Sifa Investments Limited v Dudu (Appeal E184 of 2024)
[2025] KEELRC 200 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 200 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E184 OF 2024

M MBARŨ, J

JANUARY 30, 2025

BETWEEN

SIFA INVESTMENTS LIMITED ..... APPELLANT

AND

JOSEPH MWANZA DUDU ..... RESPONDENT

(Being an appeal from the judgment in Mombasa CMELRC No.E436 of 2022 delivered on 23 August 2024)

JUDGMENT

1. The appellant filed the appeal on 2 September 2024. The respondent was served and a notice was issued for attendance on 1 October 2024. Only the appellant attended. A further mention date was allocated for 16 October 2024 before the Deputy Registrar and the respondent remained absent. Hearing directions issued on 24 October 2024 to file written submissions. Only the appellant complied. The respondent has not attended in these proceedings despite service.

2. The appeal arises from the judgment delivered on 23 August 2024 in Mombasa MCELRC No.E436 of 2022. The appellant is seeking the judgment to be reviewed.

3. The grounds of appeal are that;

    1. The learned magistrate erred in law and fact in making a finding to the effect that it was admitted for the respondent that the termination was unfair because the claimant was not given notice and a hearing in which the finding was contrary to the evidence on record.

    2. The learned magistrate erred in her appreciation of the facts in holding that the respondent was not given notice or accorded a hearing as envisaged in section 41 of the *Employment Act*.

    3. The trial court erred in awarding the respondent payment in lieu of notice when in fact a lawful notice had been issued to the respondent.

4. The trial court erred in allowing the respondent's claim for payment of 5 hours overtime for Monday to Saturday for 6 years at ksh.863, 880 when no evidence sufficient or at all had been tendered thereon.

5. The trial court erred in law and fact in resolving the issue of overtime pay by importing into the proceedings a collective bargaining agreement that was neither part of the record nor referred to by either party to the proceedings.

6. The learned magistrate erred in granting compensation for unlawful and unfair termination on account of the termination procedure being unlawful or in the alternative erred in granting compensation at 12 months' salary without taking into account the respondent's conduct giving rise to the disciplinary process.

4. The background to the appeal is a claim filed by the respondent before the trial court because he was employed by the appellant as a turnman on 1 March 2016 but was not issued with a written contract of service. On 23 December 2021, the appellant assigned him duties outside the country to accompany a group of 16 drivers in a convoy of 16 trucks to deliver cargo to a client in Wau, South Sudan. The journey took 45 days. Due to the nature of the routes taken through South Sudan, the respondent and his colleagues faced various challenges, including roadblocks, local militia, and dangers to life. This led to the depletion of the subsistence allowances of Ksh. 20, 000 which had been paid before the journey. Upon request, the appellant agreed to pay Ksh.66, 197.50. The respondent also claimed that the cost of living in South Sudan was very high. The mileage allowance earlier allocated by the appellant was not sufficient. Upon return, he was issued a disciplinary show cause notice dated 8 February 2022 on the subsistence allowance paid for the journey. On 16 February 2022, the respondent replied to the notice and was invited to a disciplinary hearing on 25 February 2022, where he narrated the events of the journey.

5. The claim was that the disciplinary hearing was a sham and held as a formality to justify termination of employment. He was issued a letter dated 10 March 2022 directing him to reapply for employment within 7 days and forfeit annual leave earned. There was a deduction of Ksh.35, 197.50 from his wages to be done in instalments of Ksh.3, 000 per month. The demands were made to terminate employment, and through a letter dated 15 March 2022, the respondent replied and disagreed with the conditions given. On 26 April 2022, he was served with a summary dismissal letter. He claimed that this was an unfair termination of employment and that he was not paid his full terminal dues. He had been at work overtime for 7 days each week without rest and without compensation and claimed as follows;

   a. Notice pay Ksh.16,585;

   b. 12 months compensation Ksh.202,296;

   c. Overtime 5 hours for 6 years ksh.863,880;

   d. Overtime for 5 hours worked every Sunday for 6 years Ksh.190,320;

   e. Compensation for working on rest days for 6 years ksh.494,832;

   f. Compensation for working on public holidays at 10 days for 6 years ksh.95,160;

   g. General damages for victimization and violation of constitutional rights Ksh.202,296;

   h. Service pay at 15 days Ksh.50,574;

   i. Costs of the suit.

6. In reply, the appellant admitted that the respondent was employed as a turnman on 1 March 2016. He was part of the team deployed to deliver goods to a client from Mombasa to South Sudan. The respondent was aware that such duties were part of his assignments due to the nature of the appellant's business. He was aware that staff on similar assignments had been exposed to similar conditions. The appellant was sensitive to the issues raised on the journey and had arranged for the convoy of trucks to be rejoined by the South Sudan military once inside its territory. Before departure from Mombasa to Wau, a meeting was held with all staff and it was agreed that;

    a. Drivers be paid Ksh.30,000 all-inclusive for 21 days;

    b. Turn men be paid Ksh.15,000 for 21 days;

    c. An extra day would be paid Ksh.1, 500 for all cadres.

7. Each team member was paid an additional Ksh.5, 000. However, the respondent and his colleagues took advantage of the trip to extort money from the respondent like allowances beyond the agreed rates;

8. On 4 January 2022 while at Nimule in South Sudan, the respondent and his colleagues demanded an additional allowance and the appellant paid ksh.15,000 to the turn men and Ksh.20,000 to the drivers;

    On 10 January 2022, the team withheld progress until they were paid Ksh.10, 000 each;

    On 17 January 2022, the drivers demanded Ksh.20, 000 and turn men Ksh.15, 000;

    On 21 January 2022, the drivers demanded Ksh.20, 000 and turn men Ksh.10, 000;

    On 28 January 2022, the drivers demanded Ksh.10, 000 and turn men Ksh.10, 000;

    On 2 February 2022, the drivers demanded Ksh.10, 000 and turn men Ksh.10, 000.

9. The response was that the respondent's conduct was gross misconduct contrary to Section 44(4) of the *Employment Act*. The payments made to the respondent and his colleagues on the journey were not as agreed. They were made under duress and exposed the appellant to real danger for its vehicles and client's cargo within a foreign jurisdiction. The appellant had factored in the cost of living in South Sudan before the journey, which informed the quantum of allowances paid. The allegations made by the respondent were preemptive to justify gross misconduct. Two drivers on the journey filed apologies for their misconduct and have been re-engaged.

10. The respondent was taken through the disciplinary process and allowed to make his responses, but he failed to give satisfactory answers on his gross misconduct. His case amounted to blackmail and sabotage and justified termination of employment. Through a letter dated 15 March 2022, the respondent sought to justify the allowances paid to him due to gross misconduct. The decision to have the respondent reapply for his position was at the discretion of the appellant. He failed to do so effectively, ending his employment, and the decision was communicated through a letter dated 10 March 2022. Pending disciplinary hearing, the respondent took his 18 leave days. The appellant's policy is an 8-hour working schedule, and trucks must stop between 6 pm and 6 am. Work is not open on Sunday. All public holidays are taken save for 25 and 26 December 2021 and 1 January 2022, when the respondent was deployed in Uganda to attend to a broken vehicle and is entitled to 3 public holidays worked. The claims for overtime going back 6 years are time-barred contrary to section 90 of the *Employment Act*.

11. The trial court heard the parties, delivered judgment on 23 August 2024, and held that the termination procedure was unlawful. The respondent was entitled to compensation, which was allowed for 12 months. The trial court also considered the Regulation of Wages Orders and the Collective Bargaining

Agreement between the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) dated 28 May 2015. It hence allowed overtime claimed at Ksh.863, 880. The respondent was also awarded notice of pay and the suit costs.

12. On the appeal, the appellant attended and agreed to address through written submissions.

13. The appellant submitted that the findings by the trial court that employment was terminated unfairly, contrary to Section 41 of the *Employment Act*, is incorrect. The appellant invited the respondent to show cause and to a disciplinary hearing. He attended and failed to give a satisfactory response. The respondent was allowed to reapply for his job but failed to address it—the issues leading to termination of employment related to gross misconduct while the respondent was on a journey. When invited to show cause, he could not explain his gross misconduct, leading to termination of employment.

