Cool Collection Limited v Murimi (Appeal E099 of 2024)
[2025] KEELRC 1393 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1393 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E099 OF 2024

NJ ABUODHA, J

MAY 5, 2025

BETWEEN

COOL COLLECTION LIMITED ..... APPELLANT

AND

JACKSON CHACHA MURIMI ..... RESPONDENT

((Being an appeal from the Judgment of Hon. C. K Cheptoo (PM) delivered on 8th March 2024 in the Chief Magistrate Court at Nairobi, CMEL NO. E1052 OF 2020))

JUDGMENT

1. Through the Memorandum of Appeal dated 26th March 2024, the Appellant appeals against part of the Judgement of Honourable C. K Cheptoo, Principal Magistrate delivered on 8th March,2024.
2. The Appeal was based on the grounds that: -
    i. The Learned Magistrate erred in law and in fact, misdirected herself and ignored the Appellant's testimony and evidence in arriving at the Judgment, to the Appellant's prejudice.
    ii. The Learned Magistrate erred in law and in fact, misdirected and contradicted herself when she , on the one hand, found that the Appellant had proved the reasons for summarily dismissing the Respondent from employment and on the other hand, finding that the said dismissal was unfair and unlawful.
    iii. The Learned Magistrate erred in law and in fact and exhibited bias when she found that the Appellant did not tender any evidence to confirm that the Respondent was granted a fair hearing before his termination.

iv. The Learned Magistrate erred in law and in fact, misdirected herself and ignored the Appellant's evidence when she found that the Appellant had not issued the Respondent with a notice to show cause prior to terminating him from employment.

v. The Learned Magistrate erred in law and in fact when she failed to appreciate that a disciplinary hearing does not have to be oral hearing in all cases and that the same may be conducted through exchange of letters.

3. The Appellant prayed that the Appeal be allowed with costs and Judgment of the trial magistrate be set aside.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions.

5. The Appellant's Advocates Maranga Nyang'ute & Co. Advocates filed written submissions dated 20th February 2025 and on the issue of whether the Respondent was granted a fair hearing prior to his dismissal, counsel submitted that it was the holding of the trial court that the summary dismissal effected by the Appellant against the Respondent had failed to tender any evidence to confirm that the Respondent was granted a fair hearing before his termination.

6. Counsel submitted that had the trial magistrate appreciated that a fair hearing need not always be oral in nature, she would have arrived at a different conclusion as pertains the procedure of the dismissal. That the warning letter dated 8th June, 2020 constituted a written opportunity for the Respondent to be heard and present his case to the Appellant, which opportunity the Respondent failed to honour by first, failing to sign for the same and secondly, failing to respond thereto as anticipated under section 41(2) of the *Employment Act*.

7. Counsel relied on among others the case of Silas Otieno Okumu v Kenya Medical Research Institute [2022] eKLR and submitted that fair hearing need not be oral and that the same can be achieved through correspondence. That the Respondent's dismissal was not only justifiable but also procedurally fair.

8. On the issue of whether the Respondent was entitled to the reliefs awarded at trial court, counsel submitted that the Respondent was not entitled to the reliefs awarded as the same were awarded upon the erroneous holding that the Respondent was not granted a fair hearing prior to his dismissal from employment.

Respondent's Submissions.

9. The Respondent despite his counsel stating that they had filed his submissions in the proceedings the only submissions were with regard to the Notice of Motion application and not this appeal. At the time of preparing this judgment the Respondent had not filed submissions with regards to this appeal.

Determination.

10. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by the Appellant's counsel herein and reiterate that principles which guide this court in an appeal from a trial court are now well settled. In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court of Appeal stated that:-

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this

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.

11. The Judgment of the trial court was entered against the Appellant with costs on the basis that the Respondent's dismissal was unfair and unlawful and the Respondent was awarded Kshs 100,481/37. The appellant was further ordered to issue the respondent with a certificate of service. The Appellant being aggrieved by the part of the said judgment raised five grounds in its Memorandum of Appeal which this court will reduce to two grounds namely:

    a. Whether the trial court erred in finding that the Respondent's termination of employment was unfair and unlawful

    b. Whether the trial court erred in awarding the Respondent the reliefs sought

    Whether the trial court erred in finding that the Respondent's termination of employment was unfair and unlawful

12. The Trial Court in its judgment held that the Appellant proved that the Respondent was terminated summarily and proved the reason for the termination as required. The requirements for employers to terminate employee's employment contracts on both substantive and procedural fairness is now paramount. Case in point is the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR among others.

13. Whereas the trial court found that the Appellant had valid reasons to summarily dismiss the Respondent this court disagrees with this position for the reason that on 5th June, 2020 the Appellant rescinded its decision to terminate the Respondent and stated that the intended termination will not be used as victimization of the Respondent. On 8th June, 2020 just three days after the decision the Appellant issued a warning letter to the Respondent alleging that he reported to work late. The Appellant had indicated that the Respondent wanted an early retirement which was disputed by the Respondent and his dues calculated which he also refused to sign for.

14. Whereas the court notes that the reason for summary dismissal talks of coming late to work and being absent, no evidence was presented by the Appellant as the custodian of employment records as per section 74 of the *Employment Act* to support that the Respondent did commit the said acts. No attendance sheets were produced to show the late coming or absenteeism of the Respondent by the Appellant. To this court it seems the Appellant reinstated the Respondent back to work instead of declaring him redundant and pay his dues in order to find reasons to terminate him without paying his dues.

15. Section 47(5) of the Act puts the burden of proof on the employer to justify the reasons for termination which should be fair under section 43 of the Act. The appellant did not sufficiently discharge this burden hence the trial Court erred in finding that the appellant had valid reasons to summarily dismiss the Respondent.

16. Regarding procedural fairness the same is governed by section 41 of the *Employment Act* which provides for notification and hearing before termination. There is no doubt that absenteeism and coming to work late are some of the grounds of gross misconduct which can lead to summary dismissal but even in such cases the employee must be heard. Case in point is the court of Appeal decision in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, where the court stated:

    " There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment

contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

17. The trial court held that the Appellant did not tender any evidence to confirm that the Respondent was granted fair hearing before his termination and that a notice to show cause was not issued to the Respondent and no disciplinary hearing was held before his termination.

18. This court affirms the finding of the trial court while noting that a warning letter given three days after the Appellant rescinded its decision to terminate the Respondent was a clear indication that the Appellant was hell bend to terminate the Respondent by all means. In any case the warning letter was only one and not a final one to amount to hearing by correspondence since no show cause letter was given to the Respondent to give his side of story. The Respondent's dismissal was therefore unfair and unlawful both procedurally and substantively.

Whether the trial court erred in awarding the Respondent the reliefs sought

19. In arriving at the suitable remedy after finding unfair termination the court ought to be guided by criteria under 49(4) of the *Employment Act*. The trial court awarded Kshs 26,206.15/= as salary for days worked in July 2020, Kshs. 21,068/= as notice pay and 3 months' salary as compensation for unlawful termination.

20. It is now an established principle that for an appellate court to interfere with the award of damages made by the trial court, there has to be sufficient grounds. Newbold P in Mbogo v Shah [1968] EA 93 while determining the principles that guide the court on interference with the exercise of judicial discretion held that:

> " ... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

21. The court is tasked to interrogate if the award of three months as damages for unfair termination was erroneous, low or excessive in order to disturb it. This court notes that the Respondent had worked for around 5 years since July, 2013.The Appellant came up with a scheme to terminate him by avoiding declaring him redundant so that he could be paid severance pay. The award of three months' salary is therefore too low in the circumstances and this court will disturb the same and in place thereof award the respondent six months' salary instead.

22. The trial court noted that the parties did not have a smooth working relationship. The appellant's actions were therefore irrational unjustified in the circumstances.

23. In conclusion, the Appeal is found without merit and is hereby dismissed with costs to the Respondent. This Court however for reasons stated above will vary the award of the trial Court as relates to compensation for unfair termination and substitute the award of three month's salary with an award of six months' salary as compensation for unfair termination of service. Other awards by the trial Court shall remain undisturbed.

24. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2025

DELIVERED VIRTUALLY THIS 5TH DAY OF MAY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION