employment was as follows:

> " 8. The respondent has not explained why she never responded to the demand letter from the claimant's lawyers to say that the claimant had absconded. She just ignored the lawyers completely and proceeded to dismiss the claimant for absconding duty. She has produced a MEMO dated 22/7/2015 purporting to reassign duties to the claimant but no evidence of service of the said MEMO has been produced in court. Having considered all the material presented to the court, I find on a balance of probability that the claimant was verbally dismissed from work on 22/7/2015 by Mr. Kingora. I have carefully perused the witness statement by Mr. Kingora and I did not see anywhere where he denied that he met the claimant on 22/7/2015 and conveyed the information that he had been dismissed Consequently I agree with the claimant that the disciplinary process commenced by the respondent after service of the demand letter by the claimant's lawyers, was an afterthought, which was meant to sanitize the mess which had already been done."

17. The respondent had averred in his witness statement that he was sent on compulsory leave for 14 days commencing from July 7, 2015 to July 22, 2015, and that on July 22, 2015 upon reporting back to work, he was informed by the appellant's human resource manager that the company had

discontinued his services and that he would be called for his dues, which did not happen. From the record, it appears that the respondent did not attach any documents in support of his claim. The appellant on its part filed a witness statement by Laurence King'ora, its human resources manager, who reiterated the averments in their memorandum of response that after resuming work from leave on July 22, 2015, the respondent absconded and did not respond to the letter of show course nor the disciplinary hearing. The appellant annexed various documents to its memorandum of response which the witness statement made reference to, as well as copies of payslips and vouchers on the deductions made from the respondent's salary for recovery of excessive diesel which he could not account for.

18. The record further shows that on September 7, 2016, the counsel on record in the ELRC for the respondent and appellant consented to the dispose the suit by "submissions on the basis of pleadings, statements and documents", and rule 21 of the *Employment And Labour Relations Court (Procedure) Rules*, 2016 provides for determination by documentary evidence, and that the Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties. We need to point out that the import of this rule is that once parties agree to proceed in this manner and no examination of the witnesses is conducted on their statement or documents, it is deemed that the veracity of the statements and documents that have been filed is not in question. It is notable in this regard that rule 15 of the said rules provides for a pretrial procedure and scheduling conference after the close of pleadings to among other things, ascertain points of agreement and disagreement, and rule 25(3) on the hearing procedure provides that evidence before the Court may be given orally or if the judge so orders, by affidavit or a written statement, and the Court may at any stage of hearing, require the attendance of a deponent or an author of a written statement for the purposes of examination of the facts deponed or written.

19. The chronological order of events as shown by the evidence filed by the appellant was as follows; on July 22, 2015 the appellant's human resource manager writes a memo to the respondent reassigning him duties, on July 27, 2022, Kituo Cha Sheria writes to the appellant claiming that the respondent's employment was unlawfully terminated on July 22, 2022 and demanding that he is paid his terminal dues. On July 29, 2022 the appellant writes to the respondent, copying Kituo Cha Sheria, citing his absenteeism from work, and requiring him to give an explanation and avail himself for a disciplinary meeting on August 21, 2015, and then proceeds to summarily dismiss him from employment by a letter dated August 21, 2015. Kituo Cha Sheria replies on August 24, 2015 insisting that the respondent was dismissed on July 22, 2022, was not issued with any memo on that date, and that it was not understandable how the appellant only noticed that the respondent was absent from work after receipt of their demand letter.

20. Indeed, we also find it curious, as the trial Judge did, as to why the appellant did not reply to Kituo Cha Sheria's formal demand, which it clearly stamped acknowledged receipt on July 27, 2015, and confirm or deny the allegation that the Respondent was dismissed from employment on July 22, 2015, or provide evidence of service of that memo in the face of denial of receipt by the respondent, and instead chose to write to the respondent alleging that it had come to their knowledge that he had absconded, and did not provide the source of the knowledge nor evidence of the alleged absenteeism.

21. It is notable in this regard that the burden was upon the appellant as the employer to prove on a balance of probabilities the reason for the dismissal as provided in section 43 of the *Employment Act* as follows:

    1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

22. We therefore do not fault the trial Judge's analysis of the evidence on record, and the finding that the evidence did point to unlawful termination of the respondent's employment, and that the invitation to defend himself for the alleged misconduct came after the dismissal, resulting in the termination also being unfair within the meaning of section 45 of the Act. It was in this regard held as follows by the Court of Appeal in *Janet Nyandiko vs Kenya Commercial Bank Limited* (2017) eKLR as regards unfair termination of employment: -

> "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity."

