



REPUBLIC OF KENYA



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**H. Young & Company (E.A) Limited v Ovonyoli (Civil Appeal
172 of 2015) [2022] KECA 599 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KECA 599 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 172 OF 2015
RN NAMBUYE, W KARANJA & DK MUSINGA, JJA
MAY 13, 2022**

BETWEEN

H. YOUNG & COMPANY (E.A) LIMITED APPELLANT

AND

EVANS AGULO OVONYOLI RESPONDENT

(Being an appeal against the orders and judgment of the Industrial Court at Nairobi (M. N. Nduma, J.) dated 27th February 2013 in Industrial Court Cause No. 1614 of 2011)

JUDGMENT

1. Evans Agulo Ovonyoli (the respondent) sued his former Employer H. Young & Company (E.A) Limited (the appellant) vide a memorandum of claim which was amended on 18th October, 2011 whereby he claimed several reliefs arising from what he averred was unlawful termination of his employment by the appellant. According to the respondent he had been working for the appellant from February 2011 until July 2011 when his services were wrongfully terminated without following the rightful procedure. He averred that at the time of dismissal his gross salary was Ksh. 22,412 per month. It was his claim that the appellant had refused to pay him his terminal benefits such as overtime worked and payment of salary in lieu of notice after he was dismissed. He asked the court to grant the following reliefs:
 - a. A declaration that the dismissal was unlawful and an order be given that the claimant be paid his dues and benefits of Kshs. 199,284 in addition to 12 months' salary for compensation as per section 15 of the Labour Institution Act 2007, section 49C of the *Employment Act* 2007;
 - b. Costs of the claim and interest;
 - c. Compensation for unfair loss of employment;
 - d. Certificate of service.



2. The appellant opposed the claim by way of a response dated 5th October, 2011 in which it admitted that the respondent was its employee from February 2011 until July 2011 when the respondent was lawfully terminated from his services on grounds set out in section 44(4)(c) and (g) of the *Employment Act*. The appellant further averred that the respondent was paid all his overtime dues for the months he was an employee as shown in the respondent's payslips but upon termination he refused to pick his dues which amounted to Ksh. 14,642.
3. Further that the respondent being a truck driver was under a duty to perform his work in an honest and forthright manner, however, he engaged himself in unlawful and criminal acts of pilfering and selling petroleum products. The appellant further maintained that the respondent was afforded an opportunity to explain himself as provided under section 41 of the *Employment Act* which he failed to do. In the end the appellant averred that the termination was legitimate and was in line with section 44(3), 44(4)(C) and (g) of the *Employment Act 2007* and, therefore, the respondent was not entitled to any reliefs.
4. The matter proceeded by way of viva voce evidence before the trial court. It was the respondent's case that from 1998 he had worked in various work projects contracted by the appellant as a heavy vehicle driver. On 4th October, 2010 he was retrenched when the construction of the Meru-Mikindani road was completed and he was paid his terminal benefits. He was rehired on 9th February, 2011 by the appellant and assigned to drive a water truck in a project based at the Kenya Ports Authority, Mombasa. His duties involved supply of water to different departments to clean equipment to avoid corrosion, for flushing toilets, drilling and construction work. He worked in that capacity until the 5th July, 2011 when he was summarily dismissed by a letter of even date. He had therefore worked continuously for a period of five (5) months from the date he was rehired. He stated that for every trip made in a month entries were made for hours worked which also included the overtime.
5. On or about the 28th June, 2011 he received a memo requiring him to explain an irregular fuel consumption on a motor-vehicle he was driving within Mombasa. It was alleged that the vehicle's consumption was an average of 27 - 29 litres per trip and it had gone up to 62 litres per trip between the 2nd to 25th June 2011. He was asked to give an explanation after which, he was given compulsory leave of 5 days. After the end of the 5 days leave he was served with a summary dismissal letter. He was informed that the Truck WT31 was given to another driver whilst he was away and the fuel had returned to the normal consumption of 29 litres, and that was a clear indication that he was responsible for pilferage of fuel. He appealed against the decision to dismiss him but there was no response to his appeal.
6. It was his evidence that the alleged rise of fuel consumption between 2nd to 25th June 2011 was because the nature of work had changed since he was required to get water from Mazaras to the Port and then to Bamburi and that he encountered heavy traffic jam hence it was possible to have a fuel increase per trip. He produced a letter dated 13th July 2011 by a Mr. Omri Kohen, the Logistics Department Manager titled, "Fuel Consumption WT31 Reg. No. KBB 444X", this letter was directed to the site manager and other officers. The letter was in regard to the consumption of fuel from the 21st January, 2011 to 30th June, 2011 and that it was right according to the Company averages and rates.
7. The appellant's Human Resource Manager Mr. Samuel Gathogo testified and produced a form containing the respondent's terms of employment. He told the court that the company had a system which indicated the time each employee clocked in and out and this was used for payment of overtime, and the respondent had been paid the overtime dues. He disputed the cards produced by the respondent and claimed that they were used when the employee was not at the station.



8. On dismissal, he stated that the respondent was dismissed because of the high fuel consumption of his truck. Upon termination, the appellant prepared the respondent's terminal dues which included salary for days worked in July, payment of 4.85 for leave days not taken, travelling allowance for days worked and an overtime for 30.02 hours at the rate of 1.5 and 9.68 hours at the double rate. The total gross amount due was Ksh. 15,261 and Ksh. 14,642 as net payment, which the respondent declined to receive. It was his evidence that the appellant followed a proper procedure to dismiss the respondent since he was afforded an opportunity to explain the accusation levelled against him but failed to give a reasonable explanation. He discounted the respondent's theory that the increase of fuel consumption could have been due to the heavy traffic jam.
9. Upon careful analysis of the pleadings, evidence on record and parties' submissions, the trial court in its judgment dated 27th February, 2013 held that: the appellant failed to satisfy the requirements of section 43(1) as read with section 45(2)(a) and (b)(i) by showing the reason for termination was valid and that the respondent's conduct was detrimental to the operations of the company and that a fair procedure was followed to terminate his services. The trial court found the respondent was entitled to leave allowance when he was sent on compulsory leave for six days to a sum of Ksh. 22,414, he was entitled to a salary of 20 days for a period between 16th June to 5th July 2011 in the sum of Ksh. 14,941. The respondent's claim for overtime was dismissed since he had been paid. In the end the court granted the award:
 - a) Ksh. 22,412 being one month's salary in lieu of Notice;
 - b) Leave allowance in the sum of Ksh. 22,412;
 - c) 20 days' salary for the period 16th June to 5th July 2011 in the sum of Ksh. 14,941 and
 - d) 8 months' salary being compensation for unfair dismissal in the sum of Ksh. 179,296
 - e) Costs of the suit.
10. Aggrieved by the award, the appellant has moved to this Court on appeal proffering grounds, inter alia, as follows:
 - a) That the learned judge erred in law by granting the claimant an amount of Ksh. 22,412 on account of leave allowance when the evidence showed that the claimant only proceeded on leave for 6 days
 - b) That the learned judge erred in law by granting the claimant a sum of Ksh. 179,296 being 8 months' salary for unfair dismissal when the said claimant had only worked for 5 months on a contract terminable by a month's notice
 - c) That the learned judge erred in law by awarding the claimant costs of the suit (save for court fees) when the said claimant had all along acted in person.

The appellant has asked this Court to allow the appeal with costs.

11. Both parties filed written submissions which they adopted and highlighted at the plenary hearing of the appeal. In his highlights, Mr Atonga learned counsel for the appellant reiterated that the award of 8 months' salary as compensation was manifestly excessive given the fact that the respondent had only worked for 5 months before his dismissal. Citing this Court's decisions in *CMC Aviation vs Mohammed Noor* [2018] eKLR where the appellant therein had been awarded 8 months' salary having worked for 2 years by the trial court, which amount was slashed to 1 month salary by this Court, counsel implored the court to reduce the said amount. He also placed reliance on the case of *Krystaline Salt Ltd vs Kwekwe Mwakele and 67 others* [2017] eKLR. Counsel emphasised that the Court should consider the length



of service when awarding damages. On the award on leave, learned counsel urged the Court to set aside that award as the respondent had not worked for 12 months for him to be eligible to take leave. He urged us to allow the appeal.

12. In response the respondent, who appeared in person, urged for the dismissal of the appeal saying that he was entitled to the award under chapter 4 of *the Constitution*.
13. The appellant has framed issues for determination as follows: whether the respondent was entitled to 8 months' salary for unfair dismissal when he had only worked for a period of 5 months; whether the respondent was lawfully entitled to an award of Ksh. 22,412 being leave allowance and whether he was entitled to costs yet he had acted in person.
14. On the first issue, the Court has been urged to find that the trial court's conclusion that since the respondent had previously worked for the appellant and had been recalled due to his good record, and that he had relocated from his rural home in Kakamega to Mombasa only for him to be dismissed after 5 months, hence the award of 8 months for unlawful termination was erroneous. The previous contracts were distinct from the current contract and therefore his employment was purely based on availability of a vacancy and once he was done with a contract he would be paid his dues. Further that the trial court failed to take into consideration section 49(4)(b) of the *Employment Act* which provides for the circumstances under which the termination took place and whether the employee contributed to his dismissal and section 49(4)(e) on the length of service with the employer. Therefore, the trial court exercised its judicial authority wrongfully and awarded excessive compensation for unfair termination.
15. On the leave allowance, counsel urged that the award by the trial court was in contravention to section 28 of the *Employment Act*. The respondent had not worked for the appellant for a period of 12 months to qualify for 21 leave days, the respondent was entitled to 8.5 leave days out of which he had already taken 6 days for which he had been compensated. Therefore, he was entitled to 2.75 days of leave equivalent to Ksh. 2,934 as leave allowance.
16. On costs, the appellant urges that having acted in person, the respondent was not entitled to costs. Counsel referred the Court to the decision in *Buckland v Watts* [1970] 1QB 27 where the court held that a litigant who acted in person was not entitled to claim costs.
17. We have considered the record before us in its entirety along with the rival written and oral submissions by both parties. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination with reasons, in line with Rule 29 (1) a of this Court's Rules. This Court has to satisfy itself that the conclusion reached by the trial Judge was consistent with the evidence on record. See this Court's decision in *Abok James Odera t/a A.J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the court held that:

“This being a first appeal, we are reminded of our primary role as first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

The statutory burden of a person complaining of unfair termination of employment or wrongful dismissal is anchored on section 47(5) of the *Employment Act*, which provides:-

“for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair



termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

From the memorandum of appeal, we note that there is no contest on the question as to whether the termination was unlawful or unfair. We shall not, therefore, delve into that issue or make any determination thereon. The appeal is purely on the amount of damages awarded under the different heads, and that is what we will endeavour to determine.

18. The learned Judge while allowing the claim held that the respondent was unfairly terminated from his employment. Section 49 of the *Employment Act*, stipulates the remedies which may be awarded for unlawful or unfair termination of employment. It is now trite that the reliefs stipulated under this section are discretionary rather than mandatory. See the case of *Co-operative Bank of Kenya Ltd vs. Banking Insurance & Finance Union* [2016] eKLR in which the court stated, inter alia, that the trial court’s exercise of mandate under section 49(1) of the Act is discretionary. This is determined on case to case basis. Section 49(4) sets out 13 considerations, which the trial court must take into account before determining what remedy is appropriate. The remedies as submitted by the appellant include the circumstances of the termination and the extent to which the employee caused or contributed to it.
19. In the instant case, the trial Judge was of the opinion that the respondent had previously worked for the appellant and he was recalled because of his good record, however this time when he was recalled he was terminated after a period of five months which was detrimental on him having relocated from Kakamega to Mombasa, and so he gave an award of 8 months’ salary as compensation under section 49(10)(c). Was this award justified in the circumstances of this case? In *Ol Pajeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR, this Court stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
20. We note that the learned Judge in arriving at the impugned award considered that the respondent had worked for the appellant earlier with a clean record. We do not dispute that fact but it was not disputed that the respondent had been paid his terminal dues for the earlier engagement and he had no complaint at all in that regard. The learned Judge had also taken into account the fact that the respondent had left his home in Kakamega to go and work in Mombasa at the behest of the appellant. It is clear to us, therefore, that by considering the earlier record and circumstances, the learned Judge had considered and been influence by some extraneous issues outside the purview of section 49 of the *employment Act* and this would invite us to interfere with the learned Judge’s discretion in making his award. It is not disputed that the respondent had worked for barely 6 months before his termination. We also find that the differentiation in fuel consumption of the truck the respondent was assigned to drive between the days preceding his compulsory leave and the time another driver was assigned the same trips with the respondent’s designated truck is quite telling. The respondent cannot therefore be completely absolved from having committed acts that caused his employer loss of money. The 8 months’ salary award as compensation cannot, in our considered view, be justified. We, therefore, interfere with that award, set it aside and substitute therefor 1 month salary as compensation for unfair termination.
21. Turning to the ground on leave allowance. The respondent claimed leave allowance of Ksh. 22,412. It was the respondent’s evidence that he was sent on compulsory leave of 6 days. This is not disputed by the appellant. Section 28 of the *Employment Act*, 2007 provides that each employee shall be entitled to leave of 21 days after 12 consecutive months of service.



The section provides that:

- “(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.” [Emphasis ours]

In this case, the respondent had been in employment for a period of 5 months from February 2011 to July 2011, and therefore clause 28(b) was applicable. Therefore, from calculation the respondent was entitled to 8.75 leave days as submitted by the appellant. The respondent had already gone for 6 days leave therefore he was left with 2.75 days leave, hence he was entitled to an allowance of Ksh. 2,934.00

22. On whether the respondent acting in person was entitled to costs, it is trite law that costs shall follow the event, as provided by section 27(1) of the *Civil Procedure Act*. The respondent was successful against the appellant in respect of his claim and therefore the respondent was entitled to costs, and this would be limited to disbursements and or court attendance and not instructions fees.

This appeal succeeds in part to the following extent.

1. Kshs. 22,412 being one month's salary in lieu of notice.
2. Kshs. 14, 941 being 20 days' salary for the period 16th June - 5th July 2011.
3. Kshs. 22,412 being 1month salary compensation for unfair dismissal.
4. Kshs. 2,934. As pro- rated leave allowance.
Total Kshs. 62,699 plus interest at court rates from the date of this judgment at the trial till payment in full.
5. Costs of the suit before the Employment and Labour Court.
6. In view of the above outcome, we order that each party bears its own costs of this appeal.

We so order.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

