



Singh v Ambani (Appeal E017 of 2023) [2025] KEELRC 1592 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1592 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E017 OF 2023**

**JW KELI, J
MAY 23, 2025**

BETWEEN

HARJIT MATHARU SINGH APPELLANT

AND

KENNETH MMBAYA AMBANI RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable B.M. Cheloti (SRM) delivered at Nairobi on the 17th of February, 2023 in MCELRC No. E1040 of 2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable B.M. Cheloti (SRM) delivered at Nairobi on the 17th of February, 2023 in MCELRC No. E1040 of 2021 between the parties filed memorandum of appeal dated the 24th day of February, 2023 seeking the following orders:-
 - a. The Appeal be allowed and the judgment and consequential orders of the Chief Magistrates Court made on 17th February 2023 be set aside.
 - b. The Respondents claim at the Chief Magistrates Court be dismissed with costs.
 - c. Costs of the Appeal be awarded to the Appellant.

Grounds of the Appeal

2. The Honourable Magistrate erred in facts and in law by finding in favour of the Claimant to the extent that his employment was unfairly terminated.
3. The Honourable Magistrate erred in facts and in law by awarding the Respondent the sum of Kshs. 168,000.00 being 12 months' salary and the sum of Kshs. 224,000.00 being service pay as compensation for unfair termination together with costs of the suit.



4. The Honourable Magistrate erred in facts and in law by failing to consider the evidence on record and appreciate the fact that the Appellant had fully paid the Respondent all the final dues despite the fact that the Respondent had not been dismissed from work.
5. The Honourable Magistrate applied the wrong principles in awarding the sum of Kshs. 392,000.00 as compensation to the Respondent and in granting the reliefs sought.
6. The Honourable Magistrate erred in facts and in law in failing to appreciate the totality of the weight of the evidence adduced by the Appellant to show that the Respondent's employment was not terminated but that he absconded duty in spite of the Appellant's efforts to trace him.
7. The Honourable Magistrate erred in law and in fact by making the award pronounced yet she did not make a finding of coercion or undue influence which would form the basis for disregard of the terminal dues already paid.
8. The Honourable Magistrate erred in law and in fact by failing to appreciate and apply the full import and legal consequences of the Certificate of Final Payment which in itself established a final contract between the two parties.
9. The Honourable Magistrate erred in law and in fact by failing to appreciate and take into account the money paid to the Respondent as terminal dues in rendering her judgment.

Background to the Appeal

10. The Respondent filed a claim against the Appellant vide a memorandum of claim dated the 9th of June 2021 seeking the following orders:-
 - a. A declaration that the Claimant's termination was substantively and procedurally unfair and unlawful.
 - b. A declaration that the certificate of final payment was obtained under coercion and undue influence thus illegal.
 - c. A finding that the Respondent underpaid the Claimant for the duration of his employment.
 - d. An award of the following:
 - i. 12 months salary for unfair termination Kshs. 176,230.00
 - ii. Salary underpayments Kshs. 19,106.65
 - iii. Accrued leave Kshs. 113,857.55
 - iv. Overtime Kshs. 5,625,874.00
 - v. Salary in lieu of notice Kshs. 14,685.85
 - vi. Service pay Kshs. 234,973.00
 - e. A Certificate of Service
 - f. Costs of the suit and interest.
 - g. Any other relief that the court may deem fit to grant.
- Pages 4-9 of the ROA dated 10th November 2023).



