



**Kenyanya v Shajanand Holdings Ltd (Appeal E024 of 2023)
[2024] KEELRC 1312 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1312 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E024 OF 2023**

**S RADIDO, J
MAY 29, 2024**

BETWEEN

JAMES NYANGOYA KENYANYA APPELLANT

AND

SHAJANAND HOLDINGS LTD RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Honourable C.N. Oruo, PM
in Winam SPMCC ELRC Cause No. E002 of 2022 delivered on 31st March 2023)*

JUDGMENT

1. James Nyangoya Kenyanya (the Appellant) sued Shajanand Holdings Ltd (the Respondent) before the Principal Magistrates Court at Winam alleging unfair termination of employment and breach of contract.
2. In a judgment delivered on 31 March 2023, the Principal Magistrate dismissed the cause on the ground that the Appellant had not established an employment relationship with the Respondent.
3. The Appellant was aggrieved and he lodged a Memorandum of Appeal with this Court on 28 April 2023, contending that:
 - i. The Learned Trial Magistrate erred in law and fact in failing to determine that the Appellant was an employee of the Respondent and proceeded to dismiss the claim where there was sufficient evidence on record that demonstrated that the Appellant was indeed an employee of the Respondent.
 - ii. The Learned Trial Magistrate erred in law and fact in disregarding the entire evidence placed before and the submissions of the Appellant and proceeded to dismiss the claim and therefore occasioned a travesty of justice against the Appellant.



- iii. The Learned Trial magistrate erred in law and fact in determining that the Appellant's employment with the Respondent was not terminated unlawfully and unfairly when the evidence and submissions placed before him fully demonstrated that the termination was unlawful and unfair and the Appellant was duly entitled to the terminal reliefs sought.
 - iv. The Learned Trial Magistrate erred in law and fact in failing to consider and take into account the submissions of the Appellant as to occasion a travesty of justice to the Appellant.
 - v. The Learned Trial Magistrate erred in law and fact in failing to assess to determine the level and extent of damages payable to the Appellant in the event that the claim was successful as to have occasioned a travesty of justice.
 - vi. The Trial Judge occasioned a travesty of justice by misapprehending the law and facts placed before him and failing to take into account the submissions placed before him by the Appellant.
4. The Record of Appeal was filed on 22 March 2024, and the Court gave directions on 16 April 2024.
 5. The Appellant filed his submissions on 27 May 2024 (should have been filed and served before 3 May 2024), and the Respondent on 27 May 2024.
 6. The Court has considered the Record of Appeal and submissions.

Role of the Court on a First Appeal

7. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

8. This Court will keep the interdict in mind.

Employment relationship

9. The Principal Magistrate reached a conclusion that there was no employment Relationship between the Appellant and Respondent because the Appellant did not produce a contract of employment during the hearing.
10. The obligation to prepare and cause a contract of employment to be signed by an employee is placed upon the shoulder of the employer by section 9(2) of the *Employment Act*, 2007.
11. Section 10(7) of the Act places a burden on the employer to produce an employment contract in any legal proceedings and when the employer fails to produce the employment contract containing the particulars set out in section 10(1) of the *Employment Act*, 2007, the burden shifts to the employer to disprove the existence and terms of the employment.
12. Further, when an employee has not issued or produced an employment contract, it is open to the Court to rely on secondary evidence to infer an employment RELATIONSHIP.



13. In the case at hand, the Appellant produced before the Principal Magistrate a copy of a Statement of Account from the National Social Security Fund. The Statement indicated that the Appellant was an employee of the Respondent.
14. The Court finds that the Principal Magistrate erred in law and fact in finding that the Appellant had not established an employment relationship with the Respondent when there was secondary evidence of such a relationship.

Unfair Termination of Employment

15. The Appellant's case before the Principal Magistrate was that his employment was terminated on 6 February 2021 upon resuming from sick leave, and that the termination was unfair because no prior notice was issued and that he was not afforded a chance to be heard. He further asserted that no justifiable reasons were given.
16. The Respondent did not lead any evidence before the Principal Magistrate.
17. Section 35(1)(c) of the *Employment Act*, 2007 demands written notice of termination of employment of at least 28 days, if the employee is paid by the month.
18. The Appellant was paid by the month and the Respondent did not demonstrate that the written notice was given.
19. Further, section 41 of the *Act* requires the employer to inform the employee of the reasons for contemplating termination of employment and give the employee a chance to make representations.
20. No evidence was led before the Principal Magistrate to demonstrate that the Appellant was taken through such a process.
21. The Court finds that the Respondent unfairly terminated the Appellant's employment.

Compensation

22. The Appellant's testimony that he was employed in 2014 and was dismissed in 2021 was not controverted. His testimony that he was earning Kshs 13,000/- at the time of separation was not challenged successfully.
23. Considering the length of service, this Court is of the view that the equivalent of 7 months' gross wages as compensation in the sum of Kshs 91,000/- would be just and appropriate.

Notice pay

24. The Respondent did not give the Appellant written notice, and the Court awards Kshs 13,000/- as salary in lieu of notice.

Accrued leave

25. The Appellant did not lay an evidential foundation to this head of the claim and relief is declined.

Conclusion and Orders

26. Flowing from the above, the judgment of the Principal Magistrate dismissing the Appellant's action for non-existence of an employment relationship is set aside and substituted with the judgment that the Appellant was an employee of the Respondent and that the Respondent unfairly terminated the Appellant's employment.



27. The Appellant is awarded:

- i. Compensation Kshs 91,000/-
 - ii. Pay in lieu of notice Kshs 13,000/-
- Total Kshs 104,000/-

28. The Appellant is denied costs of the Appeal for late filing of submissions but will have costs before the Subordinate Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF MAY 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances;

For Appellant Odhiambo Ouma & Co. Advocates

For Respondent L.G. Menezes & Co. Advocates

Court Assistant Chemwolo

