



**Radar Hardware Limited v Charles (Appeal E078 of 2023)
[2024] KEELRC 393 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 393 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E078 OF 2023
M MBARÚ, J
FEBRUARY 15, 2024**

BETWEEN

RADAR HARDWARE LIMITED APPELLANT

AND

WYCLIFFE JUMA CHARLES RESPONDENT

*(Being an appeal from the judgment of hon. D.O. Mbeja (PM) in
Mombasa CM ELRC No. 243 of 2020 delivered on 27 July 2023)*

JUDGMENT

1. This appeal is filed against the judgment dated 27 July 2023 in Mombasa CM ELRC No. 243 of 2020 on the grounds that;
2. The court allowed the appellant's claim without considering the applicable law;
3. The court failed to make a finding that the claimant was terminated based on valid and fair reasons;
4. The court failed to make a finding that proper and fair procedure was adopted in the termination of the claimant.
5. The court erred in law and fact by making a finding that the claimant's termination by way of summary dismissal was unlawful and/or illegal and unjustified yet a hearing was conducted.
6. The court erred in law and fact by failing to consider the submissions and documentary evidence submitted by the appellant.
7. The court erred in law and fact by making awards of compensation when particulars of the compensation were not pleaded and proved to the required standard.



8. The court erred in making a finding that the claimant was terminated based on alcoholism yet none of the parties pleaded such and no evidence on alcoholism was led by either party.
9. The court erred by deviating from the pleadings filed thus drawing a wrong conclusion.
10. The court failed to particularise the ward of Kshs. 280,000 made in favour of the respondent.
11. The court erred in making an award of damages of 8 months' salary in favour of the evidence tendered.
The court erred in awarding cost.
12. The appellant is seeking that the appeal be allowed and the decision of the trial court be set aside and the claim dismissed.
13. The appeal herein is based on the grounds that that the respondent herein was employed by the appellant as a driver on 16 June 2015 at a wage of Kshs. 17,000 per month and which increased to Kshs. 35,000 as of January 2020. On 13 January 2020 when the respondent was on his annual leave and due to resume on 6 February 2020 he was informed that his employment had been terminated. No reasons were given he was later issued with a certificate of service indicating that he had resigned from his employment which was false. He was not paid his terminal dues. his claims were for the following dues;
 - a. One-month notice pay Kshs. 35,000;
 - b. Salary for January 2020 Kshs. 35,000;
 - c. Compensation Kshs. 420,000;
 - d. Leave for the ear 2016 and 2017 Kshs. 70,000;
 - e. Service pay for 5 years Kshs. 87,500;
 - f. Costs.
14. In response, the appellant admitted that the respondent was a truck driver assigned to prime mover No. KCE 948U plying Mombasa-Kampala conveying clinker. While at work on 9 January 2020 at Malili checkpoint, the respondent was intercepted and found drunk while operating the truck. This was in gross breach of the safety policy of the appellant. The respondent was allowed to take leave from 9 January 2020 to 5 February 2020 while investigations were ongoing. He was required to report back on 6 February 2020 for a disciplinary hearing but he failed to show up which was breach of duty and resulted in termination of employment. The claims made are without merit and should be dismissed with costs.
15. In the judgment of the trial court on 28 July 2023, the court analysed the evidence and made a finding that there was unfair termination of employment and proceeded to award the compensation at 8 months plus costs.
16. On the appeal, both parties attended and took directions to address and file written submissions.
17. The appellant submitted that the appellant terminated the respondent's employment on 6 February 2021 after investigations that found him to have been intoxicated while on duty. This conduct subjected the employer's property, the prime mover and trailer in his custody to imminent loss and damage. This was a demonstration of his failure to adhere to directions issued by the employer including to attend to summons to appear for disciplinary hearing of a charge of insubordination. Despite being issued with a show cause notice, the respondent failed to attend. Hence, the disciplinary



process leading to termination of employment was proper and lawful as held in *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR and *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR. The duty rests on the employer to prove reasons leading to termination of employment.

18. The appellant submitted that the trial court erred in making a finding that alcoholism was used to unfairly terminate employment. The respondent was stopped on the road and found intoxicated. He was allowed leave and invited to attend disciplinary hearing which he failed to adhere to. Termination of employment was on the basis of breach of his duty and refusal to take employer directions. Parties are bound by their pleadings and the trial court cannot introduce matters not pleaded as held in *Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others* [2014] eKLR.
19. The respondent failed to prove his case and the general awards made for 8 months' compensation were not particularised and or justified. Notice pay is not due in a case where termination of employment is justified and compensation only arises in a case where the employee has proved there was unfair termination of his employment. The award made was excessive and not justified. There is a payment statement to confirm the wages for January 2020 were paid and claim for untaken leave in 2016 and 2017 is made outside Section 90 of the *Employment Act, 2007*. Service pay is not due where the respondent was registered and his dues remitted to NSSF. The appeal should be allowed the claim dismissed with costs.
20. The respondent submitted that the dismissal letter dated 8 February 2020 issued by the appellant to the respondent was on summary dismissal on the grounds of being found drunk. The trial court properly analysed the evidence and made a proper finding. This allegation was not followed up by the appellant within the meaning of Section 41, 43 and 45 of the *Employment Act, 2007* (the Act). The alleged disciplinary hearing on 6 February 2020 was in the absence of the respondent as she was on his annual leave. He was not allowed an opportunity for hearing. On 13 January 2020 the appellant alleges to have issued the respondent with 3 letters, a leave form, a clearance form and notice of disciplinary hearing. He never received the notice to attend hearing dated 3 January 2020. Without notice, he could not attend the disciplinary hearing.
21. The respondent submitted that his employment was terminated unfairly and his terminal dues should have been paid accordingly. The trial court judgment is proper and should be confirmed and the appeal dismissed with costs.
22. This being a first appeal, the court is required to review the entire record, make an assessment and reach its own conclusions. However, the court is also vested with duty to take into account that the trial court had the opportunity to hear the parties testify in court.
23. Through letter dated 8 February 2020, the appellant terminated the respondent's employment through summary dismissal. The reasons given were that following an incident on which he was found drunk by checkpoint officer at Malili on 9 January 2020, he was negligent of safety and instructions of the company on the matter (use of alcohol while at work). That was defined as gross misconduct contrary to Section 44(4)(b) of the Act.
24. The appellant proceeded to issue the respondent with his Certificate of Service dated 12 February 2020. The reasons for termination of employment is noted as resignation.
25. Whereas the certificate to be issued pursuant to Section 51 of the Act should only note the date and termination of employment, the appellant offered to give more details thereof. The reason leading to termination of employment as resignation. What is clear under Section 51 of the Act, there is a



fundamental difference between a Certificate of Service and a letter of recommendations. The former is mandatory while the latter is voluntary.

26. The contradictory notices do not aid the appellant's case. A notice terminating employment is subject of review where an employee claims there is unfair termination of employment in terms of Section 47(5) of the Act as held in the case of *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR and *Wambua v Newlight Schools Limited* (Cause 475 of 2018) [2023] KEELRC 531.
27. A Certificate of Service is a formal record of the employee issued by the employer. Overall, it has a bearing.
28. On whether the trial court made proper findings with regard to reasons leading to termination of employment, indeed, as correctly submitted by the respondent, on 13 January 2020 the appellant asserted that he was issued with three notices;
 - a. His annual leave for;
 - b. His clearance form; and
 - c. Notice to attend disciplinary hearing on ...
29. On the Record of Appeal, the appellant filed document (3), copies of leave approval forms. Document (4) is the letter dated 11 January 2020. Document (5) is letter dated 13 January 2020.
30. The leave form as approved noted that the respondent was to resume duty from his annual leave on 6 February 2020.
31. A clearance form is ordinarily issued at the end of employment or in some cases, where an employee is taking annual leave for many days and his duties are to be taken up by another employee. There is no indication that the respondent was handing over to any other employee. The record is that upon the checkpoint at Malili, he was in the company of two other employees.
32. Notice to attend disciplinary hearing is a statutory requirement under Section 41 of the Act. Where the employee is found to be of misconduct, such necessitating him to proceed on compulsory leave to allow for investigations, notice must issue to the employee. The notice dated 13 January 2020 through issued on the same day the respondent's annual leave was approved is not received by him. it relates to compulsory leave and a notice to attend disciplinary hearing on 6 February 2020.
33. The question then arises, why would the appellant approve the annual leave of the respondent on 13 January 2020 and then issue him with notice of compulsory leave at the same time? The approved annual leave is the most probable notice.
34. The contention by the respondent that he never received notice dated 13 January 2020 to attend disciplinary hearing is honest and truthful. There is no evidence that he received this notice at all. The place for him to acknowledge receipt is not marked.
35. Equally, the leave approved was to end on 6 February 2020. The appellant does not delve into whether the respondent resumed duty or not. If he was found to have absconded duty, such matter ought and should have been addressed. The offer to pay for days worked in the notice of summary dismissal dated 8th February 2020 confirm the respondent was on duty until 7 February 2020.
36. Whatever conduct resulted in the respondent being allocated his annual leave on 13 February 2020, reasons demanded that where the employer was considering termination of his employment, notice be issued in terms of Section 41 of the Act to allow him to attend and defend himself. The assessment at the checkpoint required and involved matters outside of the appellant internal



- operational requirements. Whether this was criminal conduct to be found drunk while driving or a traffic matter, though related to his employment, the appellant had a duty to apply its disciplinary procedures before termination of employment.
37. In the case of *Mathew Kipchumba Koskei v Baringo Teachers Sacco* [2013] eKLR, the court held that;
- Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.
38. And in the case of *MTM v KIE Limited & another* [2020] eKLR and the case of *Attorney General & another v Andrew Maina Gitinji & another* [2016] eKLR the courts have held that;
- ... the employer/employee internal disciplinary process is distinct from any possible criminal proceedings against any employee even if these arise from the same set of facts; the institution of the latter is not a bar to the institution of the former and vice versa, even if the latter is resolved in favour of the employee, and lastly that it is risky for a court of law to purport to rewrite a contract of employment based on an employee's acquittal in a criminal prosecution as the employer has no supervisory role or control over the criminal proceedings; and also the standard of proof in criminal proceedings is totally different from that pertaining either in an internal disciplinary proceeding or a civil litigation in a court of law. ...
39. Upon the alcohol test on the road on 9 January 2020, the appellant as the employer was required to hear the respondent through its internal disciplinary procedures. The findings by the trial court in this regard, though with different reasons cannot be faulted. Employment terminated unfairly and the respondent was denied the due process that is mandatory under section 41 of the Act. He was not given a hearing.
40. On whether the trial court erred in its findings and applied matters that were not pleaded particularly the issue of alcoholism, the appellant in the Response to the claim at paragraph (4) pleaded that the claimant while within employment on the 9th January 2020 at MALILI CHECKPOINT when intercepted was found drunk while operating the truck. These facts are reiterated by Victor Obunga Nyingilo in his evidence in court. That the respondent was taken through Alco blow and tested positive. He did a statement and was found intoxicated. He was sent on annual leave.
41. The trial court analysed the pleading and evidence before it and made a proper finding.
42. The appellant has faulted the trial court for failing to particularise the award of Kshs. 280,000. Indeed, the only finding by the learned magistrate is that the respondent's employment terminated unfairly and an award of 8 months all compounded to Kshs. 280,000. The other remedies sought are not gone into.
43. Section 118(4) of the Act requires the court to analyse each claim made by an employee and give reasons for the award or reject of it.
- (4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
44. a generalised award does not suffice. This is to allow the employer appreciate the context of each award and allocate accordingly. This also allows the employee to acknowledge what is paid and what is outstanding.



45. The award of compensation at 8 months is equally not supported by any analysis. Whether to allocate the minimum or maximum compensation at 12 months' gross wage is discretionary. However, such discretion must be applied within the law and for given reasons. Great regard must be the provisions of Section 45(5)(b) and (e) of the Act on the conduct and culpability of the employee. It is not contested that on 9 January 2020 the respondent was found intoxicated while on duty. This assessment was by a third party and even though the due process and internal disciplinary procedures were not undertaken within the confines of Section 41 of the Act, such matter is on record in his statement. Account should and ought to have been given to such record.
46. The disciplinary record of the employee has a bearing on the assessment of compensation. In the case of *Thomas Kimeli Kimaiyo v Choppies Enterprises Kenya Limited* [2020] eKLR the court held that;
- With regard to compensation, section 45(5) of the Act obligates the court to put into account the disciplinary history of the employee while assessing the compensation to be awarded. There is a record of warnings to the claimant which are not challenged in any material way. The claimant admitted to being issued with show cause notice dated 30th January, 2018; A show cause dated 23rd March, 2017;
47. And in the case of *Kenya Union of Employees of Polytechnics, Colleges and Allied Institutions (KUEPCAI) v Board of Management Limotiook Secondary School* [2015] eKLR, the court held that where there is a record of misconduct, in assessing whether to reinstate the employee, this becomes crucial.
48. In this regard, a proper compensation should have factored the conduct of the respondent. Being drunk at work is subject allowed under Section 44(4)(b) for summary dismissal. Save for notice pay due to lapse in due process, compensation is hereby allocated at zero (0).
49. The respondent was last earning Kshs. 35,000 per month. such is due in notice pay.
50. On the claim for salary for January 2020, the appellant filed the payment statement for January 2020. in the notice terminating employment dated 8 February 2020, the appellant offered to pay salary for 7 days worked at Kshs. 6,638. Such well compensates the respondent for his time.
51. For leave due in the year 2016 and 2017, the appellant in response gave the defence of Section 90 of the Act and that these claims were time barred. Such matter ought to have been addressed instantly and before delving into the main claim. Such being a legal issue, a determination thereof should have set the record.
52. As addressed above, at the end of employment, the employee is allowed to claim all payable dues accruing as of such date. section 18(4) should be read together with section 35(4) of the Act. Both allow for claims that a lawfully due to the employee once employment is terminated.
53. The appellant does not offer any record that the respondent took his annual leave for the period of 2016 and 2017. There was continuing employment and these claims did not abate. The respondent took several days off in the year 2019 which is documented. He was further allowed leave in January/ February 2020 and this is documented. There is no record with regard to 2016 and 2017.
54. Payment of due leave is based on the basic wage in terms of Section 28 of the Act. The appellant attached a payment statement at page 44 of the Record of Appeal and the basic wage is Kshs. 24,719 x 2 all due is Kshs. 49,438.
55. On the claim for service pay for 5 years, the appellant filed NSSF statement attached to the Record of Appeal at page 45. In terms of Section 35(5) and (6), service pay is not due.



56. The award of costs in employment claims is discretionary. Where costs are justified, the court must give reasons. Without any reasons outlined by the trial court, each party ought to meet own costs.
57. Accordingly, the appeal partially succeeds and the judgment in Mombasa Cm ELRC No.243 of 2020 delivered on 27 July 2023 is hereby reviewed in the following terms;
- a. Employment terminated without due process;
 - b. Compensation awarded at zero (0);
 - c. Notice pay awarded at Kshs. 35,000;
 - d. Leave pay Kshs. 49,438;
 - e. Each party to bear own costs of the lower court proceedings and for this appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 15 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

