Safina Transporters Limited v Onyango (Appeal E50 of 2024)
[2024] KEELRC 2623 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2623 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL E50 OF 2024

M MBARŨ, J

OCTOBER 24, 2024

BETWEEN

SAFINA TRANSPORTERS LIMITED ..... APPELLANT

AND

BASHIR YONGO ONYANGO ..... RESPONDENT

(Being an appeal from the judgment of Hon. Mbeja in Mombasa MCELRC No. 132 of 2018 delivered on 29 February 2024)

JUDGMENT

1. The appeal arises from the judgment delivered on 29 February 2024 in Mombasa MCELRC 132 of 2018. The appellant is seeking the judgment be set aside with costs on the basis that the trial court erred in law and fact by finding that the appellant had changed its name from Ali Yislam Abeing Transporters to Safina Transporters in February 2016. These were two different and separate entities in law: Ali Yislam Abeind Transporters and Safina Transporters. Hence, it was in error to find that the appellant employed the respondent from 2013. It was erroneous to find the appellant liable for alleged unfair termination of employment and then awarding of excessive compensation.

2. The background of the appeal is a claim filed by the respondent on the basis that he was employed by the respondent as a driver in October 2013 and worked until January 2017 when his employment was terminated. His employment was on oral terms and his wage was ksh.30, 000 per month. His terminal dues were not paid and he later discovered that despite being registered with NSSF, the appellant did not remit his dues. He was not allowed to take annual leave and hence claimed the following;

    a. One month notice pay Ksh.30,000;

    b. 12 months compensation Ksh.360,000;

    c. Service pay for the year 2014 and 2015 Ksh.34,615.38;

d. NSSF contributions;

e. Leave pay for 3 years Ksh.72,692.31;

f. Certificate of services;

g. Costs of the suit.

3. In response, the appellant's case was that the suit against it was incompetent and in violation of the law. The appellant admitted that the respondent was its employee from 1st march 2016 to 20 December 2016 when he was summarily dismissed. The appellant business was registered in February 2016 and therefore could not have employed the respondent before this date. The respondent was dismissed for gross misconduct and breach of his employment contract by failing to discharge his duties properly leading to loss of wheat assigned to him for delivery. Committing fraud and acting dishonestly against the company by offloading grain assigned to him for delivered and then disobeying lawful directions of the appellant. Such was gross misconduct in willful neglect to perform duties as assigned by the employer and committing criminal conduct. Through notice dated 20 December 2016 the appellant dismissed the respondent after according him hearing failing to offer reasonable explanation as to why a load of cargo was often less on arrival at his delivery destinations. Due to frequent loss of wheat in his deliveries, the respondent had been issued with warnings but failed to heed them same. The respondent had been allowed to take his annual leave and was registered with NSSF and the claims made should be dismissed with costs.

4. In his reply to the response, the respondent admitted that he was employed by Ali Yaslam Abeid Transporters in October 2013 as a driver and later the company changed to the appellant in February 2016. He worked for the appellant until December 2016 when his employment was wrongfully terminated.

5. The trial court in judgment held that there was wrongful and unfair termination of employment and awarded the respondent as pleaded save for the claim for leave pay. The court also awarded the costs and interests of the awards.

Parties did not file written submissions as directed.

Determination

6. The main issue in the appeal is the question of the entity of the appellant and that of Ali Yislam Abeing Transporters. And that the awards by the trial court were excessive.

7. The appeal is that the appellant, Safina Transporters was registered in February 2016 and it employed the respondent from 1st March 2016 to December 2016 when he was summarily dismissed for gross misconduct. Previously, the entity of Ali Yislam Abeid Transporters existed as a different and separate legal entity from the appellant, Safina Transporters.

8. In the Reply to the response filed by the respondent on 24 October 2019 paragraph 4.1, he admits that he commenced employment with Ali Yaslam Abeid Transporters in October 2013 as a driver. Thereafter, the employer changed its business name to the appellant in February 2016.

9. The records filed by the appellant under schedule dated 22 February 2021 page 36 of the Record of Appeal, the fact of its registration in February 2016 is not addressed. The averments by the respondent that there was the business change of name was not gone into by the appellant as the employer.

10. The legal duty to submit records in court is upon an employer as required under Section 10 (6) and (7) of the *Employment Act*.

11. Further, it is the duty of every employer to issue an employee with a written contract of service per Section 10 of the *Employment Act*. Where employment commences through oral terms, the employer is required under Section 10(3) to reduce such oral terms into writing within two months. Where there is no compliance, the word of the employee is taken as correct.

12. A written contract of employment does not only protect the employee but the employer too. Under the written agreement, the court can discern the intentions of the parties. In the case of Caroline Gathoni Gikonyo v Kenya Association of Investment Groups [2015] eKLR the court held that;

> ... A Written contract is the fodder for employment relationship. Such written document enables each party to the employment relationship to know the terms and conditions of such employment. So important is such a document that sections 9 and 10 of the *Employment Act* is fully dedicated to the subject of what should go into an employment contract.

13. In Elly Ayieko Gwara v Evans Sunrise Medical Center [2020] eKLR the court emphasized this fact and held that;

> Written communication between an employer and employee is the fodder of fair labour relations. Such assist the court where there is a dispute such as herein. It is also a legal requirement that all instructions to the employee by the employer which touch on the terms and conditions of employment be made through written notice pursuant to the provisions of section 10(1) and (7) of the *Employment Act*, 2007.

14. Therefore, where there is a change in employment, the name of the employer or changes in the business name, Section 13(1) of the *Employment Act* places the legal duty on the employer to issue the employee with written particulars of such changes;

> (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

15. More fundamentally, where the name of the employer is changed without any change in the identity of the employer so there is continuity if the employee's employment, the entity taking over employment is required to issue the employee with the requisite written notices to this effect. Section 13(6) and (7) of the *Employment Act* directs that;

> (6) Where, after an employer has given to an employee a statement under section 10 either—
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> (a) the name of the employer is changed without any change in the identity of the employer, or
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> (b) the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken, and subsection (7) applies in relation to the change, the person who is the employer immediately after the change is not required to give to the employee a statement under section 12 but the change shall be treated as a change within subsection (1).

16. It is the (8) legal duty of the employer to inform an employee of a change referred to in subsection 13 (6) (b) of the *Employment Act*, which specifies the date on which the employee's period of continuous employment began.

17. The mere assertion that the appellant is a different entity from Ali Yislam Abeid Transporters is not sufficient. From a commercial perspective, this could be sufficient but in employment and labour relations, the employee is protected.

18. Cumulatively, the respondent worked for the appellant from October 2013 to 20 December 2016 when his employment was terminated by summary dismissal.

19. On the reasons leading to termination of employment, the respondent testified that on 20 December 2016 he reported to work and was not feeling well. He went to see Mohamed Ali Islam who paid his December 2016 wage and terminated his employment and that he had not been issued with the alleged notice dated 20 December 2016 or the notice over the alleged weighbridge differences in the delivery of wheat.

20. In response and evidence, the appellant produced a warning letter and notice of summary dismissal and various records of weighbridge records. The summary dismissal notice records that there was a disciplinary hearing where the respondent failed to address his gross misconduct of theft of wheat upon delivery. However, the motion of Section 44(4) of the *Employment Act* giving the employer the right of summary dismissal must be read together with Section 41(2) of the *Employment Act* as held in *Matsesho v Newton (Cause 9 of 2019*) [2022] KEELRC.

21 Under section 41 of the *Employment Act*, if an employer proposes to terminate the services of an employee on grounds of gross misconduct, poor performance or physical incapacity, the employer must notify the employee of the grounds for termination in a language that the employee understands. This information should be given to the employee in the presence of another employee of his choice or a trade union official if he elects. In addition, the employer is obligated to hear the employee's representations in response to the accusations against him.

22. Without any record of how the appellant secured the rights of the respondent, the findings by the trial court that there was wrongful and unfair termination of employment is proper.

23. On the remedies sought, upon the finding that there was unfair termination of employment, the trial court had the discretion to award compensation under the provisions of Section 49 of the *Employment Act*. However, the award of 12 months should be allocated only in exceptional cases as this is the maximum allowed in law. Reasons for allocating the highest possible due must meet a given threshold as held in Grace Otieno v Salaries and Remuneration Commission [2020] eKLR that an award of a maximum of twelve (12) months must be accompanied with cogent reasons.

24. In National Social Security Fund v Grace K. Kazungu & another [2018] eKLR, the court of Appeal held that;

> The trial court also awarded the respondents seven (7) months' salary compensation for unfair termination. There is no explanation how the Judge arrived at seven months. In CMC Aviation Limited vs. Mohammed Noor [2015] eKLR, this Court expressed itself as follows:
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> > "The trial court did not state why it opted to give the remedy provided under section 49 (1) (c) that is, twelve months " gross salary , and not the other remedies under section 49 (1) (a) or (b). The court should have been guided by the provisions of section 49 (4) but the trial Judge said nothing about the reasons that led him to exercise his discretion in the manner he did."

25. In this case, the trial court has not assigned any exceptional circumstances justifying the maximum award. The respondent worked for the appellant from October 2013 to December 2016 a period of 3

years. Taking into account the warnings issued over his employment and reasons leading to termination of employment, an award of 3 months gross wage of Ksh.30, 000 is hereby found appropriate compensation all at ksh.90, 000.

26. On the findings that the summary dismissal was unfair, notice pay is due at ksh.30, 000.

27. There were remittances to the NSSF despite the respondent not being issued with a payment statement. This removed the respondent from the provisions of Section 35(5) and (6) of the *Employment Act*.

28. Accordingly, the judgment in Mombasa MCELRC No.132 of 2018 is reviewed in the following terms;

    a. Compensation Ksh.90,000;

    b. One month's notice pay Ksh.30,000;

    c. Certificate of services;

    d. For the appeal and trial court proceedings, each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 24 DAY OF OCTOBER 2024.

M. MBARŨ

JUDGE