



Omondi v County Public Service Board, Homabay County & another (Appeal E031 of 2022) [2024] KEELRC 1640 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1640 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E031 OF 2022
CN BAARI, J
JUNE 27, 2024**

BETWEEN

WYCLIFFE OMONDI APPELLANT

AND

**COUNTY PUBLIC SERVICE BOARD, HOMABAY COUNTY ... 1ST
RESPONDENT**

COUNTY GOVERNMENT OF HOMABAY 2ND RESPONDENT

*(Being an appeal from the judgment and Order of Hon. J. M. Nang'ea
(CM) delivered on 28th July, 2022 in Homabay CMELRC no. E001 of 2020)*

JUDGMENT

1. This judgment relates to an appeal arising from a decision rendered on 28th July, 2022, where the Trial Court found in favour the Appellant and awarded him unpaid salary arrears, but declined to award the Appellant's prayer for damages for unlawful termination of employment.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on 26th August, 2022.
3. The appeal is premised on the grounds THAT:
 - i. The Learned Trial Magistrate erred in law and in fact by failing to consider all the issues raised by the Appellant in his pleadings and evidence adduced in court.
 - ii. The Learned Trial Magistrate correctly found in favour of the Appellant in awarding unpaid salary arrears, but erred in law and in fact by leaving out an award of damages for unlawful termination of employment as had been pleaded and proven by the Appellant.
 - iii. The judgment herein was against the evidence led in court.



4. The Appellant prays that his appeal be allowed and an additional award of 3 months salary in lieu of notice and damages for unlawful termination be made to him.
5. The appeal was canvassed by way of written submissions, and both parties filed their submissions.

The Appellant's Submissions

6. It is the Appellant's submission that despite the trial magistrate correctly finding that he was entitled to the reliefs sought, the reliefs awarded in the final expression of the judgment were insufficient as it failed to address the claim as presented in the final statement of claim presented before the court.
7. The Appellant further submits that in instances where the court fails to grant a relief sought, the said refusal ought to be accompanied with an explanation to that effect. That in the absence of an explanation, as is the case herein, then an appellate court has the duty to nullify any order emanating therefrom, and in its place issue an appropriate relief. He placed reliance in *Anytime Limited v Fredrick Mutobera Omuraya* [2022] eKLR to buttress this assertion.
8. On the claim for 3 months' salary in lieu of notice, the Appellant submits that the same was duly proven as claimed, and in the absence of any reason or evidence proving the contrary, the same should be awarded as pleaded.
9. It is the Appellant's submission that his employment was unilaterally terminated by the Respondents without notice, and the Respondents went further to subject him to provide services for a further 44 months after the alleged termination without pay, and without formal notification of the termination. It is submitted that this entitles the Appellant to the maximum award of 12 months' compensation as envisaged under the law.
10. The Appellant asserts that this appeal is merited and the same ought to be allowed by issuing an order substituting the judgment of the trial court delivered on 28.07.2022 with appropriate orders in accordance with the Amended Statement of claim dated 02.02.2022.

The Respondent's Submissions

11. The Respondent submits that it is trite law that an appellate court will not interfere with damages awarded merely because it would have reached a different amount had it been the one to try the case. They sought to rely in the case of *Gitobu Iman yara & 2 Others v Attorney General* [2016] eKLR, to support this position.
12. It is their submission that the Appellant has not demonstrated that the trial court proceeded on a wrong principle of law or misapprehended the facts hence arriving at a wrong decision.
13. The Respondents submit that the trial court award ought not to be disturbed as the court considered all the issues and arrived at the award given.
14. The Respondents pray that the Appellant's appeal be dismissed with costs.

Analysis and Determination

15. I have considered the Memorandum and Record of Appeal, together with the submissions filed by both parties. The issues for determination are whether the instant appeal is merited and whether the reliefs sought ought to be allowed.
16. The Court of Appeal for East Africa in *Peters -vs- Sunday Post Limited* [1958] EA 424 set out the appropriate standard of review established in cases of appeal as follows: -



- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and bearing the witnesses testily before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
17. Further in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 the court held that;
- "An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"
18. My role therefore, as a first Appellate Court, is to re-appraise and re-evaluate the evidence adduced before the trial court in its entirety, and arrive at my own conclusion on whether the finding of the Trial Court stands or not.
19. The Appellant asserts that the Trial Magistrate erred in law and in fact by failing to consider all the issues raised in its pleadings and evidence adduced in court.
20. It is the Appellant's contention that the reliefs awarded as expressed at the opening paragraph of the impugned judgment, were as framed in the initial Statement of Claim dated 23rd September, 2020, and not those in the Amended statement of claim dated 2nd February, 2022 and filed in court on 10th February, 2022, following the leave of court granted on 20th January, 2022, to make the relevant amendments, including to the reliefs sought.
21. Indeed, it is evident from the record that the Trial Court's judgment now impugned, is premised on the Statement of Claim dated 23rd September, 2020, and not the Amended Statement of Claim dated 2nd February, 2022, and filed on 10th February, 2022, and which was filed pursuant to the leave of the same Court granted on 20th January, 2022.
22. Having proceeded to dwell on the wrong Statement of Claim, confirms that the Trial Court ended up issuing the wrong orders as opposed to those sought by the Appellant herein.
23. In view of the error of the Trial Court picked out above, I will proceed to analyze each prayer under the Amended Statement of Claim and render my self on the same.
24. Under the amended statement of claim referred to herein, the Appellant sought the following reliefs: -
- a. A declaration that the Respondents' actions to withhold the Claimant's salary is unlawful and amounts to an unfair labour practice;
 - b. The Claimant's unpaid salary arrears from November 2017 to July 2021, in the sum of Kshs.16,692 x 44 months = Kshs.734,448/-
 - c. 3 months' salary in lieu of notice Kshs. 16,692 x 3 = Kshs.50, 076/-
 - d. 12 months' salary being damages for unlawful termination being Kshs. 16,692 x 12 months = 200,304/-



- e. An order compelling the Respondents to remit the Claimant's statutory deductions and it be condemned to pay the penalties for late payments
 - f. Costs of the suit
25. On the question of whether the Appellant's salary was withheld between the year 2017 and 2021, the Appellant submitted that he diligently worked for the Respondents/employer, until November 2017 when his salary was withheld without reason or notice.
 26. The Appellant confirmed through his pleadings and his oral evidence before the trial court, that his salary was indeed stopped in November, 2017. By this admission, it is my view that he was under duty to show that he continued providing services to the Respondents without salary for the period of the claim [2017-2021].
 27. No duty roster or work attendance sheet by whatever form were produced as prove that the Appellant continued going to work upon the withholding of his salary.
 28. In my view, the Appellant was under obligation to minimize his losses by seeking alternative employment as opposed to staying home or reporting to work when no pay was forthcoming for an entire four (4) years just to lay a claim of withheld salaries.
 29. In my considered view, and the Appellant not having shown proof that he continued working for the Respondents for a record four years without a salary, I deem the claim for withheld salary not to have been sufficiently proven on a balance of probability.
 30. The claim fails and is dismissed, and the award by the Trial court is set aside.
 31. On the claim for compensation for unfair termination, no evidence was led to show that the Appellant was taken through due process prior to both the stoppage of salary, and the issuance of the termination notice contrary to the law.
 32. The totality of the Appellant's evidence on the unfair termination remains unrebutted which leads me to the finding that the Appellant's termination fell short of the requirements of Article 41 of *the Constitution* and Sections 43, 45 and 47(5) of the *Employment Act*, 2007.
 33. As to whether the Appellant deserves to be compensated for the unfair termination, compensation for unfair termination/dismissal is provided for under Sections 49 and 50 of the *Employment Act*, 2007. A finding of an unfair termination entitles the Appellant to compensation. (See Benjamin Langwen v National Environment Management Authority [2016] eKLR.)
 34. The manner in which the Appellant was terminated leads me to the conclusion that he has proved a case for maximum compensation, and is hereby awarded 12 months' salary as compensation for the unfair termination.
 35. On the pay in lieu of termination notice, none of the parties produced the Appellant's letter of appointment to enable the court establish the contractual notice period.
 36. Having said this, I still find that the Appellant is entitled to notice pay and proceed to award him the statutory one month pay in lieu of termination notice, and which is hereby awarded.
 37. In sum, I reach the following conclusion: -
 - i. That the appeal succeeds and orders issued as follows: -



- a. That the finding of the Trial Court was premised on the wrong statement of claim and is set aside in its entirety.
- b. A declaration that the Appellant was unfairly terminated
- c. An award of 12 months' salary as compensation for unfair termination at Kshs. 200,304/-
- d. One-month salary in lieu of notice at Kshs. 16,692/-
- e. That the 1st Respondents (County Public Service Board of Homabay) shall bear the costs of this appeal.
- f. Costs of the suit before lower court are set aside.

38. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JUNE, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Jael Anyango present for the Appellant

N/A for the Respondents

Ms. Anjeline Wanjofu & Debra- Court Assistants.

