Ofyze Holdings Limited t/a Harris Tavern v Mutisya (Appeal E191 of 2024) [2025] KEELRC 256 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 256 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E191 OF 2024

NJ ABUODHA, J

JANUARY 31, 2025

BETWEEN

OFYZE HOLDINGS LIMITED T/A HARRIS TAVERN ..... APPELLANT

AND

URBANUS MUSAU MUTISYA ..... RESPONDENT

(Being an appeal from the judgment delivered on 21st June, 2024 in Chief Magistrate's Court, CMELRC No. E586 of 2021 by Hon. Mr. Rawlings Musiega SRM.)

JUDGMENT

1. Through the Memorandum of Appeal dated 8th July, 2024 the Appellant appeals against the Judgment of Honourable Mr. Rawlings Musiega SRM delivered on 21st June, 2024 on the grounds inter alia:

    i. That the Learned Magistrate erred in fact and in law by failing to sufficiently consider thereby disregarding the evidence as filed and adduced by the Appellant in the matter or at all.

    ii. The Learned Magistrate erred in failing to consider and appreciate the uncontroverted evidence contained in the Appellant's defence that shows that the Respondent's allegations with regard to his alleged termination were false.

    iii. The Learned Magistrate failed to consider any of the submissions cited in opposition of the said Claim by the Appellant in its submissions dated 13.6.2024.

    iv. The Learned Magistrate misdirected himself when he came to a finding that the Respondent was indeed terminated by the Appellant despite the Respondent's own testimony that confirmed that he left the Appellant's business establishment which had been shut down due to the then prevailing coronavirus outbreak and he never returned when the establishment reopened.

2. The Appellant consequently prayed that the appeal be allowed and that the judgment of the learned trial magistrate dated 21st June, 2024 alongside all its consequential orders to be set aside and substituted with an Order dismissing the suit in the lower court. The appellant further sought to be awarded the costs of the appeal.

3. The Appeal was disposed of by written submissions.

Appellant's Submissions

4. The Appellant's advocate Mr. S.K Kandere submitted inter alia that it was clear that that the parties had agreed that the payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment. According to Counsel the respondent never denied signing the settlement agreement or questioned its veracity. Further, from the record it could not be discerned any misrepresentation on the import of the agreement. It did not matter that the amount agreed would be inadequate. There was a binding contract between the parties. In this regard Counsel relied on the case of Trinity Prime Investment Ltd vs. Lion of Kenya Ltd [2015]eKLR. According to Counsel, all the Court was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Counsel further relied on the case of Damondar Jihabhai & Co. Ltd & Anor vs. Eustace Sisal Estate Ltd [1967] EA 153.

5. Mr. Kandere further submitted that the appellant never terminated the respondent's service and the same had been admitted by the respondent in his document and Court documents. Further, that the appellant's business establishment was shut down on account of the then prevailing Covid-19 pandemic. Relying on section 45 of the *Employment Act*, Counsel submitted that the onus of proving that he was wrongfully dismissed rested on the respondent and more critically where the appellant had alleged that the respondent left on his own volition and further that due to increase in Covid-19 infections at the appellant's workplace it was forced to reschedule its business activities. The respondent acknowledged seeing a memo to that effect. However the respondent refused to resume work after the lifting of the Covid-19 restrictions by the government.

6. Counsel further submitted that after the respondent through his counsel issued a demand note on the issue of wrongful dismissal, the parties met in an attempt to amicably resolve the matter and a resolution was reached that the respondent be paid his terminal dues which were computed and an instalment sent to the respondent's advocate. Therefore the filing of the present suit came about when the appellant failed to agree on fees with the respondent's counsel. According to counsel, a claim for costs cannot and ought not sustain a claim for wrongful termination. The respondent's counsel having accepted settlement of the respondent's claim, cannot use his claim for costs as a foundation in a claim for wrongful employment where the same have been forwarded and accepted by the respondent.

7. Concerning the judgment of the trail Court, Counsel submitted that the Court made a wrong presumption that the appellant deliberately closed its business due to the then prevailing Covid-19 pandemic. The pleadings filed in Court showed that the closure was as a result of government directive. This erroneous presumption led to the conclusion that the appellant irregularly declared the respondent's position redundant. The Court further failed to uphold the appellant's agreement with the respondent which led to money being paid to the respondent in settlement of the claim.

8. The respondent did not file any submissions.

Determination

9. The court has considered the pleadings and submissions filed by the parties herein and observes that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held by the Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424. Where the Court stated that:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

10. This appeal is around the issue whether the trial court erred in finding that the respondent was wrongfully dismissed and whether as a consequence the Court was right in making the award for compensation in the manner it did.The Court has reviewed and considered submission by Counsel for the appellant on the above points.

11. The trial Court rendered itself as follows on the above issues:

> "...In this case I have observed and indicated in this judgment, the respondent issued a Memo to all Employees declaring its intention to close down the business following the government's directives on Covid-19 pandemic. Based on circumstances surrounding the termination of the employment of the claimant, it is very clear that the claimant was not terminated by word of mouth as alleged. The termination was through the Internal Memo dated 22nd March, 220, addressed to all the employees of the respondent...It was clear from the evidence of RW1 that the due procedure to be followed prior to the termination under section 40 of the *Employment Act* was not followed...However, to mitigate the damage, the respondent engaged the claimant in an out of court settlement where they paid outstanding leave, severance pay for 7 years of service and underpayment which was accepted by the respondent...parties failed to agree on compensation for unlawful termination and house allowance prompting the claimant to amend his pleadings and proceed with the suit seeking the two reliefs..."

12. From the above extract of the lower Court's judgment it is clear that the parties herein agreed to settle the matter amicably and indeed settle and paid the settlement amount but disagreement arose thereafter over the issue of housing allowance and compensation for unfair termination which formed the gravamen of the suit in the Court below.

13. Section 45 of the *Employment Act* provides:

    (1) No employer shall terminate the employment of an employee unfairly.

    (2) A termination of employment by an employer is unfair if the employer fails to prove—

        (a) that the reason for the termination is valid;

        (b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

According to the trial court, the termination of the respondent's service was unfair because the appellant did not adhere to the provisions of section 40 of the *Employment Act*. Section 40 provides:

> 40 (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
>
> (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
>
> (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
>
> (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
>
> (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
>
> (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash; (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
>
> (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service

14. It is the Court's view that the provisions of section 40 need not be observed clause by clause however if the sum total of the actions by an employer in carrying out the redundancy process meets the standard of reasonableness in the legal sense of the word, an omission that does not significantly affect the character and the purpose the redundancy and occasions no prejudice, cannot vitiate the act of redundancy as to make it qualify as an unfair termination.

15. The trial court rightly noted that the respondent's service was terminated following closure of the appellant's business pursuant to a directive by the government as one of the measures to combat or mitigate the spread of Covid-19. The appellant did not have a choice but to comply. There was no room or time for it to take its employees through the procedural requirements of section 40. The appellant however, and this has not been denied, embarked on negotiations for settlement and in the process paid the respondent among others leave, severance pay for 7 years of service and underpayment. Apart from the item of underpayment, the payments to the respondent were in the nature, payments provided for under section 40.

16. From the foregoing, the Court does not seem to understand on what basis the trial court came to the conclusion that the appellant did not comply with the provisions of section 40 of the Act hence a finding that the termination was unlawful. This ground of appeal therefore succeeds and the finding that the respondent was unfairly terminated and consequential award is hereby set aside.

17. On the issue of housing allowance, this is a statutory right and it was the responsibility of the appellant to show and demonstrate by way of evidence that the salary paid to the appellant was a consolidated salary inclusive of a housing allowance. From the judgment of the trial court, it is clear that no such evidence was provided and the learned Magistrate was right when he proceeded to award the same as prayed. This ground of appeal therefore fails.

18. In the upshot the Appeal succeeds to the extent that the finding that the respondent was unfairly terminated for want of compliance with section 40 of the *Employment Act* is hereby set aside. The appeal on the award of housing allowance fails and is hereby dismissed.

19. The appeal being partially successful, each party shall bear their own costs of the appeal.

20. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION