



REPUBLIC OF KENYA



Hakika Transport Services Limited & another v Nyongesa & another (Appeal E116 of 2023) [2024] KEELRC 438 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E116 OF 2023
M MBARŪ, J
FEBRUARY 29, 2024**

BETWEEN

HAKIKA TRANSPORT SERVICES LIMITED 1ST APPELLANT

HAKIKA TRANSPORT SERVICES LIMITED 2ND APPELLANT

AND

MARK WANJALA NYONGESA 1ST RESPONDENT

MARK WANJALA NYONGESA 2ND RESPONDENT

*(Being an appeal from the judgment by Hon. R. N. Akee (SPM)
delivered on 19 October 2023 in Mombasa CM ELRC No. E180 of 2022)*

JUDGMENT

1. The appeal herein arises from the judgment in Mombasa CM ELRC No. E180 of 2022 was delivered on 19 October 2023. The background of the appeal is that the respondent was employed by the appellant in the year 2016 as a truck driver until 14 August 2021 when he was dismissed over alleged siphoning of fuel out of a tractor he was assigned to drive. He claimed that he was not taken through the due process before termination of employment. At the time of his dismissal, the respondent was earning Kshs. 33,924 and he claimed the following;
 - a) Notice pay Ksh.26,41;
 - b) Unpaid leave allowance from 2016 to 2021 Kshs. 132,050;
 - c) Service pay from 2016 to 2021 Kshs. 66,025;
 - d) House allowance for 36 months Kshs. 142,614;
 - e) Unpaid rest days for 36 months Kshs. 94,046.40;



- f) 12 months' compensation;
 - g) Costs.
2. In response, the appellant's case before the lower court was that the respondent was taken through the disciplinary process after the breach of measures taken on remaining fuel was made at the year in the presence of other employees who were at the hearing and who confirmed the missing quantity of fuel which the respondent failed to explain. His basic wage was Kshs. 18,000 per month and termination of employment was justified hence no notice pay is due or compensations.
3. The learned magistrate delivered judgment on 19 October 2023 and made findings that the respondent was taken through the due process but his terminal dues ought to have been paid and hence awarded him as follows;
- a) Notice pay Kshs. 21,410;
 - b) Accrued leave days Kshs. 132,050;
 - c) House allowances Kshs. 64,800;
 - d) Costs and interests.
4. Aggrieved, the appellant filed this appeal on the grounds that;
- 1. The learned magistrate erred in fact and law in allowing the prayer for accrued leave;
 - 2. The learned magistrate erred in fact and law in allowing the prayer for notice pay.
 - 3. The learned magistrate erred in fact and law in allowing the prayer for house allowance.
 - 4. The learned magistrate erred in law in granting an order not sought.
5. The appellant is seeking that the judgment of the lower court be varied and or set aside.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that leave for the years 2020 and 2021 was paid to the respondent in cash and such evidence was submitted before the trial court and this was not contested. The amount for 21 leave days is allocated at Kshs. 16,720 for the year 2020 and prorated for 2021 at Kshs. 9,554 and should not have been awarded as this is a double payment.
8. The appellant had issued a contract to the respondent that allowed for dismissal and termination of employment without notice. where the employee was found to be of gross misconduct, such allowed for termination of employment without notice or payment. The lower court made a finding that there was due process in addressing the gross misconduct of the respondent and hence notice pay should not have been awarded as held in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited Cause No.435 of 2013* and in *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another*.
9. The appellant submitted that house allowances were wrongly awarded on the basis that the respondent had a basic wage of Ksh. 14,200 plus house allowance of Ksh. 2,150 per month which he admitted in evidence. His employment contract allowed for a basic wage and a house allowance and the trial court should not have awarded what was already allocated. The appellant filed work records to demonstrate that indeed, in November and December 2020 the respondent was paid a house allowance of Ksh. 2,700.



10. In response, the respondent submitted that the awards by the lower court are proper and justified and should be confirmed with costs. Notice pay is due where there is a lapse in the due process as held in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. The lower court analyzed the evidence and established that the appellant failed to take the respondent through a fair disciplinary process.
11. Leave allowance is due under Section 28 of the Employment Act, 2007 where the employee is not allowed to take his annual leave. For 3 years, the respondent had 21 days each. The appellant called the human resources manager who testified that the leave forms had different signatures which could not be verified. The respondent did not take annual leave and the award in compensation was justified.
12. A house allowance is due at 15% of the basic wage as held in *Arasa & another v Benori Agencies and Services Limited* Cause No. 242 of 2017. Where there is a payment of a minimum wage, the Regulation of Wages Orders applies in assessing the house allowance due as held in *Trevor Marambe v for You Chinese Restaurant* [2021] eKLR.

Determination

13. This is a first appeal. the court must re-evaluate the entire record and make its conclusions but take into account that the lower court had the chance to hear the witnesses in evidence.
14. The issues for determination are well addressed by both parties. These relate to the awards of notice pay, leave days, and house allowances.
15. Notice pay is due to an employee under the provisions of Section 35 of the Employment Act, 2007 (the Act). this is in the instance where the contract of employment allows for notice or payment instead of notice before termination of employment for a good cause. However, where employment is terminated due to misconduct and the employee is taken through a fair disciplinary process, he cannot justify a claim in notice pay.
16. In this case, the learned magistrate assessed the claim for unfair termination of employment and established that the appellant took the respondent through a fair procedure. He was invited to a disciplinary hearing and allowed to call witnesses. Where the due process is not faulted, notice pay does not accrue.
17. Further, Section 43(1) of the Act places the burden of proving reasons for termination of employment on an employer, and failure to do so, renders such termination unfair. In addition, section 45 (2) of the Act qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair, and relates to the employee's conduct, capacity, or compatibility; or based on the operational requirements of the employer. Where the employer discharges its burden, then notice pay ought not be awarded. In this case, the award in notice pay is not justified.
18. Leave pay only accrues where the employer fails to secure the rights under Section 28 of the Act. the appellant filed a payment statement for final dues in August 2021 which included pay for pending leave days of 21 days for the year 2020 all at ksh. 16,720 and prorated 12 days due in the year 2021 at ksh. 9,554. Section 28(2) of the Act only allows an employee to accrue leave days for up to 18 months.
19. At the end of his employment, the respondent was well compensated for untaken leave days. To make an award for the same is to negate the evidence outlined in the payment statement.
20. On house allowances, indeed, as the respondent submitted, there are cadres of employees who are regulated and the Minister publishes Wage Orders to secure the minimum wage. The respondent is defined as a truck driver. He had an employment contract appointed as a truck driver. My place of



employment is Jomvu, Changanwe in Mombasa County. His wage is allocated as Ksh. 14,200 and a house allowance of Ksh. 2,150 per month.

21. In his Memorandum of Claim, the respondent asserted that his monthly wage was ksh. 33,924 but claimed notice pay at ksh. 26,410. He also filed his payment statement for November 2020 and the basic wage is ksh. 18,000 and a house allowance of ksh. 2,700. He filed his P9 form with an outline of the monthly wages for the year 2020 and his total gross varied between Ksh. 26,000 and Ksh. 21,000. I take it this was due to overtime and other allowances paid over each month.
22. Under the Regulation of Wages (General) (Amendment) Orders, a truck driver in Mombasa in the year 2020 was earning ksh. 17,561. The due house allowance at 15% is Kshs. 2,634.15. total gross wage, Kshs. 20,195.15 per month.
23. On this assessment, the respondent was well compensated by the appellant for his role and the wages paid. to claim outside his employment contract and the minimum wage allowed is an unjust enrichment.
24. In this analysis, the appeal is with merit. The awards for notice pay, leave pay, and house allowances allocated in the judgment delivered on 19 October 2023 in Mombasa CM ELRC No. E180 of 2022 is not justified. To this extent, the awards are hereby set aside and the appeal allowed. Each party is to bear its own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

