



County Public Service Board, Homabay & another v Orwa (Appeal E027 & E030 of 2022 (Consolidated)) [2024] KEELRC 1351 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1351 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E027 & E030 OF 2022 (CONSOLIDATED)**

CN BAARI, J

JUNE 6, 2024

BETWEEN

COUNTY PUBLIC SERVICE BOARD, HOMABAY 1ST APPELLANT

COUNTY GOVERNMENT OF HOMABAY 2ND APPELLANT

AND

PACIFIC OLIVLA ORWA RESPONDENT

*(Being an appeal against the judgment and Order of Hon. J. M. Nang'ea (CM)
delivered on 28th July, 2022 in Homabay CMELRC NO. E002 OF 2020)*

JUDGMENT

1. This judgment relates to appeals arising from a judgment rendered on 28th July, 2022, where the Trial Court granted the Respondent a total of Kshs.796,626 on account of salary arrears accrued between November, 2017 and September, 2020.
2. The Appellants being dissatisfied with the decision of the Trial Court, lodged this appeal on 25th August, 2022.
3. The Respondent similarly dissatisfied with the same judgment lodged appeal No. E030 of 2022, which was consolidated with E027 of 2022.
4. The appeal No. E027 of 2022, is premised on the grounds THAT:
 - i. The learned Trial Magistrate erred in law and in fact by failing to uphold that the Respondent failed to exhaust all the available options before filing suit.
 - ii. The judgment herein was against the weight of the evidence offered before the court.



5. The Appellants pray that the appeal be allowed and the judgment of the Learned Magistrate be set aside with costs to the Appellants.
6. Appeal No. E030 of 2022, between the same parties 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 Claimant in its 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 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.
7. The appeals were canvassed by way of written submissions and both parties filed their submissions.

The Appellants' Submissions

8. It is the Appellants' submission that the law on termination of employment is codified in the *Employment Act* as read with *the Constitution* of Kenya 2010, and that Article 41 of *the Constitution* provides for the right to fair labour practices as well as the right of an employee to require that a proposed termination of his employment is informed by valid reasons and is processed in a manner that observes the dictates of due process.
9. They submit further that Section 41 of the *Employment Act* provides that whenever an employer proposes to terminate the services of an employee, the employer must notify the employee of the ground for termination in a language that the employee understands, and permit the employee to defend himself against the action of termination.
10. The Appellants contend that Section 43 of the *Employment Act* obligates the employer to prove the grounds for terminating an employee. They placed reliance in the case of *CMC Aviation Limited vs Mohammed Noor* (2015) eKLR to support this assertion.
11. The Appellant assert that an audit report revealed that the Respondent together with other employee were unprocedurally employed, and which led to their salaries being withheld. It is their further submission that the affected officers were put under investigations and requested to stop rendering their services by 30th April, 2018, pending the outcome of the investigations.
12. The Appellants submit that the audit report revealed that the Respondent had been unprocedurally employed by the Appellants, since her employment did not follow the prescribed procedures and requirements of the law, and which permitted the Appellants to proceed and terminate her contract being the contract was illegal and unenforceable.
13. The Appellants contend that the evidence on record clearly shows that the trial court failed to consider that the Respondent had ceased being an employee of the County Government of HomaBay effective 1st July, 2018 per the Notice of termination of Service dated 20th April, 2018.
14. It is their further submission that the Respondent's termination was in line with Article 41 of *the Constitution* and Sections 41 and 45(3) of the *Employment Act*, 2007.
15. They contend that Respondent was informed of his contract termination through letter dated 20th April, 2018, and was further given an opportunity to make representation if she felt the termination was unfair, but which was never done.



16. It is their submission that the Respondent is neither entitled to any accrued employment dues on termination nor the statutory deductions being that the said contract was unenforceable.
17. The Appellants urge the court to quash the decision of the trial court and allow their appeal as the same is merited.

The Respondent's Submissions

18. The Respondent submits that the Appellants' whole appeal is based on documents which were merely filed, but did not form part of the judicial record. It submits further, that the Trial Court, and even this Court on appeal, cannot be invited to apply its judicial mind to determine the relevance and veracity of the contents when the same did not go through the mandatory process of production as evidence in court, and the same subjected to scrutiny by the parties at trial before the court is invited to apply its mind to it in its final judgment.
19. She contends that the documents now relied on in appeal did not become exhibits before the Trial Court, they were simply filed and left at that. She sought to rely in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] eKLR to buttress this position.
20. The Respondent submits that it is trite that where a party gives evidence in support of her case, but the defendant fails to call any witness in support of its allegations, then the Claimant's evidence is uncontroverted and the statement of defence remains mere allegations.
21. She had reliance in *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007* where Justice Abida Ali-Aroni, citing the decision in *Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997*, and which case was cited with approval in the case of *Phelista Mukamu Makau v Elizabeth Kanini Mulumbi* [2015] eKLR stated thus:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
22. It is submitted that the Appellants' whole appeal in ELRCA E027/2022 is based on facts that were not adopted as part of the judicial record, and even if this court were to be invited to re-evaluate and examine the evidence tabled before the trial court, documents filed by the Appellants at trial would not form part of that evidence, and the same therefore ought to be dismissed with costs to the Respondent.
23. On whether the Respondent failed to exhaust available options before invoking the jurisdiction of the court, the Respondent submits that this issue was not pleaded in the defence, and neither has it been submitted on in the submissions filed by the Appellants in support of this appeal.
24. The Respondent submits further that the issue of exhaustion was equally not supported by any evidence before the trial court or in this court, hence this ground of appeal should be dismissed with an order of costs payable to the Respondent.
25. In support of her cross-appeal, the Respondent/Appellant submits that the judgment of the court is at variance with the final reliefs sought before that court and the evidence tendered in support thereof, hence this Appeal.



26. She contends 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, appearing at pages 3-6 of the Record of Appeal, and not in the Amended statement of claim 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.
27. The Respondent/Appellant further submits that the evidence, as was correctly noted by the trial court in its judgment, was unrebutted as nothing was presented by the Respondents to dispute that narrative or claims by the Appellant.
28. It is the Respondent/Appellant submission that no witness was called and the documents filed were not adopted in evidence to give the court reason to consider the same vis-a-vis the documents filed by the Appellant herself. That the Appellant's evidence was not controverted and that there was no reason for the Magistrate not to rely on the same in support of the reliefs sought.
29. It is the Appellant's submission that despite the Trial Magistrate correctly finding that she 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.
30. It is submitted that in instances where the court fails to grant the relief sought, the refusal ought to be accompanied with an explanation, in the absence of which, an appellate court has the duty to nullify any order emanating therefrom, and in its place issue an appropriate relief.
31. The Respondent/Appellant finally submits that her 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.

Analysis and Determination

32. I have considered the Memoranda and the Records of Appeal, and the submissions filed by both parties in relation to the two appeals herein. The grounds of appeal in both appeals are summarized as follows: -
 - i. Whether the judgment was against the weight of evidence adduced
 - ii. Whether the Learned Trial Magistrate erred in law and in fact by failing to consider all the issues raised by the Claimant in its pleadings and evidence adduced in court;
33. The Court of Appeal in *Selle & Another vs Associated Motor Boat Co Ltd* (1968) EA 123 set the guiding principles in dealing with a first appeal as follows: -

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
34. Further in *Peters v Sunday Post Ltd* [1985] EA 424, the Court had this to say on a first appeal;

“Whilst an Appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the Trial Judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the Appellate Court will not hesitate so to decide”

35. My role therefore, as a first Appellate Court, is to reappraise the evidence adduced before the trial court in its entirety and make my own conclusion.
36. The Appellants in appeal No. E027 of 2022 (County Public Service Board of Homabay and County Government of Homabay) contends that the judgment of the trial court was against the evidence adduced.
37. The record clearly shows that the Appellants in this appeal filed a response to the statement of claim together with their supporting documents.
38. It is also true that the same Appellants did not present any witness to produce their documents and adopt their witness statement. The question therefore, is whether the Appellants adduced any evidence for which they now claim the trial did not consider.
39. The Court in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR, opined thus on production of documents: -

“ A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.”
40. For reason that the Appellants did not have their documents produced in evidence, goes to say that the evidence of the Respondent remains uncontroverted as correctly stated by the trial court. Although this court has the obligation to reappraise the evidence adduced before the trial court, no such evidence is available for re-evaluation and reappraisal by this court as the position remains as was before the trial court.
41. I therefore solely on this basis, find the Appellants appeal, being appeal No. E027 of 2022 - County Public Service Board of Homabay and County Government of Homabay, devoid of merit and is for dismissal. It is dismissed with costs to the Respondent.
42. The Appellant in appeal No. E030 of 2022, asserts that the Trial Magistrate erred in law and in fact by failing to consider all the issues raised by the Claimant in its pleadings and evidence adduced in court.
43. 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, appearing at pages 3-6 of the Record of Appeal, and not in the Amended statement of claim 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.
44. 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. 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.



45. It is clear that prayers a, b, d and e granted by the Trial Court relate to the prayers in the initial Statement of Claim, and not the Amended Claim going by the amounts sought under the Amended Statement of Claim and those awarded vide the impugned judgment.
46. 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.
47. 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.23, 489 x 44 months = Kshs.1, 033, 516
 - c. 3 months' salary in lieu of notice Kshs.23, 489 x 3 = Kshs.70, 467.00
 - d. 12 months' salary being damages for unlawful termination being Kshs.23, 489 x 12 months = 281, 868
 - 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
48. On the question of whether the Appellant's salary was withheld between the year 2017 and 2021, the Appellant submitted that she diligently worked for the Respondents/employer, until November 2017 when her salary was withheld without reason.
49. The Respondents on their part, contend that a decision was made to terminate the Appellant's salaries based on findings of an audit report, which revealed that the Respondent together with other employee were unprocedurally employed. It is their further submission that the affected officers were put under investigations and requested to stop rendering their services by 30th April, 2018, pending the outcome of the investigations.
50. The Appellant confirmed through her pleadings and her oral evidence before the trial court that her salary was indeed stopped in November, 2017. By this admission, it is my view that she was under duty to show that she continued providing service to the Respondent without salary for the period of the claim (2017-2021).
51. No duty roster or work attendance sheet by whatever form was produced in evidence as prove that the Appellant continued going to work upon the withholding of her salary.
52. The Appellant was under obligation to minimize her losses by seeking alternative employment as opposed to staying home for almost four (4) years just to lay a claim of withheld salaries.
53. In my considered view, and the Appellant not having shown proof that she 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. The claim fails and is dismissed.
54. On the claim for compensation for unfair termination, the Court has to first determine whether or not the Appellant's termination was unfair to enable it determine an award of compensation.



55. The Respondents' submission is that the Appellant was hired unprocedurally and that her termination followed an audit that confirmed that she was indeed hired outside the human resource procedures of the Respondents.
56. It is the Respondents' submission that the Appellant's termination was in line with Article 41 of *the Constitution* and Sections 41 and 45(3) of the *Employment Act*, 2007.
57. They contend further, that the Appellant was informed of her contract termination through a letter dated 20th April, 2018, and was further given an opportunity to make representation if she felt the termination was unfair, but which was never done.
58. The Respondents' evidence was not produced, and was thus not admitted as evidence before court. It then follows that no evidence has been led to show that the Appellant was taken through due process prior to both the stoppage of her salary, and the issuance of the termination notice contrary to the law.
59. Further, being a beneficiary of a fraudulent recruitment process, is in my view valid and fair reason to terminate an employee. No evidence however was led in this regard leaving the Court with only the Appellant's un rebutted evidence
60. In the end, I find and hold 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.
61. 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 no doubt entitles the Appellant to compensation. (See Benjamin Langwen v National Environment Management Authority (2016) eKLR.)
62. In *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR, the Court held that the measures of compensation should be guided by the statutory capping at the time of termination.
63. The Appellant was recruited by the Respondents or their agents, and to accuse her of having been recruited without following procedures is lame and unfounded. Who was to follow procedure, was it the employer or the employee?
64. Further, upon finding that there was a miss in the recruitment procedure if at all, the Respondents decided to employ summary dismissal instead of following legal ways and means of properly separating with an employee.
65. All these in my view, lead me to the conclusion that the Appellant proved a case for maximum compensation, and is hereby awarded 12 months' salary as compensation for the unfair termination.
66. 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.
67. Having said that, I still find that the Appellant is entitled to notice pay and proceed to award her the statutory one month pay in lieu of termination notice, and which is hereby awarded.
68. In whole, I make the following orders: -
 - a. That Appeal No. E027 of 2022 fails and is dismissed with no orders on costs.
 - b. That Appeal No. E030 of 2022, succeeds as follows: -
 - i. That the finding of the Trial Court was premised on the wrong claim and is set aside in its entirety.



- ii. A declaration that the Appellant was unfairly terminated
- iii. An award of 12 months' salary as compensation for unfair termination at Kshs. 281,868/-
- iv. One month salary in lieu of notice at Kshs. 23,489/-
- v. That the 1st Respondents (County Public Service Board of Homabay) shall bear the costs of this appeal.
- vi. Costs of the suit before lower court are set aside.

69. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JUNE, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Okaka h/b for Mr. Yogo for the Appellant

Ms. Jael Onyango present for the Respondent

Ms. Anjeline Wanjofu - Court Assistant.

