Universe Freight Services Limited v Mwangi (Appeal E150 of 2024)
[2025] KEELRC 393 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 393 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E150 OF 2024

M MBARŨ, J

FEBRUARY 13, 2025

BETWEEN

UNIVERSE FREIGHT SERVICES LIMITED ..... APPELLANT

AND

ISAACK KARIUKI MWANGI ..... RESPONDENT

(Being an appeal from the judgment of Hon. Noelyne Akee delivered in Mombasa MCELRC No.E057 of 2022 delivered on 28 June 2024)

JUDGMENT

1. The appeal arises from the judgment delivered on 28 June 2024 in Mombasa MCELRC E057 of 2024. The appellant seeks that the judgment be set aside and replaced with an order dismissing the judgment with costs.

2. The respondent, Isaack Kariuki Mwangi, filed his claim before the trial court on the basis that the appellant employed him as a guard, earning Ksh.24,000 per month. However, on 19 January 2022, his employment was terminated for incompetence. He claimed that no due process was followed or a valid reason was given, leading to termination of employment. The appellant breached his employment contract because there was no due process and his terminal dues were not paid. He claimed the following dues;

    a. Notice pay ksh.24,000;

    b. Leave for 2 years 2020 to 2021 Ksh.48,000;

    c. Prorated leave for 8 days ksh.7,384;

    d. 12 months compensation Ksh.288,000;

    e. Loss of expected income for 34 years to retirement Ksh.9,792,000;

f. Certificate of service;

g. Costs of the suit.

3. In response, the appellant denied the respondent's employment as a guard. However, since his employment as a guard, he exhibited incompetence and could not perform his duties to the appellant's satisfaction. Despite several verbal pleas by the appellant to improve, he failed to make any improvements, leading to the termination of his employment. The appellant followed all the laid-down procedures, and the claims are without merit. There were no terminal dues owing since employment was terminated through summary dismissal.

4. The learned magistrate heard the parties, delivered judgment, and held that unlawful and unfair termination of employment justified the claim, which was allowed with costs. In particular, the trial court held that compensation be awarded at 12 months upon exercise of its discretion, various considerations made by the court, to wit, length of service, among others.

5. Aggrieved by the judgment, the appellant had 8 grounds of appeal;

   1. The learned magistrate erred in law and fact by holding that the respondent was unlawfully terminated from employment;

   2. The learned magistrate erred in law and fact by failing to consider that the respondent had prior to the termination been given several warnings.

   3. The learned magistrate erred in law and fact by failing to consider that the respondent failed to attend the disciplinary hearing.

   4. The learned magistrate erred in law and fact by awarding the respondent 12 months' salary as compensation for unlawful termination.

   5. The learned magistrate erred in law and fact by failing to consider the respondent's work period when awarding the respondent the maximum award for the alleged unlawful termination.

   6. The learned magistrate erred in law and fact by disregarding the documents produced by the appellant;

   7. The learned magistrate erred in law and fact in the manner of analyzing the evidence and the applicable law in the case.

   8. The learned magistrate erred in law and fact by failing to consider the appellant's evidence and submissions on record.

6. The parties addressed the appeal by way of written submissions.

7. The appellant submitted the finding that there was an unfair termination of employment in error. The appellant called its witness, Bernard Gachie, who testified to the respondent's conduct that he had demonstrated incompetence and gross misconduct to justify summary dismissal. There were work guidelines that he failed to apply. Under Section 43(1) of the *Employment Act*, where the employer has a genuine and valid reason that exists to justify termination of employment, the same is justified.

8. The award of 12 months was excessive and failed to consider the record of previous misconduct by the respondent. The discretion to make an award under Section 49 of the *Employment Act* should be applied judicially. In the Hema Hospital v Wilson Makongo Marwa case, the court held that the record guides the court before making an award. In this case, the appeal should be allowed, and the awards set aside with costs.

9. The respondent submitted that the appeal was defective and should be dismissed as there wasno certified copy of the Decree as required under the court rules. In the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR, the court held that omitting to file a decree with the Record of Appeal is fatal. This is not a technicality that can be cured under Article 159 of *the Constitution* because Order 42, rule 2 of the Civil Procedure Rules mandates the appellant to attach such a record.

10. On the grounds of appeal, the respondent submitted that his employment was terminated on 19 January 2022 because he was incompetent and non-professional and not doing his duties as required. There was no notice before such allegations or a disciplinary hearing contrary to Section 41 of the *Employment Act*. In the case of John Wanjala Wanyama v Wanandege Co-operative Savings Sacco and Credit Society [2016] eKLR, the court held that the employer must give reasons for the termination of employment over the alleged poor performance of employment. Such reasons put to the test must be valid and genuine. In this case, there was no due process to address any alleged incompetence.

11. The respondent submitted that the appellant alleged that he had stolen company property, but no police report had been produced. The alleged incompetence was not demonstrated or particularized. The case that the respondent absconded duty is without proof. In the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR, the court held that before summary dismissal, the employee must be allowed to attend and defend himself before another employee of his choice. Without due process, the awards by the trial court are justified, and the appeal should be dismissed with costs.

Determination

12. As this is a first appeal, the court is allowed to examine, re-evaluate, and re-analyse the entire record afresh and exhaustively to draw inferences and reach an independent conclusion. However, consider that the trial court had the benefit of hearing the witnesses.

13. The respondent has raised the issue that the appeal is incompetent because the appellant did not file a Decree from the trial court. Without the Decree, this is fatal to the appeal.

14. Indeed, under Rule 11 of the Employment and Labour Relations Court (Procedure) Rules, 2024 (Court Rules), the records which should comprise the Record of Appeal and are mandatory are outlined under Rule 11(1);

    11.

        (1) An appellant shall, before filing a memorandum of Appeals, appeal, request in writing from the court, person or body whose decision is under appeal copies of the proceedings, any documentary evidence relied on and a copy of the judgment, ruling, decision, order, Decree or award appealed against.

        Further, Rule 11(1) is reiterated by Rule 15(1) that;

    15.

        (1) A memorandum of appeal shall accompany a record comprising a certified copy of pleadings, the proceedings, any documentary evidence relied on, and the judgment, ruling, decision, order, Decree or award appealed against.

15. The Record of Appeal dated 14 October 2024 does not include the Decree of the trial court.

16. In Justine Nyamweya Ochoki & Jared Nyang'au Obino v Prudence Anna Mwambu [2020] KEHC 878 (KLR), the court held that although the rules require that a decree be attached to the Record of Appeal, such provisions should not be applied in a draconian manner.

17. This position of lack of a certified copy of the Decree is addressed with firmness by the Court of Appeal in the case of Ernie Campbell & Company Limited v Automobile Association of Kenya [2020] KECA 228 (KLR), which held that for mandatory terms that for purposes of an appeal from a superior court in its original jurisdiction, such as the present appeal, the record of appeal shall contain the certified copy of the Decree or order.

18. It is not in dispute that in the present appeal, no Decree was filed, and no attempt was made to introduce one by way of a Supplementary Record of Appeal in the manner permitted by the rules. The effect of such omission is doubtless in rendering the record of appeal incompetent.

19. The only option left to the court is to strike out the appeal. The appeal is incompetent.

20. On the substantive issue, through a notice dated 19 January 2022, the appellant terminated the employment of the respondent through summary dismissal for;

> The company's management has observed that you are incompetent and non-professional at your work by not doing what you are expected to and being inconsistent.

21. The appellant further noted that;

> Even though we have tried to guide you and show you directions, you have not shown any improvement, and according to *Employment Act* CAP 226(4)(c), we have no choice but to terminate your job.

22. The appellant filed a letter dated 14 March 2021, a warning for alleged incompetence in response to the claim.

23. The letter dated 18 January 2022 indicates that the respondent was incompetent at work and mishandled tools. It states that on 20 August 2021, he was issued a Harmer mallet from the company store valued at Ksh.2, 000 and did not return it. He requested other items from the store and did not give an account.

24. There is a letter dated 18 January 2022, a warning letter for previous acts of misconduct.

25. There is a notice dated 18 January 2022 referenced notice of disciplinary meeting and that;

> Following several verbal and written notices regarding your performance, conduct, and etiquette, the company summons you to a disciplinary hearing on 19 January 2022 ...

26. The respondent has not acknowledged all the above letters.

27. In his evidence in court on 23 June 2023, the respondent testified that;

> ... I was doing wiring. I never stole anything; we had to sign for it. I haven't even been given leave. Bernard Gachie was the company's manager; He knew how we used to work.

28. The appellant called Bernard Kariithi in evidence. His testimony was that;

> ... he [respondent] was fired due to absenteeism. He did not like wearing safety gear. He was incompetent. He stole bags worth Ksh.1, 000. Nothing to prove that things were stolen. He was fired because he had stolen. ...

29. The record and evidence were at variance.

30. Ultimately, the letters and notices said to have been issued to the respondent are not acknowledged.

31. The due process in employment and labour relations where an employee is alleged to be incompetent is Section 41 of the *Employment Act*;

> Subject to section 42(1), an employer shall, before terminating an employee's employment on the grounds of misconduct, poor performance, or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is considering termination. The employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> ...

32. The parameters are settled when an employee is allegedly incompetent or has poor work performance. The employer must demonstrate what efforts were taken to improve the employee's skills and competencies to improve his work. In National Bank of Kenya v Anthony Njue John [2019] KECA 445 (KLR), the court held that

    a. Where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof, as outlined in section 8 of the *Employment Act*, 2007. The employer must show that when deciding to note an employee's poor performance, they have put in place an employment policy or practice on how to measure good performance against poor performance.

    b. It is imperative for the employer to show what measures were in place to assess each employee's performance and, further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance; the effort leading to this decision must be established.

    c. Beyond having such an evaluation measure, and before termination on the grounds of poor performance, an employee must be called, and an explanation of their poor performance shared, where they would, in essence, be allowed to defend themselves or address their weaknesses.

    d. If a decision is made to terminate an employee due to poor performance, the employee must be called again, and the reasons for termination must be shared with the employee in the presence of an employee of their choice.

33. In this regard, the appellant did not address the allegations made against the respondent, and the due process under Sections 41, 43, and 45 of the *Employment Act* was not addressed.

34. To this extent, the findings by the trial court cannot be faulted.

35. On the award of 12 months in compensation, the learned magistrate gave the reasons, justification, and rationale for allocating the maximum award. These are the principles upon which the discretion

bestowed upon a court is to be assessed. Without any claim that the same was not applied injudiciously, the court, upon appeal, cannot interfere with the award.

36. Based on the analysis above, the appeal is hereby dismissed as incompetent, as addressed above. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet