Board of Management, Yinthungu Mixed Day & Boarding Secondary School v Muthuku (Appeal E007 of 2024) [2025] KEELRC 1175 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1175 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

APPEAL E007 OF 2024

B ONGAYA, J

APRIL 24, 2025

BETWEEN

THE BOARD OF MANAGEMENT, YINTHUNGU MIXED DAY & BOARDING SECONDARY SCHOOL ..... APPELLANT

AND

MAURICE MUTHOKA MUTHUKU ..... RESPONDENT

(Being an appeal from the Judgement and decree delivered on 14th February, 2024 by Honourable P.N.Gesora Chief Magistrate in the Chief Magistrate's Court at Makueni ELR Cause No.5 of 2022)

JUDGMENT

1. The respondent filed in the trial Court the memorandum of claim on 26.04.2022 through D.M Kyalo & Associates. The claimant alleged as follows:

    a. The appellant employed the respondent on 01.01.2013 in the position of groundsman or messenger at Kshs. 4,000.00 per month and on permanent and pensionable terms of service.

    b. On 31.05.2017 he received a warning letter levelling false allegations.

    c. On 05.06.2017 he received a termination letter stating that the appellant had decided to terminate his services as a grounds-man for failure to meet the qualifications set by the employer and his continued disrespect to the office.

    d. The respondent alleged unfair and unlawful termination. He alleged underpayment. He claimed as follows:

        i. Unpaid salary for June 2017 Kshs.4,000.00.

        ii. One month pay in lieu of notice Kshs.4,000.00.

iii. Severance pay per section 40(g) of *Employment Act* at 15/30 x 4000 x 4 years of service Kshs.8,000.00.

iv. Underpayment for entire period worked Kshs.578, 532.00.

v. Total claim Kshs.660, 627.00.

2. The appellant filed the memorandum of response on 05.08.2022 through the Hon. Attorney General. The appellant pleaded as follows:

a. The respondent was a casual employee and the letter of appointment dated 01.01.2013 was invalid because it was on a public holiday.

b. The respondent worked until 05.06.2017. He received warning letters severally upon failure to take instructions; absenteeism; insubordination; inefficiency; and, failing to perform duties.

c. The respondent failed to apply for the advertised position of messenger and he explained he had failed to do so because he did not have certificates.

d. The dismissal was fair and lawful.

e. The appellant prayed the suit be dismissed with costs.

3. The trial Court heard the testimony by the respondent and the appellant's Deputy Principal (RW). The trial Court correctly found that the appellant employed the respondent as a groundsman and the employment terminated by letter of 05.07.2017. The trial Court found that the respondent had not been accorded a fair hearing and rules of natural justice. Further, the trial Court stated, "...The claimant was humiliated. I find and hold that the complainant has proved his case as provided by law. I accordingly enter judgment as prayed for in the memorandum of claim in prayers (A), (C),

4. The appellant's memorandum of appeal is dated 07.03.2024 setting out 9 grounds of appeal and in effect that the learned trial Magistrate erred in law and fact as follows:

a. By awarding Kshs.4,000.00 in lieu of notice.

b. Awarding Kshs.4,000.00 pay for June 2017 with the respondent proving the same.

c. Awarding service pay while the respondent was a member of NSSF and failing to deduct NSSF remitted from amounts awarded.

d. Awarding leave days but which had not been proved.

e. Awarding compensation for unfair termination.

f. Awarding underpayment despite parties having agreed upon the wages.

g. Using the base of Kshs.4,000.00 to compute service pay thereby arriving at a wrong figure.

h. By awarding costs of the suit to the respondent.

5. The Court considers that the main ground of appeal is whether the trial Court erred in law and fact by awarding the reliefs as had been prayed for. The Court has considered the pleadings, the testimonies and the material on record. The Court has re-evaluated the case before the trial court. The Court returns as follows:

a. The letter of termination of the employment was dated 05.06.2017. The letter informed the respondent of a termination notice of one month as from 01.06.2017 to 30.06.2017. Thus

the effective date of the termination was on 30.06.2017. Under the prevailing three years of limitation per section 90 of the *Employment Act*, 2007, the time of limitation lapsed on 30.06.2020. The suit was filed after lapse of the limitation period and very belatedly so on 26.04.2022. Had the appellant and more so the trial Court considered that crucial statutory point going to jurisdiction, it should be obvious that there was no live cause of action to invoke the Court's jurisdiction. The point was not raised for parties before the trial Court or at the appeal stage. The Court having taken up the issue of its own motion, the appeal would be allowed, the trial Court's judgment set aside, the suit dismissed as time barred, and each party to bear own costs of the appeal and the suit before the trial Court.

b. In view of the findings above, it would be futile to evaluate the merits of the judgment made for the respondent by the trial Court. It should be also obvious that the respondent urged and claimed for severance pay under section 40 of the Act and not service pay – so that service pay would not be available at all. Underpayment would need to be particularized and strictly proved. As found, the suit having been time barred, it was futile and misconceived to challenge the award of reliefs per judgment on merits as no jurisdiction exists for the Court to proceed in that manner.

6. In conclusion the appeal is hereby determined with orders as follows:

. The trial Court's judgment set aside.

b. The suit in the trial Court is dismissed as was time barred.

c. Each party to bear own costs of the appeal and the suit before the trial Court.

d. The Deputy Registrar to forthwith return the case file to Machakos Sub registry.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 24TH APRIL, 2025

BYRAM ONGAYA

PRINCIPAL JUDGE