



REPUBLIC OF KENYA



KENYA LAW
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**Tips (Kenya) Ltd v Nyaundi (Appeal 2 of 2024)
[2024] KEELRC 1385 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL 2 OF 2024**

**S RADIDO, J
JUNE 12, 2024**

BETWEEN

TIPS (KENYA) LTD APPELLANT

AND

VINCENT ONYWOKI NYAUNDI RESPONDENT

*(An Appeal from the judgment of Learned Senior Principal Magistrate Hon.
R.M. Oanda in Employment Cause No. 1 of 2019 delivered on 23.6.2021)*

JUDGMENT

1. Vincent Onywoki Nyaundi (the Respondent) sued TPS (Kenya) Ltd (the Appellant) before the Senior Principal Magistrates Court alleging unfair termination of employment, violation of constitutional rights and breach of contract.
2. The Cause was defended and in a judgment delivered on 23 June 2021, the Senior Principal Magistrate found unfair termination of employment and ordered the Appellant to reinstate the Respondent. The Senior Principal Magistrate also awarded the Respondent the equivalent of 12 months' wages as compensation.
3. The Appellant was dissatisfied and it lodged a Memorandum of Appeal before the Kilgoris High Court contending:
 - i. The Learned Magistrate failed to take into consideration material facts of the case as presented by the Appellant in its evidence and thereby delivered a judgment that is ambiguous and unenforceable.
 - ii. The Learned Magistrate erred in law and fact when he ignored a basic but fundamental principle of law in his judgment, to wit, that a party is bound by his pleadings. To this end, the Learned Magistrate misdirected himself in failing to appreciate that the case the Respondent



sought to prove at trial was not a case he pleaded and to which the Appellant had responded in its defence.

- iii. To the extent that the Learned Magistrate ignored the above-named basic principle of law, the effect of the judgment was to condemn the Appellant unheard. The Appellant was not given an opportunity to defend itself in the face of the Respondent's new case advanced at trial.
 - iv. On the evidence tendered before the Court by the Respondent, the Learned Magistrate erred in law and fact in ultimately finding that the Respondent had proved his case that merited an award of reinstatement, damages and costs.
4. The Appellant filed a Record of Appeal before the High Court on 8 December 2023.
 5. When the Appeal was mentioned before the High Court on 4 March 2024, the Court declined jurisdiction and transferred the Appeal to this Court.
 6. This Court gave directions on 18 April 2024 and 7 May 2024.
 7. The parties' submissions were not on record by the agreed timelines and today the Appellant's advocate informed the Court that there was a technical hitch when filing the submissions. According to the advocate despite being mapped, the submissions were misdirected to the profile for Kisumu Appeal No. 1 of 2021.
 8. The Court directed the parties to email the submissions to the Court's email. The submissions were emailed.
 9. The Court has considered the Record of Appeal and submissions.

Role of the Court on a First Appeal

10. 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.

11. This Court will keep the interdict in mind.

Nature of employment

12. The Appellant employed the Respondent in May 2012.
13. The Respondent testified that he served the Appellant until 2018 when he was instructed to go home until he would be recalled. He also testified that he worked continuously and was paid fortnightly or monthly through Mpesa. He further testified that the Appellant would deduct contributions from his salary and remit to the National Social Security Fund and National Hospital Insurance Fund.
14. The Respondent produced statements from Mpesa and the National Social Security Fund to corroborate the payments and deductions.
15. The Appellant maintained that the Respondent was a casual employee who was engaged on a need basis, was paid a daily wage accumulated fortnightly or monthly and it produced attendance records.



16. In terms of section 2 of the *Employment Act*, 2007, a casual employee is one who is paid at the end of the day.
17. At the end of the day and with the payment, the contract comes to an end, and any further engagement becomes a distinct contract.
18. Further, in the present case, the statement from the National Social Security Fund indicates that the Respondent was making standard contributions on behalf of the Respondent. Casual employees ordinarily do not make standard contributions through the payroll.
19. The Appellant allowed the Respondent to report to work each day and paid the accumulated wages fortnightly or monthly. The attendance records show the Respondent worked continuously for weeks.
20. Since the Respondent was not paid at the end of the day and he served the Appellant from 2012 to 2018, he was not a casual employee on account of the payments.
21. In the circumstances, the Respondent was not a casual employee, even if the service was not continuous during the period of employment.

Unfair termination of employment

22. The Appellant did not deny that the Respondent's contract was terminated verbally. Its justification for not giving a written notice was that since the contract was oral, there was no need for a written notice.
23. The Court has concluded that the Respondent was not a casual employee. In fact, he served the Respondent from 2012 to 2018, about 6 years.
24. The Respondent was therefore assured the protections availed to employees by the *Employment Act* and more so section 35(1) on written notice of termination, section 41 on procedural fairness and sections 43 and 45 on substantive fairness.
25. In concluding that there was unfair termination or that it was a no contest, the Senior Principal Magistrate found that the Appellant never informed the Respondent formally of the termination of employment.
26. This Court finds that the Senior Principal Magistrate did not err either in law or fact in finding unfair termination of employment.

Compensation and reinstatement

27. Upon finding that the Appellant unfairly terminated the Respondent's employment, the Senior Principal Magistrate awarded both maximum compensation and reinstatement.
28. Section 49(1) and (3) of the *Employment Act* sets out the remedies where the Court finds either unjustified termination of employment or unfair termination of employment.
29. Compensation and reinstatement appear to be exclusive remedies while reinstatement or re-engagement may be without loss of any benefits or remuneration.
30. The Senior Principal Magistrate should, therefore, have granted reinstatement or re-engagement without loss of benefits or remuneration, and not reinstatement and compensation.
31. The Senior Principal Magistrate fell in error of law in allowing both reinstatement and compensation.



32. More than 3 years have elapsed since the Appellant and Respondent separated, and consequently, this Court finds that reinstatement would not be appropriate remedy.

Conclusion and Orders

33. In light of the above, the Appeal only succeeds to the extent that the order of reinstatement is set aside and vacated.
34. The Court confirms the award of compensation.
35. Each party to bear own costs of the Appeal while Respondent has costs before the Senior Principal Magistrates Court.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearance

For Appellant Namachanja & Mbugua Advocates

For Respondent Ochoki & Co. Advocates

Court Assistant Chemwolo