11. The respondent filed his verifying affidavit (missing in ROA), his witness statement dated the 20th of May 2021 (pages 10-11 of ROA), his list of witnesses (missing in ROA), and list of documents dated 9th June 2021 (pages 12-15 of ROA).
12. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response (pages 16-21 of ROA); list of witnesses (page 22 of ROA); his witness statement (pages 23-28 of ROA), and produced as his documents employment records attached to his list of documents dated 29th September 2021 (pages 29-34 of ROA).
13. The Claimant's/Respondent's case was heard on the 7th of December 2022 where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the appellant Mr. Njiru (pages 72-74 of ROA).
14. The Appellant's case was heard on the same date. The Appellant relied on his filed witness statement and produced the Appellant's documents. He was cross-examined by counsel for the claimant Mr. Kisinga (pages 74-75 of ROA)
15. The parties took directions on the filing of written submissions after the hearing. The parties complied.
16. The Trial Magistrate Court delivered its judgment on the 17th of February 2023 awarding the claimant a total sum of Kshs. 392,000/- comprising of 12 months' salary as compensation for unfair termination, and service pay for 16 years (Judgment at pages 65-68 of ROA).

Determination

17. The appeal was canvassed by way of written submissions. Both parties filed.
18. 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.”
19. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 *De Lestang V.P (As He Then Was) Observed 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

20. The appellant addressed the merits of the appeal generally.
21. The respondent addressed the following issues in the appeal-
 - a. Whether the trial court was correct in holding that the respondent was unlawfully terminated from employment



- b. Notice of cross-appeal with regard notice pay and whether the claimant was entitled to reliefs sought.
22. It is trite that parties are bound by pleadings and that the court cannot determine the dispute outside the said pleadings. The court rejected the notice of cross-appeal stated as an issue in the submissions. There was no cross-appeal filed against the judgment of the trial court and submissions are not pleadings. The appellant had no opportunity to file response to the said cross-appeal hence it would unfair for the court to determine a cross-appeal only brought up by respondent replying to the appellant's submissions. The court in the circumstances found the issues under the appeal for determination based on the grounds of appeal were:-
- i. Whether the trial court erred in finding unfair termination
 - ii. Whether the trial court erred in reliefs granted.

Whether the trial court erred in finding unfair termination

23. The grounds of appeal under the issue were:-The Honourable Magistrate erred in facts and in law by finding in favour of the Claimant to the extent that his employment was unfairly terminated.The Honourable Magistrate erred in facts and in law by awarding the Respondent the sum of Kshs. 168,000.00 being 12 months' salary and the sum of Kshs. 224,000.00 being service pay as compensation for unfair termination together with costs of the suit.The Honourable Magistrate erred in facts and in law by failing to consider the evidence on record and appreciate the fact that the Appellant had fully paid the Respondent all the final dues despite the fact that the Respondent had not been dismissed from work.The Honourable Magistrate applied the wrong principles in awarding the sum of Kshs. 392,000.00 as compensation to the Respondent and in granting the reliefs sought.The Honourable Magistrate erred in facts and in law in failing to appreciate the totality of the weight of the evidence adduced by the Appellant to show that the Respondent's employment was not terminated but that he absconded duty in spite of the Appellant's efforts to trace him.
24. The Appellant stated he had engaged the Respondent as a general worker and also did watchman duties at his residence where he was housed. They had been together from 2004 to 2020. The Respondent/claimant stated after a robbery incident at the residence of the appellant he was arrested at the instigation of the Appellant. The police investigated the incident and found the respondent was not responsible thus no charges were preferred. He had been in police custody for 3 days . Upon release on the 23rd October 2020 the appellant terminated his services. The respondent later reported the matter to the labour officer where he said he was coerced to sign agreement for payment of Kshs. 102,243 of which Ksh. 25500 was deducted by the labour officer under dubious circumstances. (pages 10-11 of supplementary ROA was the witness statement of the claimant).
25. The appellant in his witness statement agreed that he had engaged the claimant as a general worker from 2004 to 2020 and in paragraph 7 explained the terms of engagement. In paragraph 11 of the appellant's witness statement before the trial court he stated that after the police arrested the claimant he returned to work after three weeks and could not explain his absence. That he explained to him due to the police case the claimant could not resume work immediately and that he advanced Kshs 2000 to the claimant to proceed on accumulated leave which he agreed to. That at end of month he sent the claimant a message to confirm the MPESA number for payment while on leave. That the claimant did not respond. That a couple of months later the labour officer conducted him and they signed certificate to pay the claimant Kshs. 102243 after deducting Kshs. 25000 of which he had advanced a loan to the claimant. That the money was paid in 2 instalments. Ksh. 50,000 paid in the presence of the labour officer and Kshs. 52,243 paid in the month of April.



26. In paragraph 17 of the witness statement, the appellant had tabulated the payment before labour office which included notice pay for one month, leave and the loan. That labour officer tabulated the dues to Kshs. 127243 and the claimant in pleadings overlooked the loan of 25243. The appellant produced the certificate at page 31 of ROA and the court noted the tabulation in paragraph 17 of the respondent statement tallied with the certificate. During cross-examination the claimant told the court he had worked for 16 years. He admitted there were 2 other employees, a chef and a cleaner. That there was no watchman. He was granted leave when the family left for India for 21 days and when he lost his child. That after the police incident he reported after three days on release and was given off by the appellant to allow for investigation for 21 days and on reporting back the employer told him the investigations were still on.
27. The Respondent/claimant told the trial court that in March 2021 he reported to the labour officer. The matter was settled and he did not formally complain to the labour officer. On re-examination he stated that he protested to the labour officer as he did not agree with the labour officer. The appellant on cross-examination admitted the claimant was his employee 2004-2020. He was suspected for having been involved in the theft incident but was not charged, the labour officer agreed with the computation of the dues. The appellant admitted there were alterations in the certificate of payment. The appellant agreed that he did not expressly ask the claimant to return to work. On re-examination the appellant told the trial court the claimant signed the certificate of formal payment in his presence. The trial court found that the claimant was not lawfully terminated as the appellant did not recall him back. I found that was admitted by the appellant at cross-examination and no basis to interfere with the finding of the trial court.

Whether the trial court erred in reliefs granted.

28. On the award of Compensation equivalent of 12 months salary of Kshs. 168000. The claimant had served for 16 years. He was not recalled to work after being sent away after arrest by the police and release without any charge. It was the appellant who told him to stay away from work. The claimant had no other benefits. The court on finding wrongful termination is obliged to consider and apply remedies under section 49 of the *Employment Act* as stated in *Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR* on the applicability of the provisions of Section 49 as hereunder;

“.....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....” The court was of the opinion that the issue of reasons for termination was not considered by the labour officer and the claimant was entitled to his day in court on that issue despite the said agreement. The court found no basis to interfere with the decision of the trial court (*Mbogo v Shah*).



On Service pay.

29. Section 35 of the employment Act provides for payment of service pay as follows:-

- (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) 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.”The claimant was not under NSSF or any other scheme. The court noted under the tabulation, he was paid service pay amount of Kshs. 54,810. The trial court ought to have discounted that amount having held that paragraph 17 of the response was not disputed. Further the service pay under current legal framework is 15 days for every year served and as correctly applied by the labour officer. Thus the claimant was entitled to service pay of 14000 x16 /0.5 total sum of Kshs. 112,000 les 54810 total service pay due Kshs. 57190/- . The court interfered with the reliefs awarded to that extend.

Conclusion

29. The appeal is allowed on the amount of awarded service pay only. The Judgment and Orders of the Honourable B.M. Cheloti (SRM) delivered at Nairobi on the 17th of February, 2023 in MCELRC No. E1040 of 2021 is set aside and substituted as follows:-

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

The termination is held to have been unlawful

12 months salary for unfair termination at Kshs 168,000

Balance Service pay of Kshs. Kshs. 57,190/- .

Total sum awarded for Kshs. 225,190 with interest at court rate from judgment date until payment in full.

Certificate of service

Cost of the suit.

30. Costs in the appeal are awarded to the appellant.

31. It is so Ordered.



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

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : Ms. Mwanja

Respondent:-Ms. Wachira h/b Kiwinda

Further Court Order

Stay of 30 days is granted.

J.W. KELI,

JUDGE.

23/05/2025

