Komu v Sana Industries Limited (Appeal E107 of 2023)
[2025] KEELRC 75 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 75 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E107 OF 2023

JW KELI, J

JANUARY 23, 2025

BETWEEN

AUGUSTUS KIVUVA KOMU ..... APPELLANT

AND

SANA INDUSTRIES LIMITED ..... RESPONDENT

JUDGMENT

1. The Appellant named Augustus Kivuva Komu being dissatisfied with the entire Judgement of the Honourable M.W. Murage (MRS.)(Principal Magistrate)delivered on 9th June, 2023 in Milimani MCELRC No.E436 of 2022 appealed against the entire judgement seeking the following reliefs:- The appeal be allowed and the judgment and Decree of the Honourable Magistrate delivered on 9th June 2023 in Milimani MCELRC No. E436 of 2022 be set aside and instead, judgment entered for the appellant in Milimani MCELRC No. E436 of 2022 as prayed in the suit.

Grounds of the appeal

2. The learned Magistrate erred in law and fact in failing to consider the Appellant's evidence and especially the fact that the termination of the Appellant's employment amounted to a declaration of redundancy.

3. The learned Magistrate erred in law and fact in failing to find that the termination of the Appellant's employment was unfair and unlawful as the Respondent failed to follow due process before terminating the Appellant's employment.

4. The learned Magistrate erred in law and fact in failing to properly analyze the evidence on record and applicable law thereby arriving at a wrong conclusion.

5. The learned Magistrate erred in law and fact in dismissing the Appellant's claim without due consideration of the weight of available evidence thereby arriving at an erroneous decision.

6. The learned Magistrate erred in law and fact and apprehended the law in shifting the burden of proof of reason for termination of employment from the Respondent to the Appellant thus arrived at a wrong conclusion.

7. The learned Magistrate erred in law and fact in dismissing the Appellant's claim.

Background to the appeal

8. The appellant was the claimant before the Trial Magistrate Court. The appellant filed a statement of claim dated 25th January 2022 stating that he had been employed by the respondent as a general worker in August 2018 and that his employment was terminated on 29th June 2021 without just cause. The claim was accompanied by the Appellant's Statement and documents to be relied upon at trial (pages 6-49 of the RoA was the claimant's case). The Respondent filed its Memorandum of Response and witness statement on 13/05/2022 in opposition to the claim(pages 52-56 of the RoA). The appellant filed reply to the response (page 57 of the RoA).

9. The matter proceeded by way of a viva voce evidence with each party calling one witness of fact (proceedings at pages 74-79 of the RoA). The Parties filed written submissions before the trial Court.

10. The Trial Magistrate Court delivered its Judgment on the 9th of June 2023 and dismissed the claim with costs to the respondent (Judgement on pages 80-86 of the RoA).

Written submissions

11. The appeal was canvassed by way of written submissions. Both parties filed.

Determination

12. The Court was sitting at the first appeal. The duty of the Court sitting as the first appellate Court is as stated in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR):- ''This being a first appeal, we are reminded of our primary role as a 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.''

Issues for determination.

13. The appellant in written submissions addressed the grounds of appeal as the issues.

14. The Respondent identified the following issues of determination in the appeal, namely:-

    a. Whether the Appellant left employment on his own volition after expiration of the three days' suspension or whether his employment was terminated?

    b. Whether the Appellant merits the reliefs sought?

15. The Court having perused the pleadings, judgment and the issues identified by the parties finds the issues placed before the Court for determination in the appeal are the following:-

    a. Whether the respondent terminated the employment of the Appellant and whether the termination amounted to redundancy

    b. Whether the termination was lawful and fair

    c. Whether the Appellant was entitled to the reliefs sought in the claim.

Whether the respondent terminated the employment of the claimant and whether the termination amounted to redundancy

16. The appellant stated in his statement of claim at paragraph *4* that, ''On the 29th June 2021, the Respondent maliciously without just cause and or excuse whatsoever unlawfully and wrongly terminated the claimant's employment with itself. '' in paragraph 9 of the claim it was pleaded that the termination amounted to redundancy.

17. The appellant swore a witness statement dated 25th January 2022 before the trial court and stated that the respondent informed him that his employment was being terminated with immediate effect due to reduced work in the fibre section. This amounted to redundancy without compliance with procedures.

18. The respondent, in filed response, denied the allegations and stated that on 28th June 2021 the appellant reported to work and was assigned his normal hackling job which he performed. That he was careless and negligent in his work. That his work was to dispose any waste fibre at the end of the day. That on the 28th June 2021 the manager found useful and good fibre in the waste bin allocated to the claimant together with waste fibre that should have been discarded the previous day. That the respondent suspended the claimant for three days and directed him to return to duty on 2nd July 2021 since 1st July was a Sunday. The Claimant did not report back after the suspension at all. He continues to be absent. He was not dismissed. There was no redundancy. His position was not declared redundant. The witness statement of RW (Dennis Karanja) was to same effect.

19. The trial Court having heard the witnesses on the termination held that on cross-examination the claimant admitted to having been suspended orally and thereafter evidence showed he failed to resume work. The Court found that the claimant deserted work on own volition and not redundancy. During cross-examination by the Claimant's counsel, RW told the Court that they never contacted the claimant to know why he did not report on duty. The Court finds that during the trial the respondent (RW)was not questioned on the redundancy but on the suspension only.

20. Redundancy is defined under the *Employment Act* as :- "redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;'' The employee cannot be at fault in termination by way of redundancy.

21. Redundancy is a highly regulated separation process under section 40 of the *Employment Act* which required notices to be issued to the union or the individual non-unionised employee and the area labour officer. None of those notices were produced before the trial Court.

22. Section 40 of the *Employment Act* provides:-'' (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;' The appellant had the burden to prove that redundancy occurred. This did not happen. He who alleges proves as per section 107-109 of the *Evidence Act* to wit:-

''107.

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.''

23. Further the burden of proof in employment claims is as stated under section 47(5) of the *Employment Act* to wit:-

> ''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.'' It was thus the burden of the appellant to prove his employment was terminated vide redundancy and upon discharge of the burden the same would have shifted to the respondent to justify the redundancy and compliance with the procedure under section 40 of the Act. The appellant having not discharged his burden then the same did not shift to the Respondent.

24. The claimant pleaded his employment was terminated for no just cause and that the termination amounted to redundancy. He alleged there was a list held by one Duncan. He however said RW was the supervisor but during the hearing, his advocate did not ask the supervisor about the alleged redundancy. The appellant did not corroborate his allegation of redundancy. He could have called an independent witness as he said other employees were on the list and /or produced notices of the said redundancy. The labour office would also have helped. On the other hand, the claimant admitted he was handling waste fibre and he knew RW who was in charge of supervision. He was accused of negligence in discarding the waste fibre.

25. RW stated the claimant was suspended for neglect of work for 3 days and failed to return thereafter. The trial Court stated the claimant admitted the suspension was for throwing away good fibre and the accountant was in charge of supervision(page 82 RoA). The appellant in submissions contended that this was not true record of his cross-examination. That he did not admit to the suspension. The Court perused the record and found mention of supervisor and bad fibre but no admission of suspension. The appellant told the Court he was terminated orally having been on a list held by a person he called Duncan. The Court has to give benefit to the trial Court which heard and saw the witness as established in Selle & Another v Associated Motor Boat Co. Ltd & Others (1948) EA123 that the Court on first appeal must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. The appellant did not seek for correction of the judgment at the trial Court. The trial Court obviously omitted some parts of the cross-examination but at least there was no evidence of the claimant having admitted to the suspension.

26. During cross-examination, RW was only cross-examined on the position of suspension and why the Respondent did not contact the appellant to know why he did not report on duty. The appellant never asked any question on the alleged redundancy. The redundancy remained the uncorroborated allegation of the appellant.

27. The Court, for the foregoing analysis, finds no basis to disturb the finding by the trial Court that the appellant deserted work after suspension for neglect of work. The Court further upheld the trial Court's position that the termination did not amount to redundancy. The Court finds that even if the Appellant had not been suspended that would still not have amounted to redundancy without proof of the act of redundancy. It could only have been a case of unlawful and unfair termination.

Whether the termination was lawful and fair

28. The trial Court held this was a case of desertion of work which position has been upheld. The trial Court also found there was no procedural fairness in the termination process. Desertion of work for civilians is akin to absconding of work and is categorised as gross misconduct under section 44(4) of the *Employment Act* to wit:- ''Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

    (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;''

29. The Court holds that even in cases of gross misconduct, like absconding work, the employer is still obliged to comply with procedural fairness according to the provisions of section 41(2) of the *Employment Act* before taking steps of summary dismissal to wit:-'' 2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.''

30. The Respondent took the position that the Appellant was never dismissed but he deserted work. The Court finds that dismissal need not be in writing but by the act of stopping salary when the employee is no longer in suspension and not at work, the respondent having said the suspension was for 3 days, was tantamount to dismissal of the employee. The Court agreed with the position cited by the Appellant in Owundu v Digital Sanitation Services Limited (2024) e KLR where Justice Mbaru observed, ''17. First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer.

    18. Further, under Section 18(5) (b) of the Act, where the employer cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken its legal duty to properly end employment.''

31. In the upshot the Court holds that the termination of the employment was not procedurally unfair though based on valid reasons.

Whether the appellant was entitled to reliefs sought.

32. The appellant had sought the following reliefs from the trial Court

    a. One month's salary in liue of notice

    b. Leave days accrued since 2016

    c. Severance pay for 5 years served

    d. 12 months' salary compensation for unlawful termination

    e. Certificate of service.

Claim for One month's salary in liue of notice

33. Section 35(1) (c) of the *Employment Act* provides for notice of termination of employment as follows:- ''(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.''

34. The Court holds that the Appellant was entitled to notice pay which the Court on re-evaluation of the evidence awards salary for one month Kshs. 16,900/- as prayed.

Claim for Leave days accrued since 2016

35. Appellant had pleaded he had not taken leave since employment. During cross-examination, the Appellant told the trial Court he had nothing to show he applied for leave and the same was denied. He told the Court leave was for 26 days. That the company closed on December from 23rd. The date of resumption of work was not disclosed.

36. During cross-examination RW told the Court he had no evidence the claimant proceeded on leave. The respondent submits the Appellant was paid in lieu. No such evidence was produced at trial. The trial Court did not decide on this prayer on merit. Section 28 provides for annual statutory leave as follows:- ''(1) An employee shall be entitled—

    (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.''

37. The accrued leave is limited to 18 months under Section 28 subsection 4 of the Act as follows:- ''The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.''

38. The Court finds that the appellant knew he was entitled to 26 days of annual leave but had no evidence of having applied for leave and the same was denied. The Court upholds the decision cited by the Respondent in Peter Kariuki Gachiri V Kenya Baptist Theological College (2019)e KLR paragraph *19* to wit:-'' the Court will consequently allow this head of claim for outstanding leave, but only for the

last 18 months to separation, on account of section 28(4) of the *Employment Act* 2017." Likewise, the claim for accrued statutory annual leave is allowed on appeal but limited to the last 18 months thus 39 days applying the 26 days annual leave. The Court awards payment in liue this 39/30 x 16900 total award Kshs. 21970/-

Claim for Severance pay for 5 years served

39. Severance pay is only payable in the event of redundancy under section 40(1)(g) of the *Employment Act* as follows:- ''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." The Court upheld the finding by the trial Court that there was no redundancy. The prayer is disallowed.

Claim for 12 months' salary compensation for unlawful termination

40. Unlawful termination relates to the reason for the termination not being valid under section 43 of the *Employment Act* to wit: - ''(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

    (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

41. The Court upheld the finding by the trial Court that the appellant absconded duty/deserted work. The Court found this was gross-misconduct under section 44(4)a of the *Employment Act*. The Court holds that the appellant cannot be compensated for his misconduct as held in Owudu v Digital Sanitation Services Limited [2024]e KLR that ''31. The termination was thus based on lawful reasons and cannot attract compensation for unlawful termination. This position was adopted in same case cited by the appellant in Under the provisions of Section 45(5) of the Act, the Court should take these records of the appellant. They are relevant. To assign compensation would be to reward the appellant over his acts of misconduct. In this regard zero (0) compensation is appropriate."

42. The Court finds that the Notice pay awarded suffices with respect to the procedural unfairness.

Certificate of service.

43. Issuance of a certificate of service to an employee upon separation from an employer is a statutory right of the employee and the certificate ought to be issued unconditionally under section 51 of the *Employment Act* as follows: - ''(1) An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.

    (2) A certificate of service issued under subsection (1) shall contain—

        (a) the name of the employer and his postal address;

        (b) the name of the employee;

        (c) the date when employment of the employee commenced;

        (d) the nature and usual place of employment of the employee;

        (e) the date when the employment of the employee ceased; and

        (f) such other particulars as may be prescribed.

(3) Subject to subsection (1), no employer is bound to give to an employee a testimonial, reference or certificate relating to the character or performance of that employee.

(4) An employer who wilfully or by neglect fails to give an employee a certificate.''

Conclusion

44. In the upshot the appeal is held as partially successful and the Judgment of Hon M.W Murage (PM) delivered on the 9th June 2023 in Milimani MCELRC NO. E436 OF 2022 is set aside and substituted as follows:-

> ''The Court holds that the reason for the termination was lawful. There was no procedural fairness. Judgment is entered for the claimant against the respondent as follows: -
>
> Notice pay in lieu of Kshs. 16900.
>
> Accrued leave pay in lieu Kshs. Kshs. 21970/- .
>
> Interest at Court rates from the date of Judgment at the lower Court until payment in full.
>
> Cost of the suit.
>
> A certificate of service to be issued under section 51 of the *Employment Act* ''

45. The appellant is awarded costs at appeal.

46. Stay of 30 days granted.

47. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23nd DAY OF JANUARY, 2025.

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : - Ms. Muthini h/b Kangethe

Respondent: Ms. Sambai