



**Central Electricals International Limited v Abillah (Appeal E215 of 2023)
[2024] KEELRC 2579 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2579 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E215 OF 2023
NJ ABUODHA, J
OCTOBER 23, 2024**

BETWEEN

**CENTRAL ELECTRICALS INTERNATIONAL CENTRAL ELECTRICALS
INTERNATIONAL LIMITED APPELLANT**

AND

GEORGE ONYANGO ABILLAH RESPONDENT

*(Being an appeal arising from the Judgment of Honourable P. K ROTICH (MR)
(SPM) delivered on 31st July 2023 at the Chief Magistrates Court of Kenya
at Nairobi in Employment and Labour Relations Case No. 2123 of 2019)*

JUDGMENT

1. Through the Memorandum of Appeal dated 26th October, 2023, the Appellant appeals against the Judgment of Honourable P. K Rotich (Mr) (SPM) delivered on 31st July 2023.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and fact in awarding the Claimant house allowance when the same was not proved by the Claimant and was against the facts and evidence on record.
 - ii. The Learned Magistrate misdirected himself on the law awarding the Claimant 13 month’s salary compensation for wrongful termination above the statutory prescribed limit of 12 months’ wages hence arrived at the wrong conclusion.
 - iii. The Learned Magistrate erred in law and fact in awarding he Claimant the maximum damages of 12 month’s salary by failing to consider relevant factors prescribed in law and in considering irrelevant factors against the evidence on record.



- iv. The Learned Magistrate erred in law and fact in failing to consider the final dues already paid by the Appellant to the Claimant in computing the final award in favour of the Claimant.
 - v. The Learned Magistrate erred in law and in failing to consider the facts of the case against the evidence on record and the applicable laws thus arriving at the wrong conclusion.
3. The Appellant prayed that:
 - a. The Appeal be allowed and the Judgment of the Trial subordinate Court delivered on the 31st July 2023 be set aside with costs.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's advocates Mubangi & Company Advocates filed written submissions dated 13th August, 2024. On the issue of whether the Respondent was terminated from employment, counsel submitted that it was the trial court's finding that the Respondent was terminated from employment unfairly as he was not given a fair hearing which was against the evidence on record.
6. Counsel submitted that the Respondent was informed of the reported theft and on 24th July 2019 in the company of his Union representative attended a meeting at the Appellant's head office where Mr. Scaver and Mr. Mulama represented the Appellant. The report about the theft was discussed in the said meeting and it was agreed that the Appellant would compute the Respondent's final dues.
7. Counsel submitted that the Respondent voluntarily left employment on 24th July 2019 and there was no legal requirement that the Appellant ought to have issued a notice to show cause or termination notice within a day. According to Counsel, the trial court ought to have found that the Respondent was not terminated from his employment and that the remaining issue was to determine the final dues the Respondent was entitled to after he left employment.
8. On the issue of whether the trial court erred in law and in fact in making the final award, counsel submitted that the trial Court erred in law and in fact in awarding the Respondent house allowance for 16 year yet the Respondent did not adduce any evidence to prove that the salary was not inclusive of house allowance and the appellant testified that the salary was inclusive of house allowance.
9. Counsel submitted that the Respondent was paid a decent salary above the minimum wage which was Kshs 14,563 for grade III Artisan as per Regulation of Wages Building & Construction Industry) (Wages) Order of 2012 and the claim for house allowance was merely raised to inflate the damages sought from the trial court. Section 31(2) of the *Employment Act* allowed an employer to consolidate a salary and no written contract was adduced in the trial court. The trial court erred in awarding the Respondent house allowance when the same was not proved at all.
10. Counsel submitted that the court erred in awarding the said house allowance from the year of employment in 1998 which claim was time barred by the prescribed limitation period of 6 years and the same should have applied from 2013-2019 and not from 1998. That the trial court did not also consider the fact that the Respondent was paid a daily rate of Kshs. 150/- before it was increased to Kshs. 34,500/=. Counsel relied on the case of Albert Ouma Akeyo vs Maguna Self Selection Stores Limited (2023)eklr in submitting that employment contracts are governed by limitation of actions and a person should not sit while their right is violated only to wake up upon termination.



11. Counsel submitted that the trial court erred in law and in fact in making the award of 12 months' salary as damages for unlawful termination. Counsel relied on the case of *Ol Pajeta Ranching Ltd vs David Wanjau Muhoro*(2017)eKLR and *Kemfro Africa Limited vs Lubia & Another*(No.2) 1987 KLR 30 Kneller,JA in submitting on what should be considered before deciding on the quantum of damages. That the maximum compensation must be explained and given in exceptional circumstances as was held in *Kiambaa Dairy Farmers Co-operative Society Ltd vs Rhoda Njeri & 3 Others* (2018) eKLR.
12. Counsel submitted that the trial court stated that in awarding the maximum compensation it took judicial notice of the difficulty of securing another employment opportunity and failed to consider relevant factors such as the Respondent's decision to leave employment. There was nothing in the conduct of the Appellant that would invite the maximum penalty in damages which was excessive and unjustified.
13. Counsel submitted that the award for one month's pay in lieu of notice was not supported by evidence on record. That the Respondent willingly left employment on 24th July,2019 never to return after the Appellant informed him of the theft report.

Respondent's Submissions

14. The Respondent's Advocates Charles Gomba & Company Advocates filed its submissions dated 20th September, 2024 and on the issue of whether the trial Magistrate erred in law and fact in awarding the Claimant house allowance when the same was not proved by the Claimant and was against the facts and evidence on record, counsel submitted that the trial court appraised itself and considered the pleadings and evidence filed by parties and arrived at a conclusion that the Respondent was entitled to house allowance as per section 31 of the *Employment Act*. The Appellant paid his salary through bank and did not issue him itemized pay slip. The burden was thus upon the Appellant to prove that it paid him house allowance which it failed as per section 74 of the Act on the duty of employer in keeping employment records.
15. Counsel submitted that failure to produce itemized pay slip or a written contract of employment indicating that his salary was consolidated, was a clear indication that the respondent was not paid the same and this ground of appeal should fail.
16. On the issue of payment of maximum compensation of 12/13 months as damages to the Respondent counsel relied on the case of *Stephen Mwallyo Mbondo v County Government of Kilifi* (2021) eKLR and submitted that there are no limits or restrictions on the trial court's discretion if he does not misdirect himself in any point of law and fact and the decision arrived at is aimed to do justice.
17. It was the Counsel's submission that the trial court awarded 12 months and not 13 months as compensation and the Appellant has not demonstrated that the trial Magistrate applied the wrong principle of law thus the discretion cannot be interfered with. The Appellant participated in the proceedings and the court delivered a regular judgment.
18. Counsel further submitted that the Appellant had not demonstrated any prejudice that the award of 12 months compensation for unfair and unlawful termination will occasion it. Section 49 of the Act put a ceiling on the maximum compensation and the trial court upon finding that the Respondent's termination was unfair then the court was justified in awarding him the maximum compensation.
19. On the issue of whether the trial magistrate erred in law and fact by failing to consider the final dues already paid by the Appellant to the Claimant in computing the final award in favour of the Claimant, Counsel submitted that the Appellant produced a pay slip at the hearing of the primary suit but there was no proof that the said amount was paid to the Respondent or credited into the Respondent's bank



account. That the trial magistrate observed correctly that the Respondent was not paid any final dues by the Appellant and he was entitled to the sum awarded as final dues.

20. On the issue of whether the learned trial Magistrate erred in law and fact in failing to consider the facts of the case against the evidence on record and the applicable laws thus arriving at the wrong conclusion, counsel submitted that the trial Magistrate considered and appraised the pleadings and evidence filed and tendered by both parties to arrive at his decision. That the trial court disallowed some prayers like overtime and service pay as per the evidence provided by the parties hence the court considered all the evidence presented before it.

Determination

21. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a 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, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

22. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent in the sum of Kshs 1,504,200/= under the heads; salary in lieu of notice, house allowance, unfair termination with cost and interest.
23. The court finds that the issues placed by the parties for determination in the appeal are with regard to the awards by the trial court since the issue of unfairness of termination is not among the grounds of appeal but raised in the Appellants submissions. The Court will therefore not consider submissions in that regard.
24. On the issued whether the trial learned Magistrate erred in awarding the Respondent maximum compensation of 12 months’ salary and the other awards, the Court noted that there was no written contract of service between the Appellant and the Respondent. However, salary was paid through the Bank. It was also common ground that the Respondent had been in employment from 1998 to 2019 which was roughly 21 years without any written contract. This in the Court’s view amounted to unfair labour practice on the part of the Appellant. The trial court having found that the Respondent was unfairly terminated after serving such a long time without notice, was justified in awarding payment in lieu of notice. The Appellant’s claims that the Respondent willingly left employment on 24th July,2019 after it informed him of the theft report were not proved to be reasonable grounds. The Appellant was supposed to show that it made efforts to call back the respondent to work if at all he absconded duties and take a disciplinary action against him.
25. On the issue of the trial court erred in awarding the Respondent 13/12 months as compensation and terming the same as excessive and unjustifiable, the court notes that the trial court awarded 12 months compensation and not 13 months as claimed by the Appellant. The Court therefore asks itself if it should interfere with the trial court’s discretion on the award of damages. As an appellate court, it has



been stated severally that it can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

26. This court will therefore disturb awards by lower courts if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court further notes that the award of 12 months compensation is discretionary to the court. However, in the exercise of such discretion, the court is guided by considerations set out under section 49(4) of the *Employment Act*.
27. In this case the trial court stated that the reason it was awarding the maximum compensation was because there was acute unemployment and it was difficult to secure another job. The trial court therefore justified the reasons for the maximum compensation as was held in the Court of Appeal in Kenya Broadcasting Corporation v Geoffrey Wakio (2019) eKLR that;
 - (22) This Court has established the rule that an award of the maximum 12 months' pay must be based on sound judicial principles. In *Oi Pejeta Ranching Limited vs. David Wanjau Muhoro* [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
28. Section 49 and 50 of the *Employment Act* empowers the court to award salary in lieu of notice and compensation for unfair termination. Subsection (4) then sets out the factors to consider when exercising discretion to award relief to an unfairly dismissed employee.
29. While taking note of the duration the Respondent worked for the Appellant which was above 20 years and the nature of the Respondent's termination of employment in addition to the reasons given by the trial court, this court is convinced that it should not interfere with the discretion of the lower court on the quantum of compensation for unfair termination awarded by the trial Court.
30. The Appellant challenged the award for house allowance for 16 years. The Respondent on the other hand submitted that the burden shifted on the Appellant to show evidence of paying him house allowance. Section 31(1) of the *Employment Act*, 2007 states that employers must provide reasonable housing for their employees or provide sufficient housing allowances and section 31(2) states that the same does not apply to employees whose contracts include a provision that includes housing costs as part of their wages.
31. The Appellant's final dues tabulation did not indicate the Claimant's pay was consolidated. The court however does not agree with the Appellant on the six years limitation period since house allowance was a contractual obligation which claim is governed by section 90 of the *Employment Act* under which all claims arising out of the Act or contract of employment are actionable within three years of the accrual of the cause of action.



32. The court in the case of Paul Mwasatu Maganga & 2 others v G4S Kenya Limited [2015] eKLR held that;

The first claimant is awarded house allowance for the 3 years immediately before filing of the suit in line with the time bar constructed by Section 90 of the E A. The said Section limits the time for lodging suit in respect of a right under the Act to 3 years.

The court notes that the Respondent was terminated in 2019 and therefore could only claim house allowance for three years before he filed his suit. The Respondent ought to have raised the issue during the many years he worked for the appellant if he felt he was not paid his entitlement and not wait until he was terminated to claim the same. Even if the same was a continuing injury as per section 90 of the Act, the same should have been brought within twelve months after the cessation thereof. In this regard the claim for housing allowance will be capped to three years in line with section 90 of the *Employment Act*. This ground of appeal succeeds to this extent.

33. In the upshot the Appeal partially succeeds as follows; _

a. House Allowance for three years...Kshs 186,300/=

34. The appeal being partially successful, each party shall bear their own costs of this Appeal.

35. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 23RD DAY OF OCTOBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

