



Lupra Manpower & Human Management Services & another v Moriasi (Appeal E044 of 2024) [2024] KEELRC 13269 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13269 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E044 OF 2024
JK GAKERI, J
NOVEMBER 28, 2024**

BETWEEN

**LUPRA MANPOWER & HUMAN MANAGEMENT SERVICES 1ST
APPELLANT**

BASCO PRODUCTS KENYA LIMITED 2ND APPELLANT

AND

JULIUS NGARE MORIASI RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. C. A. Ocharo, Chief Magistrate Kisii delivered on 16th August, 2024, in MCELRC case No. E017 of 2022, Julius Ngare Moriasi V Lupra Manpower & Human Resource Services Ltd V Basco Products (Kenya) Ltd.
2. The Claimant sued the Respondents claiming unfair termination/dismissal from employment allegedly on 8th October, 2020 on allegations of not following instructions from seniors, creating an unpleasant environment and insubordination.
3. It is the Claimant's case that he was employed on 3rd September, 2020 for a period of 3 months as a turn boy.
4. The Claimant sought a declaration that termination of employment was unfair and wrongful terminal and contractual dues and costs.
5. The 1st Respondent admitted that it had employed the Claimant as alleged and his employment contract was due to lapse on 30th November, 2020, and staged a sit in on 8th October, 2020 at the workplace and was dismissed from employment.



6. The trial Court found that termination of the Claimants employment was unfair and declared it as such, awarded 3 month's salary pay in lieu of notice and compensation for 8 days in October, 2020, a total of Kshs.91,126.09 with costs.

This is the judgment the subject matter of the instant appeal.

7. In their Memorandum of Appeal dated 3rd September, 2024, the Appellants assail the trial Court's Judgment on the ground that the learned trial Magistrate erred in law and fact by finding that the employer had not proved a reason for termination of the Claimant's employment declaring the dismissal from employment unfair awarding three (3) months compensation yet the contract was for only three months. That the Claimant had not proved unfair dismissal from employment, awarding payment for 8 days yet the Claimant had been paid for the same and disregarded the Appellants evidence and documents.

Appellant's Submissions

8. As to whether the contract between the parties was probationary, counsel submitted that the 3 months contract was probationary and could be extended, and the termination of employment was fair and lawful as the Respondent had been warned on his behaviour, a call he did not heed.
9. That the Respondent's refusal to work was analogous to a strike. Reliance was made on the sentiments of Rika J. in Danish Jalang'o V Amicabre Travel Services [2014] eKLR.
10. Counsel further urges that the trial court awarded payment for 8 days in October 2020 erroneously as the same had been paid thus according to the Respondent double payment.
11. Counsel submits that the Respondent was requested to go home by an employee of the 2nd Appellant. That the Respondent admitted that he absconded duty.
12. On the reliefs sought, Counsel submits that since the Respondent was dismissed during probation no award commended itself for issuance and cited Elizabeth Wakanyi Kibe V Telkom Kenya Ltd [2014] eKLR.
13. Finally, Counsel urges that the judgment of the trial Court should be set aside as the power to do so is discretionary as held in Yoosin Engineering Corporation V A/A Architect Ltd [2023] KEC 872 (KLR) and Shah V Mbogo & Another [1967] EA 116 as the three (3) months compensation was excessive as the Respondent went on an illegal strike and is not entitled to pay in lieu of notice as notice was 7 days and worked for only 8 days in October, 2020.

The Respondent did not file submissions.
14. The foregoing grounds of appeal may be condensed into one; that the findings and holding by the trial Court was not supported by evidence.
15. This being a first appeal, the Court is enjoined to re-consider and re-evaluate the evidence on record and arrive at its own independent conclusions warning itself that it neither saw nor heard the witness as aptly captured in Selle and Another V Associated Motor Boat Co. Ltd & Others [1968], E.A 123 as well as Peter V Sunday Post Ltd [1958] EA 424 among others.
16. In his witness statement, the Respondent stated that he was employed by the 2nd Respondent through the 1st Respondent effective 3rd September, 2020 and was dismissed from employment on 8th October, 2020.



17. On cross-examination, the Claimant confirmed that he was serving under a 3 month renewable contract due to end in December 2020 and did not work on 8th October, 2020 but went back home as ordered by the boss.
18. That he and Kennedy the driver, never used to talk to each other but denied that they were not in good terms.
19. That Clause 6 of the contract provided for 7 days notice and worked for only 8 days in October, 2020 having worked for about one (1) month only and NSSF deductions was paid up to October 2020.
20. The Respondent admitted that he did not report to the 1st Appellant that he had been dismissed from employment and denied having absconded duty and was not paid for the 8 days.
21. An email from one Dipan Patel to HR support, Winfred Gicharu explains what transpired on 8th October, 2020, that the Claimant was insubordinate as he ignored Mr. Dipan Patel's instructions.
22. As to whether the Respondent was serving under a probationary contract as argued by the Appellant's Counsel the Court is guided by the contract of employment executed by the parties on 3rd September, 2020. On the 'Date of Engagement' the contract provided that "your employment will commence on and end on for a period of months and given probation of period.
23. While the commencement end date of the contract and the duration are filled in by hand the probationary period is not indicated.
24. RWI did not testify that the Respondent was serving under a probationary contract nor was the question put to the Claimant.

Section 2 of the *Employment Act* states that;

Probationary contract means a contract of employment which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.

25. The Contract of employment signed by the Respondent on 3rd September, 2020, which he admitted was his employment contract neither states that it is probationary nor the probationary period.
26. Relatedly, the clause on probation cites Clause I on the probationary period and as mentioned above Clause I is reticent on the probationary period.
27. In the Court's view, based on evidence on record, the Respondent was not serving on probationary terms but on terms and conditions offered by the 1st Appellant on contractual basis.
28. As to whether the employer had proved that it had a reason(s) to terminate the Respondent's employment, the Court is persuaded that it had discharged the burden of proof that although the Respondent alleged that he was told to go home by Mr. Dipan Patel for no reason, a copy of the email from Dipan Patel to HR support copied to Shailesh Shetye demonstrates what transpired on that day.
29. The email dated 8th October, 2020, at 9:34 am details what Dipan Patel did and the reaction from the Respondent.
30. The Respondent admitted that he and Kennedy were not on talking terms and attempts to convince him to work failed.



31. As held in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR, for a termination of employment to pass the fairness test it must be proved that the employer had a substantive justification to terminate the employee's employment and did so in accordance with a fair procedure.
32. The uncontested email, in the Court's view, captures the true state of affairs and the employer had reason to terminate the Respondent's employment summarily, consistent with the provisions of Section 44(4)(e) of the *Employment Act* where;

An employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of his duty to obey issued by his employer or a person placed in authority over him by the employer.
33. The fact that the Respondent refused to obey Mr. Dipan Patel's orders or commands to arrange his delivery truck on the grounds that he and the driver one Mr. Kennedy were not on talking terms shows that the Respondent was subordinate.

Section 43(2) of the *Employment Act* provides-

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
34. See *B. O. Manani J. in Galgalo Jarso Jillo V Agricultural Corporation* [2021] eKLR and the Court of Appeal in *Kenya Revenue Authority V Ruewell Gitahi Waithaka & 2 Others* [2019] on the impact of Section 43(2) of the *Employment Act*.
35. Mr. Dipan Patel's email was acted on by the 1st Appellant and the Respondent's employment was terminated on the same day.
36. Contrary to the findings of the trial Court, the Court is satisfied that the employer had a substantive justification to terminate the Respondent's employment in the manner it did.
37. The foregoing notwithstanding, it is not lost to the Court that the 1st Appellant did not demonstrate that it accorded the Respondent an opportunity to be heard. Although, RWI stated that he was called for a meeting, he equally confirmed that he had no evidence of the invitation and the Respondent did not attend any meeting.
38. In a nutshell, RWI confirmed that the provisions of Section 41 of the *Employment Act* were not complied with which vitiated the summary dismissal of the Respondent by the 1st Appellant for want of procedural fairness.
39. Thus, the termination of the Respondent's employment by the 1st Appellant on 8th October, 2020 was unfair for want of procedural propriety, the trial Court found as much.
40. Significantly, by alleging and testifying that Mr. Dipan Patel told him to go home on the morning of 8th October, 2020 for no reason after he had put on the uniform, the Respondent made a prima facie case of an unfair termination of employment in consonance with the provisions of Section 47(5) of the *Employment Act* and it behooved the 1st Appellant to demonstrate that the summary dismissal was unfair.
41. Similarly, there is a letter of termination of the Claimant's employment on record.
42. Equally, the trial Court may have disregarded the 2nd Appellant's email to the 1st Appellant but on the whole, the learned trial Magistrate evaluated the evidence on record.



43. The learned trial Magistrate is also faulted on the reliefs awarded that the 8 days in October, 2020 had been paid one month's notice and compensation was excessive.
44. On payment for the 8 days in October, 2020, RWI testified that there was a clearance certificate to show the Respondent was paid but equally confirmed that nothing was paid after 22nd October, 2023 the date of the Leave/Final clearance certificate which is not authenticated by anyone.
45. In the absence of evidence to show that the sum allegedly paid was received or paid into the Respondent's account, it is difficult for the 1st Appellant to prove that the 8 days were paid for. The trial Court cannot be faulted for having found as it did.
46. Similarly, the trial Court cannot be faulted for its finding on severance pay as this was not a case of redundancy and unpaid leave and benefits for want of proof.
47. As regards pay in lieu of notice, since the Respondent was summarily dismissed and the Respondent had a justification to do so, the one (1) month's notice pay was not merited by dint of Section 44(1) of the *Employment Act*.
48. As regards compensation for unfair termination, the Court considered length of service and being dismissed without a hearing.
49. The Court ought to have considered the wishes of the Respondent, whether he appealed the decision, which he did not and his contribution to the summary dismissal and having found that he substantially contributed by disobeying Mr. Dipan Patel's instructions, which it was his duty to obey and had only worked for about one (1) month and seven (7) days, the equivalent of 3 months salary was on the higher side.

The equivalent of 2 months gross salary is fair in the circumstances.

50. In determining whether a case has been made for the Court to interfere with the judgment of the trial Court, the Court is guided by the sentiments of the Court in *Mbogo V Shah & Another (Supra)* and *United India Insurance Co. Ltd V East Africa Underwriters (Kenya) Ltd [1985] EA* where the Court of Appeal demarcated the circumstances in which an appellate Court could interfere with the exercise of discretion by the trial Court.

In the latter case the Court expressed itself as follows:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account considerations of which he should have taken into account, or fifthly, that his decision, albeit a discretionary one is plainly wrong”.

51. In this case the Court is satisfied that the appellant has made a case for interference with the decision of the learned trial Magistrate and the Court does so to the extent that:
 - a. The equivalent of 3 months salary award is substituted with 2 months Kshs.41,918.00.
 - b. The award of pay in lieu of notice of Kshs.20,959.00 is set aside.
 - c. All other orders of the trial Court are affirmed save for costs, which will run from date of the Judgment of the trial Court as opposed to the date of filing of the suit.

Parties shall bear own costs of this appeal.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 28TH DAY OF NOVEMBER, 2024.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

