Ndugu Transport Company Limited v Onyango (Civil Appeal 24 of 2019) [2023] KECA 1249 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1249 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 24 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 6, 2023

BETWEEN

NDUGU TRANSPORT COMPANY LIMITED .... APPELLANT

AND

GILBERT ONYANGO .... RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Kisumu (M. Onyango J.) dated 21st June 2018 and delivered by Nduma Nderi J on 12th July, 2018 in)

JUDGMENT

Judgement of Mumbi Ngugi JA

1. The appellant is aggrieved by the decision of the Employment and Labour Relations Court (ELRC) sitting in Kisumu in which the ELRC found that it had unlawfully terminated the employment of the respondent and made an award of Kshs 436,727.80 in damages for unlawful termination of his employment.

2. The respondent, Gilbert Onyango, had initiated his claim before the ELRC by way of a Memorandum of Claim dated 30th November, 2014 claiming several reliefs against the appellant. His case was that he had been an employee of the appellant for a period of sixteen years, having been employed on 1st January, 1997. His employment had, however, been terminated unlawfully and without notice on 10th June, 2013 on the allegation that he had been colluding with other employees to overload trucks. He averred that at the time of his termination, he was earning a monthly salary of Kshs. 15,000. He gave the particulars of his terminal benefits as being annual leave for 15 years at 21 days per year; gratuity at 15 days per year; one month's salary in lieu of notice; rest days at 4 days per month; house allowance at 15% of Kshs. 15,000 per month, and compensation for unfair termination of employment in accordance with section 49(c) of the *Employment Act*.

3. The respondent prayed for an order declaring that his summary dismissal and the continued withholding of his terminal dues by the appellant was unjustified and unlawful; an order that the appellant pays his statutory entitlements totalling Kshs 1,246, 625; an order for his reinstatement into employment and the costs of the suit.

4. In its response dated 17th December, 2014, the appellant denied the respondent's claim. While denying that the respondent had been its employee or that he had been underpaid, it averred that he was being paid far in excess of the statutory minimum as per his job grade. It further averred that the respondent was summarily dismissed after being accorded the opportunity to respond to the allegations against him.

5. It further contended that the respondent's employment was terminated summarily in accordance with section 44(4)(c)(e) and (g) of the *Employment Act* for colluding with other employees to cause the appellant's lorry to be overloaded so as to illegally and unlawfully benefit from the excess load. The appellant averred that upon being requested to put an explanation for his conduct in writing, the respondent failed and refused to do so. The appellant further denied that the respondent was entitled to the claim of Kshs. 1,246,625 as particularised in the Statement of Claim.

6. The trial court found in favour of the respondent and awarded him Kshs. 436,727.80 as damages for unlawful termination of employment.

7. The appellant was aggrieved by the decision and filed the present appeal, raising 7 grounds of appeal in the memorandum of appeal dated 6th February 2019. The appellant argues that the trial court erred in law and fact in failing:

    i. to find that the respondent was summarily dismissed after being accorded the opportunity to respond to the allegations against him and that all procedures were adhered to as required by law;

    ii. to appreciate and consider the content and import of the submissions filed by the appellant;

    iii. to find that the respondent's leave days were taken or that the respondent would take his pay in lieu of taking his leave hence no leave pay was due;

    iv. to find that the respondent was summarily dismissed from employment hence no notice of pay was due in line with sections 44 (1) (3) and (4) of the *Employment Act*;

    v. to find and hold that the respondent was procedurally summarily dismissed for gross misconduct in accordance with the provisions of the *Employment Act*;

    vi. to find that the claim for leave was time-barred in line with section 90 of the *Employment Act*; and in awarding compensation for rest days despite the respondent being off duty every Sunday.

8. This is a first appeal. In accordance with Rule 31(1)(a) of the *Court of Appeal Rules*, we are required to reappraise the evidence and draw inferences of fact. See also *Selle v Associated Motor Boat Company* [1968] EA 123.

9. The evidence before the ELRC was presented by the respondent as the claimant and by one Atieno Albert Aketch for the appellant. The respondent's evidence was that he had been employed by the appellant on 1st January 1997 as a loading supervisor/quarryman. He worked at the company for 16 years until his services were terminated on 10th June, 2013. On that day, he reported to work at 7:00 a.m. but was told by Balraj Sehmbi, a director of the appellant, not to do anything. Mr. Sehmbi also called

him a thief and sent him and two colleagues, Cleophas Koech and Frederick Sewe, away. Two days later, the respondent and his colleagues wrote a joint letter to the Managing Director of the appellant seeking clarification of their employment status. They copied the letter to Sehmbi and the Human Resource Manager but received no response.

10. The appellant therefore approached his lawyer who sent a demand letter to the appellant on 21st July 2014, but there was no response. A reminder was sent on 6th August 2014, but it also went unanswered. The respondent therefore filed his suit seeking compensation as set out in his claim.

11. The respondent denied the appellant's claim that he had colluded with other employees to overload trucks. He also denied being arrested or caught stealing. He further testified that he was employed at a starting salary of Kshs. 10,000, which he earned for nine years. It was then increased to Kshs. 13,000 for two years before being raised to Kshs. 15,000, which he was earning until his employment was terminated.

12. The respondent stated in cross-examination that the appellant did not give him a house but they paid his NSSF and NHIF, although there were some months when these payments were not made.

13. In his testimony for the respondent, Mr. Aketch testified that on 10th June 2013, the appellant discovered that trucks from its quarry were being overloaded, and that the quarry foreman, the loader, and the day guard were involved. The appellant then asked them to explain under what circumstances the overloading occurred but they did not provide any explanation. The appellant therefore summarily dismissed them from their jobs. It was his testimony that after the dismissal, the respondent did not collect his terminal dues.

14. Mr. Aketch confirmed in cross-examination that the respondent and his colleagues were dismissed by a director, one Balraj Sehmbi, who discovered the alleged overloading. He further confirmed that no letter of dismissal was issued, and that the respondent and his colleagues worked on Sundays and public holidays.

15. In its submission in support of the appeal which were highlighted by its learned counsel, Mr. Oloo, the appellant contends that the respondent's claim before the superior court was not proved beyond reasonable doubt. It was its submission that the employer/employee relationship was not established, and that the actual circumstances leading to the respondent's exit from employment were not established, the respondent's allegation being only that his employment was unfairly terminated. The appellant relies in support on the case of *Stephen Wasike & Another v Security Express Ltd* (2006) eKLR.

16. It was further submitted on behalf of the appellant that the respondent failed to give reasons for his termination from employment. Its contention was that it clearly explained the reasons for the termination to the respondent, which he never denied.

17. The appellant contends that the trial court erred in awarding the respondent's claim in respect of annual leave, yet there was no proof that the respondent had been employed by the appellant. As for the award in respect of notice, it was the appellant's contention that as the respondent was dismissed summarily for gross misconduct, he was not entitled to the award. It is also the appellant's contention that the respondent was not entitled to the award in respect of rest days as the claim was not proved. The award of Kshs. 59,997.60 was therefore without basis and irregular and should be set aside.

18. In submissions highlighted by his learned counsel, Mr. Mwamu, the respondent argues that he produced in evidence his job identification card indicating that he was a quarry foreman at the appellant's company. He had also produced statements of account of both the NSSF and NHIF showing contributions from the appellant in his favour.

19. With respect to the appellant's contention that he was not entitled to the award in respect of rest days, the respondent submits that the appellant's witness confirmed that he worked on public holidays and on Sundays, which is why the trial court made the award in respect thereof. The respondent relies for this submission on the case of *Fancy Jeruto Cherop & Another v Hotel Cathay Limited* (2018) eKLR.

20. The respondent submits that he was never given a chance to be heard contrary to sections 41 and 44 of the *Employment Act*, Article 47 of the *Constitution* and Article 50 of the Constitution. It is his submission that an employee can only be dismissed if he has fundamentally breached his obligations under his contract of service, and the onus lies on the employer to justify such dismissal. The appellant had not demonstrated before the trial court any actions of the respondent that amounted to gross misconduct.

21. I have considered the judgment of the trial court, the appellant's grounds of appeal and their submissions. I observe that in its judgment, the trial court noted that the procedure for termination of employment is set out in the *Employment Act*; that the procedure for termination is set out in section 41; that section 43 requires that there be proof of grounds for termination, while section 44 sets out the grounds that constitute gross misconduct. The trial court noted that as provided in section 45(2) of the *Employment Act*, termination of employment without complying with the provisions of section 41 or 43 is deemed to be unfair. The trial court found that the respondent had been dismissed verbally, a fact that was admitted by the appellant. The trial court therefore found that his dismissal was both procedurally and substantively unfair.

22. The appellant challenges the decision of the trial court with respect to its findings of fact and on the law. Its contention is that the respondent's summary dismissal was procedural; that the award in damages was unfair as he was not entitled to notice since he was summarily dismissed; his claim for leave was time barred; and he was off-duty on Sundays and was therefore not entitled to the award in respect of rest days.

23. The respondent's evidence is that he was dismissed verbally by a director of the appellant, one Balraj Sehmbi. This was confirmed by the appellant's witness, Aketch, who conceded that there was no written letter of dismissal. Sections 41 of the *Act* requires that an employee should be given an explanation and a hearing before termination of employment. Such procedural fairness is required even in the event of summary dismissal. Under section 43, the employer is under a duty to prove the reason or reasons for the termination of an employee's employment. The section provides that where an employer fails to provide such proof, the termination shall be deemed to be unfair within the meaning of section 45.

24. Section 44 provides for the circumstances under which an employer is entitled to terminate employment summarily, and the conduct that will be considered grounds for summary dismissal.

25. The evidence before the trial court was that the respondent and his colleagues reported to work on 10th June 2013. They were accosted by a director of the appellant, one Balraj Sembi, who termed them thieves and, it would appear, chased them away from the appellant's premises. The appellant conceded in evidence that they were dismissed verbally. There was no hearing as required under section 41; the appellant did not place before the trial court, as it was under an obligation to do, the evidence that justified the summary termination of the respondent's employment. In its decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR this Court stated as follows:

> "There can be no doubt that the Act 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,

prove the reasons are valid and fair, prove that the grounds are justified. A mandatory and elaborate process under Section 41 requiring notification and hearing before determination. The appellant (employee) in this case had the burden to prove, not only were his services terminated but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon to prove the reason for termination, and where the employer fails to do so, the termination will be deemed to have been unfair."

See also *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR.

26. Given the facts of this case and the evidence before it, I am satisfied that the trial court properly found that the termination of the respondent's employment was unfair in terms of section 45 of the *Employment Act*. I therefore find no basis for interfering with its decision in this regard.

27. The appellant is also aggrieved by the award of Kshs. 436,727.80 as compensation for unlawful termination, and it challenges the various heads under which the award was made. It submits that since the respondent was dismissed summarily, he was not entitled to payment in lieu of notice. Having found, however, that the dismissal of the respondent was unfair, I find that the trial court properly awarded him Kshs. 15,000 in lieu of notice.

28. The appellant also challenges the award of Kshs. 181,730 .80 in respect of annual leave. The appellant makes two arguments in this respect. First, that the claim was time barred, and secondly, that the respondent had taken his leave days. It is to be observed that the argument that the claim for leave is time barred has been raised in this Court. It was not part of the appellant's response to the claim before the trial court, and the respondent did not have an opportunity to counter it. In any event, a party that desires to avail itself of a defence under a statute of limitation must specifically plead the defence -see Order 2 Rule 4 of the *Civil Procedure Rules*, 2010. A defence of limitation cannot therefore be properly raised before this Court.

29. Regarding the contention that the respondent had taken his leave days, this was a fact that the appellant was under an obligation to prove, being the party charged with the responsibility of keeping employment records. The respondent had not only pleaded his entitlement to leave in his claim, but also testified with regard thereto before the trial court. Having done so, the burden then shifted to the appellant, as the custodian of employment records, to disprove the respondent's claim, which it did not do. I find no basis to interfere with the award of the trial court in this regard.

30. The appellant also complains about the award of rest days, which the trial court awarded at Kshs 59,997.60. The appellant argues that the respondent had taken these rest days. However, the evidence before the trial court was that the respondent worked on Sundays. There is therefore no basis for interfering with this award either.

31. Finally, the trial court awarded the respondent compensation of Kshs. 180,000, calculated on the basis of his last salary of Kshs. 15,000 for a period of 12 months. Under section 49 of the *Employment Act*, 2007, the court is entitled to make an award for a maximum period of 12 months, bearing in mind the guiding principle that damages are awarded to compensate the claimant, make good his loss, and not as punishment for the employer.

32. In making its award, the trial court noted that the respondent was in the employment of the appellant for a period of sixteen years. It took into account this period, as well as the circumstances under which he was dismissed. It is settled that this Court will interfere with an award in damages only if it is satisfied that the court, in making the award, exercised its discretion injudiciously or misdirected itself in some matter and as a result, arrived at a wrong decision. Section 50 of the *Employment Act* provides that the court, in determining a claim of unfair dismissal, shall be guided by the provisions of section 49.

Under section 49 (4), the Act sets out the factors that a court should consider in arriving at the remedy for unfair dismissal.

33. These factors include the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the employee's length of service with the employer. These are the factors that the trial court took into consideration. The respondent was dismissed from employment, verbally, when he reported to work one morning. He was not given the reasons for his dismissal, other than being called a 'thief', even though he requested for the reasons, in writing, two days later.

34. The respondent had been in the appellant's employment for sixteen years. Though Mr. Aketch testified for the appellant that there had been verbal warnings before the verbal summary dismissal, there was no evidence to that effect, and in any event, such alleged verbal 'warnings' could not meet the strictures of the *Employment Act*.

35. Accordingly, I find no merit in this appeal. I would dismiss it with costs to the respondent.

Judgement of Kiage JA

1. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA and I am in full agreement with her reasoning, the conclusion she reaches, and the order she proposes.

2. As Tuiyott, JA is in agreement, the appeal is dismissed with costs to the respondent.

Judgement of Tuiyott, JA

1. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR