



East Africa Eagle Kenya Limited v Shivachi (Employment and Labour Relations Appeal E073 of 2023) [2025] KEELRC 662 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 662 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E073 OF 2023**

JW KELI, J

FEBRUARY 28, 2025

BETWEEN

EAST AFRICA EAGLE KENYA LIMITED APPELLANT

AND

KIZITO SHILIBWA SHIVACHI RESPONDENT

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment and Orders of the Honourable Muthoni Mwangi (SRM) delivered at Nairobi on the 25th of April, 2023 in Nairobi MCELRC No. E2218 of 2021 between the parties filed a Memorandum of Appeal dated 15th May, 2023, received in court on the seeking the following Orders:-
 - a. The aforesaid Judgment to be set aside with costs to the Appellant.
 - b. The Respondent's Claim be dismissed with costs to the Appellant.

Grounds of the appeal

2. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 in awarding the Claimant Kenya Shillings 685,250;
3. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 in holding that the Claimant was wrongfully terminated yet he was procedurally rendered redundant;
4. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 by awarding the Respondent house allowance;
5. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 by awarding the Respondent payment for accrued leave days;



6. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 by awarding the Respondent severance pay;
7. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 by holding that the Respondent's Salary was Kenya shillings 28,000.00 ;
8. The Learned Magistrate erred in Law and in fact in her Judgment dated the 25th of April 2023 by allowing the Respondent's Claim.

Background to the Appeal

9. The Claimant/Appellant filed a claim against the Respondent via a memorandum of claim dated 14th January, 2021, seeking the following orders:-
 - i. A declaration that the termination of the Claimant was illegal and unlawful;
 - ii. The Respondent to pay to the Claimant amount of Kshs. 969,230.77 stated in Paragraph 13 above;
 - iii. The Respondent do pay the Claimant compensation of Kshs. 300,000;
 - iv. Cost of suit and interest(Page 27 of ROA).
10. The Claimant filed his verifying affidavit, his statement and list of documents all of even date together with the bundle of documents (see pages 13-26 of ROA).
11. The claim was opposed by the Respondent who entered appearance and filed a Memorandum of Response to Memorandum of Claim dated 22nd December, 2022 (pages 29-31 of ROA), Respondent's Witness statement of Grace Wanjiku dated 22nd December, 2022 (Pages 32-35 of ROA) and bundle of documents (Pages 36-55 of ROA).
12. The claimant's case was heard on the 2nd March, 2023, where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the Respondent Mr. Odipo (pages 59-61 of the Supplementary ROA dated 14th February, 2025).
13. The Respondent's case was heard on the same date where RW1 was Grace Wanjiku testified on behalf of the Respondent. She relied on her filed witness statement. She was cross-examined by counsel for the claimant Mr. Khalwale (pages 61-64 of the Supplementary ROA)
14. The parties took directions on filing of written submissions after the hearing. The parties complied.
15. The Trial Magistrate Court delivered its Judgment on the 25th April, 2023 awarding the claimant a total sum of Kshs. 1,654,480.77/= comprising of compensation for unfair termination, House allowance in arrears, accrued leave days, severance pay and cost of suit and interest. (judgment at pages 45-56 of Supplementary ROA dated 14th February, 2025).

Determination

16. The appeal was canvassed by way of written submissions. Both parties complied.
17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard



the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

18. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

19. The Appellant raised the following issues for determination in the appeal: -
- a. whether the trial court erred in in law and fact in her judgment dated 25th April 2023 in holding the respondent was wrongly terminated yet he was procedurally rendered redundant.
 - b. whether the trial court erred in in law and fact in her judgment dated 25th April 2023 by awarding the Respondent house allowance
 - c. whether the trial court erred in in law and fact in her judgment dated 25th April 2023 by holding the Respondent's salary was Kenya Shillings 25000 and
 - d. whether the trial court erred in in law and fact in her judgment dated 25th April 2023 by allowing the Respondent's claim
20. The respondent in the written submissions addressed all the grounds of the appeal.
21. The court, having perused the written submissions of the parties and the impugned judgment of the lower court, was of the considered opinion that the issues placed by the parties for determination in the appeal were :-
- a. Whether the trial Court erred in fact and law in finding the termination was unlawful and unfair
 - b. Whether the trial Court erred in fact and law in awarding the reliefs to the respondent.

Whether the trial Court erred in fact and in finding the termination was unlawful and unfair

22. The prove of employment claims is according to section 47 of the *Employment Act* to wit:- "47(5) 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."
23. The claimant/respondent at the hearing adopted his witness statement and documents as his evidence in chief and was cross-examined. In witness statement the Respondent(Shivachi) in paragraphs 5 and 6 laid basis of his claim of unfair termination being that he sought permission to travel to bury his late mother on the 13th June 2020 and while still away on 17th June 2020 the respondent without notice or justifiable reasons terminated his services and did not pay his terminal dues. During cross-examination,



the Respondent told the court that it was Mama Geraldine (the boss) who called him in September 2020 (while still at the burial) and said his work was finished.

24. According to section 43 of the Employment Act it is the burden of the employer to justify reasons for the termination. It reads:- ‘43. Proof of reason for termination

- (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.”

25. The appellant in response pleaded that the reason for termination was that the position held by the respondent of watchman was declared redundant. (paragraph 8 of RW1 witness statement (page 41 of ROA). The letter of redundancy dated 7th September 2020 and various attempts of delivery via WhatsApp were produced (pages 27-60 of ROA).

26. 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 procedure for termination of employment on account of redundancy is according to section 40 of the Employment Act to wit:-

“Termination on account of redundancy

- (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.”

27. In the instant case, the Respondent did not plead to have been a member of a union. The appellant was thus required to comply with section 40(1)(b) of the *Employment Act* :-

“

- (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 employer produced a letter dated 18th June 2020 of termination stating there was communication to terminate on account of COVID-19 pandemic (page 53 of ROA). The said letter did not mention redundancy. The appellant produced letter dated 7th September 2020 alleged to have been sent to the Respondent while he was away titled “ termination of your employment by reason of redundancy”. It referred to a letter dated 6th April 2020, of which the respondent was said not to have answered. The letter mentioned challenges of the business and stated the position of the respondent was no longer required.’ (page 57 ROA) The court found that the letter of 6th April 2020 was proposal of salary reduction due to COVID-19 pandemic. Via the letter the gross salary was reduced from Kshs 28491 to Kshs. 24000 and the respondent was given 48 hours to reject the offer. Apparently, he did not respond.

28. The court having evaluated the evidence before the trial court held that there was no notice of redundancy prior to the termination to the respondent and the area labour officer (section 40(1) supra). While the employer is justified to declare redundancy while the employee is at no fault, the procedure is safeguarded under the provision of section 40 of the *Employment Act*. The procedure must be complied with for the termination on account of redundancy to be held as fair. The labour officer and unions (where applicable) play a key role in redundancy process of safeguarding abuse of the process by employers to do away with unwanted employees without reasons.

29. In the instant appeal, the court found this was unlawful and unfair for lack of compliance with section 40 of the *Employment Act*. The reason of the said redundancy was not justified hence real fear of abuse of the method of separation to do away with unwanted employees. The court found no reason to interfere with the trial court's decision on the issue.

Whether the trial Court erred in law and fact in awarding the reliefs to the respondent

30. The court upheld the finding of unlawful and unfair termination.

On award of House allowance in arrears.

31. The appellant stated it paid its employees, including the appellant, a gross salary. The claimant sought a house allowance, stating he was neither housed nor paid the house allowance. In the witness statement adopted as evidence in chief the claimant stated he was paid a monthly salary of Kshs. 25000. He was silent on the house allowance claim yet this was his evidence in chief (page 30 of ROA). He relied on his payslips for April and May 2013 (page 33). The payslip indicated basic salary and gross salary as the



same and underneath house allowance 0.0. The Respondent relied on the payslips for 2013 as evidence of non-payment of house allowance. The respondent on other hand stated that the payslip was for purpose of statutory deductions only and the salary was gross.

32. During cross-examination of claimant it is stated that gross salary was Kshs. 28000 when he was fired. There was no re-exam on the issue(page 60-61 of the ROA)During cross examination of RW1 she said the salary was all inclusive, did not have documents to show salary was all inclusive and the pay slips were no broken down to show house allowance. She stated the salary was all inclusive under the contract. During re-exam RW1 said the payslip was computer generated and could not have bene broken down to show it covers salary and house allowance.
33. The trial court held that there was nothing to show the salary was consolidated and inclusive of the house allowance. The lower court then awarded house allowance for all periods of employment of 15 % basic salary.
34. The court, having re-evaluated the evidence before the trial court as above, the fact that the claimant in his witness statement stated he had a monthly salary and was silence on the claim of house allowance, the uncontroverted letter of 6th April 2020 stating gross salary, admission at trial of gross salary of Ksh. 25000 and no re-exam, the lack of reply to defence that the salary was gross and inclusive of house allowance, the said salary being above the minimum wages for the position of watchman, taking into account the foregoing, the court held the evidence before the trial court was of gross salary which is all inclusive and the trial court erred in it finding on house allowance and the award thus set aside.

Compensation for unfair termination

35. The lower court entered compensation of Kshs. 150,000 the equivalent of 6 months gross salary. There was evidence the salary was reduced to Kshs. 24000(page 52). The appellant pleaded salary of Kshs. 25000. The respondent did not produce evidence to contradict the contract letter of 6th April 2020 on gross salary being 24000. The court did not find reply to defence. The court finds the written evidence of the employer was not controverted. The disturbance of award is allowed to effect that the gross salary was Kshs. 24000 (page 52) thus Kshs. 144,000/-.
36. On leave the same was for 2020 only. The court awarded monthly salary of Kshs. 25000. The claimant 's case was of termination in month of June. The trial court erred in fact failing to prorate the leave days which the court proceeds to do. Statutorily annual leave is 21 days(section 28 of the [Employment Act](#)). Thus 24000x21/30x6/12 thus Kshs. 8,400. The award for annual leave is disturbed for the error to award of Kshs. 8400.

Award for Severance pay

37. The claim before the court was of service pay(page 27 ROA was the prayers). The court held that it is trite that the trial court cannot award prayers outside what is sought by the parties. The claimant was paid severance pay on termination (page 62 of ROA) and did not seek it in the claim. The Claimant sought for service pay which is under section 35 of the [Employment Act](#). He was on NSSF and not entitled to service pay. From the judgment, the court was in error as it was addressing reliefs sought in the claim. The award is held as erroneous and set aside.
38. The notice pay is upheld. In conclusion, the court upheld the unfair ad unlawful termination. Held the awards of severance pay, and house allowance were in error of facts and law, held the salary was Ksh. 24000(page 52 of ROA) and not 25,000, and held leave was for period of 6 months, in 2020.



39. The appeal was partially successful. Judgment and Decree of the Honourable Muthoni Mwangi (SRM) delivered at Nairobi on the 25th of April, 2023 in Nairobi MCELRC No. E2218 of 2021 between the parties is set aside and substituted as follows:-

Judgment is entered for the claimant against the respondent as follows:-

Notice pay Kshs. 24000

Compensation for unfair termination - Kshs. 144,000

Untaken annual leave in lieu Kshs. 8,400

Total sum of Kshs. 176,400

Issuance of certificate of service under section 51 of the *Employment Act*

Costs and interest at court rates from the date of judgment until payment in full.

40. Each party to bear own costs at appeal.

41. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant :- Odhiambo h/b Amir

Respondent: Khalwale

