



REPUBLIC OF KENYA



KENYA LAW
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**Musau & another v Treadsetters Tyres Limited (Appeal E155 of 2021)
[2024] KEELRC 87 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 87 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E155 OF 2021
J RIKA, J
JANUARY 31, 2024**

BETWEEN

JOSEPHINE MALINDA MUSAU 1ST APPELLANT

ESTHER MUGURE KARIUKI 2ND APPELLANT

AND

TREADSETTERS TYRES LIMITED RESPONDENT

JUDGMENT

1. The two Appellants filed the Claim before the Trial Court, alleging that they were unfairly dismissed by the Respondent.
2. They worked as Customer Relations Managers.
3. They were dismissed for alleged involvement in loss of the Respondent's tyres.
4. They prayed for: -
 - a. Declaration that they were wrongfully and unlawfully dismissed.
 - b. Salaries and allowances for February 2019, and 1st March 2019 to 20th March 2019.
 - c. Damages for unfair termination.
 - d. House allowance.
 - e. Certificates of Service.
 - f. Pending annual leave days.
 - g. Costs.
 - h. Interest.



- i. Any other relief.
5. Proceedings of the Trial Court, as contained in the Record of Appeal, indicate that hearing took place on 24th June 2021 and 8th July 2021. Judgment was delivered on 2nd November 2021. The Claim was dismissed with no order on the costs.
6. The Appellants challenge the decision of the Trial Court, based on five grounds: -
 - a. The Trial Court erred in finding that termination was lawful.
 - b. The Trial Court erred by failing to consider the Appellants' submissions and evidence.
 - c. The Trial Court erred in failing to award housing allowance to the Appellants.
 - d. The Trial Court erred in failing to award unpaid salaries.
 - e. The Trial Court erred in failing to find that the Respondent bore a statutory duty to satisfy procedural fairness and grounds of termination.
7. Parties agreed to have the Appeal considered and determined on the strength of the Record of Appeal, and submissions. They confirmed filing and exchange of submissions at the last mention before the Court on 20th September 2023.
8. The Court has looked at the Judgment and Proceedings of the Trial Court with a lot of anxiety. The evidence as recorded is sketchy, muddled, and does not assist the Court on Appeal, to determine with exactitude what the issues before the Trial Court were, what evidence was presented by the Parties, and what findings were made on each issue presented for determination of the Trial Court.
9. On 24th June 2021, one of the Appellants is recorded to have given evidence. It is not indicated which of the Appellants gave evidence. The name is not recorded. It is not clarified if the particular Appellant gave evidence for both Appellants.
10. The evidence on record [verbatim], is as follows: -

“ There are allegations of theft. I was never found guilty in a court of law. There was no investigation done. At paragraph B [the document after document].

There was payment November 2018 to January 2019. March and February 2019 was not paid. Am seeking February and March 2019.

That’s all for the Claimant. That’s close for the Claimant after compulsory leave there was no other engagement. That the close of the Claimant case.”
11. The evidence above does not disclose which Appellant gave evidence; whether there was cross-examination of the Appellants; whether they exhibited any documents; or adopted their witness statements in their evidence.
12. The evidence recorded for the Respondent is equally unclear. The name of DW1 was not stated. His / her evidence was incomprehensible. He/she states [verbatim] that: -

“ There were fraud established goods were sold. Left company and account that received there was fraud. The two Claimant were involved in the fraud...”
13. Cross-examined, this unnamed witness states [verbatim]: -



“ This was my public report. The report and letter seeking compulsory leave. Have development on deletion of some information I have not extracted the date base information. The claimant were the incharge of deposit and collection of money.”

14. Re-examined, the witness states that, “I analysed data for direction. That is all.”
15. The evidence by the 2nd witness for the Respondent, who identifies himself as Gitogo, without stating what his designation with the Respondent was, is similarly unclear.
16. It is not recorded whether the Respondent exhibited documents, and the nature of the documents if any, is unstated.
17. Regrettably, the Judgment coming at the end of this hearing does not assist in clarifying the evidence, the issues, and in laying the ground for resolution of those issues. It is not worded in clear language.
18. The Trial Court writes [verbatim]: -

“ Each of the Claimant produced her case, by replying to the witness statement as evidence-in-chief... the point in case is that there was allegation of fraud at the Respondent process that resulted in loss of tyres did considerable losses at the Respondent office this happened at the Claimants tenure, they were notified of this anormally, they were suspended and later dismissed for gross misconduct the plaintiff aver that the entire process culminating to the dismissal was unprocedural and the Respondent justified dismissal...”

The subsequent decree to dismiss the Employees based on gross misconduct was amend after participating meetings. The story of the Employer in this regard is believable there is amending evidence of this Claimant involvement in this scene to fraud the company there being no criminal proceedings initiated is neither here nor there the consequence of the issue is that the Claimant case fail to succeed the same are dismissed.”

19. The record of the trial is therefore jumbled, indicative of a mistrial, and no Court on Appeal can make a proper Judgment based on this record.
20. Proceedings and Judgments of a Trial Court must be recorded in fairly clear language, bearing always in mind that Parties may wish to pursue appellate proceedings based on the record, and that the appellate jurisdiction will rely on the record, in considering and determining the grounds raised on Appeal.
21. The witnesses who appear on trial must be identified by name and their designation at the workplace, and role in the matters in dispute, clearly recorded. Witness statements and documents must be identified and presented by the relevant witness. The Judgment itself must give a case summary, identify the issues and rule on all issues raised by the Parties, anchoring determination of the issues on recorded evidence. Without this, the appellate process is hampered.
22. The Trial Court said nothing about the prayers for house allowance, annual leave, salaries and allowances. The Judgment focuses on alleged fraud, the reason justifying termination. Even this area of focus, is not clearly discussed and determined in the Judgment of the Trial Court. The Claim was dismissed wholesale, without an explanation why other prayers, beyond the remedy for unfair termination, failed. Even the prayer for Certificate of Service, a statutory right under Section 51 of the *Employment Act*, fell by the wayside, the Trial Court having determined that termination was fair and lawful. Finding that termination was fair and lawful, did not preclude consideration of other benefits claimed by the Appellants.



23. Gerald Lebovits, in his article, Judgment Writing in Kenya and the Common-Law World, Kenya Law Review, March 2010, provides some useful guidelines for Judges and Magistrates on judgment-writing.
24. He advises that Judges [and Magistrates] must be professional writers. The Litigants and Advocates affected by their decisions are not their only consumers. Judgments are read and often criticized by Advocates, other Judges and Magistrates, and the Public. The primary purpose of a Judgment is to tell the Litigants why the case was decided the way it was; why they won or lost. A Judgment should show the Litigants that the Judge considered their positions and that justice was rendered.
25. Lebovits underscores that Judgments allow the Judges to communicate with the public; explain the law to the public; and allow Judges to assure the public that justice is not being administered arbitrarily. Consistent with due process, Lebovits argues that Litigants, Appellate Courts and the public, need to know how and why the Court decided an issue.
26. There were glaring defects in the Proceedings and Judgment of the Trial Court, to warrant declaration of a mistrial.
27. The record presented by the Parties justifies a retrial. The Court does not think that the prayers sought by the Appellants, without a prayer for retrial - that the Appeal is allowed; that Judgment of the Honourable Magistrate be set aside; and costs of both the Claim and the Appeal be borne by the Respondent- would resolve the dispute between Parties. They need to be reheard.

It Is Ordered: -

- a. Proceedings and Judgment of the Trial Court in Chief Magistrate's Court at Nairobi, CMEL No 1230 of 2019 are set aside.
- b. There shall be a retrial of the Claim before any another Hon. Magistrate, other than Hon. Principal Magistrate D.W. Kivuti, designated by the relevant Chief Magistrate, Nairobi.
- c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA
JUDGE

