



**Everflora Limited v Silikhan (Appeal E003 of 2023)
[2024] KEELRC 239 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E003 OF 2023
NJ ABUODHA, J
FEBRUARY 9, 2024**

BETWEEN

EVERFLORA LIMITED APPELLANT

AND

BEN SUDI SILIKHAN RESPONDENT

*(Being an appeal from the Judgment of Hon. J.A Agonda issued in
Chief Magistrate's Court at Ruiru CMEL No. E15 of 2022 between Ben
Sudi Silikhan v Everflora Limited delivered on 19th December, 2022)*

JUDGMENT

1. Through the Memorandum of Appeal dated 12th January, 2023, the Appellant appeals against the Judgment of Honourable J.A Agonda delivered on 19th December, 2022) in Ruiru CMEL No. E15 of 2022 (Ben Sudi Silikhan v Everflora limited).
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and by fact by failing to consider evidence tendered by the Appellant on the conduct of the Respondent contrary to section 49(4) of the [Employment Act](#).
 - ii. The Learned Magistrate erred in law and fact by awarding service pay to the Respondent failing to consider evidence tendered by the Appellant on monies already paid to the Respondent and disregard of section 35(6) of the [Employment Act](#).
 - iii. The Learned Magistrate erred in law and fact by failing to consider evidence tendered by the Appellant on overtime earned by the Respondent.
 - iv. The Learned Magistrate erred in law and fact by failing to consider evidence tendered by the Appellant on the manner and procedure adopted prior to termination of the Respondent.



- v. The Learned Magistrate erred in law and fact by awarding the Respondent compensation for unfair termination of services.
3. The Appellant prayed that the appeal be allowed and the Judgment of Honourable J.A Agonda in favour of Respondent be set aside and it be awarded the costs of the Appeal.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant in its submissions dated 17th October, 2023 submitted on the issue of whether the Respondent's termination was fair and lawful that this being a first appeal the court should examine both the facts and the law as presented in the trial court which found the termination to be unfair and unlawful.
6. It maintained that the trial court erred in finding this termination as unlawful. On procedural fairness the Appellant relied on the case of Anthony Mkala Chivati v Malindi Water & Sewarage Company Limited (2013) eKLR which outlined the import of section 41 of the Employment Act when it comes to Procedure to be followed.
7. It was its submission that on 31st May,2021 the Respondent was issued with a show cause letter which contained the allegations against him including drinking on the job, wanting attendance, timely reporting of arising issues in his area of supervision which greatly affected his performance and using insulting language to his superior.
8. Further it was the Appellant's submission that the Respondent received the show cause letter and he replied admitting his wrongdoing asking for forgiveness. That the Respondent was suspended, given caution letters, last warnings and given a chance to continue working with the Appellant when he repeated his mistakes hence terminated.
9. The Appellant therefore submitted that it followed due procedure in terminating the Respondent's services.
10. On the issue of substantive justification, the Appellant submitted that section 43(1) of the Employment Act requires the employer to prove reason for termination which should be fair and valid. The Appellant submitted that the allegations against the Claimant were all admitted hence it proved the substantive reasons justifying the grounds for dismissal under section 44(4) of the Employment Act.
11. On the issue of reliefs awarded the Appellant submitted that compensation is discretionary under section 49 of the Employment Act. The Court ought to take in to account the circumstances of each case. The Appellant submitted that the Respondent was not entitled to any compensation since his termination was fair and followed due procedure. In this respect, the appellant relied on the case of Joseph Mwaniki Nganga v United Millers Limited(2022) eKLR.
12. The Appellant further submitted that the Respondent was not entitled to one- month salary pay in lieu of notice having being summarily dismissed lawfully.
13. On the issue of overtime the Appellant submitted that the Respondent did not move the court on the prayer and relied on the case of Janet Katali Kalani v Est African Growers Limited. The Appellant submitted that the overtime allocation sheets relied on by trial court to award the Respondent overtime were not endorsed by the Appellant to be legitimate and that the Respondent admitted during cross examination that the he made the documents himself.



14. On the issue of service pay the Appellant submitted that the Respondent was a member of NSSF as seen in his payslips hence not entitled to this prayer and relied on section 35 of the [Employment Act](#) and case of Hassanath Wanjiku v Vanela House of Coffees (2018) eKLR.
15. On the issue of leave days the Appellant submitted that the period between which the Respondent stated that he never went for leave of 2004-2005 was past time provided for under section 90 of the [Employment Act](#) which provides for three years or in continuing injury after 12 months after cessation.
16. The Appellant submitted that continuing injury was discussed in Peter O Magero v Board of Governors, St Augustine Soysambu Secondary School & Another (2017) eKLR as one which is still being committed. The Appellant submitted that since the injury was in 2004-2005 the same was not continuing injury and ought to have been brought within the stipulated time.
17. On the issue of costs, the Appellant submitted that the Respondent was not entitled to the said costs.
18. The Appellant therefore prayed that the lower court's judgment to be set aside with costs to the Appellant.

Respondent's Submissions

19. On the other hand, the Respondent filed his submissions dated 1st November, 2023 and submitted on the issue of procedural fairness that an employer ought to follow procedure set out in section 41 and 43 of the [Employment Act](#). In this regard he relied on the case of Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR.
20. It was the Respondent's submission that the Appellant did not follow the lawful procedure before terminating him as per section 41 of the [Employment Act](#). He relied on the case of Donald Odeke v Fidelity Limited (2012) eKLR to submit that he was not heard hence termination unfair. It was his submissions that he was never given show cause letter. He was only given a termination letter. He did not attend any disciplinary hearing before termination or informed to attend the same with a fellow employee.
21. It was the Respondent's submission that the termination letter did not mention any disciplinary hearing and that there were no minutes produced in court. That he was not heard or consider his representations on the charges against him.
22. The Respondent submitted that the show cause letter referred to by the Appellant was for different charges of being drunk, late attendance and timely reporting of issues. It was his submissions that he was punished for these offences when he was suspended and later given warning letter dated 7th June, 2021.
23. It was further the Respondent's submission that the current termination notice talked of different offences of having 90% incorrect cut points on the flowers and issuing threats to the supervisor. That he was never subjected to any disciplinary procedure on those charges as per section 41 of the [Employment Act](#) hence the termination was unfair and unlawful.
24. On the issue of substantive justification, the Respondent submitted on sections 43 and 45 of the [Employment Act](#) on the reason for termination being fair and valid which the employer believed existed at the time of termination. That the reason given of flowers having incorrect 90 % cut points was for the general workers to be blamed and not the Respondent who was the senior foreman and in between there were other people accountable such as the production supervisor and senior production supervisor. No action was taken against them apart from the respondent and no senior or junior staff came to testify in court.



25. It was the Respondent's submission that no evidence was tabled before the court to show that the flowers had 90% incorrect cut points. There was no report of such nature and the Appellant's witnesses did not testify of such. It was his submissions that the Appellant just wanted to terminate his services because he was a long-term worker of 28 years with the Respondent earning higher salary than his colleagues.
26. It was his submissions that the offence of intoxication was not adequately proved as there was no Alcoblow to prove he was drunk as alleged. The Respondent relied on the case of Mary Chemweno Kiptui v Kenya Pipeline Company Limited(2014) eKLR on validity of reason for termination.
27. On the issue of reliefs awarded, the Respondent submitted 12 months compensation for unlawful termination was provided for under section 49 of the Employment Act. The Court was to take in to account factors under section 49(4) of the Employment Act among them the length of service which was 28 years and the chances that the respondent who was of advanced age may never get employed elsewhere.
28. It was his submission that the Respondent did not have disciplinary action record over the years. That he was promoted for his excellent work. The first time he got a warning letter was in 2021; 27 years after. That issue of warning letters cropped in 2021 and 2022 when he declined to resign. This shows the same were issued maliciously. It was his submission that the court was right awarding him 12 months compensation for unlawful termination.
29. On the issue of one-month salary in lieu of notice it was the Respondent's submission that he was entitled to the same under section 35 and 36 of the Employment Act since he was never given any notice and he did not commit any offence under section 44(4) (g) to warrant summary dismissal. He relied on the case of Mary Chemweno above to support this issue of notice.
30. On the issue of service pay the Respondent submitted that during hearing the Appellant's witness confirmed that it was the Company policy to pay service pay for employees who had worked for more than 5 years. The Respondent confirmed having only been paid Kshs 214,780/= as service pay as per the May payslip.
31. It was his submission that the Appellant's assertion that the amount to be paid was 15 days salary for every year worked was not supported by any document. The Respondent maintained that they were called in to a meeting where it was said the service pay would be one month salary for every year worked. He relied on section 35(5) of the Employment Act and the case of Lydia Mongina Mokaya vs St. Leonard's Maternity Nursing Home Limited(2018) EkLR on onus of employer keeping employment records as per section 74 of the Employment Act.
32. It was the Respondent's submission that even if he was a member of NSSF the agreement they had bound the parties on payment of service pay. In addition the Appellant still paid the Respondent Kshs 214,780/= as service pay hence the same was payable to the Respondent.
33. On the issue of outstanding leave- for the year 2004 and 2005 the Respondent submitted that he was entitled to the same under section 28 of the Employment Act. That the same was not a continuing injury as it is the Appellant who requested him not to go.
34. On the issue of overtime the Respondent submitted that this prayer was specifically pleaded and claimed. That the Appellant's witness confirmed that overtime was paid to employees. He prepared overtime allocation sheets which the Appellant refused to receive or pay. He submitted that he was therefore entitled to the said overtime payment.



35. On the issue of costs, the Respondent submitted that costs follow the event. That having proved his case in trial court and in this appeal, he was entitled to the costs of the trial court and thus appeal.
36. In conclusion the Respondent prayed for dismissal of the Appeal with costs being awarded to him. He made a prayer for decretal sum held in joint account between their advocates to be released to his advocates.

Analysis & determination

37. The duty of a first appellate court was well stated in the Court of Appeal in *Selle vs Associated Motor Boat Company Limited* [1968] E.A 123 thus:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

38. In determining the Appeal herein, this Court shall similarly seek to re-analyze the evidence tendered before the Trial Court vis-à-vis the court’s conclusion and disposition.
39. In this case, the judgment of trial court was a declaration that the termination of the Claimant’s employment was unfair and the dues payable were as follows;
 - a. Compensation for unfair termination –Kshs 396,516/=
 - b. One month salary in lieu of notice _Kshs 33,043/=
 - c. Unpaid salary - Nil
 - d. Overtime _Kshs 103,534/=
 - e. Service pay _ Kshs 677,381/=
 - f. Annual Leave _Kshs 46,260.20/=
 - Total _Kshs 1,256,734.20/=
 - g. Costs and interests of the suit.
40. The undisputed facts were that the Respondent was employed by the Appellant as a supervisor production for a period of 28 years from 28th August,1994 until 28th April,2022 when his services were terminated by the Appellant. His monthly salary was Kshs 33,043/=. He rose through ranks during his employment to senior Foreman at the time of termination.
41. From the grounds in the memorandum of Appeal and pleadings of the parties two major issues arise for determination.
42. The Issues for determination are:-
 - a. Whether the Respondent’s employment was unfairly terminated.
 - b. Whether the Respondent was entitled to reliefs awarded.Aa. aa.



a. Whether the Respondent's employment was unfairly terminated

43. The Respondent alleged that on 26th April, 2022 while at work he was summoned by the Human Resource Manager and handed a notice of termination dated 7th April, 2022 without any explanation. He read the letter which stated that he had been terminated because the flowers had 90 % incorrect cut points.
44. It was not disputed that the Respondent was terminated by the Appellant who stated that the respondent was summarily terminated on account of gross misconduct.
45. In order to establish if the said termination was lawful or not the employer must ensure that he follows the laid down procedure under Section 41 of the Employment Act and have a substantive reason.
46. The reason for termination advanced by the Appellant was that there was 90 % incorrect cut points on the flowers. The Respondent on the other hand submitted that he was not in charge of cutting the said flowers. That, according to him was the work of general workers and in between there was two more supervisors that is, the Production supervisor and senior production supervisor then himself. That the two other supervisors were not blamed he was the only sacrificial lamb. From the record it came out clear that this was not the respondent's role.
47. Whereas the Respondent had other charges labelled against him in 2021 he was remorseful and punished for the same when he was suspended for 5 days and given caution letters and warning letters. The Respondent has also averred that the Appellant was forcing him to resign because he was old yet earning high salary and it needed new and young team. These allegations were never rebutted by the Appellant.
48. It is also interesting why these allegations started in 2021 after the Respondent had served the Appellant for over 27 years diligently rising in ranks. I agree with the lower court that there was no report produced in this court to show that the flowers had the said default. None of the said two supervisors testified before the trial court to convince the court that there was such default.
49. On the issue of intoxication, it was upon the Appellant to prove that the Respondent used to come to work drunk or late. There ought to have been in existence, a mechanism to prove this like Alco blow for drunkenness and attendance sheets for lateness.
50. In the end the court agrees with the finding of the trial court that the reason of incorrect 90% cut points on flowers and any other reason given by the Appellant were not a fair and valid.
51. The Reason for termination must be a valid and fair as provided for under section 43 of the Employment Act. The duty to prove the reasons lies with the Employer under section 47(5) even if the allegations amount to gross misconduct under section 44(4) of the Employment Act.
52. In this case failure to demonstrate that an employee who had worked for the Appellant for more than 28 years without any history of incompetence or drinking, leads to the inference that the Appellant terminated the services of the Respondent and turned him away on 28th April, 2022 without any valid reason. The allegation by the respondent that he was terminated on account of old age therefore becomes plausible. The Court therefore upholds the finding of the trial court in that regard.
53. In the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

“ There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment



contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

54. From the above case it is clear the Appellant was bound to prove the reason for termination but failed to do so.
55. The Appellant confirmed summarily dismissing the Respondent without hearing him. There was no show cause letter given to the Respondent, the Respondent did not make any representation on the said accusations, the Respondent was never called for any disciplinary hearing. This therefore meant that the Respondent was condemned unheard. Section 41(2) of the *Employment Act* requires that an employee must be heard on the reasons for which their termination is being considered in a language they understand and in the presence of a fellow employee of choice. Further an employer is bound to accord such employee or their representative, an opportunity to make representation over the accusations against them. The court therefore agrees with the finding of the lower court in this respect and would not disturb the same.

Whether the Respondent was entitled to reliefs awarded.

56. On the 12 months compensation for unlawful termination awarded by the trial court I would only interfere with this award which is discretionary on special circumstances. This court as an appellate court can only interfere with such discretion if there was an error leading to erroneous decision which in this case I find there was no error as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

57. I am guided by Section 49 of the *Employment Act* which provides the circumstances to be taken in to account under sub section 4. In this case I agree with the trial court that the Respondent deserved the maximum compensation of 12 months due to the 28 years he had worked with the Appellant, the conduct of the Appellant in terminating his services and the fact that he may not get another employment at his age.
58. On the award of service pay I agree with the trial court that there was no proof that the Appellant was making the relevant statutory deductions like the NSSF and NHIF for the years the Respondent worked with it. Even if the Respondent was a member of NSSF the contract between the parties binds them. In addition, the Appellant paid the Respondent Kshs 214,780/= as service pay after the said termination. Why did the Appellant pay the Respondent such amount if he was not entitled and how was the same calculated?
59. The parties did not agree on how the service would be calculated. The Appellant proposed the 15 days salary of each completed year while the Respondent proposed a one month salary for each completed year. There was no documentation to support either proposition and the trial court followed the generally agreed rule of 15 days of each completed year. I agree with the trial court to this extent but I do not agree with the calculations because 15 days gives us Kshs 16,521 x 28 years= 462,602/= .From this we minus what is already paid and we get 462,602-214780= Kshs 247,822/= as service pay.



60. On the award for outstanding annual leave. This a continuing injury which must be claimed within 12 month's after cessation thereof. As at the time the claimant was terminated the issues of unpaid leave remained a continuing injury and could have expired 12 month's after termination. This claim was filed in July, 2022 while the claimant was terminated in April, 2022. This therefore still within the stipulated 12 months. The trial Court was therefore right in making this award.
61. On the issue of overtime the Appellant's witnesses from the record confirmed that employees used to be paid overtime. The Appellant disputed the overtime allocation sheets presented by the Respondent claiming he made them himself. It came out clearly that the same were stored in store room hence the Respondent could not come in to possession of the said documents illegally. The Respondent has stated that it when a new General Manager was employed in July 2020 that employees' overtime was not paid.
62. It is the responsibility of the employer to keep employment records hence when the appellant's witnesses conceded at the trial that overtime was paid, they ought to have produced records to show that the respondent was not entitled to the overtime claimed. In the case of Abigail Jepkosgei Yator vs. China Hanan International Co. Ltd [2018]eKLR- The Court held that it is the duty of every employer upon a claim being lodged with the court to attend and file all the work records to enable to court address the same on its merits. This is provided for under Section 10(6) and (7) of the Employment Act, 2007. Therefore without any other evidence to the contrary the trial court was justified in granting this prayer.
63. In conclusion, apart from the adjustment in the calculation of the service pay in paragraph 59 above, the appeal is found without merit and is hereby dismissed with costs.
64. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024

DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2024

ABUODHA NELSON JORUM

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

