Zeze v Njoki (Civil Appeal E227 of 2022)
[2024] KEELRC 2651 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2651 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E227 OF 2022

L NDOLO, J

OCTOBER 31, 2024

BETWEEN

ELIZABETH KASOHA ZEZE ..... APPELLANT

AND

ISABELLA NJOKI ..... RESPONDENT

(Appeal from the judgment of Hon. E.M. Kagoni, PM delivered on 24th December 2019 in Milimani CMELRC No. 1778 of 2019)

JUDGMENT

1. By a judgment dated 24th December 2019, the trial court (E.M. Kagoni, PM) made the following award in favour of the Appellant:
    a. Kshs. 15,000 being one month's pay in lieu of notice;
    b. Kshs. 30,000 in compensation;
    c. Certificate of service;
    d. Costs plus interest.
2. It would appear that the Appellant was dissatisfied with the award by the learned trial Magistrate, thus preferring the present appeal against the entire judgment.
3. In her Memorandum of Appeal dated 18th December 2022, the Appellant puts forth the following grounds:
    a. The learned Magistrate erred in law and fact in finding that the Appellant was unfairly dismissed but proceeded to provide remedies based on redundancy, a fact that was not in issue nor pleaded by the parties;

b. The learned Magistrate erred in law and fact in confusing the whole issue of ordinary termination under Section 45 of the *Employment Act* and termination on account of redundancy under Section 40 of the Act;

c. The learned Magistrate erred in law and fact in finding that the Appellant was declared redundant when there was no such declaration;

d. The learned Magistrate erred in law and fact in finding that the relocation of the Respondent amounted to termination on account of redundancy when there was no such declaration and that relocation does not meet the requirements of redundancy as defined under Section 2 of the *Employment Act*;

e. The learned Magistrate erred in law and fact by proceeding to find that the Appellant was declared redundant, thereby reaching a wrong conclusion in law;

f. The learned Magistrate erred in law and fact in providing a wrong and unlawful remedy based on discretion under Section 49 (4) (g) which governs unfair termination while the remedy under the law of redundancy does not donate such discretion and the calculation is governed by Section 40 (1) (g) of the *Employment Act*;

g. The learned Magistrate erred in law and fact by awarding the Appellant 2 months' salary for unfair termination, an award that was inordinately low;

h. The learned Magistrate erred in law and fact by denying the Appellant an award for house allowance, service pay and unpaid leave days;

i. The learned Magistrate erred in law and fact in not granting unpaid leave for 8 years after finding the Appellant had worked for 8 years;

j. The learned Magistrate erred in law and fact by failing to grant the Appellant compensation for failure to issue a written contract;

k. The learned Magistrate erred in law and fact by totally disregarding the Appellant's pleadings and submissions, thereby arriving at a wrong conclusion;

l. The learned Magistrate erred in law and fact by disregarding the evidence in the Appellant's pleadings, thereby arriving at a wrong conclusion;

m. The learned Magistrate erred in law and fact by disregarding what he ought to have considered and considering what he ought to have disregarded, thus arriving at a wrong conclusion;

n. The learned Magistrate erred in law and fact by failing to take into account existing and specific provisions of law dealing with the circumstances of the case;

o. The learned Magistrate erred in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by case law with similar facts.

4. This is a first appeal which is in the nature of a retrial. The duty of a first appellate court was stated by the Court of Appeal in Selle v Associated Motor Boat Company Ltd [1968] E.A 123 thus:

> " An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the

trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

5. The Appellant raises a record 15 grounds, which may logically be condensed into four (4) categories:

   a. The mode of termination of the Appellant's employment;

   b. Level of compensation;

   c. House allowance, service pay and leave pay;

   d. Effect of failure to issue a written contract.

6. In his judgment, the learned trial Magistrate proceeded on the basis that the Appellant was declared redundant. It appears that the conclusion in this regard, emanated from evidence adduced before the trial court that the Appellant lost her job upon the Respondent's relocation. However, the issue of redundancy was not pleaded by any of the parties nor was there evidence led in this respect.

7. I therefore agree with the Appellant that the learned trial Magistrate misdirected himself by reading redundancy into the case before him. This was a case of termination without cause or notice and the proper finding ought to have been one of unlawful and unfair termination as contemplated by Section 45 of the *Employment Act*. That is all I will say on this issue.

8. On the level of compensation, the Appellant complains that two months' salary awarded by the trial court is inordinately low. On this account, the Appellant faults the learned Magistrate for considering only one factor under Section 49(4) of the *Employment Act*, being the opportunity available to the Appellant to secure alternative employment.

9. In urging this Court not to interfere with the award granted by the trial court, the Respondent relies on the decision in Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No 2) [1985] eKLR. In that case, it was affirmed that an award of damages by a trial court is an exercise of discretion that an appellate court should be slow to disturb, save where it has been demonstrated that the trial court took into account an irrelevant factor or ignored a relevant one; or where the award is so inordinately low or high that it is wholly erroneous.

10. Section 49 (4) of the *Employment Act* lists 13 factors to be taken into account in issuing remedies for unlawful and unfair termination of employment. In his judgment, the learned trial Magistrate considered only one factor, leaving out other relevant factors such as the Appellant's length of service and the fact that she did not contribute to the termination. Further, the conclusion by the trial court that the Appellant could easily secure an alternative employment was not supported by any evidence.

11. For the foregoing reasons, I find and hold that this is a case meriting interference with the compensatory award issued by the trial court. From the evidence on record, the Appellant had worked for eight (8) years prior to termination and she was not to blame for the termination. On these grounds, I augment the compensatory award from two (2) months' salary to four (4) months' salary.

12. Regarding the claim for house allowance, the trial court found that the Appellant's monthly salary was above the consolidated minimum wage. The Appellant does not contest this finding but submits that because the Respondent failed to keep employment records, then she ought to be condemned to pay her house allowance. On this account, I find the reasoning by the learned trial Magistrate that the Appellant was paid a consolidated salary above the minimum wage reasonable in the circumstances.

13. Pursuant to the finding that the termination of the Appellant's employment was within the provisions of Section 45 of the *Employment Act* and in the absence of any evidence that she was a contributing member of the National Social Security Fund (NSSF), the claim for service pay is legitimate. In her Memorandum of Claim filed at the lower court, the Appellant sought leave pay for 10 years yet she pleaded her service period as 8 years. The claim for leave pay was therefore doubtful and the trial court was justified in rejecting it.

14. With respect to the Respondent's failure to issue the Appellant with a written contract, I find that the Appellant benefited from the provisions of Section 10(7) of the *Employment Act*, where the burden of disproving the Appellant's averments as to the terms of service shifted to the Respondent. There is no provision in law for a separate remedy in damages for this lapse.

15. Finally, this appeal partially succeeds, and the award by the learned trial Magistrate is varied as follows:

    a. 1 month's salary in lieu of notice.Kshs. 15,000

    b. 4 months' salary in compensation.....60,000

    c. Service pay for 8 years (15,000/30*15*8)....60,000

    Total.....135,000

16. The Appellant will pay the costs of this appeal and of the proceedings in the court below.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

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JUDGE

Appearance:

Mr. Mwariri for the Appellant

Mr. Majani for the Respondent