



**Carslake Nominees Ltd & another v Otieno (Personal representative of Edward Otieno Sumba (Deceased) (Appeal E064 of 2022) [2024] KEELRC 1372 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1372 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E064 OF 2022**

**AK NZEI, J  
JUNE 6, 2024**

**BETWEEN  
CARSLAKE NOMINEES LTD & ANOTHER & ANOTHER ..... APPELLANT  
AND  
STEVEN OMONDI OTIENO (PERSONAL REPRESENTATIVE OF EDWARD  
OTIENO SUMBA (DECEASED) ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D.O.  
Mbeja – PM in Msa – CM ELR Cause No. E205 of 2020)*

**JUDGMENT**

1. The Appellants herein were the Respondents (defendants) in Mombasa Chief Magistrate’s Court Employment Case No. E205 of 2020 whereby they had been sued by Edward Otieno Sumba, (hereinafter referred to as “the deceased”) claiming:-
  - a. Compensation for 50% salary deducted in the months of April and May 2020 (ksh. 28,000x2) .....kshs. 56,000
  - b. 2 years salary for unfair termination (kshs. 56,000x2 years).....kshs. 1,344,000
  - c. Compensation for uniform allowance from 2014 to 2019 .....kshs. 28,500
  - d. Compensation for termination gratuity .....kshs. 728,000
  - e. A declaration that the Respondent’s dismissal was wrongful and unfair.
  - f. A certificate of service.
  - g. Costs of the suit and interest.



2. The deceased had pleaded that he had been employed by the Appellants as a security guard in 1997, and rose through the ranks to the position of a security officer earning a monthly gross pay/salary of ksh. 56,275, a position that he held until 31/5/2020 when his employment was unfairly terminated. The deceased had further pleaded:-
  - a. that vide a letter dated 27/3/2020, the Respondent was forced by the Appellants to take a 50% pay cut as from 1/4/2020, and that before he could absorb the shock of 50% salary cut, he was served with a letter dated 30/3/2020 terminating his employment with effect from 31/5/2020.
  - b. that at the time of termination, the deceased was aged 56 years, and had worked for the Appellants for 26 years. That from the year 2009, the deceased worked for both the 1<sup>st</sup> and the 2<sup>nd</sup> Appellant, and that although he was entailed to uniform during his employment, he was not given any, and therefore claimed kshs. 4,750 per year from 2014 to 2019.
  - c. that the deceased was not paid his terminal dues.
  - d. that the Appellant's act of adjusting the deceased's salary by 50% and terminating his employment 3 days later was wrongful and unfair, and contravened both the Employment Act, the Collective Bargaining Agreement and the Appellants' Employment Manual.
3. Documents filed alongside the memorandum of claim dated 9/10/2020 included the deceased's witness statement, also dated 9/10/2020, and an evenly dated list of documents listing 10 documents. The listed documents included the deceased's letters of appointment, promotion letters, the Appellants' letters dated 27/3/2020 and 30/3/2020 respectively, a demand letter dated 30/9/2020, response to the demand, a copy of a Collective Bargaining Agreement and the Appellant's Employment Manual.
4. An Amended Statement of claim, dated 23/8/2021, is shown to have been filed on 24/8/2021. The amendment is shown to have been necessitated by the death of the Original Claimant in the Lower Court suit, Edward Otieno Sumba (deceased), who is shown to have died on 31/10/2020. The amendment is shown to have been effected pursuant to the trial Court's orders dated 11/8/2021, and the import of the amendment is shown to have been to reflect the character of the Respondent herein, Stephen Omondi Otieno, as the personal representative of the original claimant (Edward Otieno Sumba - deceased). A witness statement of the said Stephen Omondi Otieno (personal representative), dated 23/8/2021, was filed on 24/8/2021. A further list of documents, listing a grant of letters of administration and a death certificate, was also filed on 24/8/2021.
5. The Appellants entered appearance on 18/11/2021 and filed a joint Response to the claim on the same date. The Appellants admitted having employed Edward Otieno Sumba (deceased), and that the deceased's gross salary was kshs. 56,275. The Appellants filed an amended Response to Amended Statement of Claim on 17/2/2022, reflecting substitution of the deceased with his personal representative. The Appellants also filed a written witness statement of Angela Mwenderani, the Appellants' Human Resource Manager, dated 17/2/2022. Further, the Appellants filed an evenly dated list of documents listing 8 documents which included a letter of appointment dated 1/7/2010, a letter dated 27/3/2020, the deceased's payslips for the months of January 2020, February 2020, April 2020 and May 2020, a notice to terminate employment dated 30/3/2020, a final dues computation slip, copies of 3 cheques (Nos. 012348,012795 and 012629) drawn in favour of the deceased, a copy of withdrawal form from Jubilee Insurance and a probation contract dated 1/12/2021.
6. At the trial, the deceased's personal representative (the Respondent herein) is shown to have adopted his filed witness statement and to have referred to/produced the documents referred to in paragraphs



- 3 and 4 of this judgment. The witness statement of the legal representative is shown to be a replication of the deceased's witness statement filed before it.
7. Cross-examined by the Appellant's Counsel, the deceased's personal representative testified that he was not working with the Appellants during the period of the deceased's employment.
  8. The Appellant's witness, Angela Mwenderani (RW-1), adopted her filed witness statement as her testimony and produced in evidence the Appellants' documents referred to in paragraph 5 of this judgment. She further testified that redundancy procedure was not followed, and that the deceased was paid 50% salary for April and May. That whereas the CBA called for compensation for uniform, the deceased was given uniform. That the deceased was a management staff, and therefore not unionisable.
  9. The trial Court delivered its judgment on 31/8/2022 and awarded the Respondent herein a cumulative sum of Kshs. 759,800 made up, according to the trial Court, of the sum claimed regarding salary deductions for the months of April and May 2020, the equivalent of 12 months' salary for unfair termination of employment and uniform allowance. The Respondent was also awarded costs of the suit and interest at Court rates, to be calculated from the date of filing suit.
  10. Aggrieved by the trial Court's said judgment, the Appellants preferred the appeal herein and set forth the following grounds of appeal:-
    - a. the learned magistrate erred in law and fact in failing to consider the evidence adduced by the Appellants pointing to the fact that the Respondent was given a reason for his termination from employment.
    - b. the learned magistrate erred in law and fact in failing to consider the evidence that the Respondent was given a two months' notice prior to his termination from employment.
    - c. the learned magistrate erred in law and fact in failing to consider the evidence adduced by the Appellants and in finding that the Respondent's termination was wrongful and unfair.
    - d. the learned magistrate erred in law and fact in failing to consider the evidence adduced by the Appellants challenging the evidence of the claimant.
    - e. the learned magistrate erred in law and fact by awarding the Respondent compensation of one-year salary for unfair termination by the Appellants as compensation.
    - f. the learned magistrate erred in law and fact in awarding the Respondent costs of the suit plus interest at Court rates from the date of filing suit, yet the Respondent prayed for costs and interest from the date of judgment.
  11. The Appellants prayed that the trial Court's judgment dated 31/8/2022 be set aside and in its place the claimant's suit be dismissed with costs.
  12. This is a first appeal, and the pleadings as filed in the trial Court and evidence adduced thereon are before this Court for fresh evaluation analysis and consideration. It is to be noted that whereas the primary suit is shown to have been filed 22/10/2020, the deceased, who had been the Appellants' employee up to the date of the contested termination, is shown to have died on 31/10/2020, barely eight (8) days from the date of filing suit. This necessitated substitution of the deceased employee (Edward Otieno Sumba – deceased) with his personal representative, Stephen Omondi Otieno, who then took over the suit from the deceased employee and prosecuted the same pursuant to an amendment of the pleadings bringing his name on board as the deceased employee's personal representative.



13. In my view, the foregoing scenario brings in the question of whether an employment claim or suit founded on an employer/employee relationship can survive the employee if he (the employee) dies before the hearing and determination of the suit and/or passage of a decree. Can the deceased employee's personal representative competently testify and prosecute the suit regarding unquantified claims flowing from an employer/employee relationship where the claims are denied by the employer? Quantified claims include earned but unpaid wages/remuneration, pending/unpaid leave days and other benefits that were already a right vested in the deceased employee at the point of his death. Unquantified claims include an alleged claim for compensation for unfair termination of employment.
14. In my view, a claim for compensation based on an alleged unfair termination of a deceased employee's employment is a claim that only the deceased employee could have proved, had he not died. The issues that fall for determination in the instant case, in my view, are as follows:-
  - a. whether the deceased employee's personal representative could competently prosecute and prove a claim based on alleged unfair termination of the deceased employee's employment.
  - b. whether the reliefs made by the trial Court to the deceased employee's estate were deserved.
15. On the first issue, and as already stated in this judgment, a claim for compensation based on alleged unfair termination of employment does not, in my view, survive the death of an employee if he dies before proving the same to the Court's satisfaction and/or before the Court passes judgment in his favour. An employer-employee relationship, though contractual, is rather a personal one and unfairness in terminating the same requires proof, on a balance of probability, by the employee himself or herself. The Black's Law Dictionary (10<sup>th</sup> Edition) defines the word unfair as "not being honest, impartial or candid, inequitable in business dealing especially with regard to labor and employment."
16. In my view, only a party to an employment relationship can attest to alleged unfairness in termination of the same. In the instant case, the deceased employee's personal representative did not tell the trial Court that he was privy to the events leading to termination of the deceased's employment. Indeed, he testified that he was not employed by the Appellants as at the time of the termination in issue.
17. I return a finding that the deceased employee's personal representative could not competently prosecute and prove a claim based on alleged unfair termination of the deceased employee's employment.
18. On the second issue, I make a finding that the 50% paycut imposed on the deceased by the Appellants, and which the Appellants did not deny, was illegal as it amounted to alteration of the terms of the deceased's contract of employment without consulting the deceased. This contravened Section 10(5) of the *Employment Act*. Consequently, I uphold the award of kshs. 56,000 made by the trial Court in that regard.
19. For reasons already set out in this judgment, the award of the equivalent of 12 months' salary for alleged unfair termination of employment is hereby set aside as unfairness was not proved. Similarly, the award of kshs. 28,500 being compensation for uniform allowance was not proved, and is hereby set aside. The claim was said to be based on a CBA, but the Appellants (DW-1) testified that the deceased was not unionisable as he was in the management. Further, the Appellants' witness testified that the deceased was given uniform during his employment. This evidence was not rebutted by the deceased's personal representative.
20. The order awarding the Respondent (the legal representative) interest on the sums awarded by the trial Court from the date of filing suit is hereby set aside. The trial Court did not state, in its impugned



judgment, how a claim that was unquantified at the time of filing suit could attract interest from the date of filing suit. The order was not anchored in either law or equity.

21. In sum, the appeal herein partly and substantially succeeds. For avoidance of doubt, judgment is hereby entered for the Respondent in the sum of kshs. 56,000 being the 50% unlawful deductions from the deceased's salary for the months of April and May 2020, plus Interest at Court rates from the date of the trial Court's judgment.
22. Each party shall bear its own costs of the appeal, but the Respondent will have costs of the proceedings in the Court below.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> JUNE 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

**This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.**

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....Appellant

.....Respondent

