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Wananchi Sacco Society Limited v Wambui (Civil Appeal 211 of 2019) [2023] KECA 1464 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1464 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 211 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 24, 2023

BETWEEN

WANANCHI SACCO SOCIETY LIMITED .... APPELLANT

AND

PATRICK KAMUNYA WAMBUI .... RESPONDENT

(Being an appeal against the judgment and decree of the ELRC Court at Nyeri (Nzioki wa Makau, J.) dated 8th April 2019 in ELRC Case No. 451 of 2017)

JUDGMENT

1. On February 6, 2000, the appellant, Wananchi Sacco Society Limited employed the respondent Paick Kamunya Wambui as an office messenger earning a salary of Kshs 3,749/=. Over time he was promoted at his place of work. In a letter dated 2nd April 2012, the respondent was appointed to the position of a loans officer. His duties included being in charge of credit matters in his branch in liaison with the branch manager; default management/delinquency loans; credit portfolio management; mobilization of shares and deposits; appraising, posting and follow-up of loans; and preparation of credit reports. He was also required to make sure there was adherence to the loans advances policy.

2. On 2nd August 2012 the respondent was ansferred from Othaya Branch to Gakindu Branch in the same capacity. His salary was reviewed on 1st October 2014 to a gross of Kshs 62,500/=. Between October 2016 and December 2016, he was also acting as the business development and marketing manager.

3. In letters dated 6th September 2016, 14th September 2016 and 17th November 2016, the appellant addressed the respondent raising questions on the outstanding coffee loans that he had issued while at Gakindu Branch. These letters preceded his suspension on 23rd February 2017 on the basis of issuance of irregular coffee loans in the branch, failure to recover the said loans and failure to submit regular recovery progress reports. A Board of Management meeting was held on 2nd June 2017 in which a

decision was reached to terminate the respondent's employment. A letter dated 3rd June 2017 was written to him effecting the Board's decision.

4. These are the events that led the respondent to file a Statement of Claim dated 27th November 2017 in the Employment and Labour Relations Court (ELRC) at Nyeri in Cause No. 451 of 2017 in which he claimed that his termination from employment was unlawful. It was his case that he had not been accorded a fair hearing as he was not allowed to scrutinize the reports bearing the allegations against him, and that he had not been allowed to cross-examine any of the factory officials of the factories where the said irregularities had occurred. He prayed for general damages for the unlawful termination of his employment, and the salary he would have earned for 16 years which was the balance of his term to retirement at age 60 years which he said was Kshs 13,871,664/=. He also sought costs of the claim.

5. The appellant filed a response to the claim and also filed a counterclaim. It denied all the contents in the claim, and further counterclaimed was for the sum of Kshs 266,790.70 where it stated that the respondent had acknowledged through his letter dated 5th September 2017 owing to the appellant and had promised to pay by 31st December 2017 but had not.

6. The learned Judge (Nzioki wa Makau, J.) heard the dispute. The respondent testified and produced various documents in evidence. Watson Maina Njogu (the C.E.O. of the appellant) testified as did the General Audit Manager Simon Mwangi Maina. They also tendered documentary evidence.

7. In a judgment rendered on 27th February 2019, the learned Judge found that: -

> "The dismissal from all accounts accords with section 41 of the *Employment Act* as the Claimant was heard prior to dismissal - both orally and in writing. The Respondent was however to pay certain obligations it had toward the Claimant and the Claimant was to pay the money owed to the Respondent. In the claim, the Claimant sought unpaid salaries until his retirement age at 60 years. This is not a remedy a court can give as there is ample authority for the decline to grant such a remedy- see D.K Njagi Marete –v- Teachers Service Commission [2013] eKLR. In the counterclaim, the Respondent seeks recovery of loan amounts said to be owed to it by the Claimant. As the SACCO and the Claimant owe the other, I will grant them two weeks to determine the liabilities on either side as my own calculations could be erroneous. If the parties are unable to agree, I will give my determination based on the documents they availed after the mention in 2 weeks."

8. In the judgment, what the appellant owed the respondent was three months' salary in lieu of notice plus "other dues the Claimant was entitled to." The dues were not specified in the judgment.

9. It is evident that the parties were not able to agree on what each owed the other. The learned Judge delivered another judgment dated 8th April 2019 in the following terms:-

> " 1. The Claimant asserts that he is owed money for the uncompleted period of his service till the age of 60 years and for the manner of dismissal. In the part judgment delivered on 27th February 2019 I found that both parties were entitled to relief on the claim and counterclaim. Parties were unable to agree on some portion of the sums owed in the final submissions, the Claimant asserts that he admits owing the sum of Kshs 227,126.70. The was dismissed without a hearing by the board of the Respondent. For that he would be entitled to 5 months' salary as compensation for the unlawful termination. He was not entitled to the recovery of salaries until the retirement at the age of 60 years. He thus would be entitled to recover Kshs 341,241.25 which sum would have

to be set off against the Respondent's entitlement which is 227,126.70 after the deduction of the sums owed from the sums held by the Respondent to the credit of the Claimant. He thus is entitled to Kshs 114,114.55. As the determination is in favor of each side, each party will bear their own costs."

10. To be able to reach this second judgment, the learned Judge had entertained subsequent written submissions.

11. The appellant was aggrieved by the subsequent judgment (the one dated 8th April 2019) and preferred an appeal to this Court based on the following grounds as contained in the Memorandum of Appeal dated 14th August 2019: -

"1) The learned judge erred in law in revisiting the issue of liability while there was an interim judgment against the respondent.

2. The entire judgment is flawed and is against the weight of the evidence and the principles guiding the writing of judgment.

3. The learned judge erred in law and fact in determining issues that were not before him.

4. The learned judge erred in law and fact in writing two judgments on the same matter.

5. The learned judge erred in law in abdicating his jurisdiction and referring the matters back to the parties through a preliminary judgment.

6. The learned ial judge erred in law in granting prayers that were not sought by the claimant.

7. The learned ial judge erred in law in writing two conadictory judgments on the issue of liability.

8. The learned judge erred in law and fact by finding that the claimant was entitled to anything from the respondent on liability.

9. The learned judge erred in law and fact by ignoring the respondent's computation of the sums owed by the claimant to the respondent and thereby fell into error.

10. The learned judge erred in law and fact in awarding the claimant compensation of equivalent five month's salary when he had earlier found that the claimant's dismissal was in accordance with section 41 of the *Employment Act*.

11. The learned judge erred in law and fact by finding that the claimant was dismissed without a hearing while he had earlier found that the claimant's dismissal was in accordance with section 41 of the *Employment Act*.

12. The learned ial judge erred in law in failing to award respondent costs of the claim and counterclaim."

12. In response to the appeal, the respondent filed a cross appeal contained in the Memorandum of Cross Appeal dated 11th September 2019. The grounds were as follows:-

> “(1) The learned judge erred in law and fact while awarding me a salary equivalent to five months gross salary of Kshs 341,241.25 by failing to consider as I had stated in my statement of claim that I had legitimate expectations to work up to retirement age of 60 years and my employment was terminated at the age of 44 years having worked for 17 years since year 2000 where I rose from a messenger to the level of Assistant Marketing
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> 2. The learned judge erred in law and in fact in failing to consider section 50 of the *Employment Act* which enumerates the factors that ELRC Court has to consider while determining a complaint or suit for wrongful termination of employment. What I was awarded by the court for the wrongful termination cannot mitigate the loses and address the severe problems that I am facing as a family man with school going children. Due to the monumental crisis of unemployment in Kenya there is no comparable or suitable employment that I had been able to secure with any other employer and the Kshs 114,114.55 award I was given after deducting a loan I had legitimately incurred while in employment was unreasonably low. If my employment termination was not unlawful I would have settled any loan comfortably I had with the appellant with my salary.
>
> 3. The learned Judge erred by failing to consider that my termination process did not accord with section 41, 42 and 45 of the *Employment Act*. There was no resolution of the Board of directors of Wananchi Sacco that resolved to sack me. In pages 82-87 of the record of appeal filed by the appellant are unsigned minutes dated 19thApril 2017 purporting that the disciplinary process meeting of 19th April 2017 passed a resolution that I should be sacked and which minutes were probably created after I had filed a case in ELRC n 30th November 2017. In page 96-101 of the appellant record of appeal is an unsigned minute purportedly showing that the B O M terminated my employment through a letter dated 3rd June 2017 yet there was no signed minutes showing that the Board had passed that resolution.
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> 4. The learned Judge erred in failing to consider that Wananchi Sacco Society Ltd was finding evidence to implicate me of any wrong doing eight months and seven months respectively from the date the Board of Directors sat on 19th April 2017 and the letter of termination dated 3rd June 2017. Page 122,123,124, 125, of the appellant Record of Appeal, the appellant was allegedly writing letters dated 29th December 2017 to Tuthaka Farmers’ Cooperative Society Ltd, Gathaithi Farmers’ Cooperative Society, Rumukia Farmers’ Cooperative Society, Taifa Sacco Society Ltd seeking evidence to implicate me more than seven months from the date my termination was done on 3rd June 2017 .On page 126, of the appellant record of appeal, an agent of Wananchi Sacco mostly likely plucked a piece of paper from an exercise book and jotted some allegations in undated letter without the name of the author that some alleged fraud had happened in Ruthaka Farmers Coop Society. This clearly shows the appellant was manufacturing evidence after I had filed the

case in ELRC Court on 30th November 2017 as no lawful procedure was followed during my termination.

5. The learned judge failed to base his calculations on the last gross salary I earned of Ksh.72,248.25 (see payslip on page 78 of the appellant record of appeal) and used an erroneous salary of Ksh.68,248.25 x 5 months = Ksh.341,241.25 while calculating the five months' salary award. I didn't understand where the figure of Ksh.68,248.25 came from.

6. The learned Judge erred in law and in fact in failing to grant me General damages for emotional disess and the social and economic problems I am undergoing due to the unlawful termination yet I had prayed the same in my statement of claim. The learned Judge did not give any explanation or any reason for failure to grant me general damages in his judgment. When the termination is unlawful and illegal and conary to Article 41 of the *Constitution*. ELRC Court which has equal status as High Court, it is my humble view should compensate the employee whose rights had been violated adequately, capping compensation to 12 months alone would be unjustified as this means Kenyan workers who earn a measly salary of Ksh.10,000 or more would be entitled to unreasonably low compensation despite their labour rights being seriously violated by an employer thus it is my respectable view that one way of compensating a worker adequately is through awarding general damages. I am informed nowadays ELRC Court are granting general damages.

7. The learned judge erred failing to consider that while I was cross examining the auditor of Wananchi Sacco Society Ltd, he admitted that no document of the alleged fraud was filed in court (Page 50 of appellant record of an appeal) or any certified or signed audit report filed in court. Any loan that could have been defaulted were as a results of factors like coffee hawking, poor prices, coffee politics and low coffee produce which were outside my conol and the issue of bad debts is a common occurrence even in major banks.

8. The appellant Wananchi Sacco Society Ltd in its counter claim filed in court was claiming wrong figure of Ksh.266,790.70 which was not supported by bank or loan statements. There was an out of court settlement and the figure was slashed down to the correct figure of Ksh 227,121.70 cents and consent recorded in court on 15th March 2019 (see page 52 of the appellants record of appeal) Thus it is ridiculous for Wananchi Sacco to claim that it was denied the figure of Ksh.266,790.70 cents it had claimed in the counterclaim and which was a wrong figure. The part time judgment which I did not fully agree with and final judgment was a result of the negotiations to agree on the contested debt. Therefore, I humbly request the Honourable Court of appeal to grant me compensation that will mitigate the social and economic turmoil that I am facing with my family as a result of my unlawful sacking.

9. The learned judge erred in law and in fact for failing to consider due to the unlawful termination I lost service benefits estimated Ksh.72,248.25 (last gross salary) x 17 years =Ksh,228,220.25."

The cross appeal was against the judgment dated 8th April 2019.

13. The gist of the appellant's appeal was that, after the learned Judge had in the judgment dated 27th February 2019 found that the respondent's dismissal was not unlawful and it was in accordance with section 41 of the *Employment Act*, he had no jurisdiction to revisit the question of liability as he had done in the subsequent judgment of 8th April 2019 in which he determined that the respondent's dismissal was without a hearing. The respondent's cross appeal attacked both judgments. The complaint against the first judgment was that it was wrong for the learned Judge to find that the dismissal was lawful; that, in the evidence, the learned Judge ought to have found that the dismissal went against the provisions of sections 41, 42, and 50 of the *Employment Act*. Regarding the second judgment, the complaint was that what he had been awarded for unlawful termination could not mitigate the loss he had suffered, that the learned Judge had used the wrong gross salary in calculating the amounts due to him, and, lastly, that the learned Judge had erred in failing to award general damages for unlawful termination of his employment.

14. Counsel for the appellant filed written submissions in which he urged this Court to find that, after the learned Judge had in the Judgment dated 27th February 2019 found that the respondent's dismissal was lawful and had been in accordance with section 41 of the *Employment Act*, it was wrong for him to return to the question of liability in the judgment of 8th April 2019 and to find that the respondent had been unlawfully dismissed for want of a hearing. Counsel submitted that the learned Judge had erred by writing two judgments, and conadictory ones at that, in the same matter. Reference was made to this Court's decision in *Kenya Broadcasting Corporation –v- Geoffrey Wakio* [2019]eKLR in which this Court had cited Order 21 Rule 3(3) of the *Civil Procedure Rules* and observed as follows:-

> "..........a judgment once drawn up, issued and entered cannot afterwards be altered or added to, save as provided by section 99 of the *Civil Procedure Act* which allows correction of a judgment only where there are clerical or arithmetic mistakes; or errors arising therein from an accidental slip or omission. The law only allows the corrections of mistakes, errors or slips, but not merit based decisional reengagement with the case "

In the same decision, this Court had observed as follows:-

> " 35. To sum up, the court is functus when the proceedings are fully concluded and the judgment or order has been perfected "

15. Counsel submitted that, after the judgment dated 27th February 2019, the learned Judge was *functus officio* on the question of liability. On the question of calculations that the learned Judge asked the parties to engage in when he gave them two weeks, counsel submitted that the learned Judge had received oral and documentary evidence on the amounts and that he was constitutionally and statutorily mandated to do the calculations and reach a figure based on the evidence. What he did, therefore, was a dereliction of duty and, consequently, the second judgment was null and void.

16. The respondent was not represented by counsel. In his written submissions, he contended that his termination had not followed the procedure required by sections 41, 42 and 45(2) of the *Employment Act* and section 4(3)(a) and (g) of the Fair Adminisative Action Act; that he had not been adequately informed of the reasons for his termination, had not been given adequate notice to enable him prepare his defence, and that the appellant's records as to the disciplinary process of the alleged hearing had been manipulated to lend credence to its claim that it had heard him before a decision to terminate him had been reached. Further, that, the alleged Kshs 266,790.70 owed according to the counterclaim was not backed by an official stamped bank statement or loan statement, and had therefore not been proved. Lastly, that the learned Judge had erred in law and fact by failing to consider that due to his

unlawful termination, he had lost benefits estimated at Kshs 72,248.25 (last gross salary) x 17 years = Kshs 1,228,220.25.

17. We are alive to the jurisdiction of this Court when dealing with an appeal from the decision of the ELRC. Our remit is to reconsider afresh all the evidence that was presented before the ELRC and analyse it in order to arrive at our own independent conclusion thereon, while bearing in mind that we did not have the benefit of seeing and hearing the witnesses as they testified (*Kenfreight (EA) Limited –v- Benson K Nguti* [2016]eKLR).

18. We have anxiously considered the claim and counterclaim that the learned Judge was confronted with, the record of proceedings as kept by him, the two judgments, the appeal and cross appeal and the written submissions by the parties. It is quite clear to us that the learned Judge wrote two judgments following his hearing of the dispute between the respondent and the appellant. In the judgment of February 27, 2019 it was clear that the learned Judge dismissed the respondent's claim that his employment had been unlawfully terminated. The court found that the respondent had been accorded a hearing, both orally and in writing, and that the termination had been in accordance with section 41 of the *Employment Act*. The court then asked the parties to go and sit down and calculate what they owed each other. This was because, according to the counterclaim, both parties owed each other certain sums of money. The learned Judge stated that he did not want to engage into the calculations lest he made a mistake. In the judgment of 8th April 2019, the learned Judge, after receiving written submissions, found the termination to have been unlawful. He found that the respondent was entitled to five months' salary in lieu of notice, and calculated the amount of salary to be Kshs 341,241.25. He found that the respondent owed the appellant Kshs 227,126.70 claimed in the counterclaim. The consequence was that the respondent was owed Kshs 114,114.55 by the appellant.

19. We are bound to agree with the appellant that, the learned Judge, having determined the question of liability in the judgment of 27th February 2019, he was *functus officio* on the issue. In *Raila Odinga & 5 Others –v- IEBC & 3 Others* [2013]eKLR and in *Telkom Kenya Limited –v- John Ochanda (suing on his own behalf and on behalf of 96 former Employees of Telkom Kenya Limited)* [2014]eKLR, both Courts were dealing with a principle of *functus officio* when they respectively reiterated that, the principle gives expression to the principle of finality; that once a court has given a decision on a matter in dispute, such a decision (subject to any right of appeal to a superior court) is final and conclusive, and cannot be revisited or varied by the same court. The court can only touch the decision to correct it in regard to clerical or arithmetic mistake, or any error arising from an accidental slip or omission. The jurisdiction to make such correction is provided under section 99 of the *Civil Procedure Act*. The limited jurisdiction, however, would not allow the court to re-engage with the merits of the decision.

20. Consequently, we find, that the court fell into grave error when it re-engaged with the merits of the decision rendered on 27th February 2019 and changed its determination on the question of whether or not the respondent had been lawfully terminated. We further find that, the court erred, given its finding on liability, in holding that the appellant was liable to pay the respondent 5 (five) months' salary in lieu of notice.

21. Going by the judgment rendered on 27th February 2019, the respondent had lost his claim. The court then proceeded as follows:-

> "In the counterclaim, the Respondent seeks recovery of loan amounts said to be owed to it by the Claimant. As the SACCO and Claimant each owe the other, I will grant them two weeks to determine the liabilities on either side as my own calculations could be erroneous"

22. The appellant's counterclaim was for recovery of Kshs 266,790.70 debt that the respondent had allegedly acknowledged. The amount was net after calculations of the loans that the respondent had taken from the appellant and after considering the respondent's terminal benefits. The respondent filed defence to the counterclaim in which he denied owing the money. It is clear to us that, the court did not make a finding on whether the appellant had proved its counterclaim, and for what amount. There was no determination on how much, if at all, the respondent was entitled to as terminal benefits. There was no finding on what the Kshs 266,790.70 in the counterclaim entailed, and whether it constituted a final settlement of the dispute between the respondent and the appellant. Consequently, we find that when the court asked the parties to go and sit down and do the calculations of what was owed to who, without having made the foregoing determinations, this amounted to dereliction of judicial duty and responsibility. The parties had through the evidence tendered documentary material which the court was constitutionally and statutorily bound to consider and analyse to be able to resolve the counterclaim. It did not undertake the exercise, however difficult or tough the exercise was. Making a mistake is part of the court's challenge. It could not ansfer the challenge to the parties.

23. The parties were entitled to a fair hearing of the dispute between them, and to determination of all aspects of the dispute, after considering all the facts and the law. This, in our view, is what the parties were entitled to under Articles 25(c) and 50(1) of the *Constitution*. For the reasons we have given in the foregoing, we find that the judgment rendered on 8th April 2019 was a nullity because the court was *functus officio* and that, in any case, it had not received any further evidence to be able to change its earlier decision, even assuming that it had the power to make such a change. Secondly, the court did not in the judgment of 27th February 2019 determine all the questions that were supposed to be dealt with, including how much money the respondent owed the appellant. Lastly, by making two different and conadictory determinations on the question of liability, within a span of less than two months, on the same evidence, it would certainly not appear to us that the parties had received a fair and satisfactory hearing on the dispute that they had placed before the Court for resolution. In those circumstances, we find and declare that the ial of the dispute was altogether a nullity, and hereby quash and set aside the hearing and the two judgments of 27th February 2019 and 4th April 2019. We remit this dispute back to the Employment and Labour Relations Court at Nyeri for fresh hearing and resolution by another judge.

24. For the foregoing reasons, both the appeal and the cross- appeal are allowed. We order that each party shall bear own costs on the appeal and the cross appeal.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 2023.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify this is a ue copy of the original.

Signed

DEPUTY REGISTRAR