



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kwale International Sugar Company Limited v Ashubwe (Civil Appeal
110 of 2019) [2023] KECA 502 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 502 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 110 OF 2019
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
MAY 12, 2023**

BETWEEN

KWALE INTERNATIONAL SUGAR COMPANY LIMITED APPELLANT

AND

HUMPHREY ASHUBWE RESPONDENT

*(Being an appeal from the judgment of the Employment and Labour Relations Court
at Mombasa (Rika, J.) delivered on 31st July 2019 in ELRC Cause No. 877 of 2017)*

JUDGMENT

1. In a judgement, the subject of this appeal, delivered on July 31, 2019, the Employment and Labour Relations Court at Mombasa (Rika, J) declared that the termination of the respondent's employment by the appellant was unfair, both substantively and procedurally, and awarded him the equivalent of 6 1/2 months' salary in the amount of Kshs 1,215,500.00 in compensation for unfair termination.
2. The appellant has challenged that judgement, principally on the ground that the Judge failed to appreciate that during the period of the respondent's suspension from work whilst on compulsory leave preceding his termination, he had secured alternative employment with Urgent Cargo Handling Limited and his claim against the appellant was therefore in bad faith, dishonest and not maintainable.
3. The facts are that the appellant, a company engaged in growing and processing of sugarcane for production of sugar, ethanol and electricity, employed the respondent as it's Administration Manager on October 6, 2014. The terms of employment were set out in a letter of employment offer, which both parties signed, dated September 2, 2014. His gross monthly salary was stated in that letter to be Kshs 187,000.00.
4. Just over one year into employment, the appellant, by a letter dated December 31, 2015 addressed to the respondent, sent him on compulsory leave on the grounds that the appellant had received several complaints with respect to his 'conduct and manner of executing' his duties; that the complains



ranged from 'minor issues' to some 'serious allegations and of a criminal nature'; that under his watch several incidents that led to loss of property had occurred and it was necessary to carry out 'thorough investigations and interrogation' of his capability to execute his duties as expected. The letter concluded:

' We find it fair in the circumstances that you immediately proceed on compulsory leave as the management proceeds to thoroughly investigate your account culpability or lack thereof in the said allegations. As its fair in any process, you shall be called upon to go for insight into the allegations.'

5. And so, the respondent proceeded on compulsory leave, until April 11, 2017, when he received a letter terminating his employment. In the intervening period, the respondent had communicated with the appellant by emails enquiring about the status of investigations, and offering to shed light, should he be called upon to do so, on any matter that the appellant may have required clarification or explanation. In his emails to the appellant, the respondent requested the appellant 'to list for [him] the allegations' and to 'be given an opportunity to give' his "side of the story'.
6. Instead of providing the respondent with the particulars of the allegations and according to him audience, the appellant sent him the letter dated April 11, 2017 terminating his services.
7. In the termination letter, the appellant informed the respondent that as the administration and transport manager, he was required to uphold the highest standards of duty, integrity, and knowledge; that during the tenure of his employment 'several incidences' that eroded the trust placed upon the respondent were witnessed by the management of the appellant, namely, unreasonable deployment of security officials, fuel theft, cane fires and mismanagement of transport operations. The appellant concluded that letter as follows:

' The management offered you ample opportunity to rectify the issues through constant meetings, appraisals and warnings.

It was against the backdrop of increased poor performance that the management decided to send you on compulsory leave with a view to carry out a thorough audit on the department and its operations.

It has been noted that during your suspension, performance in your docket has immensely improved effectively rendering the continued relationship untenable. It is on that basis that the company has decided to terminate your services forthwith.

We shall pay your entitled dues and obligations. We would like to take this opportunity to thank you for your service and wish you well in the future.'

8. During the trial, the respondent testified that he did not know what the complaints against him were based on which he was sent on compulsory leave and subsequently terminated. He stated no specific allegations were made against him and that during the tenure of his employment no appraisals were undertaken, and neither was he ever given any warning or sanction.
9. The appellant's witness during the trial was its legal officer, David Kulecho, who joined the company after the respondent had left. He reiterated the contents of the termination letter stating that the respondent's work performance was poor; that there was marked improvement after the respondent went on compulsory leave; that opportunity was given to the respondent to explain; and that he was paid his dues including service pay. He stated further that the respondent did not inform the appellant that he had obtained employment elsewhere whilst on compulsory leave.



10. Having reviewed the evidence in keeping with our mandate on a first appeal (see *Selle & another vs Associated Motor Boat Co Ltd & others (1968) EA 123*) and having considered the submissions by Mr Moses Njuru, learned counsel for the appellant and Mr Lawrence Odundo, learned counsel for the respondent, we are satisfied that the conclusion reached by the trial judge that the grounds of termination are not supported by evidence is well founded.
11. We agree with the decision reached by the judge that the appellant 'started off with cryptic accusations in the letter of compulsory leave and ended up with a cryptic letter of termination.' As already stated, the respondent sent emails to the appellant seeking details and offering to answer any queries that the appellant may have had but no explanation was given, and neither was an opportunity to be heard accorded to the respondent. We endorse fully the decision by the trial court that:

' The termination did not adhere to the minimum statutory standards of substantive and procedural fairness under Sections 41, 43 and 45 of the *Employment Act*.'
12. Regarding the remedy given, the learned judge in awarding the respondent compensation equivalent to 6 1/2 months' salary, noted that the respondent worked for the appellant for two years in seven months; that his contract was for an indefinite period; and that the respondent mitigated his loss by securing another job with Urgent Cargo Limited. But that is not all that was relevant for consideration. Under Section 49(4) of the *Employment Act*, other relevant factors include any compensation paid by the employer as well as the opportunities available to the employee for securing comparable or suitable employment with another employer. The Supreme Court in *Kenfreight (EA) Limited vs Benson K Nguti [2019] eKLR* expressed that in as much as the trial court does have discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under Section 49(4) of the *Employment Act*. See also decisions of this Court in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR* and *Kenya Broadcasting Corporation vs. Geoffrey Wakio [2019] eKLR*.
13. There is no dispute that throughout the period the respondent was in limbo on compulsory leave from December 31, 2015 to April 11, 2017, the appellant paid his salary. It also emerged from the respondent's testimony in cross examination that he started working at Urgent Cargo from December 2016. In effect he was earning salaries from two employers between December 2016 and April 2017. Apart from earning the two salaries simultaneously for a while, the appellant had, as it were, already exploited the opportunity to secure alternative employment. As the Court stated in *Kenya Broadcasting Corporation vs. Geoffrey Wakio* (above) one of the guiding principles for the remedies under Section 49 is that they are awarded to compensate the claimant, not as punishment to the employer. It is also not in contest that the appellant paid the respondent notice pay and service pay as part of his terminal dues which the learned Judge does not appear to have considered in making his award.
14. We think that had the learned Judge taken all these factors into account consistently with the dictates of Section 49 of the *Employment Act*, he would not have awarded compensation equivalent to 6 1/2 months' salary which in the circumstances is manifestly excessive to be an erroneous estimate. Taking those factors into account, we think 3 months' salary equivalent would have been adequate compensation. We accordingly set aside the award of 6 1/2 months' salary and substitute therefore an award for 3 months' salary as compensation for wrongful termination. To that extent only the appeal succeeds. We order that each party bears its own costs of the appeal.
15. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.



S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