23. On the second issue of the reliefs sought by the respondent, Ms Osino submitted that the award of five months' salary in lieu of notice was excessive and not justified, as it was based on a non-existing fixed contract which was alleged by the learned Judge to have a balance of six months, yet the respondent's contract was oral and lasted for a period of less than one year. While placing reliance on the decisions in *Regent Management Limited v Wilberforce Ojiambo Oundo* (2018) eKLR, and *CMC Aviation Limited v Mohammed Noor* (2015) eKLR, counsel maintained that the respondent was entitled to one-month salary in lieu of notice since the contract was terminable by one month's notice. It was further submitted that the learned Judge computed the compensation based on the gross salary of Kshs 26,650/= without subjecting the amount to statutory deductions in line with section 49 (2) of the *Employment Act* and as held in *Directline Assurance Co Ltd v Jeremiah Wachira Ichaura* (2016) eKLR.

24. The counsel urged that the trial Court was required under section 50 of the *Employment Act* to apply the provisions of section 49 of the Act, but it did not state why it opted to give the remedy provided under section 49 (1) (a) and (c), that is one month's salary in lieu of notice and five months gross salary, and not the other remedy under section 49 (1) (a) solely as per the terms of the contract, or (b) which was the basis upon which the employer had calculated the benefits upon the Respondent's dismissal which the Respondent refused to collect. That in the circumstances of this case, the Court ought to have been guided by the provisions of section 49 (4) of the *Employment Act*. Lastly, that the deductions were justified and proved by the appellant, the respondent was refunded the amount deducted for the traffic offence and he acknowledged receipt of the same, and that the other deductions were on loss of diesel which was justified by the appellant.

25. The trial Judge at the beginning of the impugned judgment observed as follows as regards the respondent's contract of employment :

> "The claimant was employed by the respondent as a truck driver under fixed term contract starting 23/8/2014. The last contract started on 1/12/2014 and was to end on 30/11/2015. His salary was ksh. 25,381 which was later increased to ksh.26650 per month".

The learned Judge consequently found as follows after finding that the respondent's employment was unlawful and unfair:

> " Under section 49 of the Act, an unfairly terminated employee is entitled to salary in lieu of notice, plus compensation for the unfair termination. In this case the claimant was serving under a fixed term contract which had six months remaining before expiry. I will therefore award him ksh.26650 being one month salary in lieu of notice plus kshs.133,350 being 5 months salary as compensation for the unfair termination".

26. We have perused the evidence before the trial Court and do not find any evidence of a fixed term contract entered into between the appellant and respondent, whether oral or written, or for the term alluded to by the learned trial Judge. The Respondent in his witness statement averred that "sometimes on August 23, 2014 I was employed by the respondent's company as a truck driver earning a salary off kshs 26,650/=", while Kituo Cha Sheria, in its demand letter dated July 27, 2015 made on behalf of the respondent stated as follows: "that our client was employed by you as a truck driver on August 23, 2014 until on July 22, 2015 when he's employment was terminated without tangible reasons and or notice", which position was reiterated in their submissions. In addition, other than the one month's notice in lieu of notice, the claimant sought 12 month's pay as compensation for unfair termination and did not make any reference to any remaining term of a fixed contract.

27. The trial Court's findings as regards six months remaining before expiry of a fixed term contract was therefore made without any basis and was not supported by the evidence before the court, and the award of Kshs 133, 350/= of 5 months' salary as compensation was therefore made in error. Section 49(1) provides as follows as regards payments to be made to an employee by an employer in the event of unjustified termination:

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

28. It is notable that the payment of salary in lieu of notice under section 49(1)(a) is independent of, and additional to the compensation payable either under section 49(1)(b) or section 49(1)(c). In the circumstances of the present appeal where it is not in dispute that there was no notice of termination given, the award of Kshs 26,650/= being payment of one month's gross salary in leiu of notice was justified. It is in this regard also notable that under section 49(1)(c) it is specifically provided that the figure that guide the quantum of an award is the gross salary, and for all the awards, the employer is the one required to make the statutory deductions at the point of payment under section 49(2) of the *Employment Act*. We are in this regard of the view that given the length of the respondent's employment from August 23, 2014 until on July 22, 2015, an award of two months' gross salary as compensation for unfair termination would have been adequate.

29. Lastly, on the deductions, we agree with the trial Judges finding that the payslips produced by the appellant do not explain the purposes for the said deductions which were only shown as "personal

accounts", and also for the reason that the appellant did not provide evidence of the term of the respondent's contract of employment allowing for the said deductions or their manner of calculation.

30. The appellant's appeal therefore only partially succeeds on the issue of the quantum of the award of compensation for unfair termination of employment, and we set aside the award of 5 months' gross salary of Kshs 133,350/=, and substitute it with an award of two months' gross salary of Kshs 53,300/= as compensation for unfair termination. All the other findings and awards made by the learned trial Judge are hereby affirmed and upheld, subject to the qualifications made in this judgment. Each party shall bear own costs of the appeal.

31. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR