



**Brurudika Holdings Limited & another v Onyango (Appeal E110 of 2023)
[2024] KEELRC 2315 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2315 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E110 OF 2023
M MBARŪ, J
SEPTEMBER 26, 2024**

BETWEEN

BRURUDIKA HOLDINGS LIMITED 1ST APPELLANT

PETER NGUGI 2ND APPELLANT

AND

EVANCE ONYANGO RESPONDENT

JUDGMENT

1. The appeal herein arises from the judgment delivered on 19 September 2023 in Mombasa CMELRC Cause No.515 of 2019. The appellants are seeking the judgment be set aside and the claim dismissed with costs.
2. The background to this appeal is a claim filed by the respondent on the basis that in November 2017 he was employed as a sales representative cum driver by the appellants. His wage was Ksh.29, 350 per month. He worked until February 2018 when the 2nd appellant as the director of the 1st appellant caused him to be arrested and arraigned in Mombasa Criminal case No.289 of 2018 where he was charged with the offence of stealing by a servant. Upon these criminal charges, the 2nd appellant denied him access to the office and stopped payment of his salary resulting in termination of employment. He claimed that there was no notice, hearing or adherence to the due process. He claimed for;
 - a. A declaration that there was unfair termination of employment;
 - b. 12 months compensation;
 - c. Exemplary damages for malicious prosecution;
 - d. Salary for 22 days worked in February 2018;
 - e. Costs for the suit.



2. In response, the appellant's case was that the respondent was employed as a sales representative cum driver on a casual basis and whose payment was at the end of the day and was not engaged for a longer period than 24 hours. The response was also that the 1st appellant made a report of theft by a servant to the police after the respondent acted in conspiracy with his assistant and stole monies which they received after selling the 1st respondent's products. He was arrested for investigations which were done by the police. He had been employed on a casual basis and upon being charged in Mombasa criminal case No.289 of 2018, the charge and prosecution were done by the police upon reasonable and sufficient evidence of acts of stealing by a servant contrary to the law. Accordingly, to the appellants, there was no termination of employment or disciplinary hearing required or applicable to the respondent. There was no statutory requirement to effect statutory deductions from the daily wage. If at all the respondent was an employee as alleged, from November 2017 to February 2018, employment lasted for 3 months only which does not qualify the respondent from making the alleged claims of unfair termination of employment. The claims made should be dismissed with costs.
3. The learned magistrate in the judgment delivered on 19 September 2023 held that;
 - a. A declaration of unfair termination of employment;
 - b. Compensation of Ksh.234,800;
 - c. Damages of Ksh.600,000 for malicious prosecution;
 - d. Pay for 22 days ksh.23,060;
 - e. Costs of the suit;
 - f. Interest in the above awards.
4. Aggrieved by the judgment, the appellants filed this appeal on the basis that the learned magistrate erred in law and fact in disregarding the provisions of Section 45(3) of the *Employment Act* and findings that the respondent was an employee of the appellants which was not factual. The finding that the wage paid was Ksh.29, 350 was in error since the assessment of the awards was based on a gross wage of Ksh.23, 600. The finding that there was constructive dismissal was in error as this shifted the burden of proof from the respondent to the appellants.
5. Other grounds of appeal are that the learned magistrate erred in law and fact in finding that the respondent was maliciously prosecuted in Mombasa Criminal Case No.289 of 2018 and awarding him Ksh.600, 000 in damages. This was done by failure to appreciate the evidence and submissions by the appellants hence arriving at an erroneous judgment.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that the case of malicious prosecution and award of damages is in error and contrary to the principles addressed in the case of *Mbowa v East Meno District Administration [1972] EA* that the conditions to be met by such a claimant at the;
 - a. The defendant instituted the prosecution against the plaintiff;
 - b. The prosecution ended in the claimant's favour;
 - c. The prosecution was instituted without reasonable and probable basis;
 - d. The prosecution was actuated by malice.



8. The 2nd appellant as the director of the 1st appellant on reasonable and probable cause upon noticing suspected theft concerning the 1st appellant's property and revenue made a report to the police for investigations. The appellants only made statements with the police but did not arrest or prosecute the respondent. Such a role is for the police and Director of Public Prosecutions. In the case of *Nzoia Sugar Company Limited v Fungututi* [1988] eKLR the court held that a case of malicious prosecution must fonder on the absence of proof of malice and ill will.
9. The appellants submitted that the finding that there was unlawful termination of employment was in error since under Section 45(3) of the *Employment Act*, an employee who has been continuously employed by his employer for not less than 13 months immediately before the date of termination has no right to complain that he has been unfairly terminated. The pay slip filed by the respondent is a forgery and computer-generated to capture details which do not apply.
10. The findings by the trial court that there existed no reasons to justify termination of employment and hence awarded compensation was in error.
11. The respondent submitted that there was malicious prosecution following a malicious report by the appellants to the police leading to charges in Criminal Case No.289 of 2018. This was followed by the 2nd appellant denying the respondent access to the 1st appellant's premises and unfair termination of employment. The trial court well considered the evidence and made correct awards.
12. The respondent submitted that the provisions of Section 45(3) of the *Employment Act* have since been declared unconstitutional in the case of *Samuel G. Momanyi v Attorney General & another* [2012] eKLR and *Mercy Njoki Karingithi v Emerald Hotels Resorts and Lodges Ltd* (2014) eKLR. The appellants did not file any work records as required under Section 10(7) of the *Employment Act* to demonstrate the claim that employment was on causal terms. The trial court analyzed the evidence and the judgment should be affirmed and the appeal dismissed with costs.

Determination

30. This is a first appeal and the court has to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its findings and conclusions as held by the Court of Appeal for East Africa in *Peter's v Sunday Post Limited* [1958] EA 424]. The appropriate standard of review established in cases of appeal can be stated in three complementary principles;
 - i.. First, on the first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its 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 hearing the witnesses testify 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 had been hearing the matter for the first time.
31. Before the trial court, the appellant's case was that the respondent engaged in criminal conduct, stealing by a servant leading to a report to the police who arrested him and charged him in Criminal Case No.289 of 2018. The 2nd appellant testified that the respondent was a casual employee and when there was discovery of theft, he made a report to the police. The pay slips filed are a forgery and the data indicated for NSSF and NHIF are computer generated.
32. These forgery claims were not reported to the police for investigation.



33. The 2nd appellant also testified that upon discovery of the theft, they invited the respondent for a disciplinary hearing and were issued with a warning letter.
These records are not filed.
34. An employee who is taken on casual terms is one whose employment terminates an end of day.
35. However, an employee whose employment is continuous, whose employment is not likely to end within a day and who remains at the service of an employer, such an employee becomes protected under the provisions of Section 37 of the *Employment Act*. Such protections grant the employee the rights and benefits under the *Employment Act*.
36. In the case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR the Court of Appeal defined who a casual employee is and in the case of *Kenyatta University v Esther Njeri Kenyatta University v Maina* [2022] KECA 1201 (KLR) the same court held that an employer cannot have an employee under the guise of being casual on the reasoning that it has peak and off-peak sessions. It further held that to subject an employee to such a treatment is unfair because being laid off during off-peak season does not guarantee the employee permanency and neither can the employee look for employment elsewhere during the off-peak season.
37. The continued employment of the respondent by the appellants beyond a day and for work that was not expected to be completed within a day, and he remained in the service of the appellants for longer periods beyond 24 hours, he became a protected employee under the law. These protections allowed him the right to be issued with notice before termination of employment. He had the right to be heard and given reasons before termination of employment as required under Sections 35, 41, 43 and 45 of the *Employment Act*.
38. The appellants have relied upon the provisions of Section 45(3) of the *Employment Act*. With respect, these provisions have been gone into by this court and affirmed by the Court of Appeal and rendered unconstitutional. I fully agree and associate with these findings. In the case of *Samuel G. Momanyi v Attorney General & another* [2012] eKLR the court held that;
- ... Section 45(3) of the *Employment Act* 2007 is inconsistent with the provisions of *the Constitution* of Kenya particularly Articles 28, 41(1), 47, 48 and 50(1) as the said section purports to deny the Petitioner the rights and freedoms enshrined in the said Articles of *the Constitution*. ... an order is hereby issued declaring Section 45(3) of the *Employment Act* 2007 invalid because of its violation of the rights and fundamental freedoms in the Bill of Rights of the Petitioner rights and fundamental freedoms.
39. In the case of *Mercy Njoki Karingithi v Emerald Hotels Resorts and Lodges Ltd* (2014) eKLR, this position is reiterated that a provision of the law that has been declared unconstitutional remains as such until overturned by a superior court. Hence, the appellants cannot rely on the provisions of Section 45(3) of the *Employment Act* to negate the principles that before termination of employment, there must exist valid and justified reasons.
40. Without any evidence that the appellants took the respondent through the due process, allowed him to attend and be heard before termination of his employment for any given reasons including the matters that there was theft by a servant and he had been charged in Mombasa Criminal case 289 of 2018, such resulted in unfair termination of employment. The findings by the learned magistrate in this regard cannot be faulted.



41. On the claims made, the respondent in the Memorandum of Claim was seeking for declaration that his employment had been terminated unfairly. As addressed above, the learned magistrate addressed this question correctly.
42. However, the basis of the award of Ksh.234, 800 being a total of 12 months gross wage in compensation failed to take into account that the respondent worked for the 1st appellant from November 2017 to February 2018 less than 3 months.
43. Before awarding the maximum compensation, a court is required to justify and give reasons leading to the allocation of the maximum. In the case of Titus Muriuki Ndirangu v Beverly School of Kenya Limited [2022] eKLR and in the case of *Hatari Security Gurads Ltd v Odongo (Appeal E012 of 2022)* [2023] KEELRC the courts have held that justification of the award given is imperative in every case.
44. The Court of Appeal in Chai Trading Co. Ltd v Joseph Kimathi Ikiamba [2018] eKLR held that on the award of damages the court must consider the following;

... Was the award of 12 months' salary proportionate, fair, and legal in view of the fact that the respondent was also awarded 2 months' salary in lieu of notice; the appellant substantially complied with the procedure save for failing to inform the respondent that he had a right to invite a fellow employee or a union official and generally that the appellant suffered great loss due to a lapse in security that was within the docket of the respondent? Unfortunately, the learned Judge did not give reasons why he gave the maximum award. Had the learned Judge taken the foregoing into consideration or given reasons why he gave a maximum award having acknowledged that the appellant had partially complied with the law, perhaps he would have come to the same conclusion as we have, that in the circumstances surrounding this matter, the respondent did not deserve a maximum award. For the aforesaid reasons, we find merit in this appeal. In our own evaluation of the matter, we find the award of 12 months was excessive and substitute thereto with damages equivalent to 3 months' salary.

45. In this case, the court found an award of 3 months gross wage of Ksh. 29,350 as pleaded being an appropriate award taking into account the period of service was 3 months all at Ksh.88,080.
46. Prosecutions are now regulated under *the constitution* as a function of the police and the Director of Public Prosecutions. Every citizen, real or corporate has a civic duty to report any criminal conduct upon reasonable suspicions to allow the agencies constitutionally mandated to investigate and carry out prosecutions to undertake such duty.
47. In this case, the respondent does not challenge the fact that the arrest and prosecution were not undertaken by the appellants. Such was done by the police and the DPP. The appellants thus addressed and made a report. Such cannot form the basis of a claim for malicious prosecution outside a claim against the police and the DPP who arrested and charged him respectively.
The award of damages for malicious prosecution is hereby set aside.
48. On the award for pay for 22 days worked in February 2018, there is no evidence that upon arrest and arraignment in court, the appellants paid the respondent for work done. The wage allocated at Ksh.23, 060 is for days worked and not for the gross wage due for the month. This award is correctly assessed.
49. On the award of costs, indeed the appellants failed to take the respondent through the due process or justify the reasons leading to termination of employment. This was under the mistaken belief that they were covered under the provisions of Section 45(3) of the *Employment Act*. As outlined above, such



provisions have been declared unconstitutional and with the advantage of legal advice, the award of costs to the respondent for the trial court proceedings is justified.

50. Accordingly, the appeal is partially successful and the judgment in Mombasa CMELRC No.515 of 2019 is hereby reviewed in the following terms;

- a. A declaration of unfair termination of employment;
- b. Compensation of Ksh.88,050;
- c. Pay for 22 days ksh.23,060;
- d. Costs of the trial court proceedings;
- e. For this appeal, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

