City Centre cabs Limited v Nyange (Civil Appeal 627 of 2019) [2023] KECA 1116 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1116 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 627 OF 2019

HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA

SEPTEMBER 22, 2023

BETWEEN

CITY CENTRE CABS LIMITED .... APPELLANT

AND

SAMUEL KIRIGHA NYANGE .... RESPONDENT

(Being an appeal from the Judgement and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 30th January 2018 in ELRC Cause No. 832 of 2012)

JUDGMENT

1. This appeal arises from a claim filed by Samuel Kirigha Nyanje, the respondent, against the appellant, City Centre Cabs Ltd (appellant), seeking judgment in his favour as against the appellant for underpaid salary in the sum of Kshs.14,630/-; one month's pay in lieu of notice - Kshs.18,000/-; overtime of Kshs.716,400; Leave - Kshs.1,320/-; underpaid meal allowance - Kshs.16,200; plus costs and interest.

2. The background to the claim stemmed from the respondent's employment by the appellant as a cab driver at a monthly salary of Kshs.13,972, under a contract dated 21st July 2011 for a period of three (3) months, which would have run up 20th October 2011. However, continued working for another 21 days up to 10th November 2011 when, according to him, his services were terminated without notice. The respondent had gone through the three months' probation period without any indication from the appellant that his performance was wanting. At the end of the probation period, there was no notice informing him that the probation period was being extended. Unlike the time when he was on probation, he was issued with uniform at the end of the probation period and continued working on the assumption that he had been absorbed on a permanent basis.

3. At the hearing, the respondent told the trial court that, while on night shift on 6th November 2011 at about 3 a.m, he was involved in a road traffic accident with another vehicle whose driver got out, and threatened to shoot him; that he took to his heels for dear life; that he made a report at Nairobi Central

Police Station, only to find the other driver (who turned out to be a plain-clothes police officer) also making a report; that the respondent tried to place phone calls to the appellant's three directors, but in vain; that the vehicle he was driving was towed to the police station at a fee of Kshs.2500/-, and that the respondent used part of the money collected from the sales to make payment; that no traffic offence was preferred against the respondent; and that the appellant intimated to him, that the money he had used would be recovered from his salary. A representative of the appellant then instructed him to hand over to one Faisal, who was in charge of operations, and advised him to go home and await further communication. That marked the beginning of the end of his employment.

4. It was his claim that he was entitled to equal remuneration for work of equal value as required under the Employment Act and that he should have received a salary of Kshs. 18,000/- per month from the date of his employment, translating to an underpayment of Kshs. 14,630/- for the period that he worked; that he was also entitled to one month's pay in lieu of notice being Kshs. 18,000/-; that since he worked on a 24 hour shift, he was entitled to payment for overtime for the time worked beyond the official eight (8) working hours, which included weekends and public holidays; and that, although he was entitled to 30 days leave, this was not specified in the contract document, and which he worked out at Kshs. 1,350. The respondent also claimed Kshs. 16,200/- as underpayment for meal allowance, lamenting that the meal allowance of Kshs. 200/- per 24 hour shift was inadequate, and that he ought to have been paid Kshs. 500/- for the 24 hour shift.

5. The appellant denied liability, putting the respondent to strict proof, and maintained that he had been paid in full for overtime worked. The appellant's accountant, Moses Wakabu (RW1), told the trial court that the respondent's services were terminated because of misconduct; that he caused an accident and abandoned the company vehicle which had to be towed by the police; that he never reported the accident to the appellant; and that, during the probation period, the respondent's conduct was not good as he failed to follow directions of the management, and was warned on several occasions both orally as well as in writing, even though he did not produce any written document. He denied the respondent's claim that being issued with uniform was a signal of transition from probation to permanent employment. According to him, all staff wear uniform, including those on probation.

6. James Muthui Muthoka (RW2) who worked with the respondent, confirmed receiving a call from the respondent stating that he had been involved in a road traffic accident; that he rushed to the scene, but did not see the vehicle; that he later met the respondent, who informed him that the vehicle had been stolen; that they went to make a report at the police station, and that the respondent was then arrested; and that RW2 left in fear.

7. Paul Mitao (RW3), the appellant's operations manager in charge of co-ordination and distribution of drivers' duties, told the trial court that the respondent's performance was wanting, and that he had been served with two warning letters with respect to his conduct with clients. He learnt about the accident where he found both the respondent and the car, the respondent told him that he abandoned the vehicle at the scene of the accident as he did not feel safe. Thereafter, the respondent disappeared, and calls to his phone could not go through. He failed to report, only resurfacing after a period of time accompanied by a lawyer.

8. The respondent on cross-examination, maintained that what was being touted as abandonment of the vehicle was a misrepresentation; that he had simply walked from the scene to make a report at the police station; and that when he returned to the scene, he realized that the vehicle had been towed away by the police.

9. Upon hearing the matter, the learned Judge (Wasilwa, J.) identified four issues for determination, namely:

(i) whether the respondent was on probation or confirmed in employment at the time of termination;

(ii) whether there were valid reasons to terminate the respondent's services;

(iii) whether the appellant followed due process before terminating the services; and

(iv) what remedies were available to the respondent.

10. Finding that the respondent was confirmed in employment on 22nd October 2011 on expiry of the 3 months' probation period, the learned trial Judge held that it was the responsibility of the appellant to communicate to the respondent at the end that either the service had been performed to its satisfaction or not, and that it was therefore extending or terminating the contract or that it was confirming his employment to a one year contract; that the appellant's silence could not be construed to mean that the respondent's contract was never confirmed; the appellant ought to have applied the provisions of the Company Staff Manual or, in its absence, section 41 of the Employment Act; and that having failed to do so it meant that the services were terminated without due process.

11. The learned Judge found that it was impossible to discern the reasons for the termination, as nothing was communicated in writing, and that the only conclusion to draw was that the termination was unfair and unjustified as it was effected without valid reasons and without due process in violation of section 43 of the Employment Act.

12. The learned Judge directed that the respondent be paid one month's salary of Kshs. 13,972/-; in lieu notice; prorated leave for period worked of Kshs. 1,320/-; that since there was no evidence that the respondent had been paid for overtime he was entitled to four (4) hours overtime daily, and was awarded a global sum of Kshs. 716,692/-. The appellant was also ordered to pay costs of the suit and interest with effect from the date of judgment.

13. The appellant, aggrieved by the outcome, appealed against the entire decision on grounds that;

(i) the inconsistencies in the respondent's evidence;

(ii) the circumstances under which the respondent's probation period was not extended;

(iii) the respondent's admission that he abandoned the appellant's motor vehicle, which was under his care after being involved in an accident which he had caused;

(iv) the respondent's failure to inform the appellant about the accident;

(v) that the respondent had previously been involved in an accident while drunk;

(vi) that the respondent worked on a shift basis, and that the question regarding overtime did not arise, and that in any event, the amount awarded was far in excess of the amount prescribed under the Law and Regulation of Wages (General Amendment) Order 2010 Legal Notice No. 8 published on 18th June 2010.

14. Contesting the finding that termination of the respondent was unfair and unjustified, the appellant maintained that the same was lawful and justified owing to the fact that just before the respondent could enter be confirmed on the lapse of the probation period on 20th October, 2011 the respondent not only abandoned the company's Motor Vehicle on Nyerere Road near Serena Hotel at about 3.50 a.m., but also failed to report the matter to the appellant; that, despite the explanation given by the respondent on cross- examination regarding abandonment of the motor vehicle, he nonetheless admitted that he never indicated the said reason to the appellant's representatives (RW3 and RW4),

who had requested him for a written statement to enable the appellant inform their insurer of the accident, with a view to a possible settlement; that further demand for a written explanation was met with hostility and departure of the respondent from the company premises on the said date; and that the next step he took was to file the suit in ELRC Cause No. 832 of 2012 from which this appeal emanates.

15. The appellant contended further, that the reason given for abandonment of its vehicle was a mere fabrication and an afterthought by the respondent, who admitted to previous involvement in an accident while drunk, and to being prosecuted in CMCC 5064 of 2011; that the question of the respondent's credibility in claiming that he paid for the towing charges contrary to the evidence of RW3 who paid for the towing charges; and as a result of the respondent/plaintiff conduct incurred costs of repairing the broken bumper and lights of the motor vehicle.

16. On this limb, the respondent submits that at the end of the probation period, he was neither served with any notice to show that his performance was not good, as a basis for the termination in any event, he continued working after expiry of the probation period, and there was no letter showing that it was his probation period that had been extended. The appellants witness, (RW3) confirmed that the respondent was a good driver, and that had it not been for the accident, the respondent would most probably still be the appellant's employee without his position being formalized; and that the appellant was under an obligation to adhere to is staff manual, and the due process set in section 41 of the Employment Act in dealing with the respondent's termination.

17. As to the trial court's finding that the respondent was entitled to payment of one month's salary in lieu of notice, the appellant argued that this was an erroneous finding as the respondent deserved to be summarily dismissed for his gross misconduct of abandoning the appellant's company asset; driving in a drunken state and causing the accident on 6th November, 2011, which accident he never provided statement in respect thereof, thus resulting in loss to the appellant; and that this disentitled respondent to pay in lieu of notice for termination.

18. On the other hand, the respondent maintains that this limb of the award was justified under section 36 of the Employment Act, as the appellant did not give him the one month notice, nor pay him the equivalent on one month's pay in lieu of notice.

19. The appellant also argued that the meal allowance was a contracted amount of Kenya Shillings Two Hundred, which the respondent had accepted as a term of his employment. Hence, he was estopped from making demand for more than the agreed sum of Kenya Shillings Two Hundred (KShs.200/=). It was the appellant's submission that the claim of underpaid meal allowance of Kenya Shillings Sixteen Thousand Two hundred (KShs.16,200 /- ought to be dismissed with costs.

20. On this ground, the respondent pointed out that no award was made by the trial court under this head, and that it was a non-starter, which this Court should not delve into. We concur, and will say no more.

21. The appellant also argued that the respondent was not entitled to payment for overtime of Kshs. 716,692/-, as the respondent's gross salary of Kshs. 13,972/- per month, which was over and above the prescribed salaries denoted under the Regulation of Wages (General Amendment) Order 2010 Legal Notice No. 98 Published on 18th June, 2010. Further, that as a cab service business, it was necessary to organize the employed drivers to work on shift basis supervised by the managers, who during the respondent's tenure were RW3 and RW4; and that under Clause 6 of the Employment Contract, the respondent had off days and leave days as 'Break' being the day he did not work. Yet, he was paid a monthly salary of the monthly salary at (Kshs. 13,972/=) without any deductions and therefore, the issue of overtime did not arise, as the respondent's work schedule was as provided in the employment agreement; and that the tenure of work depicted his remuneration accordingly with adequate off days

to deter any overtime entitlement. In support of this proposition, the appellant draws from the dictum in the case of *Five Forty Aviation Limited v Erwan Lanoe [2019]* eKLR wherein it reiterated the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017]* eKLR as follows:

> " We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

22. In this regard, the respondent's contention was that, under the contract, he was expected to work on a 24-hour shift and. Therefore, any time beyond the 8 hours of a given working day would be deemed as overtime as set under section 63 of the *Labour Institutions Act*; and that rest should not be interpreted to mean compensation for overtime as the Regulation on Wages (General) Order, provides for rest time in addition to overtime; that, in any event, the appellant did not produce any evidence to show that the respondent had been paid for overtime; and that the sum awarded was not excessive.

23. It was also submitted that the learned trial Judge erred in awarding the respondent Prorate leave of Kshs. 1,320/-, contending that the contract of employment did not specify any entitlement to leave; that mere allegations that the respondent had heard from other drivers that he was entitled to 30 days' leave did not form any basis to make such claim; that the employment contract was based on work shift basis, which factored in all his off duty days, including the leave dues if any applicable, and hence the award under this head should be dismissed with costs.

24. Justifying the award under this head, the respondent refers to the provisions of section 26(i) of the *Employment Act, 2007*, which provides for the basic minimum terms and conditions of contract of service.

25. The respondent further contended that, under section 28(1) (a), an employee is entitled to a minimum of 21 working days of leave, with full pay after every 12 consecutive months, while section 28(1) (b) provides for prorating, where a contract of service is terminated after the completion of two or more consecutive months of service of not less than one- and three- quarter days of leave with full pay in respect of each completed month of service in that period.

26. The appellant was also aggrieved with the order condemning it to pay costs and interest with effect from the date of Judgment arguing that the respondent did not prove his case and was thus not entitled to be awarded such costs and interest. On the other hand, the respondent maintains that having proved his case, he is entitled to costs.

27. We have considered the appeal, the submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the rules of this Court is to reappraise the evidence and draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

28. This duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence has been reiterated in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Company Advocates [2013]* eKLR.

29. A reading of paragraph 3 and 4 of the Employment contract confirmed that the respondent was on a three month probation contract whose termination could be effected without prior notice [underlined for emphasis] and that, upon completion of the probation period, he would be confirmed to a one year contract subject to satisfying the management on the quality of his services. Clause 3 read as follows:

> " The contract period will be for three months during which termination of services can be effected without prior notice."

30. It is not disputed that the contract between the parties that commenced on 21st July 2011 and ended on 21st October 2011, and that there was no immediate formal communication regarding the respondent's fate. He nonetheless remained on the job without an indication as to whether his services were unsatisfactory, and that would therefore be terminated, or that his performance had sufficiently satisfied the appellant, and that he would be retained in employment. Our understanding of Clause 3 of the contract of employment is that the no notice clause related to the service during the probation period.

31. According to the appellant, just before a decision could be made to confirm the respondent, he was involved in an accident, and abandoned the appellant's vehicle. If that be the case, then it would have been a requirement to invoke section 42(4) of the *employment Act*, 2007 which provides that:

> A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

It goes without saying that, even if it was to be assumed that the respondent was still on probation, the appellant had a duty to communicate to the respondent their decision regarding his status. That, in our view, would have protected the appellant from the action it took even without notice. However, there was no communication.

32. In view of the fact that the was no communication regarding the respondent's status, then the natural inference to draw was that he had been absorbed under clause 4 of the contract, and that his termination would then be governed by the appellant's staff policy manual, which was not adduced in evidence before the trial court. The duty placed on an employer to inform the employee the reasons for termination, finds statutory backing under section 43 of the 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.

33. As correctly observed by the learned trial Judge the onus was on the appellant to communicate to the respondent, and their silence could not be construed to mean that he had not been confirmed. This is because he continued working for the appellant as a cab driver. The occurrence of the accident could not be used as an excuse to explain away the lack of communication as the accident occurred ten days after the lapse of the probation period. Indeed, in the absence of a written communication, it remains difficult to conclusively determine whether the reason for the termination was as a result of the stated accident; past misconduct including not obeying instructions from the management; past related irresponsible behaviour while driving; or perhaps not one of all these! In addition, it was

crucial for the appellant to record any warnings, disciplinary hearings, any record of misconduct by the respondent, and not just give a sweeping statement through its operations manager, to the effect that the respondent had past misdeed which had elicited written warnings, without anything tangible in documented form.

34. Sections 43, 45(2), and 47(5) of the *Employment Act*, 2007 all place the burden of proof of the reasons for termination on the employer, and, where an employer fails to prove reasons for termination, the termination shall be deemed unfair. In *Jared Aimba vs. Fina Bank Limited [2016*] eKLR, this Court held that:

> " 20. However, under section 45 and 41 of the Employment Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination."

35. Ultimately, the Employment Act provides that for termination of services to be considered valid, the employer must demonstrate substantive fairness by clearly communicating reasons for termination, and procedural fairness by observing the procedural requirements.

36. In the present instance, the appellant adopted a nil-by- mouth approach, perhaps spurred by indignation towards the respondent, and simply told him: "hand over to Faizal, go home, you will hear from us", and that marked the termination. Would the present instance qualify to be termed a summary dismissal? Summary dismissal arises where an employee is dismissed without notice or payment of salary in lieu of notice, due to gross breach of the employment contract. Yet, even in such instances, the employer is required to follow a fair and lawful process in dismissing the employee. Otherwise, allegations of unfair dismissal will arise. The fair and lawful process means that the employee is entitled to a hearing to defend themselves from the claim, whether is in a written communication or disciplinary process as this would constitute wrongful dismissal. See The confirmation of this position by this Court of appeal in *Kenfreight (EA) Limited vs. Benson K. Nguti [2016]* eKLR that

> " "termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reason or if the reason itself or the procedure of termination are themselves not fair." [Emphasis ours]

There was no opportunity accorded to the respondent to be heard on whatever ills the appellant had identified, and the appellant could not use clause 3 as a fall-back for its non- communication.

37. We thus find no basis upon which to fault the learned Judge in holding that the termination complained of was effected without valid reasons and without due process, and that making reference to the provisions of section 45(2) of the Act to hold that the termination was not valid.

38. This then leads us to consider what reliefs were available to the respondent, and whether the trial court had any basis in awarding them. Clearly, employment is all about human relations, and there may arise instances where the employer finds it impractical to retain an employee and desires to terminate their services or vice versa. When such a scenario presents itself, then under section 36 of the Act, which is titled 'Payment in lieu of Notice':

> Either of the parties to a contract of service to which section 35(5) applies, 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 under the corresponding provisions of that section.

39. The learned Judge, having found that there was no valid reason for the termination, took into consideration the provisions of section 36, and awarded the respondent the equivalent of his one month pay in lieu of the notice that the appellant failed to give. The provision is self- explanatory, and we need not belabour the point. We find no error in the application of the law to the facts as presented.

40. The other limb of the award that was contested was the sum awarded for overtime. A reading of the employment contract at Clause 6 indicates that:

> You shall work in a 24 hour work shift check in/out at 8.30hr. Then you break for 24 hours, and resuming the shift. This includes Sundays, Public Holidays and hence the off days in clause 6 above (we note it is clause 5 that provides for the off days.

The contract was specific regarding the working hours, and the respondent voluntarily signed this contract fully aware of the provisions. Section 27 of the Employment Act addresses the hours of work as follows:

(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

41. It is our considered view that for the respondent to later turn around, and lament about the over time was dishonest, amounted to asking the trial court to rewrite the contract. In this regard, we find that the learned judge erred in awarding the respondent remedy under this head, and we thus set the same aside.

42. As to whether the respondent was entitled to prorate leave based on what he had heard from other drivers, his only basis for that claim is that he had heard from the other drivers that he was entitled to 30 days leave. The contract document did not mention leave days, but provided for off days, which the trial court indicated could not replace the leave entitlement, although no legal provision was cited.

A reading of section 28 of the Act as regards annual leave provides that:

(1) An employee shall be entitled —

(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

43. Our understanding is that the provision for leave would have been effective if the respondent had worked for two months after the probation period, and not during the probation period when he was still under 'testing'. Had he completed two months of service after lapse of the probation, then the issue regarding leave would have kicked in, in this instance, he only worked for 10 days of the service, and, in our considered view, there would be no basis for an award for leave entitlement. In any event, the work shift schedule seems to have factored in a number of days when the applicant would be away from work; and, even if the leave days were to be included in the probation contract, then the definition of prorated leave would only mean giving the respondent one day monthly until it reaches the quota by the end of the contract, and the one month's pay in lieu of leave would still not be justified. We therefore set aside the award under this head as being erroneously awarded.

44. Although the issue regarding meal allowance is addressed in this appeal, we take note that the trial court did not make any award under this head, and there is no reason to visit the issue, and we say no more.

45. Ultimately, we find that the appeal succeeds in part to the extent that the awards for overtime and annual leave were made in error, and the same are hereby set aside. We hereby uphold the trial court's award for unlawful termination of services in the sum of Kshs.13,972/-. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR