



REPUBLIC OF KENYA



KENYA LAW
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**Nolands Engineering Limited v Ogutu (Appeal E018 of 2023)
[2024] KEELRC 36 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 36 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E018 OF 2023
AK NZEI, J
JANUARY 25, 2024**

BETWEEN

NOLANDS ENGINEERING LIMITED APPELLANT

AND

BENARD OTIENO OGUTU RESPONDENT

JUDGMENT

1. The Respondent herein was the Claimant in Mombasa CM ELR case No. 312 of 2021 whereby he had sued the Appellant claiming:-
 - a. Unpaid salary for March 2021ksh. 38,000
 - b. Payment in lieu of notice (one month salary)....ksh. 38,000
 - c. Payment in lieu of annual leave
 - i. 2019 (15 days X1,266.67 per day).....ksh. 19,000.05
 - ii. 2020 (15 days x1,266.67 per day).....ksh. 19,000.05
 - iii. 2021 (5.25 days x1,266.67 per day).....ksh. 6,650.01
 - d. House allowance November 2018-March 2021 (15%x38,000) x29 monthsksh. 165,300
 - e. Compensation for damages for unfair termination (38,000x12 months)ksh. 456,000
 - f. Certificate of service.
 - g. Costs



- h. Interest at Court rates.
2. The Respondent had pleaded:-
- a. that he was employed by the Appellant as an accountant in or about November 2018 at a monthly salary of ksh. 38,000, and worked on continuous and uninterrupted basis upto 30/3/2021.
 - b. that on 30/3/2021, whilst the Respondent was undertaking his duties as an accountant, the Appellant's Director, Mr. Joseph Adoyo, requested for Kenya Railways Sales Report for Nairobi Office, which was ordinarily done by the invoicing clerk supervised by the Operations Manager at the Nairobi Office.
 - c. that according to the Director, there was a tender renewal for Kenya Railways due that day and he wanted the report for renewal of the tender. That all tender applications, renewals and contracts were handled by the Director together with the Nairobi office.
 - d. that the director indicated that the invoicing had not been done correctly, upon which the Respondent offered to follow up with the Nairobi office who had prepared the report, upon which the Director shouted at the Respondent and demanded that he shuts down his computer, hands over the KRA password, leaves the office, and wait to be called back for handover.
 - e. that the respondent was never informed of the reason for the summary dismissal, was not afforded a disciplinary hearing, and his March 2021 salary was unlawfully withheld.
 - f. that the Appellant unilaterally, without notice and without just cause, summarily dismissed the Respondent without due process, hence breaching the Respondent's labour rights under Article 41 of the Constitution of Kenya 2010 and Sections 41,43 and 45 of the Employment Act.
 - g. that the termination was unlawful termination.
 - h. that the Respondent was never paid house allowance throughout his employment, was never afforded annual leave days during the employment period, and that the same were due at the time of termination.
3. Other documents filed by the Respondent in the trial Court alongside his statement of claim dated 10/5/2021 were evenly dated written witness statement of the Respondent and a list of documents, listing four documents. The listed documents included copies of the Respondent's Identity Card, NSSF statement dated 1/4/2021, demand letter dated 19/4/2021 and response to demand dated 19/4/2021.
4. The Appellant entered appearance on 28/5/2021 and subsequently filed a Memorandum of Response on 7/7/2021. The Appellant pleaded:-
- a. that the Appellant employed the respondent as an accountant at a consolidated monthly salary of ksh. 38,000, which was paid monthly in arrears. That the Respondent was employed as an accountant on understanding that he knew his work and how to carry it out in accordance with lawful instructions issued by the Appellant.
 - b. that the Appellant never terminated the Respondent, and was never owed any dues by the Respondent.
 - c. that the Respondent resigned from employment.



- d. that the Respondent owed the Appellant for unprocedural and abrupt resignation without notice.
 - e. that on 30/3/2021, the Respondent failed to prepare and to handover a profit and loss report regarding an expiring contract between the Appellant and Kenya Railways, which report was to inform the rates for a new tender before its submission on that same day, being the deadline for submission of bids for tenders.
 - f. that the Respondent left employment voluntarily by himself, and as such no disciplinary proceedings were held, and that the respondent could not seek to benefit from his own illegal action.
 - g. that the Appellant pursued the Respondent to return to work and issue a hand over report if he was no longer interested in working, which position the Appellant indicated in its response to the Respondent's letter of demand.
 - h. that the salary that was paid to the Respondent was consolidated, and the claim for house allowance was misplaced.
 - i. that the Appellant claimed from the Respondent the equivalent of one month salary for leaving employment unprocedurally without notice.
 - j. that Sections 41,43 and 45 of the *Employment Act* can only be exercised while an employee is within the ambits and control of the employer.
5. Other documents filed by the Appellant in the trial Court were witness statements of Joseph Owuor Adoyo, Selina Wuganga Mwandawiro and Bob Munga Mbogo, dated 22/12/2021 and 15/12/2021 respectively. The Appellant also filed a list of documents dated 10/1/2022 listing three documents. The listed documents included a Tender document No. KR/SCM/136/2020-2021, a previous contract between the Appellant and Kenya Railways Corporation and an email dated 9/6/2021.
6. Trial is shown to have commenced on 5/7/2022 when the Respondent testified and adopted his witness statement dated 10/5/2021 as his testimony and produced in evidence the documents referred to in paragraph 3 of this judgment. Cross examined, the Respondent, who was the Claimant, testified:-
- a. that he left employment on 30/3/2021, and that on that date, the Appellant's director, Mr. Adoyo, asked him for a sales report, which was key to the Kenya Railways tender, which the Respondent gave to him, and that the director signed it.
 - b. that the Respondent was not handling the Kenya Railways tender, which was being handled at Nairobi.
 - c. that the director asked for another contract which the Respondent did not have and had never seen; and told the Respondent to switch off his computer, give out the KRA password, and leave.
 - d. that on the Respondent left without collecting his personal effects and was never paid his March 2021 salary.
 - e. that 27/11/2020, the Respondent took three days study leave after filling leave forms, and that during December; people were released for holidays.



7. Re-examined, the Respondent testified that the Appellant had Nairobi and Mombasa branches, and that the Nairobi office was responsible for tendering, while audited accounts came from the Mombasa Respondent's office. That sales reports were not required for tendering.
8. The Appellant, who was the Respondent in the trial Court, called three witnesses. RW-1 (Bob Munga Mbogo), adopted his witness statement as his testimony and told the trial Court that the Respondent was not terminated but quit his job by resigning.
9. RW-2 (Joseph Owuor Adoyo) was the Appellant's director and CEO, and he adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. He further testified that on 30/3/2021, he requested the Respondent for a profit/loss report which was required for purposes of renewing a tender which was downloaded from Nairobi. That the tender included units done in Nairobi, and that the report required of the respondent was within his mandate.
10. Cross-examined, RW-2 testified that the Respondent's salary was ksh. 38,000 per month and that the same was consolidated, that the Appellant did not have minutes of the meeting alleged to have taken place on 30/3/2021, and did not have the Respondent's resignation letter, that the Respondent's salary had not been paid. That the Respondent did not give RW-2 a profit and loss account, and that RW-2 did a verbal communication with him. That the Respondent was not fired, but left on his own accord, and never handed over.
11. RW-3 adopted her filed witness statement as her testimony. Cross-examined, the witness (RW-3) testified that she was RW-2's wife, and was involved in the Appellant company's management. That RW-2 asked the Respondent to switch off his computer and to give out the passwords thereto. That there were no proceedings regarding the Respondent's conduct, and that there were no follow ups. That the Respondent's conduct was rude, but he was not terminated.
12. Both parties are shown to have filed written submissions upon closure of the trial, and the trial Court delivered its judgment on 13/2/2023 in favour of the Respondent, finding that the Respondent had, on a balance of probability, established that the Appellant had summarily dismissed him without just and sufficient cause and without due process; and that the termination was unfair. The trial Court further made a finding that the Respondent was entitled to the reliefs sought in the memorandum of claim, which are set out in paragraph 1 of this judgment; and awarded the Respondent a total of kshs. 741,950.11 as sought in the memorandum of claim. The Respondent was also awarded costs of the suit plus interest at Court rates from the date of filing suit.
13. Aggrieved by the said judgment, the Appellant preferred the present appeal vide a memorandum of appeal dated 10/3/2023 and filed in Court on 13/3/2023, and set forth the following grounds of appeal. That the trial Court erred in both law and fact by:-
 - a. failing to record and analyse the evidence of the Appellant's witnesses despite acknowledging that the proceedings were vigorously defended, leading to a miscarriage of justice as only the Claimant's evidence is reflected in the judgment.
 - b. failing to appreciate and to properly analyse the evidence on record, and reaching a conclusion in error that the Claimant was terminated from employment against the weight of evidence.
 - c. disregarding the Appellant's three (3) witnesses who were present at the material time as acknowledged by the Claimant, and were consisted in their accounts that the Respondent was never terminated.



- d. entering judgment for the Claimant against the Respondent as prayed in the statement of claim without properly analyzing each award sought and giving reasons for allowing various awards.
 - e. allowing the prayer for annual leave when the Claimant's own evidence at the hearing was that he took his leave days without providing the leave days that he did not take.
 - f. awarding the prayer for house allowance when there was no basis laid for the same.
 - g. awarding maximum compensation of 12 Months without giving justification for the same and against the weight of evidence on record.
 - h. awarding the Claimant payment in lieu of notice when the evidence on record was clear that the Claimant was never terminated from employment.
 - i. awarding unpaid salary for march 2021 when the evidence on record was clear that the Claimant was the one who resigned unprocedurally and thus the one who ought to have paid the respondent in lieu of notice.
 - j. failing to consider that the Respondent was unable to provide evidence that he followed the Appellant's lawful instructions, and was unable to provide evidence on the prayers (awards) that he was seeking.
 - k. going against well-laid and long-established principles of evidence; and making orders that are unsupportable by law and fact.
14. The Appellant sought the following orders:-
- a. that the appeal be allowed.
 - b. that the judgement and orders in favour of the Claimant (the Respondent herein) delivered on February 13, 2023 be set aside.
 - c. that the Appellant be awarded costs of the appeal and of the trial below.
15. This is a first appeal; and the case as presented before the trial Court and all the evidence presented thereon is before me for fresh re-evaluation and consideration. The duty of a first appellate Court was well stated in the case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & Another* [1968] EA page 123 and in *Peters -vs- Sunday Post Ltd* [1969] EA 424.
16. In its grounds of appeal which I have set out in paragraph 13 of this judgment, the Appellant alludes to failure by the trial Court to analyse and to consider all the evidence presented before it, and as a result arriving at a judgment that was against the weight of evidence presented. I will tackle the grounds of appeal together, and in my view, the following issues emerge for determination:-
- a. whether the Appellant terminated the Respondent's employment on 30/3/2021 as pleaded by the Respondent in the trial Court; and whether the termination was unfair.
 - b. whether the Respondent was entitled to the reliefs sought.
17. On the first issue, the Respondent testified that his employment was on 30/3/2021 terminated by the Appellant's director, Mr. Joseph Ooyo (RW-2). That the said Director told the Respondent to switch off his computer, to give out the KRA password and to leave, and that he would be called to handover. That he was never called back. This bit of evidence was corroborated by RW-3 who testified under cross-examination that she heard the Respondent being told by the Respondent's Director (RW-2) to switch off his computer and to give out the passwords for the same. It is worth noting that this



particular witness (RW-3) told the trial Court that she was the Director's wife (RW-2's wife) and was involved in the Appellant company's management.

18. I am not convinced that the Respondent left employment voluntarily on 30/3/2021 and/or unprocedurally resigned as asserted by the Appellant's witnesses. If the Respondent left employment without being terminated and without formal resignation as stated by the Appellant's witnesses, the Appellant, being the employer, ought to have used that act and/or fact as a basis of initiating disciplinary proceedings against the Respondent and to summarily and formally terminate the Respondent's employment under Section 44(4) (a) of the Employment Act for absenting himself from the place appointed for the performance of his work. I am unable to agree with the Appellant that such a crucial issue of employment touching on the Appellant company's accountant could just be left to lie without being brought to a formal conclusion. RW-3 testified, under cross examination, that there were no follow-up's on the Respondent on his conduct.
19. The Appellant did not tell the trial Court what difficult it had in calling for the report in issue from the Respondent in writing, for record purposes, or issuing a notice for the Respondent to show cause why he could not be disciplined for failing to do what was within his scope of duty to do; or for failing to show up at his place of work after 30/3/2021.
20. It is to be noted that no contract of employment was produced in evidence, and that the Respondent's (contractual) scope of duty was never demarcated, at least according to the evidence on record. It is further to be noted that the Respondent's evidence in Court on the duties that the Respondent was supposed to perform and those supposed to be performed by the Appellant's Director (RW-2) together with the Applicant's Nairobi office contradicted the Appellant's witnesses' evidence on the same issue.
21. Section 10(7) of the Employment Act 2007 provides as follows:-

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”
22. In view of all the foregoing, I find and hold that the Respondent's employment was terminated by the Appellant, and that the termination was unfair as the mandatory procedure set out in Section 41 of the Employment Act was not adhered to. The Respondent was according to the evidence on record being accused by the Appellant of poor performance of a duty which he was, according to the Appellant, obligated to perform. Section 41 of the Employment Act provides as follows:-
 - “(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
23. It is my finding that the Respondent's employment was terminated by the Appellant and that the termination was unfair for failure by the Appellant to adhere to the foregoing mandatory procedure,



and to demonstrate validity of the allegations levelled by it against the Respondent pursuant to Section 43(1) of the *Employment Act* 2007.

24. On the second issue, and having made a finding that termination of the Respondent's employment was unfair, I award the Respondent the equivalent of eight months' salary as compensation for unfair termination of employment; taking into consideration the circumstance under which the Respondent's employment was terminated. That is ksh. 38,000x8 = ksh. 304,000.
25. The Respondent had pleaded and testified in the trial Court that he earned a salary of ksh. 38,000 per month. The Appellant had pleaded as much.
26. The award of twelve (12) months salary being damages for unfair termination made by the trial Court was excessive, in the circumstances of the case, and is hereby set aside.
27. It was a common ground, in evidence, that the Respondent's salary for the month of March 2021 was never paid. The award of kshs. 38,000 in that regard is upheld. Further, the award of ksh. 38,000 being payment in lieu of notice is upheld pursuant to Section 35(1) (c) of the *Employment Act* 2007.
28. The claim for untaken annual leave days was not proved. The Respondent admitted, under cross-examination, to having taken some three(3) leave days in November 2020 and a study leave in May 2019. He further testified that "during December, people were released for holidays." The Respondent did not specify on which days during the month of December the Appellant's employees were released, and whether those days formed part of the employees' leave entitlement during the particular leave earning year.
29. Claims based on alleged untaken/unpaid leave days are in the nature of special damages, and must always be strictly proved. The awards made by the trial Court in lieu of annual leave are hereby set aside.
30. The award of ksh. 165,300 being unpaid house allowance is upheld pursuant to Section 31 of the *Employment Act*. Although the Appellant pleaded and testified that the Respondent's monthly salary of ksh. 38,000 was consolidated (to include house allowance), no evidence was presented to demonstrate that fact. No employment contract or an itemized pay statement was produced by the Appellant in evidence. As already stated in this judgment, an employer who fails to cause a contract of employment to be drawn up stating the terms and particulars of employment does so at his or her disadvantage. That is the creed of Section 10(7) of the *Employment Act*.
31. The Appellant's appeal herein partly succeeds to the extent stated in this judgment. For avoidance of doubt, judgment is hereby entered for the Respondent against the appellant as follows:-
 - a. Compensation for unfair termination
of employmentksh. 304,000
 - b. Unpaid salary for March 2021.....ksh. 38,000
 - c. One month salary in lieu of notice.....ksh. 38,000
 - d. Unpaid house allowance.....ksh. 165,300Total ksh. 545,000
32. The Appellant shall issue the Respondent with a certificate of service within 30 days of this judgment.
33. The Respondent is awarded interest on the awarded sum at Court rates, to be calculated from the date of this judgment.



34. Each party will bear its own costs of this appeal, but the Respondent will have costs of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH JANUARY 2024

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

