

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJA)

CIVIL APPEAL NO. 101 OF 2017

BETWEEN

NDUGU TRANSPORT COMPANY LIMITED.....APPELLANT

AND

BARRACK MUSUMBA OLUOCH.....RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu (M. Onyango, J), dated 15th June, 2017

in

ELRC No. 99 of 2015)

JUDGMENT OF KIAGE, J.A

The respondent filed a Memorandum of Claim in the Employment and Labour Relations Court against the appellant for;

- (a) Kshs. 941,018.40/-
- (b) Costs of the suit.
- (c) Interest on (a) above.
- (d) Any other further relief that the court may deem just and fit to grant.

The facts leading to the suit were that the respondent was employed by the appellant, on a contractual basis, as a commercial truck driver in January 2010 at its Kisumu station. His starting salary was Kshs. 15,000 per month which later was increased to Kshs. 16,000. It was the respondent's claim that the appellant, without justifiable reason, unlawfully terminated his employment on 24th December 2014. Additionally, the appellant failed to pay him his terminal dues.

At the time of the unlawful termination, the respondent's asserted that; his monthly salary which was Kshs. 16,000 per month was still below the statutory minimum wage; that the appellant only paid him leave allowance; for the year 2013; that the appellant never paid him house allowance and that he was never given any notice nor three months payment in lieu of notice. The respondent gave a breakdown of the total amount sought from the appellant as follows;

- i) Underpayment from 1st Jan 2010 to April 2012, statutory minimum (15,216x16 months) less what was paid (15,000x16 months) = Kshs. 3,456.
- ii) Underpayment from 1st May 2011 to 1st April 2012, statutory minimum (17,118x12 months) less what was paid (15,000x12 months) = Kshs. 25,416.
- iii) Underpayment from 1st May 2012 to 1st April 2013, statutory minimum (19,360.50x12 months) less what was paid (16,000x12 months) = Kshs. 40,326.
- iv) Underpayment from 1st May 2013 to December 2014, statutory minimum (22,070x12 months) less what was paid (16,000x20 months) = Kshs. 121,419.
- v) 12 months' salary for unfair termination of service totalling to Kshs. 264,851.40.

The appellant filed a Reply/Defence to Memorandum of Claim and denied the allegations of unfair termination. The appellant averred that the said termination was fair and that the respondent was paid his terminal benefits in full, which he signed for as full and final settlement.

The appellant's alternative facts were that the respondent was employed as a "medium sized driver", primarily driving 3 and 5 tons canterers. During the pendency of his employment, the respondent was verbally warned on several occasions about his excessive fuel consumption. On 24th November 2014 the respondent was found with a fuel siphoning pipe and a 20 litre jerry-can in the car he had been assigned to. He was subsequently required to give an explanation in writing, which was found to be unsatisfactory. Upon appearing before the disciplinary committee for a hearing, the same conclusion was arrived at which led to his dismissal.

The appellant averred that the respondent was not entitled to the monies sought with regard to the alleged underpayment, unpaid leave, house allowance and 12 months' salary for unfair termination of service. The appellant however was willing to issue the respondent with a certificate of service.

During the hearing, the respondent denied any knowledge of the jerry-can and pipe when questioned about the same. Mr. Atieno, who testified on behalf of the appellant did not refer to any disciplinary hearing in his testimony. He further testified that because there had been queries about the fuel consumption of the vehicle assigned to the respondent, it was assumed that he used the pipe and jerry-can to siphon fuel from the vehicle and was therefore summarily dismissed.

At the end of the trial, the learned Judge Maureen Onyango, J delivered a judgment on 15th June 2017 and held that the respondent was employed as a driver of a heavy commercial vehicle; since there was no proof of the disciplinary hearing having been conducted, the summary dismissal of the respondent was un-procedural and therefore unfair, and awarded him;

- a) Kshs. 367,174.80 being the total of monies underpaid
- b) Kshs, 25,381.60 being one months' payment in lieu of notice
- c) Kshs. 101,526.40 being 4 months' pay as compensation
- d) The respondent was also entitled to certificate of service under section 51 of the Employment Act.

The appellant was aggrieved by the judgment of the High Court and filed this appeal, on 4 grounds, which are that the learned Judge erred by;

- a) Awarding house allowance to the respondent when the appellant provided housing to its employees.
- b) Misdirecting herself in treating the evidence and submissions of the appellant and consequently arriving at a wrong conclusion on the same.
- c) Tabulating the house allowance wrongly hence arriving at an unsustainable conclusion.
- d) Failing to apply herself judicially and adequately evaluate the evidence and exhibits thereby arriving at a wrong conclusion.

When the appeal came up for hearing, learned Counsel **Mr. J.O Oduor** appeared for the appellant while **Mr P.D Onyango** appeared for the respondent. Only the appellant had filed its written submissions together with a bundle of authorities.

Mr. J.O Oduor submitted that the appeal was on liability and quantum. He contended that the learned judge made an erroneous finding that the respondent was employed as a heavy commercial truck driver yet the evidence showed otherwise. Counsel further argued that an opportunity to be heard does not necessarily mean an oral hearing. He relied on the holding in **KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGAMI [2010] eKLR**. Contending that as per the reading of **section 41(1), 43(1) and 43(2)** of the **Employment Act**, the appellant acted within the law, which the learned judge misapprehended. On issue of the housing, counsel stated that the respondent declined to stay in the housing facility offered to him by the appellant and therefore was not entitled to any housing allowance. In conclusion he urged that the respondent was not entitled to any of the reliefs sought and what was subsequently awarded by the court.

Mr. P.D Onyango opposing the appeal submitted that as per the Memorandum of Appeal, the appellant was not appealing on liability. Moreover, that the appellant failed to table evidence in court to show that it had provided the respondent with housing. Additionally, the evidence tendered by the appellant's witness did not state that the appellant provided housing for the respondent. Counsel opined that appellant ought to seek for a review of the tabulation instead of appealing on the same. He urged the Court to dismiss the appeal.

As the first appellate Court we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions, see **SELLE -VS- ASSOCIATED MOTOR BOAT CO. [1968] EA 123** and **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES V JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR**.

From the record of appeal, the only clear issue being appealed on is the housing allowance awarded to the respondent. Counsel for the appellant submitted that the respondent was awarded house allowance and that the tabulation of the same was erroneous. In opposition, Counsel for the respondent argued that the issues of liability could not be canvassed in this appeal as they were not among the grounds of appeal. I further note that grounds number 2 and 4 in the Memorandum of Appeal are ambiguous to say the least as they merely stated that the learned judge misdirected herself in treating the evidence and submissions and failed to apply herself judicially, therefore arriving a wrong conclusion, which is not saying much.

Counsel failed to concisely state the evidence in question and the manner in which the learned judge misdirected herself. He also did not articulate what constituted the "un-judicial" conduct of the learned judge and how that led her to arrive at a wrong conclusion. I find that the

ambiguity of the aforementioned grounds is a violation of **Rule 86(1)** of the **Court of Appeal** Rules which provides that;

“A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.”

In **WILLIAM KOROSS V. HEZEKIAH KIPTOO KIMUE & 4 OTHERS, CIVIL APPEAL NO. 223 OF 2013**, we stated; and it bears repeating that;

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

Moreover, Counsel, having not sought the leave of this Court, is estopped from bringing arguments that he did not set out in the grounds of appeal, as provided for in **Rule 104(a)** of this Court’s Rules;

“At the hearing of an appeal—

(a) No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94.”

The only issue to be considered by this Court then is whether the respondent was entitled to house allowance and whether the tabulation of the same was correct. **Section 31(1)** of the **Employment Act** provides as follows;

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”

Now that I have established that the respondent was entitled to housing or housing allowance from the employer, the next issue to consider is whether the same was paid. From the face of the payslips presented to court, it is evident that the appellant did not pay the respondent housing allowance as the same was not itemized. The respondent testified that he was living in Kondele Migosi and was not housed by the appellant as its houses were too small. Though Counsel for the appellant intimated that the respondent refused to live in the said houses, no evidence was tendered before the court in support of the same during the trial. Therefore, I find that since the respondent was not housed by the appellant, he was entitled to house allowance.

The appellant appealed on the issue of quantum, stating that the learned judge erred in her tabulation. The same was never expounded upon in the submissions so I took it upon myself to recalculate in order to see whether the said house allowance figures arrived at by the learned judge were correct or erroneous. In doing so, I noted that the housing was based on 15% of the salary, and took judicial notice of the fact that the Government increased the minimum wages for various working classes including drivers of heavy commercial vehicles via 4 legal notices as follows;

- a) The Regulation Of Wages (General) (Amendment) Order, 2010 which increased it to Kshs. 15,216.
- b) The Regulation Of Wages (General) (Amendment) Order, 2011 which increased it to Kshs. 17,118.
- c) The Regulation Of Wages (General) (Amendment) Order, 2012 which increased it to Kshs. 19,360.50.
- d) The Regulation Of Wages (General) (Amendment) Order, 2013 which increased it to Kshs. 22,070.95.

The recalculation of the housing allowance based on the changing minimum wages over the span of the respondent’s employment vis-a-vis what the learned judge awarded is as follows;

Month	Basic Pay	House allowance by the judge	House allowance by this Court
Jan 2010-April 2011	15,216	2,267.70	2,282.40
May 2011-April 2012	17,118	2,567.70	2,567.70
May 2012-April 2013	19,360.50	2,904.10	2,904.75
May 2013-April 2014	22,070.95	3,310.60	3,310.64
May 2014-December 2014	22,070.95	3,310.69	3,310.64

Total		14,360.79	14,376.13

I find that the learned judge only erred by reducing the housing allowance amount by Kshs. 15.34, otherwise it is clear that she calculated the housing allowance based on 15% of the appropriate salary that the appellant ought to have paid the respondent during the pendency of his employment which spanned between 2010 and 2014.

Ultimately, I come to the conclusion that the learned judge did not err in her findings and as such I have no basis for interfering with her judgment. This appeal has no merit and is accordingly dismissed with costs to the respondent.

As Makhandia, JA agrees, those are the orders of the Court. Given under **Rule 32(3)** of the **Court of Appeal Rules**, Odek, JA having died before delivery of the Judgment.

Dated and delivered at Kisumu this 31st day of January, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.

JUDGMENT OF MAKHANDIA, J.A

I have had the benefit of reading in draft the Judgment of my learned brother Kiage, J.A. I wholly agree with his analysis and concur in his conclusions with nothing useful to add.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR