



REPUBLIC OF KENYA



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**Ngunda v Ready Consultancy Limited (Civil Appeal 129 of 2019)
[2022] KECA 577 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 577 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 129 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
FEBRUARY 4, 2022**

BETWEEN

JANVAN GATHARA NGUNDA APPELLANT

AND

READY CONSULTANCY LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court, at Mombasa (Rika, J.) delivered 13th June 2019 in ELRC NO. 906 of 2016)

JUDGMENT

1. The appellant, Janvan Gathara Ngunda is aggrieved by the trial court's decision which declared that he was unfairly terminated by the respondent, Ready Consultancy Limited, but which declined to order that the appellant be awarded payment for public holidays, Sundays and overtime worked, amongst other grievances.
2. The appellant claims that he was employed by the respondent as a General Manager, on June 1, 2013, earning Kshs. 33,600 monthly; that he was required to work for 48 hours a week, excess hours, and was compensated at 1.5 % of the basic rate. He claimed that he was entitled to 21 days of paid annual leave and had worked on Public Holidays and Rest Days without compensation.
3. He claimed that he was summarily dismissed on 13th June, 2016 without justification and prayed for judgment against the respondent for;
 - a) Damages for unlawful termination at Kshs 2,000,000.
 - b) 1 month salary in lieu of notice at Kshs 33,600.
 - c) 1 month salary in lieu of notice [again] at Kshs 33,600.
 - d) June, July and 3 days of August worked with no pay at Kshs 71,076.



- e) Service pay for 3 years and 2 months at Kshs 58,184.
- f) Unpaid annual leave from June 2013 to August 2016 at Kshs 54,277.
- g) 33 Public Holidays worked at Kshs 127,882.
- h). 152 Sundays worked at Kshs 589,030.
- i) Overtime of 5184 hours from June 2013 to 6th July 2016 at Kshs 1,255,565.
- j) Refund of unremitted NHIF of 38 months at Kshs 21,120.
- K) Refund of unremitted NSSF deductions of 38 months at Kshs 34,200.
- l) Penalty accrued for unremitted NHIF payments at Kshs 24,320.
- m) Penalty accrued for unremitted NSSF payments at Kshs 760.
- n) Compensation for unlawful dismissal at Kshs 403,200.

Total....Kshs 4,017,200.

- o) Declaration that termination was unfair.
 - p) The Respondent to pay the Claimant compensation and damages for unfair and unlawful termination at Kshs 4,017,200.
 - q) The Respondent to pay the Claimant damages for unfair and unlawful termination.
 - r) Interest.
 - s) Costs.
4. The respondent's reply to the allegations was that the appellant was employed as a Supervisor, not General Manager, and was assigned duties at the respondent's client's workplace, Mombasa Maize Millers, Milly Branch; that he was summarily dismissed for gross misconduct. When he was summoned to show cause why he should not be disciplined, and was provided an opportunity to defend himself, he declined to respond to the allegations that faced him and was thereafter summarily dismissed fairly and lawfully.
 5. The appellant testified and called 3 witnesses, while Gloria Moses, the respondent's Human Resources Director testified on behalf of the respondent.
 6. After considering the pleadings, the evidence and the parties' submissions, the trial court found that the process leading up to his termination was procedurally proper. But the court went on to conclude that the termination of his employment was unfair for want of a valid reason or reasons for termination.
 7. In so far as his terminal dues and allowances were concerned, the court awarded the appellant: annual leave of Kshs. 48,461; service of Kshs. 51,923; salary arrears of Kshs. 61,153; equivalent of 6½ months' salary in compensation for unfair termination of Kshs 195,000; and notice of Kshs. 30,000, giving rise to a total of Kshs 386,537, together with costs and interests.
 8. Concerning the claims for 33 Public holidays, 152 Sundays and 5184 hours worked, the trial court declined to award him the amounts claimed as the court found them to be without foundation.
 9. The appellant was dissatisfied with the judgment and lodged this appeal on grounds that the learned judge was wrong in finding that the appellant's prayers for payment or public holidays worked, Sundays worked, and overtime worked had no foundation; in placing upon the appellant the burden of proving



- facts within the special knowledge of the respondent; finding that the termination of the appellant was procedurally fair, and failing to award the appellant the full 12 months-wages compensation for unfair termination.
10. The appeal was canvassed by written submissions. At the hearing, learned counsel Mr. O. Owino appeared for the appellant. Counsel informed us that Mr. Birir, the learned counsel for the respondent, was indisposed, but they had agreed that both parties would rely on their written submissions.
 11. In his submissions, the appellant submitted that the trial court was wrong in dismissing the claim for public holidays Sundays and overtime worked because, the trial court observed that the appellant scheduled work shifts and did not clock any overtime, public holidays or Sundays worked and then held that without these records, the claims lacked foundation and were for that reason rejected. It was submitted that in making this finding, the learned judge failed to properly consider the facts in the appellant's cross-examination that, (1) the appellant, as an officer of the respondent company responsible for scheduling shifts, as a matter of practice, did not record overtime; (2) the appellant, again as an officer of the respondent responsible for scheduling shifts, was not responsible for paying compensation for holidays worked; and (3) there was no attendance register; that the contract of employment provided for 48 hours of work a week, and that the appellant had pleaded that he was overworked by 5,184 hours during his period of employment; that he worked late into the night and; that the respondent, being the presumed custodian of the work schedules, did not lead any evidence to controvert that claim.
 12. It was asserted that the onus was on the respondent to rebut this evidence by producing records of time sheets, evidence which should be presumed to be in their possession or control and having failed to do so, the learned trial judge ought to have made an adverse inference against the respondent and found in favour of the appellant. In support of this contention, the case of *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 other* [2012] eKLR was cited for the proposition that where the party has custody or control of evidence which that party fails or refuses to tender or produce, the court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to that party.
 13. The appellant asserted that the respondent did not serve the appellant with the first notice to show cause whereupon a second one had to be issued; that there was nothing fair about the short notice given to the appellant and that having found the termination to be substantively unfair, there was nothing on record that could lead the learned judge to conclude that the procedure leading up to his termination was procedurally fair.
 14. Finally, the appellant submitted that in awarding the appellant 6 ½ months wages as compensation for unfair termination, the trial court denied the appellant substantive justice.
 15. The respondent also filed written submissions which were highlighted. On whether the judge correctly found that the appellant's claim for payment for holidays, Sundays and overtime had no foundation, it was submitted that he who alleges must prove. The case of *Pinnacle Tours and Travel Limited & 3 others v Pauline Ngigi t/a Safari Market Tours* [2019] eKLR, citing the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'Mwarabua* [2015] eKLR for the proposition that the appellant had the burden of proving that the respondent did not pay the sums owed, and in failing to do so, the burden did not shift to the respondent; that the appellant in this case did not specifically list the holidays that he purported to work despite the respondent having produced an off days/holiday sheet dated 3rd December 2015 and signed by all the parties; that there was no evidentiary proof that the appellant worked on Sundays and that the appellant did not specifically plead or prove the 5184 hours overtime



- claimed. It was further submitted that the appellant failed to discharge the burden of proving that he was entitled to the sums claimed, and therefore, the learned judge was right in reaching this finding.
16. As to whether the learned judge rightly found the termination of the appellant procedurally fair, it was submitted that the chronology of events leading up to the appellant's termination was procedurally fair, as the appellant was given every opportunity to show cause why he should not be dismissed. Though he declined to appear before the Disciplinary panel, he admitted that he was accorded an opportunity to be heard.
 17. Turning to the 6 ½ month award of compensation, it was asserted that section 49 (1)(c) of the Employment Act does not automatically award 12 months' compensation; that the trial court having found the termination procedurally fair but substantively unjustified, settled on the award of 6 ½ months. It was submitted that the compensation awarded was excessive, and the court ought to have awarded one month's salary as compensation, particularly for the reason that the trial court failed to specify reasons for the amount awarded. The case of CMC Aviation Limited v Mohammed Noor [2015] eKLR was relied on to support the contention that in awarding compensation to a party, a court should specify the reasons for such award.
 18. This is a first appeal and the duty of the first appellate court was laid. In the case of *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court pronounced itself as follows with regard to the mandate of this Court on a first appeal: -

"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." *Watt v Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 984, applied. See also *Selle v Associated Motor Boat Company Ltd.*, [1968] EA 123"
 19. Having considered the submissions of counsel, the evidence on record and the legal authorities cited, the issues that lend themselves for determination are;
 - i. Whether the appellant was entitled to payment for public holidays, Sundays, and overtime, and in shifting the burden of proof to the appellant;
 - ii. Whether the learned judge rightly found that the termination of the appellant's employment was procedurally fair; and
 - iii. Whether the appellant was entitled to 12 months' compensation.
 20. On the issue of payment for 33 public holidays, 152 Sundays, and 5184 hours of overtime, the learned judge was not satisfied that a firm basis was established, and dismissed the claim. An analysis of the record does not disclose that these claims were properly established. No evidentiary proof was provided that the appellant worked on those days. There were no details or particulars given of the public holidays or Sundays worked. Did he work on all public holidays and Sundays, or just some of them? Which days in particular? As regards the alleged overtime, there was no breakdown of the 5184 hours into the days to which they related. As it were, it would seem that the appellant was engaged in overtime work continuously for the entire 5184 hours, which is neither feasible nor humanly possible. As correctly submitted by the respondent, he who alleges must prove.
 21. Since the appellant did not provide any proof that he worked on public holidays or the Sundays, or indeed overtime, contrary to his assertions, the burden could not shift to the respondent to provide



further evidence in this regard. As rightly observed by the learned judge, the appellant did not clock overtime, and there was no record to show that he attended the workplace on public holidays or on Sundays.

22. We would further add that the appellant was a General Manager. Being a part of management, he was well placed to pursue payment for public holidays, Sundays and overtime worked, or at the very least furnish the court with further and better particulars in support of his claim. As a consequence, the learned judge cannot be faulted for finding that the claim was unsubstantiated and lacking in foundation or basis. As such, the claim was not merited and is dismissed.
23. The next issue was whether the learned judge rightly found that the termination of the appellant's employment was procedurally fair. In this regard the learned judge stated thus;

"The Claimant was issued with a letter to show cause on 30th June 2016, which he is said to have declined to receive. The letter alleged that the Claimant had absconded duty repeatedly, causing dissatisfaction among Respondent's Clients.

The 2nd letter issued on July 6, 2016. It states that the Claimant failed to respond to the 1st letter. The 2nd letter gave the Claimant another chance to show cause. The default the Claimant was called upon to answer is the same one contained in the earlier later-absconding.

[22] Although the respondent alleges the claimant did not respond, there is a response in Claimant's documents filed in court, complete with the stamp of the respondent. The response was received by the respondent on July 8, 2016. The claimant basically states that he was not given any specific date when he is said to have absented himself. He rejected the accusation about insubordination, arguing it was not in the 1st letter to show cause.

[23] He was invited to a disciplinary hearing through the letter dated 9th July 2016. He was issued a letter of summary dismissal dated the 13th July 2016. The letter states that the claimant has been found guilty of absconding.

[24] The Claimant conceded in his evidence that he was heard. He had the benefit of 2 letters asking him to show cause why, he should not be disciplined. At the disciplinary hearing, he asked for time to respond which was granted. He did not respond, to even say he was relying on the letter he had earlier issued upon the Respondent, in responding to the letter to show cause. The court does not see any defect in the procedure adopted by the respondent. The Claimant was granted an opportunity to explain his position at a disciplinary hearing. Procedure met the minimum standards of fairness imposed on Employers on the section 41 and 45 of the *Employment Act*."

24. An analysis of the facts as they transpired show that the appellant was issued with two show cause letters. He declined to receive the first one. He was provided with ample opportunity to respond. He was invited to attend a disciplinary hearing. He attended and asked for more time to have one of his colleagues accompany him to the hearing, stating that he would return by 5 pm. He was granted more time. It is instructive that he went away never to return. The appellant was given an opportunity to be heard. He chose not to appear before the disciplinary hearing, as a consequence of which, he has no one else but himself to blame for having squandered that opportunity. As such, we agree with the trial judge that the procedure adopted by respondent was procedurally proper, and we so find.
25. Finally, we turn to the issue of whether the award by the trial judge of 6 ½ months compensation was sufficient having regard to the circumstances of the case. The appellant's complaint is that the



court ought to have awarded him 12 months' compensation, and by declining to do so he was denied substantive justice. On the other hand, the respondent asserts that the trial court did not provide reasons for granting him the 6½ months compensation; that the award was excessive because the appellant had only been employed for a relatively short period of 3 years.

26. At the outset, it is observed that the respondent did not file a cross appeal and therefore it is not entitled to query the 6 ½ months compensation awarded by the court. Having said that, in arriving at the award, the learned judge observed that the appellant had served for three years, was a dutiful general manager who provided useful services to both the respondent and its employees. He expected to serve the respondent until retirement; that he was accorded procedural fairness but denied substantive justice. From the above, it is apparent that the judge provided reasons for exercising his discretion to award compensation of 6 ½ months' salary. And having found that the process adopted in summarily dismissing the appellant was procedurally proper, we find that the appellant's complaint that he was denied substantial justice is unfounded.

27. In sum, the appeal is unmerited and is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