14. In assessing the claims, the trial court failed to take into account the respondent's conduct and history of misconduct. The award of 12 months' compensation was excessive in the given facts. The appellant filed a list of warning letters issued to the respondent.

15. The appellant served the respondent with notice, and the award in lieu of notice was not justified. The overtime claimed was not particularized and not justified. The application of a collective bargaining agreement that was not part of the pleadings to assess overtime was in error. The appellant relied on the following cases: Fredrick Kilengeta v Sifa Investments Limited [2015] eKLR; Motex Limited v Yusuf Mutemi Ngolo [2023] eKLR.

Determination

16. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its conclusions, bearing in mind that it neither saw nor heard the witnesses testify.

17. On 8 February 2022, the respondent was issued a notice to show cause why disciplinary action should not be taken against him by the appellant. The appellant noted that while the respondent was on a journey from Mombasa to Wau, South Sudan, on diverse dates from 4 January 2022 to 2 February 2022, he was held at ransom by making demands for more money to continue the journey failure to which he would not further movement. The respondent demanded more money, which negatively affected the appellant's budget. He was given 7 days to respond and to attend a disciplinary hearing on 25 February 2022 in the company of another employee of his choice.

18. The respondent admitted in his pleadings that he filed his response on 16 February 2022.

19. He admitted that he attended the disciplinary hearing on 25 February 2022.

20. The appellant filed a record of the disciplinary meeting notes. The record notes that the respondent attended and admitted that he would refund Ksh.35, 197 and apologized for his conduct. The meeting pointed out that the respondent had given false information to the appellant that the allowances allocated for the journey were insufficient, knowing this to be incorrect. The disciplinary meeting resolved that;

    1. That you will get paid any balance salary for January 2022

    2. That you will get paid a net salary for the month of February 2022

    3. That you will apply for the job afresh within seven (7) days from the date of receipt of this letter and issued terms contract expecting the same gross salary you were earning and any leave pending forfeited. Failure to get your reply within 7 days after receipt of the letter will assume you have declined to accept

4. That you will pay Ksh.35 197.50 back to the company at instalment of Ksh.3000.00

21. The respondent replied on 15 March 2015 and contested the findings. He challenged the directions that he should reapply for his employment and why his employment terms had been changed, and the appellant had approved the paid allowances.

22. Through notice dated 21 March 2022, the appellant replied to the respondent and noted that;

23. For the avoidance of doubt please note that you are still an employee of the company until otherwise advised.

24. Also, note that you have not applied/ or taken leave for the last year and have a balance of 18 days which accordingly should be applied and taken without delay.

25. Things do not seem to have improved.

26. Through notice dated 26 April 2022, the appellant terminated the respondent's employment by summary dismissal. The reasons were that he was issued a notice to show cause on 8 February 2022 and attended a disciplinary hearing on 25 February 2022. He was further directed to apply for annual leave on 21 March 2022 but declined. Considering the disciplinary hearing and the outcomes, the respondent was found to have gross misconduct and summary dismissal was justified.

27. On these facts, during the hearing before the trial court, the respondent admitted that the appellant had taken him through the disciplinary process. After the hearing, he was allowed to reapply for his job to permanent employment. He was also required to refund the monies paid in allowances, but he refused.

28. The employer is allowed to terminate employment through summary dismissal under section 44 of the *Employment Act* on condition the employee is given his rights under Section 41(2). This is to allow the employer the right to discipline its employees who commit gross misconduct but also to enable the employee to notice and have a chance to attend and defend himself. This is the procedural fairness contemplated under the law in Jane Samba Mukala v Ol Tukai Lodge Limited [2013] KEELRC 794 (KLR). In the case of Mutwol v Moi University [2022] KECA 537 (KLR), the Court of Appeal held that where there exist valid and justified grounds for termination of employment, including summary dismissal, the employee cannot justify a claim for unfair termination of his employment. This position is restated in Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017) [2022] KECA that before termination of employment, the employer must adhere to four elements;

> ... four elements must thus be satisfied for the summary dismissal procedure to be said to be fair, being: -
>
> a) An explanation of the grounds of termination in a language understood by the employee;
>
> b) The reason for which the employer is considering termination;
>
> c) Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
>
> d) Hearing and considering any representation made by the employee and the representative chosen by the employee.

29. In this case, the appellant issued notice to the respondent to address matters outlined under a letter dated 8 February 2022. He replied and also attended a disciplinary hearing on 25 February 2022. His responses to the issues of gross misconduct were found unsatisfactory.

30. The respondent asserted that the disciplinary hearing was a sham and intended to justify termination of employment. However, such assertions are incorrect since, through a letter dated 10 March 2022, he was informed of his gross misconduct and that the sanction given was to repay the allowances paid without justification and reapply for his job.

31. Instead of addressing as directed, the respondent opted to contest the findings of the disciplinary hearing. He did not apply to take his accrued leave days.

32. The appellant issued a letter of summary dismissal on 26 April 2022.

33. The respondent had been issued notice dated 21 March 2022 to abide by the outcome of the disciplinary hearing and to take accrued leave days but declined.

34. The respondent admitted to these facts and events in his evidence before the trial court.

35. On the given facts and records, the court finds that termination of employment was justified, the appellant followed due process, and substantive grounds existed. An employee who engages in gross misconduct and is once offered a lenient sanction to reapply for his employment and to refund irregularly paid allowances cannot claim unfair termination.

36. The trial court erred in awarding compensation and notice pay.

37. On the claims made, the trial court awarded overtime pay on the basis that there was a Collective Agreement with KUDHEIHA dated 28 May 2015. The record does not have such a document. The respondent did not plead as being unionized under KUDHEIHA.

38. In the payment statement filed by the appellant and the respondent dated 30 April 2022, the respondent is not noted as unionized or paying any agency fees to KUDHEIHA. The application of a collective agreement is in error. Such a document only applies to the trade union members or employees eligible for agency fees and is based on the Order of the Minister.

39. The respondent also claimed for overtime for 5 hours each day for 6 years. Overtime where due is a continuing injury. It arises daily and should be paid monthly. Under Section 89 of the *Employment Act*, such injury should be claimed 12 months upon cessation as held in Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR) that a continuing injury such as overtime, house allowances and benefits which accrue monthly is a continuing injury and must be addressed within 12 months from the date of cessation.

40. In this case, employment was terminated on 26 April 2022. The suit before the trial court was filed on 26 July 2022. Within this period, the respondent could only claim for the alleged overtime worked until 25 July 2021.

41. In the Memorandum of Claim, the respondent does not particularize his work hours save to assert that he worked overtime for 5 hours for 6 years. The general claim cannot suffice.

42. Equally, the claim for working on Sunday for 6 years plus the claim for a rest day for 6 years is a conflation of claims. Indeed, the trial court did not award these claims.

43. The claim for work during public holidays should set out in detail the particular days that were gazetted by the Minister. These are not general days; each must be particularized.

44. The respondent did not give the particulars on the claim for general damages for victimization and alleged violation of constitutional rights. As set out above, the appellant went through an elaborate process in issuing notice to show cause why disciplinary action should not be taken against the respondent. He replied and was invited to attend a disciplinary hearing. He was offered to reapply for his position and to refund the unfairly paid allowances. He refused.

45. The sanction of summary dismissal was issued lawfully and is valid.

46. To claim for damages for alleged victimization is without merit.

47. The claim for 15 days of service pay should only arise where the employer fails to abide by the provisions of Section 35(5) and (6) of the *Employment Act* by paying statutory dues. The appellant filed the payment statement dated 30 April 2022, which includes payments to NSSF, NHIF, and PAYE. Service pay is not due.

48. The respondent was invited to participate in these proceedings but failed to attend. The appeal is successful, and costs are due.

49. Based on the analysis above, the appeal is found to have merit. The judgment in Mombasa CMELRC No. 436 of 2022 is hereby set aside in its entirety. The appellant is awarded the costs of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.

M. MBARŨ

JUDGE