Ombengi v Lavington Security Limited (Civil Appeal 56 of 2019)
[2023] KECA 1147 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1147 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 56 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

SEPTEMBER 22, 2023

BETWEEN

JOSEPH AGARI OMBENGI ..... APPELLANT

AND

LAVINGTON SECURITY LIMITED ..... RESPONDENT

(An Appeal from the Judgment of the Employment and Labour Relations Court at Nakuru (M. Mbaru, J.) dated and delivered on 29th November 2018 in E&LRC Cause No. 291 of 2015)

JUDGMENT

1. This appeal emanates from the judgment of Mbaru J. in Nakuru Employment and Labour Relations Court (E&LRC) Cause No. 291 of 2015 wherein the learned Judge found that the appellant, Joseph Agari Ombengi, was unfairly terminated by the respondent, Lavington Security Limited. The learned Judge proceeded to assess the awards and made an order for payment in lieu of notice at Kshs.11,330.10; leave pay at Kshs.11,330.10; underpayments of Kshs.33,495; work during public holidays at Kshs.9,064; overtime work payment of Kshs.86,265; and, the costs of the suit.

2. Dissatisfied with the judgment of the E&LRC, the appellant lodged this appeal. In his Memorandum of Appeal, the appellant raises twelve grounds of appeal. In summary he contends that the learned Judge erred in awarding Kshs11,330.10 as payment in lieu of notice instead of Kshs.13,029.55 which was pleaded and is provided for under the Minimum Wage Order; that the learned Judge erred in failure to make an award for housing allowance at 15%, service pay, gratuity, and off-duty compensation; that the learned Judge erroneously calculated the leave pay for 1 year instead of 4 years as was pleaded; that the learned Judge erred in failing to make an award for the salary arrears of August 2015; that the learned Judge erred in the computation of the awards for underpayment, public holidays and overtime; and, that the learned Judge erred in failing to make an award for compensation under section 49(1)(c) of the *Employment Act*.

3. The appellant originated his suit through a Memorandum of Claim dated October 8, 2015. The appellant's case was premised on his pleadings as well as his own viva voce evidence. In a nutshell, the appellant's case was that he was engaged by the respondent as a night guard as from November 1, 2010 until the time he was terminated on August 28, 2015 after loss of fuel at the premises he was guarding. The appellant stated that his salary was not only below the minimum wage but that he worked 12 hours a day contrary to the statutory requirement that employees work 9 hours a day. He further claimed that he was never accorded off days and he also worked during public holidays which practice was in violation of section 27 of the *Employment Act*. The appellant consequently made claims for payment in lieu of notice, underpayments, overtime payment,payment for leave not taken, gratuity, compensation for unlawful termination and costs of the suit.

4. For the respondent, its case was anchored on the reply to the memorandum of claim. It is necessary to mention that despite filing two witness statements and exhibits, the respondent never appeared for hearing of the matter. Be that as it may, the respondent's defence was that the appellant was a casual labourer whose wages were subjected to various legal notices in existence from time to time. The respondent stated that the appellant and others were summarily dismissed upon their own admission that they had committed gross misconduct hence their termination was legal and fair. The respondent also denied the assertion that the appellant was not accorded off days and leave days. The respondent asserted that the appellant's termination complied with sections 43(2) and 44(3) of the *Employment Act* and that the claim was not sustainable as it was barred by Section 35(6) (d) of the *Employment Act*.

5. At the virtual hearing, Mr. Maragia and Mr. Koome appeared for the appellant and the respondent respectively. Both parties had filed their written submissions which they sought to rely on. Counsel for the appellant submitted that the learned Judge erred in finding that the appellant was employed as from 1st January 2014 yet the respondent had admitted that the appellant was engaged from November 1, 2010. According to counsel, this error led to the learned Judge arriving at the wrong computable damages in as far as the duration of engagement between the appellant and the respondent was concerned. Counsel also pointed out that the proof of extra working hours was evident from the casual employment agreement form dated 1st January 2014. Counsel further submitted that under section 31(1) of the *Employment Act* and Regulation 4 of the Regulation of Wages (General) Order, the appellant was entitled to an award for house allowance at 15% of the basic salary which salary would be equated to an amount prescribed under the wages order.

6. With regard to the award for underpayments, Mr. Maragia submitted that the appellant had tabulated his claims which was not countered by the respondent. It was counsel's view that the same computation ought to have been adopted by the trial court failure of which the E&LRC wrongfully made an award founded on the wrong date of engagement. Counsel submitted that the E&LRC also erred in its determination of the award for public holidays worked as it proceeded on the assumption that the appellant had been engaged as from 1st April 2014 as opposed to November 2010. Counsel further submitted that once the trial court found that the termination was unlawful, it ought to have made an award under section 49(1)(c) of the *Employment Act* equivalent to 12 months' salary. He also submitted that the claims for gratuity and off-duty allowance were also proved and merited against the respondent. Counsel concluded by urging us to allow his appeal.

7. In response to the appeal, counsel for the respondent started off by pointing out that this being a first appeal, this Court has the duty to re-appraise all the evidence on record. Counsel proceeded to submit that this appeal is unmerited and an abuse of the court process as no evidence was tendered by the appellant in support of his claims before the E&LRC. Counsel referred to the decision in *Bernard Philip Mutiso vs. Tabitha Mutiso* (2022) eKLR to submit that the burden of proving all the allegations made was with the appellant who in turn failed to surmount that challenge. Counsel also urged this

court to consider the fact that certain documents were not produced and could not form part of the record of the trial court. He consequently urged us to find this appeal without merit and dismiss it with costs.

8. This is a first appeal and our mandate under rule 31(1)(a) of the *Court of Appeal Rules,* 2022 encompass both issues of law and fact. As was stated in *Abok James Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, in discharging our mandate, we are required to independently re-consider the facts vis-à-vis the applicable law and legal principles prior to arriving at our independent conclusion. Upon reviewing the Memorandum of Appeal, the submissions by both counsel and the record, it is clear to us that this appeal tilts upon determination of two issues, namely, whether an order for compensation under section 49(1)(c) of the *Employment Act* was merited; and whether the awards made by the trial court were in accordance with the evidence submitted at the trial.

9. With regard to the issue of compensation for unlawful termination as provided by section 49(1)(c) of the *Employment Act*, it is the appellant's contention that once a court makes a finding of unlawful termination, it follows that an award under section 49(1)(c) of the *Employment Act* must be made. Counsel also contended that the appellant's rights under articles 28 and 47 of *the Constitution* were infringed upon thereby warranting compensation. The appellant therefore urged us to award him compensation amounting to 12 months' salary.

10. We start with the claim for compensation for unlawful termination of employment. The Supreme Court dealt with the provisions of section 49 of the *Employment Act* in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR and stated as follows:

> "(38) What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies."
>
> (Emphasis ours)

11. From the above decision, and which decision binds us, the law is that it is within the discretion of a trial judge to determine the appropriate remedy applicable to each case under section 49 of the *Employment Act*. The remedy under section 49(1)(c) of the *Employment Act* is just but one of the remedies available to the trial court for consideration depending on the circumstances of each case. It then follows that for the appellant to impeach the trial court's decision resulting from an exercise of discretion, he ought to show either that the discretion was exercised injudiciously, in a prejudicial manner, or that such powers were exercised in a capricious or whimsical manner. To elaborate on this, the Supreme Court in *Apungu Arthur Kibira vs. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR explained the manner of exercising discretionary judicial power as follows:

> "(37) It is also the law that discretionary power is to be exercised in a manner that is not capricious or whimsical, and that judicial officers to whom this power is donated should exercise the same judiciously. That is why, and we agree, with Stanley Kang'ethe Kinyanjui v. Toney Ketter & 2 others Civil Application No.

> Nai 31 of 2012, where it was stated that a responsibility is bestowed upon Courts to ensure that the exercise of the discretionary powers donated to them is not exercised in any manner that would prejudice any party coming before it."
>
> [Emphasis ours]

12. Therefore, with regard to the appellant's claim that the learned Judge erred in failing to award him compensation under section 49(1)(c) of the *Employment Act*, it is our finding that the trial Judge was not bound to award all remedies provided under section 49 of the *Employment Act* but instead, she was at liberty and within her discretion to decide which remedies were appropriate to the circumstances of the appellant. We therefore do not find any fault in the manner in which the learned Judge exercised that discretion.

13. The next issue for our determination is whether the remedies awarded by the trial court were in accordance with the evidence tendered. Again, the award of damages is a discretionary matter which an appellate court ought to approach with deference to the trial court's decision. As an appellate court, we can only interfere with the award of damages by a trial court for reasons that either the court acted on a wrong principle of law or that the quantum awarded was either so low or inordinately high as to result into an error in the whole judgment. This principle was restated by this Court in *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR as follows:

> "The law on when an appellate court can interfere with an award of damages is firmly established... In order to justify reversing the award of damages, this court must be convinced that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

14. Guided by the principles we have restated above, we note that at paragraph 22 of the judgment of the E&LRC, the court proceeded to assess damages on the assumption that the appellant was employed as from April 1, 2014 as indicated on the Casual Employment Agreement Form. However, upon perusal of the pleadings by both parties, we find that the respondent, in the response to the Memorandum of Claim, admitted the contents of paragraph 3 of the Memorandum of Claim where the appellant had stated his period of employment to have been between November 1, 2010 to August 8, 2015. This is a fundamental error which may have resulted into an entirely erroneous estimate of damages. On this basis, we would therefore be minded to interfere with the trial court's awards on the claim for underpayments. However, upon considering the record, we find that the evidence on record only proved underpayments were for the period between April 1, 2014 and August 8, 2015 by virtue of the Casual Employment Agreement. No evidence was adduced to prove the appellant's allegations of underpayments prior to April 1, 2014. Therefore, in as much as the claim for underpayments is concerned, the appellant has not laid any basis for the enhancement of the award made on this head by the trial court.

15. The next issue is with regard to the house allowance. Mr.Maragia argued that the appellant was entitled to house allowance. Mr. Koome on the other hand submitted that the appellant being a casual, he was not entitled to house allowance. Under section 2 of the *Employment Act*, a casual worker is defined as follows:

> "casual employee" means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time"

(Emphasis ours)

16. Section 37(1)(b), (3) and (4) of the *Employment Act* provides as follows:

> " 37. Conversion of casual employment to term contract
>
> (1) Notwithstanding any provisions of this Act, where a casual employee—
>
> a. ...; or
>
> b. performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
>
> (2) ...
>
> (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
>
> 4. Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act."
>
> (Emphasis ours)

17. This court expressed itself on this question in *Chemelil Sugar Company vs. Ebrahim Ochieng Otuon & 2 others* [2015] eKLR where it stated that:

> " Those provisions are self-explanatory. The respondents' employment with the appellant were automatically converted into term contracts by operation of that provision. The contention by the appellant that the respondents were casual employees when their employment was terminated and were for that reason not entitled to house allowance is therefore incorrect..."

18. We agree with the holding above. We also wish to point out that regulation 4 of the regulation of Wages (General) Order also provides that where a house is not provided to the employee by the employer, house allowance shall be calculated at 15% of the minimum wage and added to the salary. It follows that the appellant having served for a period of more than 3 months would by virtue of section 37 of the *Employment Act* and regulation 4 be entitled to a house allowance. It is on finding that this ground

of appeal succeeds. The respondent did not tender any documents to show that it paid the appellant his house allowance prior to the April 2014 agreement. We are however cognizant that according to section 74(1)(i) as read with section 74(2) of the *Employment Act*, the respondent was required to maintain records on provision of a house to an employee for at least the preceding thirty-six months. We will therefore limit our award on house allowance to 3 years from August 2015 when the appellant was terminated. The cut-off date for the award on house allowance will therefore be September, 2012. Therefore, the appellant is hereby awarded house allowance which is as follows:

a. For the period between September 2012 to April 2013 (Legal Notice No. 71 of 2012)

Basic minimum wage = Kshs. 8,873.80

House allowance (0.15x8,873.80) = Kshs. 1,331.07

House Allowance due - 1,331.07x8 = Kshs.10,648.56/=

b. For the period between May 2013 to April 2015 (Legal Notice No. 197 of 2013)}

Basic minimum wage = Kshs. 10,116.15

House allowance (0.15x10,116.15) = Kshs. 1,517.42

House Allowance due - 1,517.42x24 = Kshs. 36,418.14/=

c. For the period between May 2015 to July 2015 (Legal Notice No. 117 of 2015)

Basic minimum wage = Kshs. 11,330.1

House allowance (0.15x11,330.1) = Kshs. 1,699.51

House Allowance due - 1,699.51x3 = Kshs. 5,098.55/=

Total House Allowance Due = KSHS. 52,165.25

19. With regard to the award for payment in lieu of notice, the learned Judge correctly found that the appellant was entitled to Kshs.11,330.10 being the monthly minimum wage as at the time he was terminated.

20. We agree with the learned Judge's finding that the claim for off- duty was not warranted in the circumstances. Similarly, we also concur with the learned Judge on the award for payment for work during public holidays as well as the finding on claims for overtime.

21. The final issue is on the question of costs. The appellant faults the trial court for failure to award him costs of the suit. However, we note from the penultimate paragraph of the judgment of the trial court, that the learned Judge made an award of costs to the appellant. The only question on costs would therefore be in respect to the proceedings before this court. Under rule 33 of the *Court of Appeal Rules,* 2022, this court is clothed with the power to make such orders as to costs in regard to the proceedings before it. This is a case where the appellant was an employee of the respondent. He was dismissed from work summarily and unfairly. We have re-assessed the evidence and we concur with the trial court that he was unlawfully dismissed. The appellant herein diligently prosecuted his claim before the trial court and did not act out of malice or occasion any delay and the same can be said of his conduct before us. We also note that this appeal succeeds on quantum. In the circumstances of this case, the interest of justice demands that we stick to the rule that costs follow the event and award the costs to the appellant.

22. In the penultimate, we find that this appeal merited to the extent that the appellant is entitled to the unpaid house allowance to the tune of Kshs.52,165.25. Otherwise the other awards made to the appellant by the trial court remain undisturbed.

23. The award by this court shall earn interest at court rates until full satisfaction of the same. The appellant shall have the costs of this appeal.

24. It is so ordered.

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

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR