



County Public Service Board of Uasin Gishu v Komen (Employment and Labour Relations Appeal E055 of 2022) [2024] KEELRC 590 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 590 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E055 OF 2022
MA ONYANGO, J
MARCH 7, 2024**

**BETWEEN
COUNTY PUBLIC SERVICE BOARD OF UASIN GISHU APPELLANT
AND
WILLIAM KOMEN RESPONDENT**

(Being an appeal from the Judgment of the Senior Principal Magistrate R. Odenyo delivered on 24th November 2022 in Eldoret MC.ELRC No. 206 OF 2019)

JUDGMENT

1. The Appellant herein was the Respondent in Eldoret MC. ELRC No. 206 of 2019 in which it had been sued by the Claimant, the Respondent herein, vide a Statement of Claim dated 25th July 2019 who was seeking his terminal dues for alleged unfair and illegal termination of his employment.
2. After hearing the parties, the trial court delivered its judgment on 24th November 2022 where it found that the Claimant's dismissal was unlawful and awarded the following to the Respondent herein:
 - a. A declaration that his dismissal was unlawful
 - b. Payment of one month salary in lieu of notice..... Kshs 25,000
 - c. Compensation of 12 months.....Kshs 300,000
 - d. Service pay for 10 years.....Kshs 575,000
 - e. Costs and Interest
3. The Appellant (Respondent in the trial court) was aggrieved by the said judgment and filed the instant appeal vide the Memorandum of Appeal dated 13th December 2022 on the grounds that:



- i. The learned magistrate erred in law and in fact in finding that the Respondent was on leave during the period in question when:
 - a. The Respondent's leave application form was not filled as required by the Appellant's Human Resource Policy & Procedures Manual standards.
 - b. The Respondent's leave was not approved and consequently if at all he proceeded on leave, the same was taken without leave of absence.
 - c. The Respondent's Supervisor (DW2) confirmed that the leave application form signed by himself was not valid as it had not been signed by the other officials.
 - ii. The learned magistrate erred in law and in fact by finding that the decision by the Appellant's Board to dismiss the Respondent herein was not supported by any reason whereas the banking slips that had been forged bore the name of the Respondent as the one who purportedly deposited the money.
 - iii. The learned magistrate erred in law and fact in finding that the Respondent's termination from employment was unlawful and awarded a service pay to a tune of Kshs. 250,000 when it was proved that the Appellant used to remit contribution towards the Respondent's pension and NSSF.
 - iv. The learned magistrate erred in law and fact in multiplying the number of years worked by the Claimant against his salary as service pay as opposed to 15 days for each year worked.
 - v. The learned magistrate erred in law and in fact in awarding the Respondent a sum of Kshs 300,000 as compensation for unlawful termination of employment when there was overwhelming evidence that the respondent was involved in the loss of money hence the termination was fair and lawful
 - vi. The learned magistrate erred in fact and law in failing to accord the Appellant's submissions due consideration.
4. The Appellant therefore prays for Orders that:
- a. The Judgment that the Respondent's dismissal was unlawful be set aside as this Honourable Court may deem fit.
 - b. The judgement on service pay for 10 years at Kshs 250,000 be set aside and in its place a finding be made that the Respondent was not entitled to service pay.
 - c. The costs of this Appeal be awarded to the Appellant.
5. The appeal was disposed of by way of written submissions. The Appellant filed its submissions on 9th August 2023 while the Respondent filed his submissions on 20th September 2023.

Analysis

This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.

6. Vide his Statement of Claim dated 25th July 2019, the Respondent herein sued the Appellant seeking orders that:



- i. A declaration that the Claimant's termination from employment on 15th October 2018 was unfair and illegal
 - ii. Compensation for unfair dismissal under section 45 of the *Employment Act*.
 - iii. An order directing the Respondent to reinstate the Claimant to employment.
 - iv. Costs and Interest of this suit
 - v. Any other further and/or better relief as this Honorable Court may deem just and fit to grant.
7. In that statement of claim, the Respondent averred that he was engaged as an employee by the Appellant in the month of February 1988 in the parking section.
 8. He averred that he executed his duties dutifully and diligently with dedication until 15th October 2018 when the Appellant without any reason and or following due process and the law dismissed him.
 9. The Respondent averred that the termination was unfair and unlawful for the reasons that he was not accorded an opportunity to be heard in the presence of fellow employee of his choice or union representative as required under section 41 of the *Employment Act*; that no misconduct existed to justify the termination; that the reasons for termination were never communicated to the Claimant; and that, no notice was given prior to the termination of the Claimant's employment.
 10. Consequently, the Respondent sought for a declaration that the termination of his employment on 4th July 2018 was unfair, illegal and or unlawful. He also particularized the payment of damages as follows:
 - a. 1 month pay in lieu of notice as per Regulation of Wages (General) (Amendment) Order 2017.....Kshs 25,000
 - b. 12 months' pay compensation on the monthly wage of Kshs 25,000 x 12 months.....Kshs 300,000
 - c. Service pay @ Kshs 25,000 x15 years.....Kshs 4,500,000
 11. The Appellant on its part filed a Memorandum of Response on 19th May 2021 denying the averments made by the Respondent in his Claim. According to the Appellant, the Claimant was engaged as a grounds sweeper in the year 1988 by the defunct Municipality and rose through the ranks to become a Senior Market Attendant/Revenue Officer in the finance department.
 12. The Appellant stated that while still in employment of the County Government of Uasin Gishu as a Revenue Officer, on diverse dates in July, August and September 2017, the Respondent submitted fake banking deposit slips purporting to be from Kenya Commercial Bank, Family Bank and National Bank to prove that he had deposited the collected revenue from, members of the public, and which deposits did not reflect in the revenue account.
 13. The Appellant averred that the actions of the Respondent amount to gross misconduct which was clearly done in contravention of section 44 (4)(g) of the *Employment Act*, the County Public Service Human Resource Manual, 2013 and the Human Resource Policies and Procedures Manual for the Public Service, May 2016.
 14. It is the Appellant's case that the Claimant was issued with a show cause and suspension letter on 2nd February 2018 inviting him to respond to the allegations therein within 21 days; that the Claimant responded to the show cause and suspension letters vide a response dated 13th February 2018 and 26th April 2018; that upon consideration of the Claimant's response, it was found to be unsatisfactory and that he was invited to a disciplinary hearing on 6th July 2018 and following which it was resolved that



the Claimant be dismissed on grounds of loss of revenue being parking fees in the months of July, August and September 2017 and presentation of unauthentic banking slips.

15. The Appellant further stated that the Claimant's allegation that he was on leave when the incident resulting to his dismissal occurred is a misrepresentation as from the Claimant's leave form application it was only signed by his immediate supervisor who is not authorized to approve leave applications. It was contended that the Claimant was not on leave at the material time as can be evidenced by the deposit slips which the Claimant lodged at the revenue office purporting to confirm payments made to the Bank.

The Evidence Adduced

16. At trial the Claimant testified as CW1. He stated that he was previously employed by the Respondent as a Senior Market Attendant. He testified that he was issued with a show cause letter on 8th February 2018 over allegations of loss of funds which letter he responded to stating that he was on leave during the period in question. He produced a leave application form as Exb 7. He testified that he was invited to a disciplinary hearing and was later issued with a dismissal letter.
17. On being cross examined, CW1 maintained that he was on leave during the period when the alleged offence occurred. He stated that he proceeded on compassionate leave on 7th July 2017 when his mother passed on and that the leave lasted upto 31st July 2017. He told the court that he was not on duty on 29th July 2017 and that he did not know who did the banking using his name.
18. On re-examination, CW1 stated that during the disciplinary hearing, he was not shown any letter from the bank. He reiterated that he was on leave on the particular dates the Respondent alleged he forged banking slips.
19. The Claimant called Moses Wangolo Mulongo who testified as CW2. He stated that he previously worked with CW1 and that CW1 handed over his duties to him when he proceeded on leave and that he was on leave on 1st August 2017 until 18th September 2017.
20. During cross examination, CW2 stated that on 29th July 2017, he was on duty. When shown the banking slip bearing the Respondent's name, he denied that the Respondent made any banking transactions as he was on leave. He told the court that ordinarily, the leave forms were to be approved by 6 different officers though in practice, it was usually approved by the head of section only.
21. In re-examination, CW2 reiterated that during the period the offence is alleged to have been committed, the Respondent was on leave and CW2 was performing the Respondent's duties using his machine to collect revenue in the region the Respondent was to cover.
22. The Appellant called William Kipleting Koech who testified as RW1. He introduced himself as the Secretary to the Appellant. He adopted his witness statement dated 5th October 2021 as his evidence in chief.
23. On cross examination, RW1 stated that the board deliberated on the Respondent's case and noted as evidenced in DExh. 5 that the Claimant was on leave. He stated that the case was not reported to the police.
24. In re-examination, RW1 explained that the Claimant's leave application was incomplete for lack of signature of other officers. He stated that the bank denied having received the money that was allegedly deposited by the Respondent.



25. Henry Kimei Yego testified as RW2 and stated that he worked for the Appellant as stage master. When referred to the Claimant's leave form, RW2 stated that it was supposed to be filled at least two weeks before the applicant proceeded on leave. He stated that he signed the Respondent's leave form, and proposed that CW2 takes over the Respondent's duties. He stated that the leave form was to be signed by the other officials and that the leave was not taken because it was not completed.
26. On cross examination, RW2 stated that during the period in question, both the Respondent and CW2 were at work. He also stated that the Respondent filled an annual leave form which is not issued during bereavement as ordinarily when an employee is bereaved, he is given compassionate leave.
27. On the issue of the fake bank slips, RW2 stated that it is the Appellant that raised the alarm that money had been lost and not the bank.
28. RW2 stated that he proposed CW2 to relieve the Respondent and maintained that even if CW2 relieved the Respondent, he could not continue using the Respondent's parking ticket machine.
29. In re-examination, RW2 maintained that the leave form is only approved by the head of department and that in this case, the head of department did not approve it which means that the leave was not approved. He further stated that it was the Respondent's duty to take the leave form to the head of department for approval.

The Appeal

The Appellant's Submissions

30. In its submissions dated 8th August 2023 and filed in court on 9th August 2023, the Appellant has crystalized the issues for determination into two main grounds that:
 - i. The Learned Magistrate erred in law and fact in finding that the Respondent was unfairly dismissed from employment;
 - ii. The Learned Magistrate erred in law and in fact in awarding the Claimant service pay in the sum of Kshs. 250,000.
31. On the first ground, Counsel for the Appellant submitted that during cross examination, the Claimant when asked about the forged banking slips acknowledged that they bore his name and signature but maintained that he was on leave during the period in question.
32. The Appellant has submitted that the defence witness stated that the Respondent was not on leave as he alleged as his leave had not been approved. It is the Appellant's submissions that the only logical conclusion that can be drawn from the circumstance and from the evidence of the Appellant's witnesses is that the banking slips were presented by the Respondent who was on duty during the period in question.
33. The Appellant submits that the receipts having been declared as forgeries by the various banking institutions was sufficient reason to dismiss the Respondent from employment. It is submitted that the Appellant had valid reasons to terminate the Respondent and in support of this position, the Appellant cited the cases of Galgalo Jarso Jillo vs Agricultural Finance Corporation(2021)eKLR and Thomas Sila Nzivo v Bamburi Cement Limited (2014)eKLR.
34. It is the Appellant's case that the trial court erred in disregarding the testimonies of the witnesses and consequently arrived at the conclusion that there were no valid reasons to dismiss the Respondent.



35. The Appellant has also faulted the trial court for substituting the Appellant's evidence with its opinion regarding the manner in which leave applications are made. According to the Appellant, the trial court essentially held that the endorsements by the rest of the officials were mere formalities and that which was important was that of the supervisor. It is the Appellant's submission that the said line of argument was not pleaded and that the Appellant's witness having indicated that all the portions of the leave application had to be endorsed, the court ought to have been guided by such evidence.
36. On the second ground, the Appellant submits that the trial court erred in law in awarding the Respondent the sum of Kshs 250,000 as service pay because the Appellant was making monthly contribution to NSSF. According to the Appellant, in the Respondent's dismissal letter, he was informed of his entitlement to the contribution towards pension and NSSF. It was therefore submitted that the Respondent was not entitled to gratuity. In support of this position, reliance was placed on the cases of Antony Yamo Ihito v Basco Products Kenya Limited(2022)eKLR, Apex Steel Limited v Dominic Mutuamendon(2020)eKLR and Next Generation Communication vs George M. Kirungaru (2019)eKLR.
37. The court was urged to allow the appeal and substitute the judgment of the trial court with an Order dismissing the Claim.

Respondent's Submissions

38. The Respondent on its part identified the issues for determination in this appeal to be;
 - i. Whether the Respondent was an employee of the Appellant
 - ii. Whether the learned magistrate erred in law and in fact in finding that the Respondent was on leave during the period in question when:
 - a. The Respondent's leave application form not filled as required by the Appellant's Human Resource Policy & Procedures Manual standards
 - b. The Respondent's leave was not approved and consequently if at all he proceeded on leave, the same was taken without leave of absence
 - c. The Respondent's Supervisor (RW2) confirmed that the leave form signed by himself was not valid as it had not been signed by the other officials.
 - iii. Whether the learned Magistrate erred in law when he awarded the Respondent service pay to a tune of Kshs 250,000
39. On the first issue for determination, the Respondent maintained that he was an employee of the Appellant on permanent and pensionable terms.
40. As regards the second issue, the Respondent submitted that on 7th July 2017, he proceeded on leave for 24 days and that he resumed work on 31st July 2017 and applied to proceed on his annual leave effective from the 31st July 2017 to 18th September 2017. The Respondent further submitted that the leave application was approved by the Head of Section in the Finance Department, Mr H.K Yego whom also approved for Mr Moses Mulongo to take over while the Respondent was away on leave.
41. On the third issue on whether the learned magistrate erred in law in awarding the Respondent service pay of Kshs. 250,000, it was the Respondent's submission that he was entitled to Kshs. 300,000 as compensation for 12 months' pay after being unlawfully terminated from his job by the Appellant.



42. According to the Respondent, the Appellant did not provide any evidence to attest that it was remitting statutory deductions for all the years the Respondent worked for the Appellant. It was the Respondent's submission that it was the responsibility of the Appellant to prove payments of NSSF dues from 1988 to 2018 when the Respondent was unfairly and unlawfully terminated from his employment.
43. The Respondent urged the court to uphold the award of service pay as the Appellant did not produce any documentation showing that it remitted NSSF contributions for the Respondent. Reliance was placed on the case of Elijah Kipkoros Tonui vs Ngara Opticians T/A Bright Eyes Limited (2014) eKLR.
44. It was the Respondent's submission that the trial court only erred in law and in fact by failing to consider the submissions of the Respondent in their entirety when the learned magistrate erred in fact and in law in holding that the Cross-Appellant was only entitled to service pay for ten (10) years of Kshs 250,000 only instead of an award for the maximum 12 months gross salary for 35 years he worked for the Respondent.
45. In the end, the court was urged to dismiss the Appeal with costs to the Respondent.

Determination

46. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that fall for determination are;
 - i. Whether the trial court erred in finding that the Claimant was unfairly dismissed from employment.
 - ii. Whether the trial court erred in awarding the Respondent service pay.
 - iii. What orders should issue?
47. On the first issue, the Appellant has faulted the trial court for failing to consider the evidence adduced by its witnesses in support of the position that the Respondent did not prove that he was on leave during the period the alleged funds were lost and as a result finding that the Respondent was dismissed unfairly.
48. It is the Appellant's case that the Respondent was on duty on the diverse dates in July, August and September 2017 when he submitted fake banking deposit slips purporting to be from Kenya Commercial Bank, Family Bank and National Bank to prove that he had deposited the collected revenue from members of the public which deposits did not reflect in the revenue account.
49. The Respondent on his part maintained that during the alleged period when the funds were lost, he was on leave. It was his evidence that he went on compassionate leave from 7th July 2017 until 31st July 2017 after he lost his mother, and that thereafter, he proceeded on annual leave from 31st July 2017 to 18th September 2017.
50. The Appellant disputed that the Respondent was on leave during the said period. According to the Appellant, the leave application form produced by the Respondent was irregular as it had not been signed by all the relevant heads of departments as was the procedure.
51. I have analyzed the record of appeal in its entirety. The Respondent was issued with a Notice to Show Cause letter dated 2nd February 2018 which is reproduced hereunder:

To: William Komen



19880012537

Thro'

In-charge Parking

Re: Show Cause And Suspension

It has been reported to this office your general conduct and work performance as a Revenue Collector in the parking street has been found wanting and the following acts of gross misconduct have been reported against you.

1. Presenting bank deposit slips not reflected in the revenue account purporting to be from Kenya Commercial Bank, Family Bank and National Bank on diverse dates in the month of July, August and September 2017.
2. Loss of County Revenue collected from parking fee on the diverse dates in the month of July, August and September 2017 not banked in the revenue account at Kenya Commercial Bank, Family Bank or National Bank.

Your presentation if any, should reach this office within 21 days from the date of this letter failure to which the contemplated action will be taken without further reference to you.

In the meantime, it has been decided that you are hereby suspended from exercising the duties of your office from the date of this letter pending investigation and finalization of your case. While on suspension, you will be paid full house allowance and be retained on medical cover.

Thank you.

Signed

Peter K.Chesos

Chief Officer Finance

County Government of Uasin Gishu

CC: The CECM finance and Economic Planning

The Chief Officer, Public Service Management

The Ag- secretary Public Service Board

52. From the record, the Respondent wrote his responses to the above letter which reads:

The Chief Officer Finance

County Government Of Uasin Gishu

Po Box

Eldoret

13.02.2018

Dear Sir/ Madam,

Re: Show Cause And Suspension

Sir, this is reference to your letter dated 2nd February 2018 addressed to me copied to



- i. The CECM finance and Economic Planning
- ii. The Chief Officer, Public Service Management
- iii. The Ag- secretary Public Service Board

That in response to the said letter, I wish to respond as hereunder;

That I personally banked the revenue collected for the first week of July and then I was given off duty for the rest of July to attend my mother who was under medication who later passed on.

That I came back on 31st July 2017, in which I applied for official leave for 30 days effective 31st July 2017 to 18th September 2017.

That I reported to work on 18th September 2017, in which I started banking the collected revenue at the Family bank thereafter submitting all the said banking slips to parking office which the supervisor personally received.

Yours faithfully,

Signed

William Komen

19880012537

53. The second letter reads;

The Chief Officer Finance
County Government of Uasin Gishu
Box 40
Eldoret
26.04.2018

Dear Sir/madam

Re: Show Cause And Suspension

Reference is made to my response letter dated 13.02.2018,

That I hereby submit my further documentary evidence that indeed I was off duty to attend the burial of my late mother on 7/7/2017 and that I came back on 21/7/2017 where I officially applied for leave.

That again, at the earliest opportunity, during the hearing, I will be requesting that the attendance register and the black book being held by the Section Head be produced to enable the panel look at it and confirm my records on attendance and make their final decision on the said matter.

Yours faithfully,

Signed

William Komen

19880012537



54. CW2 in his testimony stated that he took over the Respondent's duties pursuant to RW2's approval. CW2 further testified that although the procedure for leave application was that an employee was required to have it signed by six heads of departments, in practice, the signature of the Head of Section sufficed.
55. I have looked at the evidence adduced by all the parties in the trial court. RW2 testified that he signed the Respondent's leave form and that since the Respondent did not take the leave form for signing by the other 5 officials, it means that he did not proceed on leave as alleged.
56. RW2 who was introduced as the Respondent's immediate supervisor stated that he recommended that CW2 takes over the Respondent's duties while he was on leave and signed the Respondent's leave form.
57. It was upon the Appellant to prove that the Respondent did not take annual leave which it did not. The Respondent on his part proved that he handed over his duties to CW2 when he proceeded on leave and that the falsified documents he was accused of submitting were done while he was away on annual leave and CW2 was undertaking his duties of collection of revenue.
58. In the absence of concrete evidence by the Appellant in form of attendance list or register to confirm that the Respondent was at work during the period in question, it follows that his dismissal was based on unsubstantiated allegations. The reasons advanced by the Appellant for the Respondent's dismissal were thus not proved and as such, the dismissal was unfair.
59. With regard to the second issue on the award of service pay, the Appellant has submitted that the trial court erred in law in awarding the Respondent the sum of Kshs 250,000 as service pay because the Appellant was making monthly contribution to NSSF.
60. Although the court did not have the advantage of seeing the Respondent's payslip to satisfy itself that the Appellant was making monthly contributions to NSSF, the court takes judicial notice that all employees on permanent and pensionable terms in Public Service like the Respondent have their NSSF contributions made on a monthly basis by their employers unless they are exempt by virtue of being a member of a pension scheme. Under Section 35(6) of the *Employment Act* an employee who is a member of NSSF or a pension scheme into which the employer makes a contribution on the employee's behalf is not entitled to service pay. The Respondent was therefore not entitled to service pay.
61. On the award of compensation in the sum of Kshs. 300,000 being maximum compensation, the Appellant's ground of appeal no. 5 was that the learned magistrate erred in law and in fact in awarding the Respondent a sum of Kshs 300,000 as compensation for unlawful termination of employment when there was overwhelming evidence that the respondent was involved in the loss of money hence the termination was fair and lawful. This ground was however not set out in the submissions of the Appellant as one of the issues for determination. Nevertheless, as it was raised as a ground of appeal I will consider the same.
62. Section 49(4) of the *Employment Act* sets out factors to be considered by a court before determining the remedies to be awarded to an employee who has been dismissed wrongfully or unfairly. The Court of Appeal has severally interfered with the award of remedies of this court where the reasons for granting this discretionary remedy was not stated. In *OI Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR, the Court of Appeal observed as follows:

“ The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been



exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention.”

63. In the instant case the Respondent had been in employment since 1988. He had been inherited by the Appellant from its predecessor. He had thus served for approximately 30 years at the time of dismissal. From the evidence adduced, he did not contribute to the circumstances that led to the termination of his employment. Taking these two factors into account and also the amount that his maximum compensation constituted, it is my view that even though the trial court did not state the grounds for awarding maximum compensation, there is justification for the award. I therefore do not find any reason to disturb the same.
64. Consequently, the appeal partially succeeds in the following terms:
- a. The award of service pay is set aside.
 - b. The rest of the award by the trial court is sustained.
65. As the appeal has succeeded partially, I direct that each party will bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF MARCH 2024

MAUREEN ONYANGO

****JUDGE***

