



Kimindi v Umoja Sons Ltd (Employment and Labour Relations Appeal E016 of 2022) [2024] KEELRC 302 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 302 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E016 OF 2022
ON MAKAU, J
FEBRUARY 16, 2024**

BETWEEN

JOHN KIMANI KIMINDI APPELLANT

AND

UMOJA SONS LTD RESPONDENT

(Being an Appeal against the Judgment of the Senior Resident Magistrate at Murang'a, Hon.S. Mwangi delivered on 28th September, 2022 in MELRC No. 4 of 2019))

JUDGMENT

1. By a Memorandum of Appeal dated 12th October 2022, the appellant seeks to reverse the judgment and decree of the Senior Resident Magistrate rendered on 28th September, 2022. The grounds of the appeal are:-
 - a. THAT the learned Magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probability contrary to the evidence on record.
 - b. THAT the learned Magistrate erred in law and in fact by failing to consider that the circumstances under which the appellant was terminated from his place of employment amounted to unlawful termination.
 - c. THAT the learned Magistrate erred in law and in fact by not inferring to the fact that there was no evidence of any convictions whatsoever on allegations of theft by servant.
 - d. THAT the learned Magistrate erred in law and in fact by improperly putting into consideration the issuance of a cheque by the respondents despite the fact



that it was issued under unclear circumstances and under a misguided belief that the cheque was sufficient compensation.

- e. THAT the learned Magistrate erred in law and in fact by failing to consider that as at May 2018 the basic minimum wage for a heavy commercial driver ought to have been Kshs.28,822.10 plus 15% house allowance.
- f. THAT the learned Magistrate erred in law and in fact by failing to consider that the appellant worked for the respondent from 6.am to 7pm and thus was entitled to overtime which collectively amounted to 15,600 hours for the period between 2009 to 2019.
- g. THAT the learned Magistrate erred in law and in fact by failing to consider and award the appellant his legal terminal benefits as from 2009 to 2019.
- h. THAT the learned Magistrate erred in law and in fact in believing and relying on the Respondent's submissions without any evidential value attached to them.
- i. THAT the learned Magistrate applied the wrong principles in law in making her findings.

Factual background

2. The appellant was employed by the respondent as a driver in January 2009. His employment was terminated on 13th February, 2019 for alleged theft of his employer's property. As at the time of the termination his monthly salary was Kshs.20,166.00. According to him, a heavy commercial driver like him, ought to have been receiving Kshs.28,822.00 basic pay plus 15% of the same as house allowance.
3. He further alleged that his work started at 6.00am and ended at 7.00pm everyday and every week for the whole period of service from 2009 to 2019, but he was never compensated for the extra time worked equaling to 15,600 hours. He sued the respondent in the lower court claiming one-month salary in lieu of notice, overtime for 10 years, annual leave and salary underpayment equaling to Kshs.3,217,397.60.
4. The respondent admitted that it employed the appellant but contended that it dismissed him for the offence of stealing company property. It denied liability to pay the dues sought and prayed for the suit to be dismissed with costs.
5. After hearing the suit, the trial court (Hon.S.Mwangi -SRM) found that the suit had not been proved to the required thresholds and dismissed it with costs.

Submissions herein

6. The appellant faulted the trial court for finding that his case had not been proved on a balance of probabilities. He submitted that the burden of proof was on the employer to prove the alleged theft but it did not discharge that burden. He contended that the respondent never proved the alleged theft by police OB Number or court judgment to prove that he was investigated, charged and convicted by court.
7. He further submitted that the employer did discharge the burden of proving that the vehicle he was employed to drive was not heavy commercial.
8. He further submitted that the trial court erred in law and fact by failing to find that his dismissal was unlawful. He contended that the dismissal was unlawful because he was dismissed for no valid reason



and without being accorded a hearing. For emphasis he cited the case of Postal Corporation of Kenya v Andrew K.Tanui (2019) eKLR and Pius Machafu Isindu v Lavington Security Guards Ltd (2017) eKLR where the court discussed the threshold for fair termination of employment.

9. He further submitted that the trial court erred in law and fact by failing to award the reliefs sought. He contended that he used to work from 6.00am to 7.00am which surpassed the normal working hours of 8.00am to 5.00pm. He assessed the extra time worked in 10 years to be 15, 600 equaling to Kshs.2,997,498.40.
10. Finally, he submitted that the trial court failed to consider his arguments and made a judgment that was per incuriam. He cited several authorities and Wage Regulations for 2017 and 2018 to fortify his case.
11. The Respondent, on the other hand submitted that the burden of proof lies with the party who wishes the court to enter judgment in his favour. It placed reliance on section 107 and 112 of the Evidence Act to fortify its submissions. It further relied on Section 47 (5) of the Employment Act which places the burden of proof of unfair termination on the employee. The respondent supported the impugned judgment since the appellant failed to place before the court sufficient evidence to establish his claim for unfair termination.
12. As regards the allegation that the trial court erred by failing to find that the dismissal of the appellant was unlawful, the respondent submitted that the appellant was involved in theft of Kshs.35,000.00 which was in his custody and that justified summary his dismissal under section 44(4) of the Employment Act. It contended that a report of theft was indeed made to the police under an OB Number 21/11/2019.
13. It submitted that the claimant registered persistent shortages of goods over a period of time. The shortage was confirmed when goods were counted during off loading in the presence of the appellant. A specific case was on 9th February 2019 when goods worth Kshs.35,000.00 in the appellant's custody went missing. He failed to account for the loss, hence the summary dismissal under section 44(4) (g) of the Employment Act and clause 15(e) of the Rules and Regulations for permanent employees which provide for summary dismissal for criminal offence against employer, and theft respectively.
14. For emphasis it relied on the case of Thomas Sila Nzivo v Bamburi Cement Limited (2014) eKLR and maintained that the trial court was right in her judgment on the matter of a suspected theft.
15. As regards the issue of salary payable to the appellant, the respondent submitted that the claimant was not employed to drive heavy commercial vehicle but canter FH. It submitted that canter FH was a medium commercial vehicle which was commensurate with the salary given to the appellant.
16. The respondent further submitted that the claim for overtime was not proved by evidence. It placed reliance on clause 15 of its Rules and Regulations for permanent workers, which barred claim for overtime unless the same was raised the same day the employee works. Further reliance was placed on the case of James Nyaundi v Kilgoris Sacco Ltd (2022) eKLR where the court held that if employee wishes to rely on employment records to prove his claim for overtime, he should utilize the procedure provided by the law to have the records produced in court.
17. As regards the reliefs sought, the respondent submitted that the appellant failed to adduce any evidence to prove the same. It contended that the claim for 21 days leave lacked particulars and supporting evidence.
18. It further contended that the claim for salary in lieu of notice lacked merits because the appellant was summarily dismissed for misconduct. It cited section 44 of the Employment Act which allows an



employer to dismiss his employee without notice for gross misconduct. Therefore, it prayed for the appeal to be dismissed with costs for lack of merits.

Issues for determination

19. This being a first appeal, my mandate is to re-evaluate the evidence and arrive at my own independent conclusions. I gather support from the case of Kenya Ports Authority v Kushton (Kenya) Limited (2009) 2EA 212 where the Court of Appeal held that: -

“On first appeal from the High court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though always it should bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

20. Having considered the evidence in the record of appeal and the submissions made herein, the following issues fall for determination: -

- a. Whether the appellant merited the reliefs sought in his suit.
- b. Whether the impugned judgment should stand.

DIVISION - Reliefs sought

Salary in lieu of notice

21. The appellant accused the respondent for terminating his employment without any justifiable cause and prayed for one-month salary in lieu of notice. The respondent denied the said allegation and contended that the claimant was involved in theft of goods while in his custody. On 9th February 2019, there was a shortage of goods worth Kshs.35,000.00 while in the appellant's custody. He was then dismissed on 12th February 2019.

22. The question that arises is whether the dismissal met the legal threshold of fair termination of employment. Section 45 (1) and (2) of the *Employment Act* provides that:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee's conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”

23. Section 41 of the *Employment Act* provides that: -

- “(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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

24. The appellant denied the alleged theft and maintained that the termination was unjustified. I have perused the documentary evidence filed by the respondent but I have not seen any evidence of the stolen goods. Even the nature of the alleged stolen goods has not been stated. Consequently, I find that the alleged theft or shortage of goods remains mere allegations.
25. Even if the alleged theft did take place, which has not been proved, the termination would still be unfair and unlawful since the respondent did not prove that it accorded the appellant a fair hearing before the termination. The emerging jurisprudence from our courts is that an employee is entitled to be afforded a fair opportunity to defend himself before dismissal from employment for whatever reason. (see *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR and *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR).
26. Having found that the respondent never proved that the appellant stole its property, and that it afforded him a hearing before the dismissal, I find that the dismissal was unfair and unlawful. Under section 49 of the *Employment Act*, an employee who is unfairly dismissed is entitled to salary in lieu of notice plus compensation for the unfair dismissal. The appellant prayed for salary in lieu of notice only and that is what he will get.

Overtime

27. The appellant alleged that for ten years he worked daily every week from 6.00am to 7.00pm equaling to 15,600 hours. He then computed the compensation using a salary of Kshs.28,822.00. The respondent denied the claim for overtime and averred that under Clause 15 of its Permanent Employees Rules, no claim for overtime is payable unless claimed and paid the same day worked. That fact has not been rebutted.
28. The appellant has not shown that it placed its claims the same day he worked extra time. He has also exaggerated his claim since, despite admitting that he used to take his annual leave he still claimed overtime pay for each day since 2009. He also used a salary which is not reflective of the actual salary for the respective year of service. He used his last salary to compute yet he had worked for 10 years. Consequently, I find that the claim for overtime is lacking in material, particulars and supporting evidence.

Annual leave

29. The appellant claimed 21 days leave for the year 2018. The respondent acknowledged that claim by the dismissal letter dated 12th February 2019. It paid the said leave together with 12 days salary vide the cheque dated 12th February 2019 through the Labour Office Murang'a. However, since the applicable salary is in dispute, the court will assess the correct sum payable for the annual leave of 21 days.



Salary underpayment

30. The appellant claimed salary under payment for the period starting May 2017 to December 2018. The Government of Kenya publishes Wage guidelines every year which runs from 1st May to 30th April the following year. The appellant has broken the claim into four parts.

Basic salary for May 2017-April 2018 (Kshs.88,003.80) house allowance for May 2017-April2018, (Kshs.13,210.80) Basic salary for May 2018-December 2018 (Kshs.60,592) and then house allowance for May 2018 to December 2018 (Kshs.9,085.10).

31. The respondent, has however, denied the claim and maintained that the appellant was driving medium commercial vehicle and his salary was commensurate to that job. It filed the general wage orders for the period under review. The trial court agreed with the respondent that the appellant was a driver of medium commercial vehicle and therefore based on the attendant wage order, his remuneration was okay except for the house allowance which was underpaid by only Kshs.1.02. the trial court further found that the shortage of Kshs.1.02 was too little to render the house allowance an underpayment.

32. I have considered the evidence carefully. I have also checked the meaning of Heavy commercial vehicle from the internet, which is given the meaning of a commercial vehicle of over 3500kgs. The appellant never attempted to provide the weight of the vehicle he was driving. The burden of proof was upon him to demonstrate to the court that he was in deed a heavy commercial driver.

33. The respondent has maintained that the appellant was driving a canter FH which is a medium commercial vehicle. I will not contradict the finding of the trial court on that the appellant was a driver of a medium commercial vehicle and the salary he was receiving was in accordance with the wage orders published by the Government.

Conclusion

34. I have found that the dismissal of the appellant from service was unlawful and as such he is entitled to one-month salary in lieu of notice by dint of section 49(1) of the *Employment Act*. He is also entitled to leave of 21 days for the year 2018. However, I have found that he is not entitled to the claim for overtime pay and salary underpayment. Accordingly, I partially allow the appeal to the extent highlighted above, and make the following orders: -

- i. The appellant is awarded one-month salary in lieu of notice being Kshs.24,350.00.
- ii. The rest of the orders in the impugned judgment are allowed to stand.
- iii. Each party shall bear own costs since the appeal succeeded only in part.

DATED, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF FEBRUARY, 2024.

onesmus n makau

judge

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE



