



**Majid Alfuttaim Hypermarkets Limited v Macharia (Appeal
E153 of 2021) [2025] KEELRC 301 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E153 OF 2021
JW KELI, J
FEBRUARY 5, 2025**

**BETWEEN
MAJID ALFUTTAIM HYPERMARKETS LIMITED APPELLANT
AND
JOSEPH MACHARIA RESPONDENT**

(An appeal from the decision of the Magistrate's court at Nairobi before Honourable P. Muholi Senior Resident Magistrate delivered on 30th of April, 2020 in CME suit No. 1022 of 2019)

JUDGMENT

1. The appellant dissatisfied with the entire Judgment of the learned Honourable P. Muholi (Senior Resident Magistrate) delivered on 30th of April, 2020 in CME suit No. 1022 of 2019 between Joseph Machari -Vs- Majid Al Futtaim Hypermarkets Limited filed a memorandum of appeal dated 17th December 2020 seeking for the following Orders:-
 - a) This Appeal be allowed with costs to the Appellant
 - b) The Judgment issued on 30th April 2020 be set aside in its entirety.
 - c) Any other orders as the Honourable Court May deem fit and just.
 - d) Any other and further orders as the Honourable Court may deem fit and just to grant.

Grounds of the appeal

2. That the Learned Magistrate erred in fact and in law by not appreciating the evidence of the Appellant that there were reasonable and valid grounds to terminating the services of the Respondent and hence arriving at a wrong decision of finding that the Respondent was unfairly terminated and awarding the Respondent severance pay and salary arrears amounting to 110,507.29 plus costs.



3. That the Learned Magistrate erred in law and fact by failing to consider the test to be applied on what constitutes fair and reasonable grounds for terminations provided under Section 43(2) of the Employment Act, 2007 and the evidence required at the shop floor level during a disciplinary hearing in determining whether there is sufficient reason for dismissal and hence arriving at a wrong finding that the Appellant did not have valid reasons to terminate the Respondent.
4. That the Learned Magistrate erred in law and fact by awarding the Respondent severance pay when actually the Respondent was not declared redundant.
5. That the Learned Magistrate erred in law and fact when he failed to address the issues raised by parties in their pleadings and submissions as to the exact date of dismissal.
6. That the applicant's intended appeal is not only arguable but has high chances of success.

Background to the appeal

7. The Respondent, following termination of his employment, filed a memorandum of claim dated 14th June 2019 in the subordinate court seeking the following reliefs against the appellant: -
 - a. The principle sum of Kshs. 186,086 as more particularised and set out in paragraph 5 hereinabove.
 - b. Interest of court rate in (a) above.
 - c. Damages.
 - d. Costs of this suit
 - e. Any other relief this Honorable Court will deem it fit to grant. (page 3 of RoA)
8. The respondent/ claimant filed his affidavit sworn on dated 14th June 2019 (page 4-7 of RoA) in support of the claim, and filed documents in support of his case which included an employment letter, notice to show cause, dismissal letter, appeal letter and discharge voucher and the cheque for terminal dues under the discharge (pages 8 -21 of RoA were the claimant's documents).
9. The appellant entered appearance through the Federation of Kenya Employers and filed a statement of response dated 13TH September 2019, a witness statement of Everest Bulinda dated 12th August 2019, and produced documents related to the disciplinary process of the respondent including the minutes of the disciplinary proceedings (pages 22-53 of ROA was the entire respondent's defence evidence)
10. The Respondent's/claimants case was heard on the 21st January 2020 where he testified on oath as PW1, and was cross-examined by counsel for the Appellant. The appellant's case was heard on the same date with Everest Bulinda as DW1 who testified on oath and was cross-examined by the respondent/ claimant who was in person. (pages 96-103 of RoA were the proceedings)
11. The parties filed written submissions after the hearing. The trial court entered judgment in favour of the respondent for payment of salary up to and including 14th March 2019 for Kshs.69,496 and severance pay of Kshs.34,743. The claimant was awarded half costs of the suit.
12. The respondent filed response to the appeal vide his replying affidavit dated 25th July 2022 in opposition to the appeal.

Determination

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



14. 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.”

Issues for determination

15. The appellant addressed the summarised grounds of appeal as follows:-
- A. Failure to appreciate the evidence of the appellant on the circumstances leading to the dismissal of the respondent thus leading to a wrong finding and decision to award severance pay and salary arrears amounting to Kshs. 110,507.29
 - B. Misconstruing the provisions of the law with respect to redundancy
 - C. Failure to properly construe the exact date of the dismissal thereby arriving at a wrong decision.
16. The respondent in submissions relied on his replying affidavit.
17. The court found the issues for determination in the appeal to be whether the reliefs granted were merited being severance pay and salary arrears.

Claim on Salary arrears

18. The trial court on salary arrears stated that the dismissal letter was dated 23rd February 2019 and received by the claimant on 14th March 2019. The trial court held that the claimant’s services were terminated on the date he received the letter of dismissal which was 14th March 2019 and hence the claimant was entitled to salary on a prorated basis.
19. The appellant was aggrieved by the decision and submitted that the trial court failed to properly construe the dismissal date. That there was no evidence the claimant was at the workplace in the period between 23rd February 2019 to 14th March 2019 to earn a salary. That the dismissal letter demonstrated intention to sever the service of the respondent immediately. (At page 36 of RoA was the dismissal letter) The appellant further relied on the record on page 53 of the RoA to submit that the respondent refused to sign the minutes as confirmed by an independent witness.
20. The court on appeal is obliged to re-evaluate the evidence before the trial court and reach its own conclusion (*Selle* decision- *supra*). The Court observed that the minutes of the disciplinary meeting were signed by only 3 of the 7 attendees (At page 53 of ROA) . Even the Appellant’s witness did not sign and yet she was present. The 3 attendees who signed did so on the 16th February 2019. There were handwritten notes by two people who the court noted were not in the meeting. Their notes were dated 23rd February 2019. The court found no evidence was led on this issue at trial court. Why would it be an issue for the claimant to have failed to sign minutes if it was not an issue for the other persons in the meeting including RW1 who failed to sign? The court found the allegations on refusal by the claimant to sign minutes by two strangers, being persons who were not recorded to have been at the meeting of no relevance to the dispute. (page 53 OF RoA).



21. At the trial RW1 told the court that they paid the claimant upto date of dismissal of 13th February 2019. The letter of dismissal was dated 23rd February 2019. The trial court held that the dismissal was effective on the date the claimant received the dismissal letter 14th March 2019. The appellant stated that the intention of the letter was that the dismissal was effective 23rd February 2019.
22. The court on perusal of the letter found the intention was dismissal effective 13th February 2019 as the letter stated that the Respondent would be paid gross salary upto and including 13th February 2019(page 36 of RoA). The court found that by 13th February 2019 the disciplinary committee had not yet approved the minutes as true and only signed the minutes on the 16th February 2019(see page 53 of RoA).
23. The court found that at the 2nd page of the letter of dismissal , Ms. Kweyu Country Human Capital Manager signed the letter on the 4th March 2019. Could the claimant's service have been deemed terminated without the appellant's concerned officer, Ms. Kweyu signing the letter? The court returned in the negative. The court holds that the trial court did not err in holding the termination was effective on the 14th march 2019 when the claimant received the termination letter the same having been signed by Ms. Kweyu on the 04th March 2019.
24. As to whether the Respondent worked from 23rd February 2019 to 14th March 2019 or not, the court finds it was the obligation of the appellant to have produced documents to prove dismissal and that the claimant had not worked on dates as alleged before he received the letter of dismissal. The appellant stated they dismissed him on 13th February 2019 and yet the letter was dated 23rd February 2019 and signed by Ms. Kweyu for appellant on 4th march 2019. The court found no evidence before trial court of absconding duty. The court found no basis to disturb the award on salary arrears by the trial court and the same was upheld.

Severance pay.

25. The claimant was dismissed from employment for misconduct. The trial court on the severance pay stated that the claimant having been dismissed for misconduct he was entitled to severance pay. The appellant submitted that the respondent was not declared redundant hence the severance pay was erroneous.
26. Severance is payable in the case of termination of employment on reasons of redundancy according to section 40 of *Employment Act* to wit :- "40. 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:- (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. 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 is usually not at fault in redundancy. In the instant case the claimant was dismissed from employment on account of misconduct.
28. The Court has in the past found several cases of a mix-up between service pay and severance pay in decisions coming before it on appeal. The court has already explained severance pay applies to cases of redundancy. In cases of termination on account of misconduct service pay is payable where the



employee was not a beneficiary under a pension scheme including NSSF. The claimant was paid for NSSF (Page 16 of ROA) and hence the employer complied with the provisions of section 35 of the Employment Act to wit:- “35(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

- (6) This section shall not apply where an employee is a member of—
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d)) the National Social Security Fund.” In the upshot, the Court held that the award of severance pay by the trial court was in error as the respondent’s employment was not terminated on reason of redundancy. The award of severance pay was set aside.

29. In the upshot the appeal was held as partially successful. The judgment of Honourable P. Muholi Senior Resident Magistrate delivered on 30th of April, 2020 Nairobi CMEL suit No. 1022 of 2019 is set aside and substituted as follows:-

Judgment be and is entered for the claimant against the respondent for salary arrears upto and including 14th March 2019 at Kshs. 69,496 with interest at court rates from date of judgment until payment. The claimant is awarded half costs.

30. Each party is to bear its own costs in the appeal.

31. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF FEBRUARY , 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant: - Absent

Respondent: -Macharia in person

